



Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD724/2016

**BILJANA CAPIC**

Applicant

**FORD MOTOR COMPANY OF AUSTRALIA PTY LTD ACN 004 116 223**

Respondent

### ORDER

**JUDGE:** JUSTICE PERRAM

**DATE OF ORDER:** 26 August 2022

**WHERE MADE:** Sydney

#### THE COURT ORDERS THAT:

1. Pursuant to s 33X(5) of the *Federal Court of Australia Act 1976* (Cth) (the **Act**), the form and content of the notice set out in Schedule A (the **Notice**) is approved.
2. Pursuant to s 33Y of the Act, from 16 September 2022 until the final disposition of this proceeding or any appeal therefrom, or further order from the Court, the Notice be displayed according to the following procedure:
  - a. the Applicant, through her solicitors, shall cause a copy of the Notice to be displayed on the website <http://fordclassaction.net/>;
  - b. the District Registrar of the New South Wales Registry of the Federal Court of Australia shall cause a copy of the Notice to be displayed on the Federal Court website; and
  - c. the Respondent shall cause a copy of the Notice to be:
    - i. viewable by clicking on a ‘click through’ icon displayed on the Respondent’s website (<https://www.ford.com.au/>);
    - ii. prominently displayed on its “Ask Ford” website (<https://euw-va2.astuteknowledge.com/ford/AUPublic/>) in response to any search performed which includes the terms “DPS6” or “Powershift”; and
    - iii. ‘crawlable’ such that its contents may be indexed by a search engine.



3. The Second Respondent's costs in the amount of \$1,446.58, being for legal costs in respect of the interlocutory application filed 22 June 2022, shall be paid in the first instance by the Applicant but shall be costs in the cause.

Date that entry is stamped: 26 August 2022

*Sia Lagos*  
Registrar



## SCHEDULE A

### Ford DPS6 "PowerShift" Class Action – Important Notice Federal Court of Australia Case No. NSD724/2016

#### Notice Affecting Current and Former Owners of certain Ford Focus, Ford Fiesta and Ford EcoSport cars

##### Why are you getting this notice?

This notice is being sent to provide an update on the status of the class action that was filed in the Federal Court of Australia in relation to certain Ford Focus, Ford Fiesta and Ford EcoSport cars built between 2010 and 2016 fitted with a DPS6 'Powershift' transmission.

You may be a Group Member in the class action if you purchased or acquired an interest in an Affected Vehicle between 1 January 2011 and 29 November 2018 (and you have not opted out of the class action).

A list of Affected Vehicles appears at Schedule 1 of this notice.

You are not required to do anything by this notice. If you wish to be contacted and kept up to date about the progress of the class action, you may register your details online at [www.fordclassaction.net.au](http://www.fordclassaction.net.au).

##### Update

The initial trial of the class action occurred over six weeks in 2020, and judgment was handed down on 29 June 2021. The Court found that the Affected Vehicles were not of acceptable quality, with some vehicles containing more defects than others. A public interest summary of the judgment, which was prepared by the Federal Court, is at Schedule 2 of this notice.

The Court ordered that Ford pay \$17,248 (including interest and excess GST, stamp duty and financing costs) in compensation to the lead applicant, Ms Capic, in respect of her 2012 Ford Focus Sport.

On 18 November 2021, the Federal Court published its order in relation to the "common questions". The orders describe the common questions affecting Group Members and the Court's answers to them. A copy of the orders is available on the Commonwealth Courts Portal:

<https://www.comcourts.gov.au/file/Federal/P/NSD724/2016/3756310/event/30893238/document/1868612>

Both Ford and the lead applicant are appealing aspects of the trial decision. The appeal is set to be heard by the Full Court of the Federal Court of Australia from 20 to 31 March 2023.

The Court has not yet decided whether damages will be payable to group members (and, if so, the quantum of those damages). The Court will not decide those matters until after the appeals are heard and determined.

The lead applicant's legal fees are being paid by Martin Place Litigation Services Pty Limited (the **Funder**). If there is a settlement or judgment (following appeals) awarding compensation to group members, the Funder intends to apply to the Court for a 'common fund order' calculated as a percentage sum of compensation awarded to group members. The funder does not intend to seek an amount exceeding 25% of net proceeds that may be paid to eligible group members.

##### Further information?

Please do not direct any questions about the class action or this notice to Ford or any Ford dealer. If you have any questions about this notice, you may contact the lawyers for the Applicant, Corrs Chambers Westgarth, by emailing [fordclients@corrs.com.au](mailto:fordclients@corrs.com.au), or seek independent legal advice.



**Schedule 1 to Notice**

**Affected Vehicles**

<b>Make</b>	<b>Model</b>	<b>Build Year</b>
<b>Focus</b>	Titanium LW	2011 – 2012
	Sport LW	2011 – 2012
	Trend LW	2011 – 2012
	Ambiente LW	2011 – 2012
	Sport LW MKII	2012 – 2015
	Titanium LW MKII	2012 – 2015
	Ambiente LW MKII	2012 – 2015
	Trend LW MKII	2012 – 2015
	<b>Fiesta</b>	Zetec WT
LX WT		2010 – 2013
CL WT		2010 – 2013
Sport EcoBoost WZ		2012 – 2015
Trend WZ		2013 – 2016
Ambiente WZ		2013 – 2016
<b>EcoSport</b>	Titanium BK	2013 – 2016
	Trend BK	2013 – 2016
	Ambiente BK	2013 – 2016



Schedule 2 to Notice

FEDERAL COURT OF AUSTRALIA

Capic v Ford Motor Company Of Australia Pty Ltd [2021] FCA 715

SUMMARY

In accordance with the practice of the Federal Court in cases of public interest, importance or complexity, the following summary has been prepared to accompany the Orders made today. This summary is intended to assist in understanding the outcome of this proceeding and is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court's reasons is that contained in the published reasons for judgment which will be available on the internet at [www.fedcourt.gov.au](http://www.fedcourt.gov.au) together with this summary.

- 1 The Applicant Biljana Capic brought this proceeding as a representative proceeding under Part IV of the *Federal Court of Australia Act 1976* (Cth) on behalf of herself and the group whom she represents, against Ford Motor Company of Australia Pty Ltd ('Ford Australia'). The initial trial of the matter occurred over six weeks between 15 June 2020 and 24 July 2020. The matters for determination at the initial trial were (a) the whole of Ms Capic's individual claim and (b) a series of questions of fact and law said to be common to the claims of the group members. These questions are recorded in the Schedule to the Orders of Perram J dated 7 July 2020 ('Common Questions').
- 2 The case relates to various problems alleged to exist with 73,451 vehicles, manufactured by Ford Motor Company ('Ford US') between July 2010 and December 2016 and imported into Australia by Ford Australia, which contained a type of transmission called the 'DPS6' ('Affected Vehicles'). The Affected Vehicles were manufactured under three model lines: Focus, Fiesta and EcoSport. The exact size of the group is presently undetermined but it comprises the Applicant and anyone who bought or otherwise acquired an interest in an Affected Vehicle between 1 January 2011 and 29 November 2018 who did not opt out of the proceeding.
- 3 The Applicant's case at the initial trial was twofold: first, she brought a claim under s 271(1) of the Australian Consumer Law ('ACL') for damages under s 272(1) on the basis that the Affected Vehicles were not of acceptable quality when supplied to consumers contrary to the guarantee in ACL s 54 ('Acceptable Quality Claim'); and secondly, she brought a claim for damages under ACL s 236(1) on the basis that Ford Australia engaged in misleading or deceptive conduct in connection with the promotion and sale of the Affected Vehicles contrary to ACL ss 18 and 33 ('MDC Claim').
- 4 The Acceptable Quality Claim comprised allegations that the Affected Vehicles as supplied suffered from two sets of deficiencies:
  - (a) A real risk that four components of the transmission would fail, being the input shaft seals, the clutch lining, the transmission control module and the rear main oil seal (together, the 'Component Deficiencies'); and
  - (b) So-called 'architectural' features which created risks of failure because they meant that the DPS6 inadequately managed the torsional vibrations and heat generated by the engine (the 'Architectural Deficiencies').
- 5 It was alleged that the Component Deficiencies and Architectural Deficiencies meant that the Affected Vehicles had a propensity to exhibit a range of undesirable behaviours including shudder, jerking, sudden deceleration and loss of power, difficulty changing gears and gear rattling (among others).
- 6 The Applicant was largely successful in proving that the Affected Vehicles supplied with the relevant original components were not of acceptable quality within the meaning of ACL s



54. However, the Applicant did not succeed in proving her case on the rear main oil seal or her case on the 'half-hybrid' clutches which contained a combination of two clutch lining materials. These components were not found to carry a real risk of failure and therefore Affected Vehicles were not found to have been supplied contrary to ACL s 54 by reason of these two components.
- 7 The Applicant was partially successful in her case on the Architectural Deficiencies. She failed to prove that the DPS6 had a risk of failure owing to the way in which heat was managed. However, she succeeded in proving that the DPS6 inadequately managed torsional vibrations and that this could cause gear rattling and a slight shudder at low speeds. Despite Ford Australia's description of these symptoms as 'normal operating characteristics' of the DPS6, it was found that all of the Affected Vehicles as supplied were not of acceptable quality by reason of the inadequate management of torsional vibrations.
- 8 Ford Australia implemented various fixes for the proven Component Deficiencies but not for the Architectural Deficiencies. Where fixes were implemented in production, it was for the Applicant to prove that vehicles as supplied were not of acceptable quality even despite the revised components. The Applicant did not succeed in doing this. Where fixes were implemented in service for vehicles on the road, it was for Ford Australia to show that these fixes were effective. It succeeded in doing this for the final versions of the revised components with the exception of the replacement of original clutches with the 'half-hybrid' variety referred to above.
- 9 Insofar as her individual claim was concerned, Ms Capic was awarded damages for reduction in value and other reasonably foreseeable loss and damage under ACL s 272(1).
- 10 The group's Acceptable Quality Claim is significantly more complicated and is not finally resolved by these reasons and orders. The group claimed damages assessed on an aggregate basis. Such damages were not awarded. The primary reason for this was the operation of ACL s 271(6). Put simply, that provision confers on Ford Australia a defence to a claim for reduction in value damages where, pursuant to an express warranty, it fixed a relevant problem with an Affected Vehicle within a reasonable time. Whether Ford Australia did so for each group member was not an issue litigated in the initial trial. It is an issue the resolution of which will depend on the particular position of each group member.
- 11 The Applicant and the group members were wholly unsuccessful in their MDC Claim.
- 12 The consequence of the findings of fact and law made in these reasons for judgment is that only some of the Common Questions may now be answered. Moreover, other questions not yet posed will now need to be if the resolution of the group's Acceptable Quality Claim is to progress. The Orders made today provide for the parties to return before the Court for a case management hearing on 27 July 2021 at 9.30 am where the consequences of the reasons for judgment and the future conduct of the matter will be discussed.
- 13 Lastly and for completeness, it is noted that the Orders also deal with a set of documents listed in Annexure A to the Orders. At the conclusion of the initial trial Ford Australia objected to the Applicant's attempt to rely upon 84 identified documents on the basis that it would be procedurally unfair for her to do so. The Court has largely sustained Ford Australia's objection and ordered that the Applicant not be entitled to rely on the documents listed in Annexure A.

Justice Perram

29 June 2021

Sydney



**Schedule**

No: NSD724/2016

Federal Court of Australia

District Registry: New South Wales

Division: General

**ASSISTED DISPUTE RESOLUTION**

Applicant

**BILJANA CAPIC**