

Article Information

Authors: Martin del Gallego, Matthew Harris

Service: Class Actions, Commercial Disputes, Dispute Resolution & Litigation

Federal Court of Australia makes first aggregate damages award in a funded representative proceeding in Toyota Class Action

This article considers a recent decision of the Federal Court of Australia, awarding damages to class action claimants on an aggregate basis. Aggregate damages is a rare global award which covers all group members described or identified in the award. This was the first instance of aggregate damages being awarded to a funded litigant in Australia, and may spur a trend in representative claims brought on this basis.

In *Williams v Toyota Motor Corporation Australia Limited (Initial Trial)* [2022] FCA 344, Justice Michael Lee relied on s 33Z(1)(e) of the *Federal Court of Australia Act 1976* (Cth) (**the Act**) to award damages to group members in possession of certain Toyota vehicles throughout the entirety of the claim period, calculated as the percentage reduction in value of their vehicle or vehicles. It has been estimated that Toyota's total aggregate damages bill may exceed AU\$2 billion.

Key Takeaways

- For an order of aggregate damages to be made in a representative proceeding, the Court needs to be satisfied on a principled basis with which to assess and distribute the relief;
- The analysis must be informed by general principles governing the assessment of damages, and can result in an award of aggregated damages applying to a specific class of group members within a representative proceeding;
- While the judgment is liable to spur a trend in claims for aggregate damages, precisely how such an award will impact the approval of legal costs and a funder's commission remains to be seen.

Background to the proceedings

The case before the Court concerned claims relating to Toyota's supply of 264,170 defective diesel vehicles to Australian consumers between 1 October 2015 and 23 April 2020 (**Relevant Period**). These vehicles were fitted with diesel combustion engines and a 'diesel exhaust after treatment system', or 'DPF', aimed at reducing harmful pollutants and other emissions from the engine. The case alleged that the vehicles were defective because the DPF was not designed to function during all reasonable driving conditions, and even if driven normally, there was a propensity for the car's exhaust to emit excessive white smoke and malodour, and cause reduced fuel efficiency and trigger 'excessive' notifications prompting the need for service or repair.

In alleging that the vehicles were not of 'acceptable quality' in breach of the statutory guarantee under s 54 of the *Australian Consumer Law (ACL)*, and that Toyota's conduct had been misleading and deceptive in contravention of ss 18, 29(1)(a) and (g), and 33 of the ACL, the lead applicant sought two types of damages under s 272 of the ACL:

- Under s 272(1)(a), damages for the reduction in value of each relevant vehicle resulting from the failure to comply with s 54 of the ACL; and
- Under 272(1)(b), other reasonably foreseeable loss or damage incurred as a result of the defect and failure to comply with s 54 of the ACL, including excess taxes, fuel consumption, financing costs, servicing costs and lost income.

Of these heads of damage, only two were suitable for determination at the initial trial of the lead applicant's claim: the 'reduction in value' damages under s 272(1)(a) and damages for excess GST paid by group members in connection with acquiring the relevant vehicles under s 272(1)(b). (A separate question had been asked and answered in an earlier interlocutory application in the case, clearing the way for a potential aggregate damages award, in respect of only part of

the lead applicant and group members' claims.^[1]

Aggregate Damages

Having found in favour of the lead applicant, on among other things, their 'acceptable quality' cases, Justice Lee also found that the same determinations could be made on a common basis for the remainder of group members. His Honour found that the lead applicant and group members were entitled to damages for the reduction in value of their vehicles, and for excess GST paid in connection with that reduction. Accordingly, it was necessary for his Honour to determine a principled basis for arriving at a quantum of the reduced value which could be applied on an aggregate basis to all relevant group members.

The Federal Court's power to award damages on an aggregate basis is found in s 33Z of the Act. This section provides, among other things, that the Court may, in determining a matter in a representative proceeding, make an award of damages for group members, sub-group members or individual group members, being damages consisting of specified amounts or amounts worked out in such manner as the Court specifies,^[2] or award damages in an aggregate amount without specifying amounts awarded in respect of individual group members.^[3] Further, subject to section 33V of the Act, the Court is not to make an award of damages under s 33Z(1)(f) unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment.^[4]

Noting that class actions were not the 'Galapagos islands' of litigation, Justice Lee observed that an award of damages, even on an aggregate basis, was subject to two overarching principles as to the award of compensatory damages.^[5] His Honour observed that an award of compensatory damages must be considered in the light of the overriding compensatory principle, and that even where the process of estimating damages is difficult, the Court 'must do what it can', this principle equally applying to an assessment of 'reduction in value' damages.

Justice Lee found that the Court is not permitted, by s 33Z of the Act, to take an approach of awarding aggregate damages on a per vehicle basis and determining the separate question of distribution at a later stage. Because of this, his Honour was faced with a challenge of how to distribute relief to group members who had possessed the relevant vehicles for only part of the Relevant Period. His Honour termed these group members as 'Partial Period Group Members' and concluded at [432]:

The bottom line is that without knowing the price at which, or the time at which, the Partial Period Group Members bought and sold Relevant Vehicles on the secondary market, one cannot determine on a principled basis how the compensation for the owners of those Relevant Vehicles ought to be assessed or distributed. One must always bear in mind the whole object of any award of damages is to put the claimant in the position the claimant would have been in but for the contravening conduct.

Ultimately, the Partial Period Group Members will be required to undertake an individualised assessment of their loss. For the 'Entire Period Group Members', that is, people who possessed the relevant vehicles throughout the entirety of the Relevant Period, the Court awarded aggregate damages under s 33Z(1)(e) of the Act. The award of aggregate damages for the Entire Period Group Members was calculated on the basis of a 17.5% reduction in value of the average retail price of the particular type of vehicle at the particular time it was purchased. In circumstances where the group member paid a price lower than the average retail price for their vehicle, the lower of the two prices was said to be the applicable comparator from which the 17.5% reduction in value is to be calculated.^[6] In being satisfied there was a reduction in value of the relevant vehicles of 17.5% resulting from the failure to comply with s 54 of the ACL, Lee J also found that Entire Period Group Members were also entitled to recover the excess GST they paid on that reduction in value, calculated as 10% of the reduction in value.^[7]

Regarding the claim for damages under s 33Z(1)(f) of the Act, the Court declined to award aggregate damages on this basis, because his Honour was not satisfied that a reasonably accurate estimate could be made of the total amount owing to group members as required by s 33Z(3).

Conclusion

Williams is the first instance of a Court awarding aggregate damages in a funded representative proceeding, and provides helpful guidance on how the Court will approach such claims, particularly where only part of the claim is suitable for determination on an aggregate basis. That said, while Justice Lee found in favour of the class on the issue, it is plain that such an assessment will need to be carried out on a case-by-case basis.

This article was originally published in the Litigation Finance Journal on 9 June 2022

^[1] *Williams v Toyota Motor Corporation Australia Limited* [2021] FCA 1425.

[2] *Federal Court of Australia Act 1976* (Cth) s 33Z(1)(e).

[3] *Ibid* s 33Z(1)(f).

[4] *Ibid* s 33Z(3).

[5] *Williams* [421]-[423].

[6] *Williams* [446].

[7] *Williams* [492].