

## NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 7/03/2017 5:15:31 PM AEDT and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

### Filing and Hearing Details

Document Lodged: Originating Application - Form 15 - Rule 8.01(1)  
File Number: NSD322/2017  
File Title: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v  
AUDI AKTIENGESELLSCHAFT & ORS  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF  
AUSTRALIA  
Reason for Listing: First Case Management Hearing  
Time and date for hearing: 04/04/2017, 9:30 AM  
Place: Court Room 18A, Level 17 Law Courts Building Queen's Square, Sydney



Dated: 8/03/2017 3:09:11 PM AEDT

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

Form 15  
Rules 8.01(1), 8.04(1)

**ORIGINATING APPLICATION**

**FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: NEW SOUTH WALES  
DIVISION: GENERAL**

**NO NSD OF 2017**

**AUSTRALIAN COMPETITION AND CONSUMER  
COMMISSION**

Applicant

**AUDI AKTIENGESELLSCHAFT**  
and others named in Schedule 1  
Respondents

To the Respondents

The Applicant applies for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

**TIME AND DATE FOR HEARING:**

**PLACE:**

Federal Court of Australia  
Level 17, Queens Square  
SYDNEY NSW 2000

Date:

.....  
Signed by an officer acting with  
the authority of the District Registrar

Filed on behalf of the Applicant, ACCC  
Prepared by: Glenn Owbridge  
AGS lawyer within the meaning of s 551 of the *Judiciary Act*  
1903

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This is an application for:

- a) declaratory relief pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth);
- b) orders for pecuniary penalties pursuant to s 224 of Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**CCA**), being the *Australian Consumer Law* (**ACL**);
- c) orders for corrective advertising pursuant s 246 of the ACL;
- d) an order that the reasons for Judgment, with the Court's seal affixed, be retained on the Court file for the purposes of s 137H of the CCA; and
- e) costs,

in respect of alleged false and misleading conduct and representations, in trade and commerce, in the period from 1 January 2011 to 3 October 2015 (**Sales Period**), in connection with the marketing, distribution and sale in Australia of the types of vehicles specified in column 1 of Schedule 2 to the accompanying Concise Statement, including the Q5 model (Audi Q5 Vehicles) (collectively, **Vehicles**), in contravention of ss 18(1), 29(1)(a), 29(1)(g), 33 and 106 of the ACL.

The Court's jurisdiction to hear the present case and to grant the relief sought is found in s 138(1) of the CCA, and s 39B(1A)(c) of the *Judiciary Act 1903* (Cth).

#### **DETAILS OF CLAIM**

On the grounds stated in the accompanying Concise Statement, the applicant, the Australian Competition and Consumer Commission, claims:

#### **Declarations**

1. A declaration that, in the Sales Period, the first respondent Audi Aktiengesellschaft (**Audi AG**) knew and deliberately concealed from, or deliberately failed to disclose to, the Commonwealth of Australia (**Commonwealth**) and the Australian public, including consumers, that:
  - (a) the Exhaust Gas Recirculation system (**EGR System**) in each of the Vehicles and the Selective Catalytic Reduction system (**SCR System**) (only in Audi Q5 Vehicles), was controlled by software (**Defeat Software**) which caused them to adopt different modes, depending on whether or not the Vehicles were being tested for compliance with emissions limits set by Australian and European standards, namely *Vehicle Standard (Australian Design Rule 79/01 – Emissions Control for Light Vehicles) 2005*, *Vehicle Standard (Australian Design Rule 79/02 – Emissions Control for Light Vehicles) 2005* and *Vehicle Standard (Australian Design Rule 79/03 – Emissions Control for Light Vehicles) 2011*, (collectively, **ADR 79**), as well as EU Regulation 715/2007 as amended by and including EU Regulation 692/2008 (**Euro 5**) (together, the **Standards**);

- (b) the mode adopted when the Vehicles were being tested (**Mode 1**) resulted in the production of materially lower emissions of nitrogen oxides (**NOx**) than the mode adopted at all other times (**Mode 2**);
- (c) the Vehicles produced levels of NOx emissions which were within the limits set by the Standards in Mode 1, but not in Mode 2;
- (d) Audi AG had deliberately installed, programmed and concealed, or failed to disclose, the Defeat Software in order to deceive consumers and regulators as to the levels of NOx emissions produced by the Vehicles;
- (e) the Defeat Software, on its own or together with the EGR System and (in Audi Q5 Vehicles) the SCR System, was a “defeat device”, the use of which was prohibited by the Standards, or was a “Defeat Device Equivalent” (as defined in paragraph 11 of the Concise Statement);
- (f) the Vehicles did not comply with the Standards; and
- (g) because the Vehicles did not comply with ADR 79:
  - i. the importation and supply of new Vehicles was contrary to ss 7, 14(1)(a) and 18(1)(a) of the *Motor Vehicle Standards Act 2009* (Cth) (**MVS Act**);
  - ii. the new and second-hand Vehicles did not comply with the requirements for registration under State and Territory vehicle registration legislation; and
  - iii. it was an offence for a person to use the Vehicles on a road under State and Territory road transport legislation,

in circumstances where the Commonwealth and the Australian public, including consumers, had no knowledge or expectation that such matters were the case, and/or reasonably expected that they were not the case and/or that, if they were, Audi AG would disclose them, which expectations arose by reason of the following matters:

- (h) the Standards and the statutory regime for vehicle registration and road use in Australia;
- (i) that Audi AG had designed and manufactured the Vehicles, and supplied them to Audi Australia Pty Ltd (**Audi Australia**), for supply to consumers for use as road vehicles in Australia;
- (j) that Audi AG had obtained from the Commonwealth approval to place identification plates on the Vehicles, pursuant to s 10A of the MVS Act, by certifying that they complied with the NOx emissions limits in ADR 79;
- (k) that Audi AG had obtained from the Commonwealth inclusion of the Vehicles in the Commonwealth’s Green Vehicle Guide (**GVG**) by certifying that the Vehicles complied with the NOx emissions limits in Euro 5;

- (l) that Audi AG caused or permitted Audi Australia to have identification plates placed on the Vehicles on Audi AG's behalf;
- (m) that Audi AG had imported, or permitted Audi Australia as its nominated agent to import the Vehicles into Australia; and
- (n) that the Vehicles were promoted, offered, sold and otherwise dealt with as vehicles for use as road vehicles in Australia, including as being compliant with Euro 5 and/or ADR 79,

and thereby engaged in conduct, in trade or commerce, which:

- (o) was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL; and
- (p) was liable to mislead the public as to the characteristics and suitability for their purpose of the Vehicles, in contravention of s 33 of the ACL.

2. A declaration that, in the Sales Period, Audi AG, by:

- (a) obtaining from the Commonwealth approval to place identification plates on each of the Vehicles, pursuant to s 10A of the MVS Act, on the basis that they had been approved under United Nations Economic Commission for Europe Regulation No. 83 (**ECE Regulation 83**) and thereby certifying that they complied with the NOx emissions limits in ADR 79;
- (b) obtaining recertification of its identification plate approvals in respect of certain of the Vehicles identified in Schedule 5 of the Concise Statement, on the basis that they had been approved under ECE Regulation 83, so that the recertified approvals were referable to ADR 79/03 rather than ADR 79/02; and
- (c) applying to the Commonwealth for Blanket Import Approvals to import and take delivery of Vehicles for which it had identification plate approvals,

represented to the Commonwealth, in respect of each Vehicle type, that all Vehicles of that type:

- (d) had been properly approved in accordance with the requirements of ECE Regulation 83;
- (e) complied with NOx emissions limits specified by ADR 79; and/or
- (f) had not been modified to operate in a different mode from that used in normal driving conditions when undergoing testing for compliance with emissions standards,

when those matters were not the case, and thereby, in trade or commerce in respect of each of the Vehicles:

- (g) engaged in conduct which was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL; and
  - (h) in connection with the supply or possible supply of the Vehicles, made false or misleading representations that the Vehicles:
    - i. were of a particular standard, quality, grade or composition, in contravention of s 29(1)(a) of the ACL; and
    - ii. had approval, performance characteristics, uses or benefits which they did not have, in contravention of s 29(1)(g) of the ACL.
3. A declaration that, in the Sales Period, Audi AG, by obtaining from the Commonwealth inclusion of the Vehicles in the Commonwealth's GVG by certifying that the Vehicles complied with the NOx emissions limits in Euro 5, represented to the Commonwealth, in respect of each Vehicle type, that all Vehicles of that type complied with NOx emissions limits specified by Euro 5, when those matters were not the case, and thereby, in trade or commerce in respect of each of the Vehicles:
- (a) engaged in conduct which was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL;
  - (b) in connection with the supply or possible supply of the Vehicles, made false or misleading representations that the Vehicles:
    - i. were of a particular standard, quality, grade or composition, in contravention of s 29(1)(a) of the ACL; and
    - ii. had approval, performance characteristics, uses or benefits which they did not have, in contravention of s 29(1)(g) of the ACL.
4. A declaration that, in the Sales Period, Audi AG, by:
- (a) designing and manufacturing the Vehicles, and installing the 1.6 and 2.0 litre "EA189" diesel engines (**EA 189 Engines**) incorporating the Defeat Software in them, including by programming that software, and supplying the Vehicles to Audi Australia, for supply to consumers for use as road vehicles in Australia;
  - (b) obtaining from the Commonwealth approval to place identification plates on the Vehicles, pursuant to s 10A of the MVS Act, by certifying that they complied with the NOx emissions limits in the Standards;
  - (c) causing or permitting Audi Australia to have identification plates placed on the Vehicles;
  - (d) importing, or permitting Audi Australia, as its nominated agent, to import, the Vehicles to Australia;
  - (e) providing information to Audi Australia to produce marketing materials for the Vehicles;

- (f) creating and distributing marketing materials to Audi Australia to advertise the Vehicles; and/or
- (g) deliberately concealing, or deliberately failing to disclose, the matters in subparagraphs 1(a) to 1(g),

represented to consumers, or otherwise engaged in conduct which was likely or liable to cause consumers to believe, that the design and manufacture of new and second-hand Vehicles was such that they:

- (h) complied with all applicable legal requirements for road vehicles in Australia, including ADR 79;
- (i) had properly been given identification plate approval by the Commonwealth in accordance with the requirements of the MVS Act and ADR 79; and/or
- (j) did not contain a Defeat Device Equivalent or any form of device designed to defeat emissions tests which used the New European Drive Cycle (**NEDC**),

when those matters were not the case, and thereby, in trade or commerce in respect of each of the Vehicles:

- (k) engaged in conduct which was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL;
- (l) in connection with the supply or possible supply of the Vehicles, made false or misleading representations that the Vehicles:
  - i. were of a particular standard, quality, grade or composition, in contravention of s 29(1)(a) of the ACL; and
  - ii. had approval, performance characteristics, uses or benefits which they did not have, in contravention of s 29(1)(g) of the ACL; and
- (m) engaged in conduct which was liable to mislead the public as to the characteristics and suitability for their purpose of the Vehicles, in contravention of s 33 of the ACL.

5. A declaration that, in the Sales Period, Audi AG, by:

- (a) designing and manufacturing the Vehicles, and installing the EA 189 Engines incorporating the Defeat Software in them, including by programing that software, and supplying the Vehicles to Audi Australia, for supply to consumers for use as road vehicles in Australia;
- (b) applying to the Commonwealth for the Vehicles to be included GVG on the basis that they complied with the NOx emissions limits specified by Euro 5 and obtaining their inclusion on that basis; and
- (c) deliberately concealing, or deliberately failing to disclose the matters in subparagraphs 1(a) to 1(g),

represented to consumers, or otherwise engaged in conduct which was likely or liable to cause consumers to believe, that the design and manufacture of the Vehicles was such that they:

- (d) complied with Euro 5;
- (e) in normal use, or when driven in normal driving conditions, would produce NOx emissions at levels at or below the limits specified by Euro 5; and/or
- (f) did not contain a Defeat Device Equivalent or any form of device designed to defeat emissions tests which used the NEDC,

when those matters were not the case, and thereby, in trade or commerce in respect of each of the Vehicles:

- (g) engaged in conduct which was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL;
- (h) in connection with the supply or possible supply of the Vehicles, made false or misleading representations that the Vehicles:
  - i. were of a particular standard, quality, grade or composition, in contravention of s 29(1)(a) of the ACL; and
  - ii. had approval, performance characteristics, uses or benefits which they did not have, in contravention of s 29(1)(g) of the ACL; and
- (i) engaged in conduct which was liable to mislead the public as to the characteristics and suitability for their purpose of the Vehicles, in contravention of s 33 of the ACL.

6. A declaration that, in the Sales Period, Audi Australia, by:

- (a) importing the Vehicles into Australia as Audi AG's nominated agent;
- (b) having identification plates placed on the Vehicles; and
- (c) marketing, distributing and, through its authorised dealers, selling the Vehicles to consumers for use as road vehicles in Australia;

in circumstances where the matters in subparagraphs 1(a) to 1(g) had not been disclosed, represented to consumers, or otherwise engaged in conduct which was likely or liable to cause consumers to believe, that the design and manufacture of the Vehicles was such that:

- (d) they complied with all applicable legal requirements for road vehicles in Australia, including ADR 79;
- (e) had properly been given identification plate approval by the Commonwealth in accordance with the requirements of the MVS Act and ADR 79; and/or



- (f) did not contain a Defeat Device Equivalent or any form of device designed to defeat emissions tests which used the NEDC,

when that was not the case, and thereby, in trade or commerce in respect of each of the Vehicles:

- (g) engaged in conduct which was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL;
- (h) in connection with the supply or possible supply of the Vehicles, or in connection with the promotion of the supply of the Vehicles, made false or misleading representations that the Vehicles:
  - i. were of a particular standard, quality, grade or composition, in contravention of s 29(1)(a) of the ACL; and
  - ii. had approval, performance characteristics, uses or benefits which they did not have, in contravention of s 29(1)(g) of the ACL; and
- (i) engaged in conduct which was liable to mislead the public as to the characteristics and suitability for their purpose of the Vehicles, in contravention of s 33 of the ACL.

7. A declaration that, in the Sales Period, by publishing or causing to be published the advertisements and marketing materials identified in Schedule 4 of the Concise Statement (**Advertisements**), Audi Australia represented to consumers that the Vehicles:

- (a) were environmentally friendly, environmentally responsible, and environmentally sustainable;
- (b) produced low emissions;
- (c) complied with Euro 5; and/or
- (d) in normal use, or when driven in normal driving conditions, would produce NOx emissions at levels at or below the limits specified by Euro 5,

when those representations were false by reason of some or all of the matters in subparagraphs 1(a) to 1(g) or, alternatively, were misleading in circumstances where they were made without any of those matters being disclosed and, thereby, in trade or commerce in respect of each of the Advertisements:

- (e) engaged in conduct which was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL;
- (f) in connection with the supply or possible supply of the Vehicles, or in connection with the promotion of the supply of the Vehicles, made false or misleading representations that the Vehicles:

- i. were of a particular standard, quality, grade or composition in contravention of s 29(1)(a) of the ACL; and
    - ii. had approval, performance characteristics, uses or benefits which they did not have, in contravention of s 29(1)(g) of the ACL; and
  - (g) engaged in conduct which was liable to mislead the public as to the characteristics and suitability for their purpose of the Vehicles, in contravention of s 33 of the.
8. A declaration that, in the Sales Period, Audi AG:
  - (a) contravened section 106(1) of the ACL, by supplying the Vehicles;
  - (b) contravened section 106(2) of the ACL, by offering the Vehicles for supply; and
  - (c) contravened section 106(3) of the ACL, by manufacturing, possessing or having control of the Vehicles,because the Vehicles did not comply with ADR 79.
9. A declaration that, in the Sales Period, Audi Australia:
  - (a) contravened section 106(1) of the ACL, by supplying the Vehicles;
  - (b) contravened section 106(2) of the ACL, by offering the Vehicles for supply; and
  - (c) contravened section 106(3) of the ACL, by possessing or having control of the Vehicles,because the Vehicles did not comply with ADR 79.
10. A declaration that, in the Sales Period, Audi AG participated in each of Audi Australia's contraventions of the ACL, identified in paragraphs 6, 7 and 9 above, with knowledge of each of the essential elements of those contraventions, and thereby aided, abetted, counselled or procured Audi Australia's contraventions, or was directly or indirectly knowingly concerned in, or party to, those contraventions, within the meaning of s 224(1) of the ACL.
11. A declaration that, in the Sales Period, VWAG participated in each of Audi AG's and Audi Australia's contraventions of the ACL, identified in paragraphs 1 to 5 and 8 above (Audi AG) and 6, 7 and 9 above (Audi Australia), with knowledge of each of the essential elements of those contraventions, and thereby aided, abetted, counselled or procured Audi Australia's contraventions, or was directly or indirectly knowingly concerned in, or party to, those contraventions, within the meaning of s 224(1) of the ACL.

### Findings of fact

12. An order that the reasons for Judgment, with the Court's seal affixed, be retained on the Court file for the purposes of s 137H of the CCA.

### Other orders

13. An order that Audi AG pay to the Commonwealth, within 30 days of the date of this order, a pecuniary penalty in such amount as the Court considers appropriate, pursuant to s 224 of the ACL, in respect of each of the contraventions of the ACL identified in paragraphs 1 to 5, 8 and 10 above.
14. An order that Audi Australia pay to the Commonwealth, within 30 days of the date of this order, a pecuniary penalty in such amount as the Court considers appropriate, pursuant to s 224 of the ACL, in respect of each of the contraventions of the ACL identified in paragraphs 6, 7 and 9 above.
15. An order that VWAG pay to the Commonwealth, within 30 days of the date of this order, a pecuniary penalty in such amount as the Court considers appropriate, pursuant to s 224 of the ACL, in respect of each of the contraventions of the ACL identified in paragraph 11 above.
16. An order, pursuant to s 246 of the ACL, that Audi Australia within 28 days of the date of this order take all reasonable steps to cause to be published, at its own expense, a corrective notice in a manner and form approved by the Court.
17. An order that the respondents pay the Applicant's costs of and incidental to these proceedings.
18. Such further or other orders as the Court considers appropriate.

### Definitions

19. In this Originating Application:
  - (a) "State and Territory vehicle registration legislation" means the Road Transport (Vehicle Registration) Regulation 2007 (NSW), r 6(1); Road Safety (Vehicles) Regulation 2009 (Vic), r 14(1) (formerly Road Safety (Vehicles) Regulations 1999 (Vic), r 214(1)); Transport Operations (Road Use Management – Vehicle Registration) Regulation 2010 (Qld), r 9 (formerly Transport Operations (Road Use Management – Vehicle Registration) Regulation 1999 (Qld), r 8); *Motor Vehicles Act 1959* (SA), s 24(1); Road Traffic (Vehicles) Regulations 2014 (WA), r 34 (formerly Road Traffic (Licensing) Regulations 1975, r 9(2)); Vehicles and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010 (Tas), r 52(1) (formerly Vehicles and Traffic (Driver Licensing and Vehicle Registration) Regulations 2000 (Tas), r 45(1)); and Road Transport (Vehicle Registration) Regulation 2000 (ACT), r 26(1); and

- (b) "State and Territory road transport legislation" means the Road Transport (Vehicle Registration) Regulation 2007 (NSW), rr 6(1); Road Safety (Vehicles) Regulation 2009 (Vic), rr 14(1), 29(1) and 50 (formerly Road Safety (Vehicles) Regulations 1999 (Vic), r 202(1), 214(1), 222 and 223); Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 2010 (Qld), r 9, 127 and 128 (formerly Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 1999, r 8); *Motor Vehicles Act 1959* (SA), s 24(1); Road Traffic (Vehicles) Regulations 2014 (WA), rr 34 and 232 (formerly Road Traffic (Licensing ) Regulations 1975, rr 9(2) and 15); Vehicle and Traffic (Driver Licensing and Vehicle Registration ) Regulations 2010(Tas), r 52(1) (formerly Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulation 2000 (Tas), rr 45(1) and 57; Road Transport (Vehicle Registration) Regulation 2000 (ACT), rr 26(1) and 85; and Motor Vehicles (Standards) Regulations (NT), r 35.

#### APPLICANT'S ADDRESS

The Applicant's address for service is:

Australian Government Solicitor,  
Level 11, 145 Ann St, Brisbane, QLD 4000

Email: Glenn.Owbridge@ags.gov.au

The Australian Government Solicitor's telephone, facsimile, and document exchange numbers are:

Tel: 03 9242 1462

Fax: 07 3360 5795

DX 119 Brisbane

The Applicant's address is:

Australian Competition and Consumer Commission  
23 Marcus Clarke Street  
CANBERRA ACT 2601

#### SERVICE ON THE RESPONDENTS

It is intended to serve this application on all Respondents.

Date: 7 March 2017

  
.....  
Glenn Owbridge  
AGS lawyer  
for and on behalf of the Australian Government Solicitor  
Lawyer for the Applicant

**Schedule 1**

**FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: NEW SOUTH WALES  
DIVISION: GENERAL**

**No NSD of 2017**

**Respondents**

Second Respondent

Audi Australia Pty Ltd

Third Respondent

Volkswagen Aktiengesellschaft

Released under the FOI Act