



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

Case: S ECI 2023 02581  
No. S ECI 2023 02581  
Filed on: 23/05/2025 04:03 PM

B E T W E E N

TRACEY LEIGH HEPI AND ERU MARTIN HEPI

Plaintiffs

-and-

TOYOTA FINANCE AUSTRALIA LIMITED (ACN 002 435 181)

Defendant

**DEFENCE TO AMENDED STATEMENT OF CLAIM**

Amended pursuant to the orders of  
the Honourable Justice M Osborne made on 14 May 2025

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Date of Document:	<del>31</del> <u>23</u> May <del>2024</del> <u>2025</u>	Solicitors Code: 110456
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As to the allegations in the Amended Statement of Claim filed on ~~2~~23 April ~~2024~~2025 (ASOC), the Defendant says as follows:

1A. Unless otherwise stated, or the context otherwise requires, the Defendant adopts the defined terms and the headings used in the ASOC, but does not admit any factual assertions contained in, or in any way implied by, any defined term or heading used in the ASOC and repeated in this Defence.

1B. The Defendant and the Plaintiffs entered into a Car Loan in the following circumstances:

- (a) on around 18 December 2017, the Plaintiffs entered into a loan contract with the Defendant (Plaintiffs' Loan Contract);

**Particulars**

The Plaintiffs' Loan Contract was wholly in writing,  
comprising a "Schedule" executed by the Plaintiffs and the  
Defendant and dated 18 December 2017  
[TFA.001.002.0001] and a Consumer Fixed Rate Loan  
Contract Booklet TFA064 (11/2016) [TFA.001.004.0037].

- (b) the Plaintiffs entered into the Plaintiffs' Loan Contract after attending the premises of a  
Dealer known as "Broome Toyota" on or about 4 and 5 December 2017, entering into a

contract with Broome Toyota to purchase a used vehicle on or around 5 December 2017, and exchanging emails with Broome Toyota between 8 and 18 December 2017.

#### **Particulars**

The contract for the used vehicle was wholly in writing, comprising a document titled "Contract / Tax Invoice for the sale of a pre-owned motor vehicle" dated 5 December 2017 [TFA.001.004.0011].

(c) the Plaintiffs' Loan Contract had the following terms, among others:

(i) commissions were payable by the Defendant to Broome Toyota;

#### **Particulars**

Consumer Fixed Rate Loan Contract Booklet TFA064 (11/2016) [TFA.001.004.0037], clauses 15.4(a) and 15.4(c).

Page 3 of the Schedule provides "COMMISSION: (i) Commission is paid for the introduction of credit business by the Credit Provider to the Supplier and its sales representatives or finance manager with whom you dealt in relation to your loan. In each case the amount of commission is not presently ascertainable."

(ii) commissions were payable by the Defendant to a Dealer who introduced the customer to the Defendant;

#### **Particulars**

Consumer Fixed Rate Loan Contract Booklet TFA064 (11/2016) [TFA.001.004.0037], clauses 15.4(a) and 15.4(c).

(iii) Broome Toyota was acting as an agent of the Defendant, and not acting in the interests of, or on behalf of, the Plaintiffs; and

#### **Particulars**

Page 4 (the signing page) of the Schedule provides "THE PERSON ARRANGING THIS FINANCE FOR YOU IS ACTING AS AN AGENT FOR TOYOTA FINANCE, AND THEREFORE THEY ARE NOT ACTING IN YOUR INTERESTS OR ON YOUR BEHALF. IF YOU REQUIRE

ADVICE ON THE CREDIT CONTRACT, YOU SHOULD  
SEEK INDEPENDENT FINANCIAL ADVICE."

- (iv) the Plaintiffs acknowledged that a Dealer accredited by the Defendant was acting as the Defendant's agent, and not acting in the customer's interests or on the customer's behalf.

Particulars

Consumer Fixed Rate Loan Contract Booklet TFA064  
(11/2016) [TFA.001.004.0037], clauses 15.4(a) and  
15.4(b)(i).

A. INTRODUCTION

A.1. The Group Members

1. ~~In answer to the allegations in~~ As to paragraph 1 of the ASOC;

- (a) the Defendant:

- (i) admits the allegations in sub-paragraphs 1(a)(i)-(ii) and (iv) in respect of the Plaintiffs;
- (ii) does not know and therefore cannot admit the allegations in sub-paragraphs 1(a)(i)-(ii) and (iv) in respect of the Group Members; and
- (iii) denies that a Flex Commission was paid to each Dealer in respect of each Car Loan;

~~denies that the Plaintiffs and the Group Members have suffered loss or damage, or are entitled to relief against it, by reason of the alleged conduct of the Defendant pleaded in the SOC;~~

- (b) denies the allegations in sub-paragraph 1(b) and says further that:

- (i) as to the Plaintiffs' and Group Members' claims of **misleading or deceptive conduct** pursuant to ss 1041H and 1041I of the Corporations Act and, further or alternatively, ss 12DA, 12GF(1) and 12GM(1) of the ASIC Act:

- A. claims in relation to a Car Loan entered into prior to 16 June 2017 are statute barred by reason of:

- 1) s 1041I(2) of the Corporations Act;
- 2) s 12GF(2) of the ASIC Act;
- 3) s 12GM(5) of the ASIC Act;

- B. further or alternatively to sub-paragraph (A), claims in relation to a Car Loan entered into in Western Australia prior to 16 June 2017 are statute barred by reason of s 13(1) of the *Limitation Act 2005* (WA);
  - C. further or alternatively to sub-paragraphs (A) to (B), claims in relation to a Car Loan entered into in the Australian Capital Territory (**ACT**) prior to 16 June 2017 are statute barred by reason of s 11(1) of the *Limitation Action 1985* (ACT);
  - D. further or alternatively to sub-paragraphs (A) to (C), claims in relation to a Car Loan entered into in the Northern Territory prior to 16 June 2020 are statute barred by reason of s 12(1) of the *Limitation Act 1981* (NT);
- (ii) ~~with respect to~~ as to the Plaintiffs' and Group Members' claims of **unfair conduct** under pursuant to s 180A of the ~~National Consumer Credit Protection Act 2009~~ (Cth) (NCCP Act):
- A. no claims exist in relation to a Car Loan entered into prior to 1 March 2013 as s 180A of the NCCP Act did not commence operation until 1 March 2013;
  - B. further or alternatively to sub-paragraph ~~1(b)(i)(A) of this Defence~~, claims in relation to a Car Loan entered into prior to 16 June 2017 are statute barred by reason of s 180A(5) of the NCCP Act;
  - C. further to sub-paragraphs ~~1(b)(i)(A)~~ and (B), no claims exist in relation to any Car Loan entered into prior to 1 April 2010 as ss 3 to 337 of the NCCP Act did not commence until 1 April 2010, 3 months after the beginning of the Relevant Period;
  - D. further or alternatively to sub-paragraphs (A) to (C), claims in relation to a Car Loan entered into in Western Australia prior to 16 June 2017 are statute barred by reason of s 13(1) of the *Limitation Act 2005* (WA);
  - E. further or alternatively to sub-paragraphs (A) to (D), claims in relation to a Car Loan entered into in the ACT prior to 16 June 2017 are statute barred by reason of s 11(1) of the *Limitation Action 1985* (ACT); and
  - F. further or alternatively to sub-paragraphs (A) to (E), claims in relation to a Car Loan entered into in the Northern Territory prior to 16 June 2020 are statute barred by reason of s 12(1) of the *Limitation Act 1981* (NT);
- (iii) ~~with respect~~ as to claims of **unjust transactions** pursuant to ss 76 and 77 of the Credit Code:

- A. no claims exist in relation to any Car Loan entered into prior to 1 April 2010 as Schedule 1 of the NCCP Act (being the Credit Code) did not commence until 1 April 2010, 3 months after the beginning of the Relevant Period; ~~and~~
- B. claims in relation to a Car Loan that was rescinded, discharged or otherwise came to an end prior to 16 June 2021 are statute barred by reason of s 80(1) of the Credit Code;
- C. further or alternatively to sub-paragraph (A) to (B), claims in relation to a Car Loan entered into in Western Australia prior to 16 June 2017 are statute barred by reason of s 13(1) of the *Limitation Act 2005* (WA);
- D. further or alternatively to sub-paragraphs (A) to (C), claims in relation to a Car Loan entered into in ACT prior to 16 June 2017 are statute barred by reason of s 11(1) of the *Limitation Action 1985* (ACT); and
- E. further or alternatively to sub-paragraphs (A) to (D), claims in relation to a Car Loan entered into in the Northern Territory prior to 16 June 2020 are statute barred by reason of s 12(1) of the *Limitation Act 1981* (NT);

~~with respect to claims of misleading or deceptive conduct under s 1041H of the Corporations Act 2001 (Cth) (Corporations Act) or s 12DA of the Australian Securities Investments Commission 2001 (Cth) (ASIC Act) (Misleading or Deceptive Conduct Claims), claims in relation to any Car Loan entered into prior to 16 June 2017 are statute barred, by reason of, respectively:~~

~~A. s 1041H(2) of the Corporations Act; and~~

~~B. s 12GF(2) of the ASIC Act;~~

(iv) as to claims of **unconscionable conduct** pursuant to ss 12CB, 12GF(1) and 12GM(1) of the ASIC Act:

- A. claims in relation to a Car Loan entered into prior to 16 June 2017 are statute barred by reason of:
  - 1) s 12GF(2) of the ASIC Act; and
  - 2) 12GM(5) of the ASIC Act;
- B. further or alternatively to sub-paragraph (A), claims in relation to a Car Loan entered into in Western Australia prior to 16 June 2017 are statute barred by reason of s 13(1) of the *Limitation Act 2005* (WA);

- C. further or alternatively to sub-paragraphs (A) to (B), claims in relation to a Car Loan entered into in the ACT prior to 16 June 2017 are statute barred by reason of s 11(1) of the *Limitation Action 1985* (ACT); and
  - D. further or alternatively to sub-paragraphs (A) to (C), claims in relation to a Car Loan entered into in the Northern Territory prior to 16 June 2020 are statute barred by reason of s 12(1) of the *Limitation Act 1981* (NT);
- (v) as to claims of **money had and received for mistake of fact** pleaded in Part C.5 of the ASOC:
- A. ~~with respect to claims of unilateral mistake,~~ claims in relation to a Car Loan entered into prior to 16 June 2017 in states and territories other than the Northern Territory are statute barred by reason of the following provisions ~~and, further or alternatively, they are barred in equity:~~
    - 1) s 5(1)(a) of the *Limitation of Actions Act 1958* (Vic);
    - 2) s 14(1) of the *Limitation Act 1969* (NSW);
    - 3) s 10(1) of the *Limitation of Actions Act 1974* (Qld);
    - 4) s 13(1) of the *Limitation Act 2005* (WA);
    - 5) ss 35(a) and 38(1) of the *Limitation of Actions Act 1936* (SA);
    - 6) s 4(1) of the *Limitation Act 1974* (Tas);
    - 7) s 11(1) of the *Limitation Action 1985* (ACT); and
  - B. ~~with respect to claims of unilateral mistake,~~ further or alternatively to sub-paragraph (A), claims in relation to a Car Loan entered into in the Northern Territory prior to 16 June 2020 are statute barred by reason of s 12(1) of the *Limitation Act 1981* (NT) ~~and, further or alternatively, they are barred in equity;~~
- (vi) as to claims of **unjust enrichment for unilateral mistake** pleaded in Part C.5 of the ASOC:
- A. claims in relation to a Car Loan entered into prior to 16 June 2017 in states and territories other than the Northern Territory and Western Australia are statute barred by reason of the following provisions:
    - 1) ss 5(1)(a) and 5(8) of the *Limitation of Actions Act 1958* (Vic);
    - 2) ss 14(1) and 23 of the *Limitation Act 1969* (NSW);

3) ss 10(1) and 10(6) of the *Limitation of Actions Act 1974 (Qld)*;

4) s 38(1) of the *Limitation of Actions Act 1936 (SA)*;

5) ss 4(1) and (9) of the *Limitation Act 1974 (Tas)*;

6) s 11(1) of the *Limitation Action 1985 (ACT)*;

B. further or alternatively to sub-paragraph (A), claims in relation to a Car Loan entered into in Western Australia prior to 16 June 2017 or, further or alternatively, 16 June 2020, are statute barred by reason of s 27 of the *Limitation Act 2005 (WA)*;

C. further or alternatively to sub-paragraphs (A) to (B), claims in relation to a Car Loan entered into in the Northern Territory prior to 16 June 2020 are statute barred by reason of ss 12(1) and 21 of the *Limitation Act 1981 (NT)*; and

(c) does not know and therefore cannot admit the allegations in sub-paragraph 1(c) ~~of the SOC~~.

2. The Defendant:

(a) refers to and repeats paragraph 1 of the ASOC, and

(b) otherwise does not know and therefore cannot admit the allegations in paragraph 2 of the ASOC.

#### A.2. The Defendant

3. ~~In answer~~ As to paragraph 3 of the ASOC, the Defendant:

(a) admits the allegations in sub-paragraphs 3(a) to (e); and

(b) in respect of the allegations in sub-paragraphs 3(f) to (g), it ~~refers to and repeats sub-paragraphs 1(b)(i)A, 1(b)(i)C and 1(b)(ii)A of this Defence and admits the allegations in respect of~~ denies that it was a person within the NCCP Act and Credit Code for the period from 1 April 2010, save for meaning of s 180A of the NCCP Act for which it admits the allegations in respect of the period from ~~before~~ 1 March 2013 as s180A of the NCCP Act did not commence until 1 March 2013, and otherwise admits the allegations.

#### A.3. Arrangements between Dealers and Toyota

4. In answer to the allegations in paragraph 4 of the ASOC, the Defendant:

(a) admits that it entered into agreements with Dealers throughout the Relevant Period (**Dealer Agreements**);

### Particulars

The Dealer Agreements were in writing and included the Trade Agreement between Broome Toyota and the Defendant dated 26 August 2010 (**2010 Broome Toyota Dealer Agreement**) [TFA.001.001.0007]. ~~Further particulars will be provided following discovery.~~

- (b) says that the purpose of each of the Dealer Agreements was to facilitate the introduction of credit business by the Dealers to the Defendant, including customer applications (**Car Loan Applications**) for:
  - (i) financial accommodation in connection with a contract or proposed contract to acquire a vehicle which, if provided, would be regulated by the NCCP Act and Credit Code (a **Regulated Car Loan**);
  - (ii) financial accommodation in connection with a contract or proposed contract to acquire a vehicle which, if provided, would not be regulated by the NCCP Act and Credit Code (an **Unregulated Car Loan**);
- (c) says that the Dealer Agreements contained the terms and conditions set out in the Dealer Agreements, the full terms and effect of which the Defendant will rely on at trial;
- (d) says that the Dealer Agreements included the following terms, ~~among other things~~:
  - (i) for the purposes of any application for finance and offer by a customer to enter into a contract with the Defendant for the provision of financial accommodation, the Defendant appoints the Dealer as the Defendant's agent at law to collect and verify "Know Your Customer" information in accordance with the Defendant's obligations under the *Anti-Money Laundering and Counter Terrorism Act 2006* (Cth) (**AML/CTF Act**), and provide a copy of that information to the Defendant;

### Particulars

2010 Broome Toyota Dealer Agreement, cl 3.3, 3.5(a).

- (ii) for the purposes of any application for finance and offer by a customer to enter into a contract with the Defendant for the provision of financial accommodation, the Defendant appoints the Dealer as the Defendant's agent at law to make enquiries of customers who were natural persons about the purpose for which credit was to be provided to them under the proposed credit facility;

### Particulars

2010 Broome Toyota Dealer Agreement, cl 3.1, 3.5(a).



~~These terms were introduced from about 2010. Further particulars may be provided following discovery.~~

(iii) the Defendant appoints the Dealer as the Defendant's agent at law to do the following things in relation to Regulated Car Loans:

A. procure Car Loan Applications and submit the Car Loan Applications to the Defendant for approval or rejection;

**Particulars**

2010 Broome Toyota Dealer Agreement, cll 3.2(a)(i), 3.5(a).

B. provide to each customer a copy of the proposed loan contract to be entered into by that customer, provide the customer with an adequate opportunity to read and take advice in relation to the proposed loan contract and ensure that after signature of a loan contract by a customer the customer was provided their own copy to keep; [and](#)

**Particulars**

2010 Broome Toyota Dealer Agreement, cll 3.2(a)(ii), 3.5(a).

C. where a guarantee is to be provided under a Regulated Car Loan, provide to the prospective guarantor a copy of the proposed guarantee and the proposed loan contract to be entered into by the customer, provide the proposed guarantor with an adequate opportunity to read and take advice in relation to the proposed guarantee and proposed loan contract, and ensure that after signature of the guarantee the guarantor was provided with a copy of the guarantee and the signed loan contract to keep;

**Particulars**

2010 Broome Toyota Dealer Agreement, cll 3.2(a)(iii), 3.5(a).

(iv) the Defendant is required to provide the Dealer with "Credit Procedures" ~~(as defined);~~<sup>1</sup> [meaning](#) the procedures or instructions issued by the Defendant (whether by dealer bulletin or otherwise) in effect at that time relating to the services to be performed by the Dealer under the Dealer Agreement and other matters relevant to the Defendant's obligations under the "Credit Laws" (~~as defined~~ [Credit Procedures](#));

**Particulars**

2010 Broome Toyota Dealer Agreement, cl [4\(d\)](#) and cl 1.1 definition of "Credit Procedures".

- (v) the Dealer is required to [comply with the Credit Procedures, and procure that its employees, agent and contractors](#) comply with the Credit Procedures;

**Particulars**

2010 Broome Toyota Dealer Agreement, cll 6.3(iii), 6.3(iv).

- (vi) the Dealer is required to ensure that its ~~personnel~~[employees, agents and contractors](#) are accredited by the Defendant;

**Particulars**

2010 Broome Toyota Dealer Agreement, cl 6.4(iii) [and definition of "Laws" in cl 1.1.](#)

- (vii) the Dealer is required to participate in training, ~~and procure the participation of its personnel in,~~ programs made available by the Defendant related to the performance by the Dealer of its obligations under the Dealer Agreement, [and to procure the participation of its employees, agents and contractors in such training programs](#);

**Particulars**

2010 Broome Toyota Dealer Agreement, cl 6.5.

- (viii) the Dealer is required to not act on behalf of, or hold itself out as acting on behalf of, customers in relation to Regulated Car Loans;

**Particulars**

2010 Broome Toyota Dealer Agreement, cl 5.1(a).

- (ix) the Dealer is required to inform all customers that it acts as an agent for the Defendant and not the customer in relation to Regulated Car Loans;

**Particulars**

2010 Broome Toyota Dealer Agreement, cll 5.1(b), 6.2.

- (e) says further that:

- (i) from about 2010, Dealer Agreements contained provisions by which a Dealer could be appointed as:

- A. a "First Choice Dealer", in which case the Dealer agreed not to procure applications for Regulated Car Loans for or on behalf, or refer applicants for Regulated Car Loans to, any entity or business other than the Defendant;

### **Particulars**

2010 Broome Toyota Dealer Agreement, cl 2.2(a).

- B. a "Second Choice Dealer", in which case the Dealer agreed not to refer an application for Regulated Car Loans to a financier other than the Defendant unless:
- 1) an application for a Regulated Loan Contract was refused by the Defendant; or
  - 2) the application was approved by the Defendant subject to conditions, and the customer was unable to satisfy the conditions of approval set by the Defendant;

### **Particulars**

2010 Broome Toyota Dealer Agreement, cll 2.2(b) and 2.3.

- C. a "Program Only Dealer", in which case, the Dealer was not permitted to refer applications for Regulated Credit (other than credit offered under a subvention program) to the Defendant unless the Dealer agreed to become a First Choice Dealer or a Second Choice Dealer;

### **Particulars**

2010 Broome Toyota Dealer Agreement, cl 2.4

- (ii) during the Relevant Period, all Dealers were appointed as either a First Choice or Second Choice Dealer, and no Dealers were appointed as a Program Only Dealer;
- (f) says further that the Defendant from time to time issued Dealers with Credit Procedures in accordance with its obligations under the Dealer Agreements, and from time to time issued internal policies concerning the Defendant's accreditation, monitoring and supervision of Dealers and their personnel;

### **Particulars**

The Credit Procedures were in writing and comprised the following documents:

- A. Retail Finance & Insurance Sales Guide

Version 1.0, dated 1 September 2013,  
[TFA.001.001.0018]-

Version 2.0, dated 1 August 2014,  
[TFA.001.001.0015]-

Version 3.0, dated 10 November 2015,  
[TFA.001.001.0016]-

Version 3.1, dated 8 February 2016,  
[TFA.001.001.0017]-

Version 4.0, dated 1 January 2017,  
[TFA.001.001.0014]-

Version 5.0, dated 1 July 2017,  
[TFA.001.001.0013]-

Version 6.0, dated August 2018,  
[TFA.001.001.0011]; [and](#)

- B. Dealer Bulletins, as issued by the Defendant from time to time ([Dealer Bulletins](#)).

The internal policies were in writing and comprised the following documents:

A. Monitoring and Supervision Policy

Version 1.0, dated 1 April 2014-

Version 2.0, dated 8 August 2014,  
[TFA.001.004.0053]-

Version 3.0, dated 31 August 2015,  
[TFA.001.004.0054]-

Version 4.0, dated 1 August 2016,  
[TFA.001.004.0055]-

Version 5.0, dated 14 March 2017,  
[TFA.001.004.0056]-

Version 6.0, dated 16 May 2017-

Version 6.1, 20 August 2018,  
[TFA.001.004.0057]; [and](#)

B. Accredited Person Policy

Version 1.0, dated 5 December 2012-

Version 2.0, dated 9 September 2013,  
[TFA.001.004.0050]; [and](#)

C. Sales Accreditation Policy

Version 1.0, dated 23 December 2014-

Version 2.0, dated 23 April 2015-

Version 3.0, dated 13 April 2016,  
[TFA.001.004.0051]-

Version 4.0, dated 16 March 2017,  
[TFA.001.004.0047]-; [and](#)

Version 5.0, dated 21 May 2018,  
[TFA.001.004.0049].

~~Further particulars may be provided following discovery.~~

- (g) says further that, on an annual basis, the Defendant reviewed the terms of its relationship with Dealers and, following that review, offered the Dealers specified financial incentives for introducing credit business to the Defendant, including the payment of commissions; and

#### Particulars

Each of the offers were wholly in writing, contained in a letter from the Defendant to the Dealer (**Annual Review Document**). The Annual Review Documents include the following:

- A. Letter dated 20 May 2014 [from the Defendant](#) to Broome Toyota [TFA.001.013.0002]
- B. Letter dated 20 October 2015 [from the Defendant](#) to Broome Toyota [TFA.001.013.0003]
- C. Letter dated 9 September 2016 [from the Defendant](#) to Broome Toyota [TFA.001.013.0005]
- D. Letter dated 19 September 2017 [from the Defendant](#) to Broome Toyota [TFA.001.013.0006]; [and](#)
- E. Letter dated 16 April 2018 [from the Defendant](#) to Broome Toyota [TFA.001.013.0004].

- (h) [says that employees of the Dealers who were accredited by the Defendant, such that they were an "Accredited Person" within the meaning of Retail Finance & Insurance Sales Guide, acted as agents for the Defendant in respect of Car Loans \(Accredited Persons\); and](#)

#### Particulars

~~Further particulars will be provided following discovery.~~

[The terms regulating the agency are in writing, in the Retail Finance & Insurance Sales Guide.](#)

- (i) otherwise denies the allegations in paragraph 4.
5. ~~In answer~~ As to the allegations in paragraph 5 of the ASOC, the Defendant:
- (a) admits that during the Relevant Period it implemented a process by which the Dealers and Accredited Persons participated in the process of offering and writing of Car Loans;
  - (b) says as follows in respect of the allegations concerning the features of the process:
    - (i) as to sub-paragraph 5(a), it does not know and therefore cannot admit the allegations;
    - (ii) as to sub-paragraph 5(b), it admits that Accredited Persons had direct contact with each person who submitted a Car Loan Application to the Defendant during the Relevant Period, refers to and repeats sub-paragraphs 4(b) to (d) of this Defence, and otherwise denies the allegations;
    - (iii) as to sub-paragraphs 5(c) to (d), it says that the term "credit decision" is not defined and is vague and embarrassing and, under cover of that objection, it denies the allegations and says the following:
      - A. Dealers, by way of the conduct of Accredited Persons, engaged in the following conduct in connection with Car Loan Applications:
        - 1) they procured applications for finance and offers by a customer to enter into a Car Loan with the Defendant, which applications and offers included the following information:
          - a) the proposed loan amount;
          - b) the proposed loan term;
          - c) the annual percentage rate of interest payable under the proposed loan contract;
          - d) the total amount of interest payable over the proposed loan term;  
and
          - e) the stamp duty, fees and charges payable by the customer at the time of draw down on the proposed loan;
        - 2) they submitting the customer's Car Loan Application to the Defendant, for approval or rejection, via the Defendant's finance application system called "ATLAS";

and, in respect of Regulated Car Loans, the conduct of the Dealers and Accredited Persons was performed in their capacity as agents of the Defendant;

- B. the Defendant's Credit Procedures set a minimum term and maximum term for Regulated Car Loans and Unregulated Car Loans;

#### **Particulars**

The Defendant notified Dealers of the minimum and maximum terms by issuing to the Dealers the Retail Finance & Insurance Sales Guides and Dealer Bulletins from time to time. ~~Further particulars will be provided following discovery.~~

From around 1 July 2010, the minimum loan term was 12 months and the maximum loan term was 84 months.

- C. within the minimum and maximum terms, customers negotiated and agreed ~~their~~ with Accredited Persons on the customers' preferred loan term to include in ~~Finance Applications~~ their Car Loan Application based on ~~their~~ the customers' individual preferences and circumstances (**Loan Term**);

#### **Particulars**

By way of example, ~~the following conduct of Dealers in connection with Regulated Car Loans was performed~~ Loan Term in the ~~Dealer's capacity as agent of the Defendant acting within the scope of the Dealer's authority under the TFA Agency Appointment;~~

~~1) — procuring applications for finance~~ Plaintiffs' Loan Contract was negotiated and offers agreed by a customer the Plaintiffs by way of the in-person meetings and emails referred to enter into a Regulated Loan Term;

~~B. — B. — submitting the customer's Car Loan Applications to the Defendant, for approval or rejection, via the Defendant's finance application system called "ATLAS";~~ in paragraph 1B(b) of this Defence.

- D. the rate of interest specified in customers' Car Loan Applications was determined by way of the matters pleaded in paragraph 7 below;
- E. the Defendant's approval of any Car Loan Application was entirely at the discretion of the Defendant;

### Particulars

2010 Broome Toyota Dealer Agreement, cl 3.5(c).

- F. the Dealer acknowledged and agreed that the Defendant was under no obligation to approve or accept any Car Loan Application made by any customer;

### Particulars

2010 Broome Toyota Dealer Agreement, cl 3.5(c).

~~(e) — otherwise denies the allegations in paragraph 5.~~

- (c) ~~In answer~~ as to sub-paragraph 5(e), it says that the term “Car Loan offer documentation” is vague and embarrassing and, under cover of that objection, it refers to and repeats sub-paragraph 5(b) of this Defence and otherwise denies the allegations.

6. As to the allegations in paragraph 6 of the ASOC, the Defendant:

- (a) says that the terms “credit decisions” and “loan management” (which are not defined and not particularised) are vague and embarrassing;

- (b) refers to and repeats ~~paragraphs 4 and paragraph 5 above~~ of this Defence;

~~(b) — admits that during the process by which Dealers and Accredited Persons participated in the process of the offering and writing of Car Loans during the Relevant Period, the Defendant was solely responsible for all aspects of credit assessment, accepting or rejecting Car Loan applications, and the administration and servicing of Car Loans; and~~

- (c) ~~In answer~~ admits that during the process by which Dealers and Accredited Persons participated in the process of the offering and writing of Car Loans during the Relevant Period, the Defendant was solely responsible for all aspects of credit assessment, accepting or rejecting Car Loan Applications, and the administration and servicing of Car Loans; and

- (d) otherwise denies the allegations.

## B. THE CAR LOAN PROCESS IMPLEMENTED BY TOYOTA

### B.1. The Flex Process

7. As to the allegations in paragraph 7 of the ASOC, the Defendant:

- (a) says that in relation to ~~Regulated Car Loans and Unregulated~~ Car Loans provided by the Defendant during the Relevant Period ~~(Car Loan/s)~~:



- (i) the Defendant set base rates of interest (**Base Rates**) and maximum rates of interest (**Maximum Rates**) for different types of Car Loans and notified Dealers of the Base Rates and Maximum Rates;

#### Particulars

The Base Rates and Maximum Rates were set on a monthly basis by members of the Defendant's Pricing Committee.

The Defendant notified Dealers of the Base Rates and Maximum Rates by way of email communications sent on a monthly basis by the Defendant's regional sales teams in each State and Territory.

~~Further particulars may be provided following discovery.~~

- (ii) if the Defendant increased ~~or a~~ Base Rate by a particular increment it would increase the Maximum Rate by the same increment, and if the Defendant decreased a Base Rate by a particular increment, ~~the Defendant it~~ would ~~increase or~~ decrease the Maximum Rate by the same increment;
- (iii) the Base Rate applicable to a given Car Loan depended upon the following criteria:
- A. the age of the motor vehicle to be ~~purchased~~ acquired by the customer; and
  - B. whether the loan was a Regulated Car Loan or an Unregulated Car Loan;
- (iv) customers ~~could~~ would negotiate and agree with ~~Dealers~~ Accredited Persons a rate of interest to include in their Car Loan Application (the Contract Rate);

#### Particulars

~~the conduct~~ By way of ~~Dealers when negotiating and agreeing~~ example, the ~~Loan Term and Contract Rate to be included in a Car Loan Application for a Regulated Car~~ in the Plaintiffs' Loan Contract (Regulated Car Loan Application) was ~~conduct performed in the Dealer's capacity as agent~~ negotiated and agreed by the Plaintiffs by way of the ~~Defendant acting within the scope~~ in-person meetings and emails referred to in paragraph 1B(b) of the Dealer's authority under the TFA Agency Appointment; this Defence.

- (v) ~~pursuant to the terms of the Annual Review Document~~, for particular types of Car Loans, in particular circumstances, where the Contract Rate on a Car Loan was higher than the Base Rate, the Defendant agreed to pay to the Dealer who submitted the Car

Loan for approval a payment calculated by reference to a number of factors specified in the Annual Review Document referred to in the particulars subjoined to sub-paragraph 4(g) of this Defence, including the difference between the Base Rate and the Contract Rate (**Dealer Commissions**); and

#### Particulars

~~Further particulars may be provided following discovery. The Defendant refers to and repeats sub-paragraph 4(g) of this Defence.~~

The Defendant was contractually obliged to pay Dealer Commissions to Broome Toyota pursuant to the terms of:

- A. the 2010 Broome Toyota Dealer Agreement [TFA.001.001.0007];
- B. the Annual Review Document in force at the time the Plaintiffs' entered into the Plaintiffs' Loan Contract, being the letter dated 19 September 2017 from the Defendant to Broome Toyota [TFA.001.013.0006]; and
- C. the Dealer Bulletin titled "Rate Chart" and dated 1 December 2017 [TFA.001.003.0051].

(b) otherwise denies the allegations ~~in paragraph 7.~~

8. ~~In answer to the allegations in~~ As to paragraph 8 of the ASOC, the Defendant ~~refers to and repeats paragraphs 4 to 7 of this Defence,~~ denies the allegations ~~in paragraph 8,~~ refers to and repeats paragraphs 5 and 7 of this Defence and says further that:

- (a) each Car Loan Application was an arms-length, commercial transaction;
- (b) as to the allegations in sub-paragraph 8(f), the Dealers and Accredited Persons did not owe the ~~customers~~ Plaintiffs or Group Members any duties in respect of Car Loan Applications (unless a customer appointed the Dealer to act as their agent in respect of an Unregulated Car Loan) such that any actual or potential conflict of interest between the Dealers/Accredited Persons and Group Members could not and did not arise;
- (c) the Defendant disclosed in writing to ~~customers~~ Group Members and the Plaintiffs:
  - (i) that commissions were payable by the Defendant to Dealers, and that the amount of commission was specified if ascertainable but otherwise noted as unascertainable;

#### Particulars

Consumer Fixed Rate Loan Contract Booklet TFA064  
(11/2016) [TFA.001.004.0037], clauses 15.4(a) and 15.4(c).

Business Vehicle Loan Booklet TFA071 (11/2016)  
[TFA.001.004.0039], clause 16.4.

Term Purchase Loan Booklet TFA053 (12/2013)  
[TFA.001.014.0002], clause 8.4.

Page 3 of the Plaintiffs' loan contract schedule  
[TFA.001.002.0001] at [.0005] provides "COMMISSION: (i)  
Commission is paid for the introduction of credit business by  
the Credit Provider to the Supplier and its sales  
representatives or finance manager with whom you dealt in  
relation to your loan. In each case the amount of  
commission is not presently ascertainable."

- (ii) that the ~~Dealer was~~ Dealers were acting as an agent of the Defendant in respect of Regulated Car Loan Applications, and ~~was~~ were not acting in the interests of, or on behalf of, the customer;

#### Particulars

Consumer Fixed Rate Loan Contract Booklet TFA064  
(11/2016) [TFA.001.004.0037], clauses 15.4(a) and  
15.4(b)(i).

Page 4 (the signing page) of the Plaintiffs' loan contract  
schedule [TFA.001.002.0001] at [.0006] provides "THE  
PERSON ARRANGING THIS FINANCE FOR YOU IS  
ACTING AS AN AGENT FOR TOYOTA FINANCE, AND  
THEREFORE THEY ARE NOT ACTING IN YOUR  
INTERESTS OR ON YOUR BEHALF. IF YOU REQUIRE  
ADVICE ON THE CREDIT CONTRACT, YOU SHOULD  
SEEK INDEPENDENT FINANCIAL ADVICE."

- (d) during the Relevant Period:
- (i) ~~customers~~ Group Members and the Plaintiffs were able to seek to finance the ~~purchase~~ acquisition of their vehicle with any available finance method of their choosing, of which credit from the Defendant was one potential option;

- (ii) in the event ~~a customer~~ Group Members and the Plaintiffs elected to seek to finance their vehicle ~~purchase~~ acquisition using credit, they could seek that credit from any applicable credit provider or through Dealers;
- (iii) ~~information there~~ was publicly available information to assist ~~customers~~ Group Members and the Plaintiffs to ~~access~~ assess and select motor vehicle finance, including through Dealers, to suit their individual circumstances and preferences;
- (iv) ~~customers~~ Group Members and the Plaintiffs could negotiate the terms to include in their Car Loan Application based on their individual preferences and circumstances, including the loan amount, Loan Term (provided the term was not shorter than 12 months or longer than 84 months), repayment schedule and ~~interest rate (each of which was subject to consideration and approval by the Defendant);~~ Contract Rate;
- (v) ~~customers~~ Group Members and the Plaintiffs could withdraw their ~~offer to the Defendant to borrow the loan amount~~ Car Loan Application at any time before the Defendant accepted it, and seek credit from other credit providers.

9. ~~In answer~~ As to the allegations in paragraph 9 of the ASOC, the Defendant:

- (a) denies the allegations in sub-paragraphs 9(a) to (c) by reason of the matters ~~pleaded~~ in paragraphs 4 to 8 of this Defence and ~~the following matters~~ says further that:
  - (i) flex commission arrangements were a common form of commission in the motor vehicle finance market during the Relevant Period;
  - (ii) from about 2010, Dealer Agreements contained provisions by which the Dealer:
    - A. was required to inform all customers that it acted as an agent for the Defendant and not the customer in relation to Regulated Credit;

#### Particulars

2010 Broome Toyota Dealer Agreement, cl 5.1(b), 6.2.

- B. warranted to the Defendant, in respect of each customer, that the Dealer had complied with any law requiring a statement of any commission charge payable or receivable by the Dealer;

#### Particulars

2010 Broome Toyota Dealer Agreement, cl 7.1(e).

- (iii) from around August 2018, the Defendant required the Dealers to inform customers:

- A. that the Dealer was receiving a commission or benefit from the Defendant for referring the customer to it in relation to providing consumer credit to finance the customer's vehicle purchase; and
- B. the details of the benefits or commissions;

#### Particulars

Retail Finance & Insurance Sales Guide Version 6.0, dated  
August 2018, page 24 [TFA.001.001.0011].

- (b) ~~in relation to the allegations in sub-paragraphs 9(d) to (e):~~ says that the allegations in sub-paragraphs 9(d)-(e) are vague and embarrassing and, under cover of that objection, ~~says that it does not know~~ denies the allegations and ~~therefore cannot admit whether Group Members who are not identified and whose claims are not particularised:~~

~~were in a comparatively weaker position to the Defendant and, or alternatively, the Dealers; or~~

~~were not treated equally in that comparable Group Members (who are also not identified and whose claims are also not particularised) were not afforded equal Contract Rates; and~~

says further that during the Relevant Period, Dealers warranted to the Defendant, in respect of each customer, that:

- (i) the Dealer was aware of statements made by the customer, had reviewed application forms completed by the customer and supporting documentation provided by the customer, and after such review had no reason to doubt that the statements made by the customer were correct;

#### Particulars

2010 Broome Toyota Dealer Agreement, cll 7.1(a)-(b).

- (ii) to the best of the Dealer's knowledge and belief, the customer was not subject to any undue influence, duress or unfair pressure from the Dealer during the course of the credit application process, in making a Regulated Car Loan Application, Unregulated Car Loan Application, or in entering into a Regulated Car Loan or Unregulated Car Loan;

#### Particulars

2010 Broome Toyota Dealer Agreement, cl 7.1(c).

- (iii) to the best of the Dealer's knowledge and belief, the customer was not acting under any mistake or misapprehension during the course of the credit application process, in making a Regulated Car Loan Application or Unregulated Car Loan Application, or in entering into a Regulated Car Loan or Unregulated Car Loan;

**Particulars**

2010 Broome Toyota Dealer Agreement, cl 7.1(d).

- (iv) the Dealer had not engaged in conduct that was misleading or deceptive or likely to mislead or deceive, or that was unconscionable;

**Particulars**

2010 Broome Toyota Dealer Agreement, cl 7.1(i).

- (v) the Dealer had not made any false or misleading statements or representations;

**Particulars**

2010 Broome Toyota Dealer Agreement, cl 7.1(j).

- (vi) the Dealer had taken all steps required by the Credit Procedures to ensure that a Regulated Car Loan was not unsuitable for the customer;

**Particulars**

2010 Broome Toyota Dealer Agreement, cl 7.3(i).

10. The Defendant admits the allegations in paragraph 10 of the [ASOC](#).

11. ~~In answer As to the allegations in~~ paragraph 11 of the [ASOC](#), the Defendant:

- (a) admits that the Plaintiffs' Loan Contract and Consumer Car Loans were contracts under which credit was provided ~~refers to and repeats sub-paragraphs 1(b)(i)C and 1(b)(ii)A of this Defence;~~
- (b) says that Consumer Car Loans that satisfied the following two criteria were credit contracts within the meaning of s 4 of the Credit Code and s 5 of the NCCP Act:
  - (i) the Consumer Car Loan was entered into on or after 1 April 2010; and
  - (ii) the Consumer Car Loan provided, or was intended to provide, credit wholly or predominantly for personal, domestic or household purposes; and

- (c) says that to the extent that the Plaintiffs' Loan Contract was not wholly or predominately for personal, domestic or household purposes it was not a credit contract within the meaning of section 4 of the Credit Code and section 5 of the NCCP Act; and
  - (d) otherwise denies the allegations in paragraph 11.
12. ~~In answer~~ As to the allegations in paragraph 12 of the ASOC, the Defendant:
- ~~(a) — refers to and repeats paragraphs 5 and 6 of this Defence;~~
  - ~~(b) — denies that during the Relevant Period, the Defendant offered to customers consumer leases that were wholly or predominantly for personal, domestic or household use and consequently denies the allegations in sub-paragraphs 12(b)(iii) to (iv) of the SOC;~~
  - (a) admits that, during the Relevant Period, ~~Dealers~~ Accredited Persons dealt directly with ~~customers who were natural persons and who wanted to make a Car Loan Application to the Defendant, and the Plaintiffs and Consumer Group Members during the course of,~~ as part of ~~those dealings the Dealers assisted customers to submit Car Loan Applications to the Defendant, or incidentally to the business of the Dealers~~ and otherwise denies the allegations in sub-~~paragraphs~~ paragraph 12(a) ~~and (b)(ii);~~
  - ~~(d) — says that the conduct of Dealers when engaging in the types of conduct alleged in sub-paragraphs 12(b)(i) to (ii) of the SOC, to the extent such conduct occurred (which is not admitted), was conduct performed in the Dealer's capacity as agent of the Defendant acting within the scope of the Dealer's authority under the TFA Agency Appointment; and~~
  - (b) it does not know and therefore cannot admit the allegations in sub-paragraph 12(b)(i);
  - (c) admits the allegations in sub-paragraph 12(b)(ii);
  - (d) denies the allegations in sub-paragraphs 12(b)(iii)-(iv) and says that during the Relevant Period the Defendant did not offer to Consumer Group Members consumer leases that were wholly or predominantly for personal, domestic or household use, and denies the allegations.
13. As to the allegations in paragraph 13 of the ASOC, the Defendant:
- (a) refers to and repeats paragraphs 11 and 12 of this Defence; ~~and~~
  - (b) admits that: from 1 April 2010 to the end of the Relevant Period, ~~the Dealers, on behalf of the Defendant and/or Accredited Persons,~~ in ~~the Dealer's~~ their capacity as agent ~~for the Defendant acting within the scope of the Dealer's authority under the TFA Agency Appointment of the Defendant,~~ provided ~~credit~~ assistance ~~within the meaning of ss 7(a) and 8 of the NCCP Act~~ to customers Consumer Group Members who:
    - ~~(i) — were natural persons; and~~

- (i) ~~(ii)with the Dealer's assistance,~~ entered into Regulated Car Loans with the Defendant which were credit contracts within the meaning of s 4 of the Credit Code and s 5 of the NCCP Act; ~~and, which assistance was credit assistance within the meaning of ss 7(a) and 8 of the NCCP Act; and~~
  - (ii) Broome Toyota and/or its Accredited Persons, in their capacity as agent of the Defendant, provided credit assistance to the Plaintiffs within the meaning of ss 7(a) and 8 of the NCCP Act when it assisted the Plaintiffs to apply for the Plaintiffs' Car Loan on the basis that the Plaintiffs' Car Loan was wholly or predominately for personal, domestic or household use;
  - (c) otherwise denies the allegations in paragraph 13.
14. ~~In answer~~ As to the allegations in paragraph 14 of the ASOC, the Defendant admits that Dealers carried on business in Australia during the Relevant Period.
15. ~~In answer~~ As to the allegations in paragraph 15 of the ASOC, the Defendant:
- ~~(a) — refers to and repeats sub-paragraphs 1(b)(i)C and 1(b)(ii)A of this Defence; and~~
- admits that Dealers carried on business in this jurisdiction as defined in s 21(2) of the NCCP Act from 1 April 2010 to the end of the Relevant Period.
16. ~~In answer~~ As to the allegations in paragraph 16 of the ASOC, the Defendant:
- (a) ~~refers to and repeats~~ denies the allegation concerning the Car Loan Process by reason of the matters in paragraphs ~~4 to 75~~ and ~~45~~12 of this Defence;
  - (b) admits that, from 1 April 2010 to the end of the Relevant Period, Dealers, and/or Accredited Persons in the course of, or as part of, or incidentally to, the business carried on by ~~them~~ Dealers in this jurisdiction, acted as an intermediary between the Defendant and ~~customers who were natural persons;~~ (i) the Plaintiffs; and (ii) Consumer Group Members, wholly or partly for the purposes of securing a provision of credit for them under Regulated Car Loan;
  - (c) otherwise denies the allegations in sub-paragraph 16 ~~of the SOC. (a); and~~
  - (d) ~~In answer~~ refers to and repeats sub-paragraph 12(d) of this Defence and denies the allegations in sub-paragraph 16(b).
17. As to the allegations in paragraph 17 of the ASOC, the Defendant:
- (a) admits that, from 1 April 2010 to the end of the Relevant Period, Dealers and/or the Accredited Persons acted as an intermediary for the purposes of ss 7(b) and 9(a) of the NCCP Act;



- (b) refers to and repeats paragraph 16 of this Defence; and
  - (c) otherwise denies the allegations in paragraph 17.
18. ~~In answer~~ As to the allegations in paragraph 18 of the ASOC, the Defendant:
- ~~(a) —refers to and repeats paragraphs 13 and 17 of this Defence;~~
- (a) admits that Dealers and/or Accredited Persons provided a credit service to Consumer Group Members within the meaning of ss 7 and 180A(1)(a) of the NCCP Act when providing the credit assistance referred to in sub-paragraph 13(b)(i) of this Defence; ~~and~~
  - (b) admits that Broome Toyota, or Accredited Persons of Broome Toyota, provided a credit service to the Plaintiffs within the meaning of ss 7 and 180A(1)(a) of the NCCP Act when providing the credit assistance to the Plaintiffs on the basis that the Plaintiffs' Car Loan was wholly or predominately for personal, domestic or household use;
  - (c) says that pursuant to s 180A(8)(a) of the NCCP Act, s 180A does not apply to the conduct of Broome Toyota, the Dealers or the Accredited Persons by reason of their conduct as agents of the Defendant, being a "credit provider" within the meaning of s 180A(8)(a);
  - (d) refers to and repeats paragraphs 13 and 17 of this Defence; and
  - (e) otherwise denies the allegations in paragraph 18.

## **C. THE CONRAVENING CONDUCT**

### **C.1. Misleading or deceptive conduct**

19. ~~In answer~~ As to ~~the allegations in~~ paragraph 19 of the ASOC, the Defendant refers to and repeats paragraph 9(a) of this Defence and denies the allegations.
20. As to paragraph 20 of the ASOC, the Defendant:
- (a) says that the allegation that "in the circumstances pleaded in paragraph 9(a) of the ASOC" the Plaintiffs and Group Members had a reasonable expectation that Dealers, Accredited Persons or the Defendant would have disclosed the matters stated in sub-paragraphs 20(a) to (c) is embarrassing because:
    - (i) paragraph 9(a) of the ASOC alleges that the Defendant did not disclose to the Plaintiffs and Group Members the matters stated in sub-paragraphs 9(a)(i)-(iii) of the ASOC;
    - (ii) the fact of non-disclosure of certain matters cannot give rise to a reasonable expectation that the non-disclosed matters would be disclosed;

- (iii) paragraph 20 does not otherwise identify the basis on which it is alleged that the Plaintiffs and Group Members had a reasonable expectation that the matters stated in sub-paragraphs (a) to (c) of the ASOC would be disclosed; and
  - (b) under cover of that objection, denies the allegations by reason of the matters in sub-paragraph 49(a) of this Defence.
21. ~~as~~ As to paragraph 21 of the ASOC, the Defendant:
- (a) says that the allegation is embarrassing because:
    - (i) the reasonable expectation of the Plaintiffs and Group Members which is alleged in paragraph 20 cannot alone give rise to a representation by Dealers and/or Accredited Persons; and
    - (ii) paragraph 21 does not otherwise identify a basis on which it is alleged the Dealers and/or the Accredited Persons made the representation alleged in paragraph 21; and
  - (b) under cover of that objection, denies the allegations by reason of the matters in paragraph 20 and sub-paragraph 49(b), the Defendant 9(a) of this Defence.
22. As to paragraph 22 of the ASOC, the Defendant:
- (a) says that the allegations are embarrassing because paragraph 20 alleges a failure to disclose the matters pleaded in paragraph 20 of the ASOC but paragraph 20 of the ASOC alleges that the Plaintiffs and Group Members had a reasonable expectation as to the matters stated in sub-paragraphs 22(a) to (c) of the ASOC; and
  - (b) under cover of that objection, insofar as the allegation concerns a failure to disclose the matters in sub-paragraphs 22(a) to (c), it denies the allegations by reason of the matters in sub-paragraph 9(a) of this Defence.
23. As to paragraph 23 of the ASOC, the Defendant refers to and repeats paragraphs 19 to 22 of this Defence and denies the allegations.
24. As to paragraph 24 of the ASOC, the Defendant refers to and repeats paragraphs 19 to 23 of this Defence and denies the allegations.
25. As to paragraph 25 of the ASOC, the Defendant:
- (a) says that the allegation in sub-paragraph 25(b) is embarrassing because it does not identify the interest rate or the loan term that Group Members would otherwise have entered into; and

- (b) under over of the objection in sub-paragraph 25(a), it refers to and repeats paragraphs 19 to 23 of this Defence and denies the allegations.
26. As to paragraph 26 of the ASOC, the Defendant refers to and repeats paragraphs 19 to 25 of this Defence and denies the allegations.
27. As to paragraph 27 of the ASOC, the Defendant:
- (a) refers to and repeats paragraphs 19 to 26 of this Defence;
  - (b) denies the allegations;
  - (c) says further that if the Court finds that the Defendant is liable to the Plaintiffs or Group Members (whose Car Loan was issued or entered into during the six-year period prior to commencement of this proceeding) for any loss or damage suffered by reason of the alleged Misleading Conduct, and that the Plaintiffs or Group Members are entitled to an order against the Defendant under s 1041I of the Corporations Act, or ss 12GF(1) or 12GM(1) of the ASIC Act, then:
    - (i) Group Members whose Car Loan was issued or entered into in the Northern Territory prior to 16 June 2020 may not recover any loss or damage by reason of s 12(1) of the Limitation Act 1981 (NT);
    - (ii) further to sub-paragraph (i):
      - A. the Plaintiffs and Group Members are responsible in part or wholly for that same loss or damage, to the extent that the loss resulted partly or wholly from the Plaintiffs' and Group Members' failure to take reasonable care to avoid such loss;
      - B. the claims under Part C.1 of the ASOC are "apportionable claims" within the meaning of sub-ss 1041L(1) and (4) of the Corporations Act and sub-ss 12GP(1) and (4) of the ASIC Act; and
      - C. the Defendant's liability to the Plaintiffs or Group Members is limited to an amount reflecting the proportion of the damage or loss claimed that the Court considers is just having regard to the extent of the Defendant's responsibility for that damage or loss in accordance with:
        - 1) s 1041N and sub-ss 1041L(1) and (4) of the Corporations Act; and
        - 2) s 12GR and sub-ss 12GP(1) and (4) of the ASIC Act;
  - (d) says further that if it appears to the Court that the Defendant has or may have any liability to the Plaintiffs or Group Members by reason of any contravention of s 1041H of the

Corporations Act, then the Defendant ought to be relieved from that liability pursuant to s 1317S of the Corporations Act (as applied by s 1041I(4)) on the basis that:

- (i) the Defendant acted honestly; and
- (ii) having regard to all the circumstances of the case, the Defendant ought fairly to be excused from the contraventions.

## **C.2. Unfair Conduct**

### **C.2.1. The Dealers and Dealer Representatives engaged in unfair conduct in respect of the Plaintiffs and the Consumer Group Members**

28. As to the allegations; in paragraph 28, the Defendant:

- ~~(ii) — says that the determination of whether a customer was unable, or considered themselves unable, to enter into a credit facility for the purpose of purchasing a motor vehicle with a credit provider other than the Defendant involves an assessment of the individual characteristics, situation and circumstances relevant to each customer;~~
- (a) refers to and repeats paragraphs 5 and 7 to 9 of this Defence and denies the allegations in sub-paragraph ~~19(e)~~ 28(a);
- (b) as to the allegations in sub-paragraph ~~19(d)~~, ~~it:~~ 28(b):
  - (i) refers to and repeats paragraphs ~~4 5 and 7~~ to ~~7-9~~ of this Defence; and ~~otherwise~~ denies the ~~allegations;~~ existence of the “Car Loan Process”, “Flex Commission Features” and “Car Loan Circumstances” and “Flex Commission Non-Disclosure”;
  - (ii) does not know and therefore cannot admit the allegations that the Consumer Group Members were unable, or considered themselves unable, to make a Consumer Car Loan with a credit provider other than the Defendant, or a Consumer Car Loan that was a consumer lease with a credit provider other than the Defendant.
  - (iii) says that the determination of whether Consumer Group Members were unable, or considered themselves unable, to make a Consumer Car Loan with a credit provider other than the Defendant, or a Consumer Car Loan that was a consumer lease with a credit provider other than the Defendant, involves an assessment of the individual characteristics, situation and circumstances relevant to each Consumer Group Member;
  - (iv) denies the allegation that the Plaintiffs were unable to, or considered themselves unable, to make a Consumer Car Loan with a credit provider other than the Defendant; and

### Particulars

The Plaintiffs had used motor vehicle finance from another source to facilitate the purchase of their previous motor vehicle (see the document headed "Payout Advice" addressed to Mr Eru Hepi from Volkswagen Financial Services and dated 18 December 2017 [TFA.001.002.0001], page 8).

- (c) as to the allegations in sub-paragraph ~~19-28(c)~~:
  - (i) says that the term "Plaintiffs' Loan Circumstances" is not pleaded or particularised and is therefore embarrassing; and
  - (ii) under cover of that objection, it refers to and repeats paragraphs 5 and 7 to 9 of this Defence and denies the allegations;
- (d) as to the allegations in sub-paragraph 28(d), the Defendant:
  - (i) refers to and repeats paragraphs 5 and 7 to 9 of this Defence; and
  - (ii) denies the allegations;
- (e) as to the allegations in sub-paragraph 28(e):
  - (i) says that the allegations are vague and embarrassing and liable to be struck out on the basis that: (i) the "terms" which are alleged to be "less favourable"; and (ii) "the terms of a comparable transaction", are not pleaded or properly particularised and the Defendant is unable to understand the allegations; and
  - (ii) under cover of ~~the that~~ objection ~~in sub-paragraph 19(e)(i) of this Defence,~~ it denies the allegations- it refers to and repeats paragraphs 5 and 7 to 9 of this Defence and denies the allegations.

29. ~~In answer~~ As to the allegations in paragraph ~~20-29~~ of the ASOC, the Defendant:

- (a) refers to and repeats paragraph ~~19-28~~ of this Defence;
- (b) says that pursuant to s 180A(8)(a) of the NCCP, s 180A does not apply to the conduct of Accredited Persons or Dealers acting by reason of their conduct as ~~agent~~ agents of the Defendant, being a "credit provider" within the ~~scope of the Dealer's TFA Agency Appointment~~ meaning of s 180A(8)(a); and
- (c) denies the allegations ~~in paragraph 20~~.

### C.2.2 Consequences of the Dealers' Unfair Conduct

30. ~~In answer~~ As to the allegations in paragraph ~~24~~ 30 of the ASOC, the Defendant

~~(a) — refers to and repeats paragraphs 19 to 20 of this Defence; and~~

~~(b) — denies the allegations in paragraph 21.~~

~~22. — In answer to the allegations in paragraph 22 of the SOC, the Defendant:~~

refers to and repeats paragraph ~~24~~ 29 of this Defence and denies the allegations.

~~(b) — denies the allegations in paragraph 22.~~

31. ~~In answer~~ As to the allegations in paragraph ~~23~~ 31 of the ASOC, the Defendant:

(a) says that the allegation in sub-paragraph 30(b) is embarrassing because it does not identify the interest rate or the loan term that Group Members would otherwise have entered into; and

(b) under over of that objection:

(i) refers to and repeats ~~paragraph 4~~ paragraphs 29 and 30 of this Defence; and denies the allegations;

(ii) says further that the following Consumer Group Members are not entitled to claim a remedy against the Dealers and/or the Accredited Persons pursuant to s 180A of the NCCP Act:

A. Consumer Group Members who entered into a Car Loan prior to 1 March 2013 as s 180A of the NCCP Act did not commence operation until 1 March 2013;

B. Consumer Group Members who entered into a Car Loan prior to 16 June 2017 as their claims are statute barred by reason of s 180A(5) of the NCCP Act;

C. Consumer Group Members who entered into a Car Loan in Western Australia prior to 16 June 2017 as their claims are statute barred by reason of s 13(1) of the Limitation Act 2005 (WA);

D. Consumer Group Members who entered into a Car Loan in the ACT prior to 16 June 2017 as their claims are statute barred by reason of s 11(1) of the Limitation Action 1985 (ACT); and

E. Consumer Group Members who entered into a Car Loan in the Northern Territory prior to 16 June 2020 as their claims are statute barred by reason of s 12(1) of the Limitation Act 1981 (NT).

32. As to the allegations in paragraph 32 of the ASOC, the Defendant:
- (a) admits that the Defendant is the holder of an Australian credit licence;
  - (b) says that, during the Relevant Period, Dealers and Accredited Persons acted as agent of the Defendant, agents of the Defendant when engaging in conduct described in sub-paragraphs 4(d)(i) to (iii) of this Defence; and
  - (c) otherwise denies the allegations.
33. As to the allegations in paragraph 33 of the ASOC, the Defendant:
- (a) admits that from 1 April 2010 to the end of the Relevant Period, the Dealers and Accredited Persons were a representative of the Defendant within the scope of the Dealer's authority under the TFA Agency Appointment, meaning of s 5 of the NCCP Act when engaging in conduct described in sub-paragraphs 4(d)(i) to 4(d)(iii) above of this Defence; and
  - (b) otherwise denies the allegations ~~in paragraph 23.~~
34. ~~In answer As~~ to the allegations in paragraph ~~24~~ 34 of the ASOC, the Defendant:
- ~~(a) admits that from 1 April 2010 to the end of the Relevant Period, each Dealer was a representative of the Defendant within the meaning of s 5 of the NCCP Act for the limited purpose referred to in paragraph 23(b) of this Defence; and~~
  - ~~(b) otherwise denies the allegations in paragraph 24.~~
- ~~25. In answer to the allegations in paragraph 25 of the SOC, the Defendant:~~
- ~~refers to and repeats paragraphs 18-18(c) and 29 of this Defence and 20 of this Defence; and denies the allegations.~~
- ~~(b) denies the allegations.~~
35. ~~In answer As~~ to paragraph ~~26-35~~ of the ASOC, the Defendant refers to and repeats paragraph 29 of this Defence and denies the allegations.
36. As to paragraph 36 of the ASOC, the Defendant refers to and repeats paragraphs ~~20 and 21~~ 29 of this Defence; and denies the allegations. ~~(b) denies the allegations in~~
37. ~~In answer to the allegations in paragraph 27~~ As to paragraph ~~27-37~~ of the ASOC, the Defendant refers to and repeats paragraphs ~~20-29~~ and ~~24~~ 33 to 36 of this Defence and denies the allegations. ~~(b) denies the allegations in~~

38. ~~In answer to the allegations in paragraph 28~~As to paragraph 38 of the ASOC, the Defendant refers to and repeats paragraphs 25 29 to 27 37 of this Defence and denies the allegations ~~in paragraph 28~~.
39. ~~In answer~~As to the allegations in paragraph 29 39 of the ASOC, the Defendant refers to and repeats paragraphs 26 28 to 27 38 of this Defence and denies the allegations ~~in paragraph 29~~.
40. ~~In answer~~As to the allegations in paragraph 30 40 of the ASOC, the Defendant ~~refers to and repeats paragraphs 20 to 29 of this Defence; and~~ denies the allegations ~~in paragraph 30~~ by reason of the matters in paragraphs 29 and 36 to 39 of this Defence.

~~The Defendant denies the allegations in~~

### C.3 Unjust Transactions

41. ~~In answer to the allegations in paragraph 32~~As to paragraph 31 41 of the ASOC, the Defendant refers to and repeats paragraphs 5(b)(i) to (ii), and 7(a)(ii) and 8 to 9 of this Defence and denies the allegations.
42. ~~(b) denies the allegations in~~As to paragraph 32 42; ~~(c) as to the allegations in sub-paragraph 32(b), says that the degree and nature of negotiation between Dealers and customers is a matter to be assessed having regard to all the relevant individual characteristics, situation and circumstances of each customer and transaction. and~~In answer to the allegations in paragraph 33 of the ASOC, the Defendant refers to and repeats paragraph 32 41 of this Defence and denies the allegations.
43. ~~denies the allegations in~~As to paragraph 33 43 of the ASOC, the Defendant: ~~denies the allegations in paragraph 34 of the SOC. In answer to the allegations in paragraph 35 of the SOC:~~
- (a) refers to and repeats ~~sub-paragraphs 5(b)(i)~~41 to (ii) and 7 to 9 42 of this ~~Defence~~Defences and denies the allegations; and
- (b) ~~denies the allegations in paragraph 35; and~~
- (b) says further that ~~(i) the Contract Rate and~~the following Consumer Group Members are not entitled to have their Consumer Car Loan Term ~~were negotiated and agreed between customers and~~transactions reopened or to orders against the Defendant; ~~and (ii) the Dealer Commission was disclosed to Group Members. In answer to the allegations in paragraph 36 under s 77 of the SOC, the Defendant:~~Credit Code:

~~(a) refers to and repeats paragraph 35 of this Defence; and~~

~~(b) denies the allegations in paragraph 36.~~

37. ~~In answer to the allegations in paragraph 37 of the SOC, the Defendant:~~



~~(a) — refers to and repeats paragraphs 35 and 36 of this Defence; and~~

~~(b) — denies the allegations in paragraph 37.~~

~~38. — In answer to the allegations in paragraph 38 of the SOC, the Defendant:~~

~~(a) — refers to and repeats paragraph 37 of this Defence; and~~

~~(b) — denies the allegations in paragraph 38.~~

~~39. — In answer to the allegations in paragraph 39 of the SOC, the Defendant:~~

~~(a) — refers to and repeats paragraphs 36 to 38 of this Defence; and~~

~~(b) — denies the allegations in paragraph 39.~~

~~40. — In answer to the allegations in paragraph 40 of the SOC, the Defendant:~~

~~(a) — refers to and repeats paragraphs 36 to 39 of this Defence;~~

~~(b) — the Defendant denies the allegations in paragraph 40 of the SOC.~~

~~41. — In answer to the allegations in paragraph 41 of the SOC, the Defendant:~~

~~(a) — refers to and repeats paragraph 40 of this Defence;~~

~~(b) — denies the allegations in paragraph 41;~~

- (i) ~~says~~ Consumer Group Members who entered into a Car Loan that was rescinded, discharged or otherwise came to an end prior to 16 June 2021 as their claims are statue barred by s 80(1) of the Credit Code;
- (ii) ~~further that, if the Court finds that the~~ or alternatively to sub-paragraph 43(b)(i) of this Defence, Consumer Group Members who entered into a Car Loan in Western Australia prior to 16 June 2017 as their claims are statue barred by s 13(1) of the Limitation Act 2005 (WA);
- (iii) further or alternatively to sub-paragraphs 43(b)(i)-(ii) of this Defence, Consumer Group Members who entered into a Car Loan in ACT prior to 16 June 2017 as their claims are statue barred by s 11(1) of the Limitation Action 1985 (ACT); and
- (iv) further or alternatively to sub-paragraph 43(b)(i)-(iii) of this Defence, Consumer Group Members who entered into a Car Loan in the Northern Territory prior to 16 June 2020 as their claims are statue barred by s 12(1) of the Limitation Act 1981 (NT).

#### **C.4. Unconscionable conduct**

44. As to paragraph 44 of the ASOC, the Defendant refers to and repeats paragraphs 7 to 9 of this Defence and denies the allegations.
45. As to paragraph 45 of the ASOC, the Defendant:
- (a) says that the allegation “By reason of the matters referred to in paragraphs 4 to 43 above” is embarrassing as those paragraphs make numerous allegations and do not identify a basis for the allegations in paragraph 45 of the ASOC; and
  - (b) under cover of that objection, denies the allegations.
46. As to paragraph 46 of the ASOC, the Defendant:
- (a) says that the allegation “Further or alternatively, by reason of the matters referred to in paragraphs 5 to 43 above” is embarrassing as those paragraphs make numerous allegations and do not identify a basis for the allegations in paragraph 46 of the ASOC; and
  - (b) under cover of that objection, denies the allegations.
47. As to paragraph 47 of the ASOC, the Defendant refers to and repeats paragraphs 45 and 46 of this Defence and denies the allegations.
48. As to paragraph 48 of the ASOC:
- (a) says that the pleading is vague and embarrassing in that it does not plead the matters said to give rise to the Plaintiffs’ and Group Members’ alleged entitlement to recover their loss and damage; and
  - (b) under cover of that objection, it:
    - (i) refers to and repeats paragraphs 44 to 47 of this Defence and denies the allegations;
    - (ii) says further that Group Members who entered into a Car Loan in the Northern Territory prior to 16 June 2020 may not recover any loss or damage from the Defendant as their claims are statute barred by s 12(1) of the Limitation Act 1981 (NT);
    - (iii) says further that if the Court finds that the Defendant is liable to the Plaintiffs or Group Members (whose Car Loan was issued or entered into during the six-year period prior to commencement of this proceeding) for any loss or damage suffered by reason of the alleged unconscionable conduct, and that the Plaintiffs or Group Members are entitled to an order against the Defendant under s ~~1041I of the Corporations Act or s 12GF of the ASIC Act and the Defendant is liable to the Group Members in respect of any loss or damage suffered by them by reason of those alleged contraventions (which is denied),~~ then:

A. the Plaintiffs and Group Members are responsible in part or wholly for that same loss or damage, to the extent that the loss resulted partly or wholly from the Plaintiffs and Group Members' failure to take reasonable care to avoid such loss;

B. ~~the Misleading or Deceptive Conduct Claims~~ the Plaintiffs' and Group Members' claims are "apportionable claims" within the meaning of sub-ss ~~1041I(1) and (4)~~ of the Corporations Act and sub-ss 12GP(1) and (4) of the ASIC Act;

~~(iii) — in the premises, the Defendant's liability (if any) to the Group Members is limited to an amount reflecting the proportion of the damage or loss claimed that the Court considers is just having regard to the extent of the Defendant's responsibility for that damage or loss in accordance with:~~

~~1) — s 1041N and sub-ss 1041L(1) and (4) of the Corporations Act; and~~

~~1) — s 12GR and sub-ss 12GP(1) and (4) of the ASIC Act;~~

~~(d) — says further that if it appears to the Court that the Defendant has or may have any liability to the Group Members by reason of any contravention of s 1041H of the Corporations Act (which is denied), then the Defendant ought to be relieved from that liability pursuant to s 1317S of the Corporations Act (as applied by s 1041I(4)) on the basis that:~~

~~(i) — the Defendant acted honestly; and~~

~~(ii) — having regard to all the circumstances of the case, the Defendant ought fairly to be excused from the contraventions.~~

C. ~~In answer to the allegations in paragraph 42 of the SOC~~ in the premises, the Defendant's liability to the Plaintiffs or Group Members is limited to an amount reflecting the proportion of the damage or loss claimed that the Court considers is just having regard to the extent of the Defendant's responsibility for that damage or loss in accordance with s 12GR and sub-ss 12GP(1) and (4) of the ASIC Act.

#### C.5. Money had and received, and unjust enrichment

49. As to paragraph 49 of the ASOC, the Defendant denies the allegations by reason of the matters in paragraphs 5 to 9, 29, 31, 45 to 46 of this Defence.

50. As to paragraph 50 of the ASOC, the Defendant:

(a) refers to and repeats ~~paragraphs 4 to 9, 20, 31, 33 and 34~~ paragraph 49 of this Defence and denies the allegations;

(b) says further that:

- (i) it denies that each of the matters alleged, if they were true, would have been material information relevant to the decision of the Plaintiffs or Group Members about whether to proceed with an offer to enter into the Car Loan;
- (ii) further or in the alternative to sub-paragraph 50(b)(ii) of this Defence:

~~(b) — denies the allegations in paragraph 42;~~

- A. ~~says further that~~ it does not know and therefore cannot admit what matters were known to Group Members who are not identified and whose claims are not particularised; and

~~43. — In answer to the allegations in paragraph 43 of the SOC, the Defendant:~~

~~(a) — refers to and repeats paragraph 42 of this Defence;~~

~~(b) — denies the allegations in paragraph 43 of the SOC; and~~

~~(c) — says:~~

~~(i) — it does not know and therefore cannot admit what matters were known to Group Members who are not identified and whose claims are not particularised or whether such matters would have been relevant to the decision of the Group Members to proceed with an offer to enter into the Car Loan;~~

- B. ~~denies that~~ whether each of the matters alleged was material information ~~that would have been~~ relevant to the decision of the ~~Group Members about whether to proceed with an offer to enter into the Car Loan;~~ further Plaintiffs or ~~in the alternative to sub-paragraph 43(b) of this Defence, whether each of the matters alleged was material information relevant to the decision of the~~ Group Members about whether to proceed with an offer to enter into the Car Loan is subjective and would depend on the individual characteristics, situation and circumstances of each Group Member.

51. ~~In answer to the allegations in~~ As to paragraph ~~44~~ 51 of the ASOC, the Defendant:

- (a) says that the allegation in sub-paragraph 51(b) is embarrassing because the Plaintiffs do not identify the interest or the terms of the loans that the Plaintiffs and Group Members would otherwise have entered into if they were informed of the matters alleged in sub-paragraphs 51(d) to (j) of the ASOC; and
- (b) under cover of that objection:
  - (i) in respect of the alleged mistaken beliefs in:

- A. sub-paragraphs 51(d) to (e), refers to and repeats paragraphs ~~42~~ 7 and ~~43~~ 49 of this Defence and denies the allegations ~~in paragraph 44 of the SOC~~;
  - B. ~~In answer to the allegations in sub-~~paragraph ~~45 of the SOC~~, the ~~Defendant:51(f)~~, refers to and repeats paragraphs ~~7 to 9, 20, 31, 33, 34 and 44~~ 8 of this Defence and denies the allegations;
  - C. sub-paragraph 51(g), says that ~~even~~ the Defendant was and is legally entitled pursuant to the Plaintiffs' Loan Contract and the Car Loans to payment of interest at the Contract Rate, and interest for the Loan Term, and denies the allegations;
  - D. sub-paragraph 51(h), says that at the time of making the decision to enter into the Car Loan, the Plaintiffs and Group Members had received all material information and therefore denies the allegations;
  - E. sub-paragraphs 51(i) to (j), refers to and repeats sections C.2, C.3 and C.4 of this Defence, says that the conduct of the Dealers was not unfair within the meaning of s 180A(1)(b) of the NCCP Act, the Car Loans were not unjust transactions within the meaning of s 26 of the Credit Code and the Defendant's conduct was not unconscionable within the meaning of the ASIC Act, and denies the allegations;
- (ii) says that if the ~~alleged~~-mistaken beliefs ~~pleaded in paragraph 45 of the SOC were made, were held~~:
- A. none of ~~them~~ the mistaken beliefs relate to fundamental terms of a Car Loan; and
  - B. further or alternatively, ~~they~~ the mistaken beliefs did not cause the Plaintiffs or Group Members to enter into ~~their respective~~ the Plaintiffs' Loan Contract or the Car Loans on the terms they did,
- such that the alleged mistaken beliefs do not give rise to a cause of action against the Defendant, or an entitlement on the part of the Plaintiffs or Group Members to relief, on the grounds of unilateral mistake; ~~and or mistake~~;
- (iii) refers to and repeats paragraphs 49 to 50 of this Defence; and
- (iv) denies the allegations ~~in~~.

52. ~~In answer to~~ As to paragraph ~~45-52~~ of the ~~allegations~~ ASOC:

- (a) the Defendant denies the existence of the alleged mistaken beliefs; and

- (b) in respect of the mistaken beliefs alleged in sub-paragraphs 51(f) to (j) of the ASOC, says that if the mistaken beliefs were held the mistakes were mutual mistakes, and denies that the mistakes were unilateral mistakes.
53. As to paragraph ~~46-53~~ of the ASOC, the Defendant denies the allegations by reason of paragraphs 49 to 51 and 52(a) of this Defence.
54. ~~refers to and repeats~~ As to paragraph ~~44-54~~ of the ASOC, the Defendant refers to and ~~45~~ repeats paragraphs 49 to 53 of this Defence and denies the allegations-in.
55. As to paragraph ~~46-55~~ of the ASOC, the Defendant:
- (a) ~~The Defendant~~ denies the allegations by reason of the matters in paragraphs 53 to 54 of this Defence;
- (b) further or in the alternative, says that the following Group Members are not entitled to rescind the Car Loans or to an order declaring the Car Loans (or the terms requiring payment of the Contract Rate and/or payment over the Loan Term) to be void:
- (i) Group Members who entered into a Car Loan prior to 16 June 2017 in states and territories other than the Northern Territory as their claims are statute barred by the following provisions:
- A. s 5(1)(a) of the Limitation of Actions Act 1958 (Vic);
- B. s 14(1) of the Limitation Act 1969 (NSW);
- C. s 10(1) of the Limitation of Actions Act 1974 (Qld);
- D. s 13(1) of the Limitation Act 2005 (WA);
- E. ss 35(a) and 38(1) of the Limitation of Actions Act 1936 (SA);
- F. s 4(1) of the Limitation Act 1974 (Tas); and
- G. s 11(1) of the Limitation Action 1985 (ACT);
- (ii) Group Members who entered into a Car Loan in the Northern Territory prior to 16 June 2020 as their claims are statute barred by s 12(1) of the Limitation Act 1981 (NT); and
- (c) in respect of the allegation in sub-paragraph ~~47 of the SOC-55(a)~~, says further that:
- (i) the Plaintiffs and Group Members are not entitled to rescission of the Plaintiffs' Loan Contract of the Car Loans because the Plaintiffs' and Group Members' receipt and use of the automobile purchased or leased using monies advanced by the Defendant pursuant to the Plaintiffs' Loan Contract and the Car Loans constitutes unequivocal

conduct by which the Plaintiffs and Group Members have elected to take the benefit of the Plaintiffs' Loan Contract and Car Loans and, in the premises, the Plaintiffs and Group Members are not entitled to rescission of the Plaintiffs' Loan Contract of the Car Loans; and

- (ii) further or in the alternative to sub-paragraph (i), the Plaintiffs and the Group Members whose Car Loans have been fully performed are not entitled to rescind their Car Loans as contracts that have been fully performed and discharged cannot be rescinded.

### **Particulars**

~~In answer to~~ The Plaintiffs' Loan Contract was discharged in April 2023.

56. As to paragraph 56 of the ASOC, the Defendant denies the allegation by reason of the matters in paragraphs 49 to 54 of this Defence and says that any cause of action for monies had and received by the following Group Members is statute barred:

- (a) Group Members who entered into a Car Loan prior to 16 June 2017 in states and territories other than the Northern Territory by reason of the following provisions:
  - (i) s 5(1)(a) of the *Limitation of Actions Act 1958* (Vic);
  - (ii) s 14(1) of the *Limitation Act 1969* (NSW);
  - (iii) s 10(1) of the *Limitation of Actions Act 1974* (Qld);
  - (iv) s 13(1) of the *Limitation Act 2005* (WA);
  - (v) ss 35(a) and 38(1) of the *Limitation of Actions Act 1936* (SA);
  - (vi) s 4(1) of the *Limitation Act 1974* (Tas); and
  - (vii) s 11(1) of the *Limitation Action 1985* (ACT);
- (b) Group Members who entered into a Car Loan in the Northern Territory prior to 16 June 2020 by reason of s 12(1) of the *Limitation Act 1981* (NT).

57. As to paragraph 57 of the ASOC, the Defendant denies the allegations ~~in paragraph 48 of the SOC, the Defendant~~ and says that:

- ~~(a) refers to and repeats paragraphs 46 to 47 and sub-paragraphs 1(b)(iv) and (iv) of this Defence; and~~
- ~~(b) denies the allegations.~~

~~49. In answer to the allegations in paragraph 49 of the SOC, the Defendant:~~

- (a) ~~refers to and repeats~~ unless the Plaintiffs' Loan Contract and the Car Loans are rescinded or declared void on the basis of the alleged mistaken beliefs pleaded in paragraph 51 of the ASOC, the Plaintiffs and Group Members are not entitled to restitution of interest at the Contract Rate and/or payment over the Loan Term;
- (b) by reason of the matters in paragraphs 49 to 55 of this Defence, the Plaintiffs' Loan Contract and the Car Loans are not void (and none of their terms are void) and the Plaintiffs and Group Members are not entitled to rescind the Plaintiffs' Car Loan or the Car Loans;
- (c) further or alternatively to sub-paragraphs 57(a) to (b) of this Defence, the Defendant is not liable to make restitution to the following Group Members as their claims are statute barred:
  - (i) Group Members who entered into a Car Loan prior to 16 June 2017 in states and territories other than the Northern Territory and Western Australia by reason of the following provisions:
    - A. ss 5(1)(a) and 5(8) of the *Limitation of Actions Act 1958* (Vic);
    - B. ss 14(1) and 23 of the *Limitation Act 1969* (NSW);
    - C. ss 10(1) and 10(6) of the *Limitation of Actions Act 1974* (Qld);
    - D. s 38(1) of the *Limitation of Actions Act 1936* (SA);
    - E. ss 4(1) and (9) of the *Limitation Act 1974* (Tas); and
    - F. s 11(1) of the *Limitation Action 1985* (ACT);
  - (ii) Group Members who entered into a Car Loan in Western Australia prior to 16 June 2017 or, further or alternatively, 16 June 2020, by reason of s 27 of the *Limitation Act 2005* (WA);
  - (iii) Group Members who entered into a Car Loan in the Northern Territory prior to 16 June 2020 by reason of ss 12(1) and 21 of the *Limitation Act 1981* (NT); and
- (d) further or in the alternative to sub-paragraphs ~~42-57(a)~~ to ~~48(c)~~ of this Defence:
  - (i) the Defendant gave good consideration to the Plaintiffs and Group Members from whom the Defendant received interest payments pursuant to the Plaintiffs' Loan Contract and the Car Loans, and the Plaintiffs and Group Members have received a benefit from the Plaintiffs' Loan Contract and Car Loans;

### Particulars

~~(b) denies the allegations; and~~



~~says further that~~ Amounts advanced by the Defendant under the Plaintiffs' Loan Contract and the Car Loans were applied to one of more of the following:

- A. to obtain a valuable asset, being the automobile acquired by the Plaintiffs and Group Members;
  - B. to repay an amount owing by the Plaintiffs and Group Members under another credit contract; and
  - C. to pay for accessories or extras in relation to the automobile purchased or leased.
- (ii) by reason of the matters in sub-paragraph (i), the Plaintiffs and Group Members would be unjustly enriched at the Defendant's expense if the Defendant was required to repay the interest charges paid by the Plaintiffs and Group Members to the Defendant;
- (iii) further or in the alternative to sub-paragraph (ii), Group Members are not entitled to repayment of ~~any interest by reason of the following matters:~~ Interest Charges in whole or in part unless they account for the benefit;
- (e) further or in the alternative to sub-paragraphs 57(a) to (d) of this Defence:
- (i) the Defendant, acting in good faith and without knowledge of the Plaintiffs' and Group Members' alleged mistaken beliefs pleaded in paragraph 51 of the ASOC, relied on the agreement ~~by~~ of the Plaintiffs and Group Members to pay interest charges pursuant to the Car Loans (**Interest Charges**) and ~~the~~ their subsequent payment of those Interest Charges;
  - (ii) the Defendant will suffer detriment if required to repay the Interest Charges in whole or in part, and, ~~in the premises~~ it would be inequitable to require the Defendant to make repayment; in the circumstances; and

### Particulars

In reliance upon the agreement by the Plaintiffs and Group Members to pay Interest Charges, and the payment of those Interest Charges, the Defendant:

- A. financed the acquisition of motor vehicles including, where the acquisition involved the trade in of another vehicle, paying out an outgoing financier to discharge their security over the trade in vehicle.
- B. bore the costs associated with that finance;

- C. bore the risk associated with the provision of that finance including that ~~a~~ the Plaintiffs or the Group ~~Member may~~ Members might cease to make repayments and the underlying assets would be insufficient to cover the balance of the loan; and
- D. paid ~~commissions~~ the Dealer Commissions to Dealers<sub>1</sub>

and the Plaintiffs and Group Members have had the benefits referred to in the particulars subjoined to sub-paragraph 57(d)(i) of this Defence.

Further particulars may be provided following discovery and the filing and service of evidence.

- (f) says further that it is entitled to rely upon the equitable doctrine of laches due to the Plaintiffs' and Group Members' delay in bringing their claim.

~~(ii) — Group Members have received a benefit from the Car Loans, to the extent that the amount advanced under the Car Loans was applied:~~

~~A. — to repay an amount owing by a Group Member under another credit contract;~~

~~B. — to finance premiums for comprehensive motor insurance of any “add-on” insurance products;~~

~~C. — to pay for accessories or extras in relation to the automobile purchased; and~~

~~D. — to obtain a valuable asset, being the motor vehicle acquired;~~

~~and, in the premises, Group Members would be unjustly enriched at the Defendant's expense if the Defendant was required to repay the Interest Charges;~~

~~(iii) — the Group Members' receipt and use of the motor vehicles purchased using monies advanced by the Defendant pursuant to the Car Loans constitutes unequivocal conduct by which Group Members have elected to take the benefit of the Car Loans and, in the premises, the Group Members are not entitled to the repayment of Interest Charges paid in respect of the Car Loans in whole or in part;~~

~~(iv) — further or in the alternative to sub-paragraph 49(c)(ii) of this Defence, Group Members are not entitled to repayment of Interest Charges in whole or in part unless they account for the benefit.~~

~~50. — In answer to the allegations in paragraph 50 of the SOC, the Defendant:~~

~~(a) — refers to and repeats paragraphs 48 and 49 of this Defence; and~~

~~(b) — denies the allegations in paragraph 50.~~

~~51. — In answer to the allegations in paragraph 51 of the SOC, the Defendant:~~

~~(a) — admits that on around 18 December 2017, the Plaintiffs entered into a loan contract with the Defendant (Plaintiffs' Loan Contract) after discussions with Broome Toyota;~~

~~Particulars~~

~~The Plaintiffs' Loan Contract was wholly in writing, comprising a "Schedule" executed by the Plaintiffs and the Defendant and dated 18 December 2017 [TFA.001.002.0001] and a Consumer Fixed Rate Loan Contract Booklet TFA064 (11/2016) [TFA.001.004.0037].~~

~~(b) — says that the Plaintiffs' Loan Contract contained the following terms, among others:~~

~~(i) — that commissions were payable by the Defendant to Broome Toyota;~~

~~Particulars~~

~~Page 3 of the Schedule provides "COMMISSION: (i) Commission is paid for the introduction of credit business by the Credit Provider to the Supplier and its sales representatives or finance manager with whom you dealt in relation to your loan. In each case the amount of commission is not presently ascertainable."~~

~~(ii) — that Broome Toyota was acting as an agent of the Defendant, and not acting in the interests of, or on behalf of, the Plaintiffs;~~

~~Particulars~~

~~Page 4 (the signing page) of the Schedule provides "THE PERSON ARRANGING THIS FINANCE FOR YOU IS ACTING AS AN AGENT FOR TOYOTA FINANCE, AND THEREFORE THEY ARE NOT ACTING IN YOUR INTERESTS OR ON YOUR BEHALF. IF YOU REQUIRE ADVICE ON THE CREDIT CONTRACT, YOU SHOULD SEEK INDEPENDENT FINANCIAL ADVICE."~~

~~(iii) — that commissions were payable by the Defendant to a Dealer that introduced the customer to the Defendant;~~

~~Particulars~~

~~Consumer Fixed Rate Loan Contract Booklet TFA064 (11/2016) [TFA.001.004.0037], clauses 15.4(a) and 15.4(e).~~

~~(iv) — that the customer acknowledged that a Dealer accredited by the Defendant was acting as the Defendant's agent, and not acting in the customer's interests or on the customer's behalf;~~

~~Particulars~~

~~Consumer Fixed Rate Loan Contract Booklet TFA064 (11/2016) [TFA.001.004.0037], clauses 15.4(a) and 15.4(b)(i).~~

~~(c) — says further that the Plaintiffs entered into the Plaintiffs' Loan Contract after attending the premises of Broome Toyota on or about 4 and 5 December 2017, on or around 5 December 2017 entering into a contract with Broome Toyota to purchase a used vehicle, and exchanging emails with Broome Toyota between 8 and 18 December 2017.~~

#### ~~Particulars~~

~~The contract is wholly in writing, comprising a document titled "Contract / Tax Invoice for the sale of a pre-owned motor vehicle" dated 5 December 2017 [TFA.001.004.0011].~~

~~52. — The Defendant admits the allegations in paragraph 52 of the SOC.~~

~~53. — The Defendant admits the allegations in paragraph 53 of the SOC.~~

~~54. — In answer to the allegations in paragraph 54 of the SOC, the Defendant:~~

~~(a) — denies the allegations;~~

~~(b) — says that Broome Toyota's rights and obligations in respect of the Plaintiffs' Loan Contract were subject to the terms and conditions recorded in the following documents:~~

~~(i) — Trade Agreement between Broome Toyota and the Defendant dated 26 August 2010 (2010 Broome Toyota Dealer Agreement) [TFA.001.001.0007];~~

~~(ii) — Annual Review Document dated 19 September 2017 from the Defendant to David Watson of "North West Motor Group Pty Ltd" and signed by Mr Watson [TFA.001.013.0006];~~

~~(iii) — document titled "Rate Chart" dated 1 December 2017 [TFA.001.003.0051];~~

~~(c) — says that, pursuant to the 2010 Broome Dealer Agreement, with effect from 26 August 2010, Broome Toyota was appointed by the Defendant as its agent in law to engage in the conduct pleaded in sub-paragraphs 4(d)(i)-(iii) in this Defence (Broome Toyota Agency Appointment);~~

#### ~~Particulars~~

~~2010 Broome Toyota Dealer Agreement, cl 3.1, 3.2(a)(i), 3.2(a)(ii), 3.3, 3.5(a), cl 5.1(a), 5.1(b), 6.2, 6.3(iii), 6.3(iv), cl 6.4(iii), 6.5.~~

~~(d) — says that the Plaintiffs' Loan Contract was a Regulated Loan Contract and that that Broome Toyota's dealings with the Plaintiffs in respect of the Plaintiffs' Loan Contract were performed in Broome Toyota's capacity as agent of the Defendant acting within the scope of Broome Toyota's authority under the Broome Toyota Agency Appointment; and~~

~~(e) — says that the Defendant was contractually obliged to pay Dealer Commissions to Broome Toyota pursuant to the Annual Review Document in force at the time the Plaintiffs entered into the Plaintiffs' Loan, the full terms and effect of which the Defendant will rely on at trial;~~

~~Particulars~~

~~Annual Review Document dated 19 September 2017 from the Defendant to David Watson of "North West Motor Group Pty Ltd" and signed by Mr Watson [TFA.001.013.0006].~~

~~55. — In answer to the allegations in paragraph 55 of the SOC, the Defendant:~~

~~(a) — refers to and repeats paragraphs 4 to 9 of this Defence;~~

~~(b) — denies the allegations in paragraph 55; and~~

~~(c) — says that the conduct of Broome Toyota when negotiating and agreeing the Contract Rate with the Plaintiffs was conduct performed in Broome Toyota's capacity as agent of the Defendant acting within the scope of Broome Toyota's authority under the Broome Toyota Agency Appointment.~~

~~56. — In answer to the allegations in paragraph 56 of the SOC, the Defendant:~~

~~(a) — refers to and repeats paragraphs 4 to 9 of this Defence;~~

~~(b) — denies the allegations in paragraph 56 of this Defence;~~

~~(c) — says that the Defendant disclosed in writing to the Plaintiffs:~~

~~(i) — that commissions were payable by the Defendant to Broome Toyota, and that the amount of commission was specified if ascertainable but otherwise noted as unascertainable;~~

~~Particulars~~

~~Consumer Fixed Rate Loan Contract Booklet TFA064 (11/2016) [TFA.001.004.0037], clauses 15.4(a) and 15.4(c).~~

~~(ii) — that Broome Toyota was acting as an agent of the Defendant, and not acting in the interests of, or on behalf of, the customer, including the Plaintiffs in this case;~~

~~Particulars~~

~~Consumer Fixed Rate Loan Contract Booklet TFA064 (11/2016) [TFA.001.004.0037], clauses 15.4(a) (b).~~

~~57. — The Defendant admits the allegations in paragraph 57 of the SOC.~~

~~58. — In answer to the allegations in paragraph 58 of the SOC, the Defendant:~~

~~(a) — says that to the extent that the Plaintiffs' Loan Contract was not wholly or predominately for personal, domestic or household purposes it was not a credit contract within the meaning of section 4 of the Credit Code and section 5 of the NCCP Act; and~~

~~(b) — otherwise admits the allegations in paragraph 58.~~

~~59. — In answer to the allegations in paragraph 59 of the SOC, the Defendant:~~

~~(a) — says that Broome Toyota's dealings with the Plaintiffs in connection with the Plaintiffs' Loan Contract was performed by Broome Toyota in its capacity as agent of the Defendant acting within the scope of Broome Toyota's authority under the Toyota Broome Agency Appointment;~~

~~(b) — the Defendant does not know and therefore cannot admit that Broome Toyota suggested that the Plaintiffs apply for the Plaintiffs' Loan Contract;~~

~~(c) — admits that Broome Toyota assisted the Plaintiffs to apply for the Plaintiffs' Loan Contract, in its capacity as the Defendant's agent acting within the scope of Broome Toyota's authority under the Toyota Broome Agency Appointment; and~~

~~(d) — otherwise denies the allegations.~~

~~60. — In answer to the allegations in paragraph 60 of the SOC, the Defendant:~~

~~(a) — refers to and repeats paragraph 59 of this Defence;~~

~~(b) — admits that Broome Toyota, as agent for the Defendant, provided credit assistance to the Plaintiffs within the meaning of ss 7(a) and 8 of the NCCP Act when it assisted the Plaintiffs to apply for the Plaintiffs' Loan Contract with the Defendant; and~~

~~(c) — otherwise denies the allegations.~~

~~61. — In answer to the allegations in paragraph 61 of the SOC, the Defendant admits that Broome Toyota carried on business in Australia during the Relevant Period.~~

~~62. — In answer to the allegations in paragraph 62 of the SOC, the Defendant admits that Broome Toyota carried on business in this jurisdiction as defined in s 21 of the NCCP Act from 1 April 2010 to the end of the Relevant Period.~~

~~63. — In answer to the allegations in paragraph 63 of the SOC, the Defendant~~

~~(a) — refers to and repeats paragraphs 4 to 7 and 62 of this Defence;~~

~~(b) — admits that, from 1 April 2010 to the end of the Relevant Period, Broome Toyota, in the course of, or as part of, or incidentally to, the business carried on by Broome Toyota in this jurisdiction, acted as an~~

~~intermediary between the Defendant and the Plaintiffs wholly or partly for the purposes of securing a provision of credit for the Plaintiffs under a credit contract for the Plaintiffs with the Defendant;~~

~~(c) — says that the term “Toyota Finance Car Loan” is not defined; and~~

~~(d) — otherwise denies the allegations.~~

~~64. — In answer to the allegations in paragraph 64, the Defendant:~~

~~(a) — refers to and repeats paragraph 63 of this Defence;~~

~~(b) — admits that, from 1 April 2010 to the end of the Relevant Period, Broome Toyota acted as an intermediary for the purposes of ss 7(b) and 9(a) of the NCCP Act; and~~

~~(c) — otherwise denies the allegations in paragraph 64.~~

~~65. — In answer to the allegations in paragraph 65 of the SOC, the Defendant:~~

~~(a) — refers to and repeats paragraphs 60 and 64 of this Defence;~~

~~(i) — admits that Dealers provided a credit service within the meaning of ss 7 and 180A(1)(a) of the NCCP Act when providing the credit assistance referred to in paragraph 60(b) of this Defence on the basis that the Plaintiffs’ Car Loan was wholly or predominately for personal, domestic or household use;~~

~~(ii) — says that pursuant to s 180A(8)(a) of the NCCP, s 180A does not apply to the conduct of Broome Toyota acting as agent of the Defendant within the scope of the Broome Toyota Agency Appointment; and~~

~~(b) — otherwise denies the allegations in paragraph 65.~~

~~66. — In answer to the allegations in paragraph 66, the Defendant:~~

~~(a) — denies the allegations in sub-paragraph 66(a) of the SOC;~~

~~(b) — as to the allegations in sub-paragraph 66(b) of the SOC:~~

~~(i) — denies the allegation that the Plaintiffs were unable to enter into a Car Loan for the purpose of purchasing a motor vehicle with a credit provider other than the Defendant;~~

~~(ii) — does not know and therefore cannot admit whether the Plaintiffs considered themselves unable to obtain a Car Loan from a credit provider other than the Defendant;~~

~~(iii) — denies the allegation that any conduct on the part of the Defendant or Broome Toyota rendered the Plaintiffs unable, or caused the Plaintiffs to consider themselves unable, to make a Car Loan with a credit provider other than the Defendant;~~

~~(iv) — says that Broome Toyota or the Defendant did not have any duty to inform the Plaintiffs that finance from another source could be obtained;~~

~~(v) — says that reasonable consumers standing in the position of the Plaintiffs would have been aware that the Defendant was not the only source of finance for the purchase of their motor vehicle;~~

~~(vi) — says further that the Plaintiffs had used motor vehicle finance from another source to facilitate the purchase of their previous motor vehicle;~~

~~further~~Particulars

Document headed "Payout Advice" addressed to Mr Eru Hepi from Volkswagen Financial Services and dated 18 December 2017 [TFA.001.002.0001], page 8.

~~(vii) — says that the Plaintiffs say that Broome Toyota did not inform the Plaintiffs that finance from another source could not be obtained;~~

Particulars

~~Letter of 3 May 2024 from Echo Law to Clayton Utz.~~

~~(c) — refers to and repeats the matters in paragraphs 5, 7 to 9 and 56 of this Defence and denies the allegations in sub-paragraph 66(c) of the SOC;~~

~~(d) — as to the allegations in sub-paragraph 66(d) of the SOC:~~

~~(i) — refers to and repeats paragraphs 54 and 55 of this Defence;~~

~~(ii) — otherwise denies the allegations;~~

~~(e) — as to the allegations in sub-paragraph 66(e):~~

~~(i) — says that the allegations are vague and embarrassing and liable to be struck out on the basis that the "terms" which are alleged to be "less favourable", and "the terms of a comparable transaction", are not pleaded or properly particularised and the Defendant is unable to understand the allegations;~~

~~(ii) — under cover of the objection in sub-paragraph 66(e)(i) of this Defence, denies the allegations;~~

~~(f) — otherwise refers to and repeats paragraphs 54 to 56 of this Defence, and denies the allegations in paragraph 66 of the SOC.~~

~~67. — In answer to the allegations in paragraph 67 of the SOC, the Defendant:~~

~~(a) — refers to and repeats paragraph 66 of this Defence;~~

~~(b) — denies the allegations in paragraph 67.~~



~~68. In answer to the allegations in paragraph 68 of the SOC, the Defendant:~~

~~(a) refers to and repeats paragraph 67 of this Defence; and~~

~~(b) denies the allegations in paragraph 68.~~

~~69. In answer to the allegations in paragraph 69 of the SOC, the Defendant:~~

~~(a) refers to and repeats paragraphs 68 of this Defence;~~

~~(b) denies the allegations in paragraph 69.~~

~~70. In answer to the allegations in paragraph 70 of the SOC, the Defendant:~~

~~(a) admits that it holds an Australian credit licence;~~

~~(b) says that during the Relevant Period, Broome Toyota acted as agent for the Defendant, within the scope of Broome Toyota's authority under the Toyota Broome Agency Appointment, when performing the conduct pleaded in paragraph 4(d)(i)-(iii) of this Defence; and~~

~~(c) otherwise denies the allegations in paragraph 70.~~

~~71. In answer to the allegations in paragraph 71 of the SOC, the Defendant:~~

~~(a) admits that, from 1 April 2010 to the end of the Relevant Period, Broome Toyota was a representative of the Defendant within the meaning of s 5 of the NCCP Act for the limited purpose pleaded in paragraph 70(a) of this Defence; and~~

~~(b) otherwise denies the allegations in paragraph 71.~~

~~72. In answer to the allegations in paragraph 72 of the SOC, the Defendant:~~

~~(a) admits that Broome Toyota engaged in a credit activity within the meaning of s 74(a) of the NCCP Act when it provided the credit service referred to in paragraph 60(b) of this Defence; and~~

~~(b) otherwise denies the allegations in paragraph 72.~~

~~73. In answer to the allegations in paragraph 73 of the SOC, the Defendant:~~

~~(a) refers to and repeats paragraphs 55, 56, 65 and 67 of this Defence; and~~

~~(b) denies the allegations in paragraph 73.~~

~~74. In answer to the allegations in paragraph 74 of the SOC, the Defendant:~~

~~(a) refers to and repeats paragraphs 55, 56, 65 and 67 of this Defence;~~

~~(b) — denies the allegations in paragraph 74.~~

~~75. — In answer to the allegations in paragraph 75 of the SOC, the Defendant:~~

~~(a) — refers to and repeats paragraphs 72 to 74 of this Defence; and~~

~~(b) — otherwise denies the allegations in paragraph 75.~~

~~76. — The Defendant denies the allegations in paragraph 76.~~

~~77. — The Defendant denies the allegations in paragraph 77.~~

~~78. — The Defendant denies the allegations in paragraph 78.~~

~~79. — In answer to the allegations in paragraph 79 of the SOC, the Defendant:~~

~~(a) — refers to and repeats sub paragraphs 5(b)(i) to (ii), 7(a)(ii), 8 to 9 and 56 in this Defence; and~~

~~(b) — denies the allegations.~~

~~80. — The Defendant denies the allegations in paragraph 80.~~

~~81. — The Defendant denies the allegations in paragraph 81.~~

~~82. — In answer to the allegations in paragraph 82 of the SOC, the Defendant:~~

~~(a) — refers to and repeats sub paragraphs 5(b)(i) to (ii) and 56 of this Defence;~~

~~(b) — denies the allegations in paragraph 82 of the SOC;~~

~~(c) — says that the Contract Rate and Loan Term were negotiated and agreed between the Plaintiffs and the Defendant; and~~

~~(d) — says that the Dealer Commission was disclosed to the Plaintiffs.~~

~~83. — In answer to the allegations in paragraph 83 of the SOC, the Defendant:~~

~~(a) — refers to and repeats paragraph 82 of this Defence; and~~

~~(b) — denies the allegations in paragraph 83.~~

~~84. — In answer to the allegations in paragraph 84 of the SOC, the Defendant:~~

~~(a) — says that the reference to “Toyota Conduct” should be a reference to “Defendant Conduct”;~~

~~(b) — refers to repeats paragraphs 56(b) to (c) and 83 of this Defence; and~~

~~(c) — denies the allegations in paragraph 84.~~

~~85. In answer to the allegations in paragraph 85 of the SOC, the Defendant:~~

~~(a) refers to and repeats paragraph 84 of this Defence; and~~

~~(b) denies the allegations in paragraph 85.~~

~~86. In answer to the allegations in paragraph 86 of the SOC, the Defendant:~~

~~(a) refers to and repeats paragraph 85 of this Defence; and~~

~~(b) denies the allegations in paragraph 86.~~

~~87. In answer to the allegations in paragraph 87 of the SOC, the Defendant:~~

~~(a) refers to and repeats paragraphs 83 to 87 of this Defence; and~~

~~(b) denies the allegations in paragraph 87.~~

~~88. In answer to the allegations in paragraph 88 of the SOC, the Defendant:~~

~~(a) refers to and repeats paragraph 87 of this Defence;~~

~~(b) denies the allegations in paragraph 88; and~~

~~(c) says that if the Court finds that the Plaintiffs are entitled to an order against the Defendant under s 1041I of the Corporations Act or s 12GF of the ASIC Act and the Defendant is liable to the Plaintiffs in respect of any loss or damages suffered by them by reason of those alleged contraventions (which is denied), then:~~

~~(i) the Plaintiffs are responsible in part or wholly for that same loss or damage, to the extent that the loss resulted partly or wholly from the Plaintiffs' failure to take reasonable care to avoid such loss;~~

~~(ii) the Plaintiffs' Misleading or Deceptive Conduct Claims are "apportionable claims" within the meaning of sub-ss 1041L(1) and (4) of the Corporations Act and sub-ss 12GP(1) and (4) of the ASIC Act;~~

~~(iii) by that reason, its liability (if any) to the Plaintiffs is limited to an amount reflecting the proportion of the damage or loss claimed that the Court considers is just having regard to the extent of its responsibility for that damage or loss in accordance with:~~

~~A. s 1041N and sub-ss 1041L(1) and (4) of the Corporations Act; and~~

~~B. s 12GR and sub-ss 12GP(1) and (4) of the ASIC Act.~~

~~(d) says further that if it appears to the Court that the Defendant has or may have any liability to the Plaintiffs by reason of any contravention of s 1041H of the Corporations Act (which is denied), then the~~

~~Defendant ought to be relieved from that liability pursuant to s 1317S of the Corporations Act (as applied by s 1041I(4)) on the basis that:~~

~~(i) — the Defendant acted honestly; and~~

~~(ii) — having regard to all the circumstances of the case, the Defendant ought fairly to be excused from the contraventions.~~

~~89. — In answer to the allegations in paragraph 89 of the SOC, the Defendant:~~

~~(a) — refers to and repeats paragraphs 42-43, 49, 56, 67 and 75 to 78 of this Defence;~~

~~(b) — denies the allegations in paragraph 89 of the SOC;~~

~~(c) — says that it does not know and therefore cannot admit what matters were known to the Plaintiffs; and~~

~~(d) — says further that it was not obliged to inform the Plaintiffs of any of the matters alleged in paragraph 89 (to the extent the Plaintiffs establish the existence of such matters).~~

~~90. — In answer to the allegations in paragraph 90 of the SOC, the Defendant:~~

~~(a) — refers to and repeats paragraph 89 of this Defence;~~

~~(b) — says that it does not know and therefore cannot admit what matters were known to the Plaintiffs;~~

~~(c) — denies that each of the matters alleged was material information that would have been relevant to the decision of the Plaintiffs whether to proceed with an offer to enter into the Plaintiffs' Car Loan; and~~

~~(d) — denies the allegations in paragraph 90.~~

~~91. — In answer to the allegations in paragraph 91 of the SOC, the Defendant:~~

~~(a) — refers to and repeats paragraphs 42 and 43 of this Defence;~~

~~(b) — admits that the Plaintiffs became liable on 18 December 2017 to pay interest at the rate and for the term set out in the Plaintiffs' Car Loan;~~

~~(c) — says that the Plaintiffs had a legal obligation to pay those interest charges and the Defendant was legally entitled to payment of such moneys;~~

~~(d) — says that the matters alleged in paragraphs 91 to 96 of the SOC:~~

~~(i) — do not relate to fundamental terms of the Plaintiffs' Car Loan;~~

~~(ii) — did not cause the Plaintiffs to enter into the Plaintiffs' Car Loan; and~~

~~(iii) — in the premises, do not make out a cause of action against the Defendant, or give rise to an entitlement on the part of the Plaintiffs, on the grounds of unilateral mistake; and~~

~~(e) — otherwise denies the allegations in paragraph 91.~~

~~92. — In answer to the allegations in paragraph 92 of the SOC, the Defendant:~~

~~(a) — refers to and repeats paragraph 91 of this Defence;~~

~~(b) — says that each of the alleged mistaken beliefs pleaded in paragraph 91 of the SOC is not a mistake which would entitle the Plaintiffs to rescind the Plaintiffs' Car Loan or otherwise be relieved of their obligation to perform the Plaintiffs' Car Loan, including the obligation to pay interest charges; and~~

~~(c) — denies the allegations in paragraph 92.~~

~~93. — In answer to the allegations in paragraph 93 of the SOC, the Defendant:~~

~~(a) — refers to and repeats paragraphs 91 and 92 of this Defence; and~~

~~(b) — otherwise denies the allegations in paragraph 93.~~

~~94. — The Defendant denies the allegations in paragraph 94 of the SOC.~~

~~95. — In answer to the allegations in paragraph 95 of the SOC, the Defendant:~~

~~(a) — refers to and repeats paragraphs 93 and 94 of this Defence;~~

~~(b) — denies the allegations in paragraph 95; and~~

~~(c)(f) — refers to and repeats sub paragraph 1(b)(iv)D of this Defence, and says~~

~~58. In answer to As to the allegations in paragraph 96 of the SOC, paragraphs 58 to 88, the Defendant:~~

~~(a) — refers to and repeats paragraphs 89 to 95 of this Defence;~~

~~(b) — denies the allegations in paragraph 96.~~

~~97. — In answer to the allegations in paragraph 97 of the SOC, the Defendant:~~

~~(a) — repeats paragraphs 93 and 94 of this Defence; and~~

~~(b) — denies the allegations in paragraph 97.~~

~~The Defendant does not plead to paragraphs 98 to 124 of the SOC admit that the questions involve common issues of fact or law or that, insofar as those paragraphs make no allegations against it the questions are common, that they are common to both the Plaintiffs and any Group Member.~~

Date: ~~31~~23 May ~~2024~~2025

**K Foley**

**L O'Rorke**

.....*Clayton Utz*.....

Clayton Utz

Solicitors for the Defendant