

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 31/08/2016 5:07:00 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Non-Prescribed Pleading
File Number: NSD1462/2016
File Title: Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft & Anor
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading 'David Soden'.

Dated: 1/09/2016 1:55:18 PM AEST

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 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.

CONCISE STATEMENT

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

NO NSD



OF 2016

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

Applicant

VOLKSWAGEN AKTIENGESELLSCHAFT

and another named in Schedule 1

Respondents

IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. This proceeding concerns the conduct of the first respondent, Volkswagen Aktiengesellschaft (**VWAG**) and its indirect subsidiary the second respondent, Volkswagen Group Australia Pty Ltd (**VWA**), in connection with the marketing, distribution and sale in Australia of the Volkswagen brand diesel vehicles specified in **Schedule 2 (Vehicles)** during the period from 1 January 2011 to 3 October 2015 (**Sales Period**).
2. VWAG is a company incorporated in Germany. It designed and manufactured the Vehicles, and supplied them to VWA, for sale to consumers for use as road vehicles in Australia. The Vehicles were “consumer goods” within the meaning of s 2(1) of the *Australian Consumer Law (ACL)*, which is Schedule 2 to the *Competition and Consumer Act 2010 (Cth) (CCA)*.
3. VWA marketed, distributed and, through its authorised dealers, sold the Vehicles to consumers for use as road vehicles in Australia. In the Sales Period, VWA’s authorised dealers sold 57,605 Vehicles in Australia. Second-hand Vehicles¹ were also bought and sold in Australia for use as road vehicles during the Sales Period.
4. Each of the Vehicles had a four cylinder “EA 189” 1.6 Litre or 2 Litre diesel engine which contained an Exhaust Gas Recirculation System (**EGR System**). The EGR

¹ All references to second-hand Vehicles are to such vehicles manufactured in and from the first year shown in Schedule 2 in relation to the relevant vehicle.

Filed on behalf of the Applicant, ACCC

File ref: 15188969

Prepared by: Glenn Owbridge

AGS lawyer within the meaning of s 551 of the *Judiciary Act 1903*

Address for Service:

The Australian Government Solicitor,
Level 11, 145 Ann St, Brisbane, QLD 4000
Glenn.Owbridge@ags.gov.au

Telephone: 07 3360 5654
Lawyer's Email:
Glenn.Owbridge@ags.gov.au
Facsimile: 07 3360 5795
DX 119 Brisbane

19866640

System controlled the amount of nitrogen oxides (**NOx**) produced in the engine's combustion chamber.

5. NOx is an air pollutant which is limited by Australian and European emissions control standards due to its significant impact on the environment and human health. The emissions standards applicable during the Sales Period were *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* (together, **ADR 79**), as well as Council Directive 70/220/EEC as amended by EU Directive 98/69/EC (**Euro 4**) and EU Regulation 715/2007 (**Euro 5**) (together, the **Standards**).
6. The EGR System was controlled by software which caused it to adopt one of two modes (**Defeat Software**). The Defeat Software was designed to reduce NOx emissions produced by the Vehicles during testing to below the limits specified in the Standards. It did this by causing the EGR System to adopt **Mode 1** when the Vehicles were operated in accordance with the New European Drive Cycle driving pattern (**NEDC**). The NEDC is the unique operating cycle prescribed under the Standards to be used in testing vehicles to assess compliance with emissions limits set by the Standards, including NOx emissions.
7. The Defeat Software caused the EGR System to adopt **Mode 2** when it detected that the Vehicles were *not* being operated in accordance with the NEDC, such as when they were in normal vehicle operation and use. Once the EGR System adopted Mode 2, it remained in Mode 2 until the Vehicles were turned off and restarted. The Vehicles produced materially higher levels of NOx emissions in Mode 2 than in Mode 1.
8. To enable the Vehicles to be imported into and supplied in Australia, VWAG obtained approval to place identification plates on the Vehicles from the Commonwealth of Australia (**Commonwealth**) by certifying that they complied with the NOx emissions limits specified in the Standards. Once VWAG had obtained identification plate approval for the Vehicles, it caused VWA to have identification plates placed on them, which indicated that the Vehicles complied with all applicable legal requirements for road vehicles in Australia. VWAG, or VWA as its nominated agent, imported the Vehicles into Australia.
9. VWAG also obtained inclusion of the Vehicles in the Commonwealth's Green Vehicle Guide (**GVG**) by certifying that they complied with the NOx emissions limits in Euro 5. The GVG was a publicly available website which gave the Vehicles an air pollution rating based on their compliance with Euro 5.

10. ADR 79 was a national standard for the purposes of the *Motor Vehicle Standards Act 1989* (Cth). Unless they complied with ADR 79, new Vehicles could not lawfully be supplied or imported, nor could new or second-hand Vehicles meet State and Territory requirements for vehicle registration or lawfully be driven under State and Territory laws.
11. The Vehicles did not comply with any of the Standards as the Defeat Software, on its own or together with the EGR System, was a “defeat device”, the use of which was prohibited by each of the Standards, and the Vehicles did not comply with the NOx emissions limits set by the Standards except by reason of the use of a “defeat device”, which was prohibited by each of the Standards.
12. VWAG concealed the Defeat Software so that it would not be detected when the Vehicles were tested for compliance with the Standards. Neither VWAG nor VWA disclosed to the Commonwealth, VWA’s authorised dealers or consumers any of the matters in paras 6, 7 or 11, including (a) the existence of the Defeat Software, (b) its effect on NOx emission levels during normal on-road driving conditions when the Vehicles were operated in Mode 2, or (c) that the vehicles did not comply with the applicable legal requirements for road vehicles in Australia. Each of these matters was a matter which the Commonwealth, VWA’s authorised dealers and consumers would reasonably have expected to be disclosed to them.
13. By certifying compliance to the Commonwealth as set out in paras 8 and 9, designing, manufacturing, importing and supplying the Vehicles to VWA for sale in Australia, providing information for and reviewing and approving VWA’s marketing of the Vehicles as set out in para 16, and not disclosing the matters in para 12, VWAG expressly and/or impliedly represented, or otherwise engaged in conduct which was likely or liable to cause consumers to believe, that the Vehicles complied with all applicable legal requirements for road vehicles in Australia, including ADR 79, and that the Vehicles complied with Euro 5, when those matters were not the case.
14. By placing identification plates on the Vehicles, importing (as VWAG’s nominated agent), marketing and distributing the Vehicles for sale by its authorised dealers in Australia, and not disclosing the matters in para 12, VWA expressly and/or impliedly represented, or otherwise engaged in conduct which was likely or liable to cause consumers to believe, that the Vehicles complied with all applicable legal requirements for road vehicles in Australia, including ADR 79, when those matters were not the case.
15. Further, by publishing or causing to be published the advertisements and marketing materials identified in **Schedule 3 (Advertisements)**, VWA expressly or impliedly represented to consumers that the Vehicles (a) were environmentally friendly (or

environmentally responsible or sustainable), had clean burning diesel engines, and/or produced low emissions, **(b)** complied with Euro 4 or Euro 5, and/or **(c)** during normal on-road driving conditions, would produce NOx emissions at levels at or below the limits specified by Euro 4 and/or Euro 5. Those representations were false by reason of the matters in paras 6, 7 and 11 or, alternatively, misleading or likely or liable to mislead in circumstances where they were made without any of those matters being disclosed.

16. In publishing, producing and distributing the Advertisements, VWA relied on information provided, directly or indirectly, by VWAG that the Vehicles complied with the Standards, without further inquiry. VWAG knew and intended that VWA would rely on this information in preparing advertising and marketing materials for the Vehicles. VWAG also reviewed and approved some of VWA's advertising and marketing materials before they were published.

RELIEF SOUGHT FROM THE COURT

17. The ACCC seeks the relief set out in the accompanying application, comprising:
 - (a) declarations pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth);
 - (b) pecuniary penalties pursuant to s 224 of the ACL;
 - (c) an order for corrective advertising pursuant to 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.

PRIMARY LEGAL GROUNDS FOR RELIEF SOUGHT

18. By engaging in the conduct set out above, VWAG engaged in conduct in Australia and/or was carrying on business in Australia within the meaning of s 5(1) of the CCA.
19. By reason of the matters in paras 2, 8, 9, 12, 13 and 16, VWAG, in trade or commerce engaged in conduct which was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL, made false or misleading representations about the Vehicles in connection with their supply or possible supply in contravention of ss 29(1)(a) and 29(1)(g) of the ACL, and 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.
20. By reason of the matters in paras 2, 3, 8, 14 and 15, VWA, in trade or commerce engaged in conduct which was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL, made false or misleading representations about

the Vehicles in connection with their supply or possible supply in contravention of ss 29(1)(a) and 29(1)(g) of the ACL, and 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.

21. During the Sales Period, ADR 79 was also a safety standard for consumer goods, such as the Vehicles, within the meaning of s 106(1) of the ACL, and was in force. By reason of the matters in paras 2, 3 and 11, each of VWAG and VWA, in trade or commerce, supplied, offered for supply and/or manufactured, possessed or had control of the Vehicles which did not comply with a safety standard for consumer goods of that kind that was in force, in contravention of s 106 of the ACL.
22. By reason of the matters in paras 2, 8, 9, 11, 12, 13 and 16, VWAG participated in each of VWA's contraventions of the ACL, with knowledge of each of the essential elements of those contraventions, and thereby aided, abetted, counselled or procured VWA's contraventions, or was indirectly knowingly concerned in, or party to, those contraventions within the meaning of s 224(1) of the ACL.
23. Each of VWAG's contraventions of the ACL was deliberate or reckless, or occurred in circumstances where VWAG consciously courted the risk of misleading consumers.

ALLEGED HARM SUFFERED

24. During the Sales Period, Australian consumers purchased Vehicles which **(a)** could not lawfully be registered or driven under State and Territory laws because they did not comply with ADR 79, **(b)** produced levels of NOx emissions exceeding the limits in the Standards and **(c)** did not possess the qualities or characteristics represented in the Advertisements. VWAG and VWA secured a commercial advantage over their competitors by their false and misleading conduct and representations.

Date: 31 August 2016



Glenn Owbridge

AGS lawyer, for and on behalf of the Australian Government Solicitor
Lawyer for the Applicant

This concise statement was prepared by Glenn Owbridge and Alexander Tate of the Australian Government Solicitor, and settled by Matthew Darke SC and Radhika Withana of counsel.

SCHEDULE 1

FEDERAL COURT OF AUSTRALIA

DISTRICT REGISTRY: NEW SOUTH WALES

DIVISION: GENERAL

NO NSD

of 2016

Respondents

Second Respondent

Volkswagen Group Australia Pty Ltd (ACN 093 117
876)

Schedule 2

Table of affected vehicles sold in Australia between 1 January 2011 and 3 October 2015

Model	Years of manufacture	No of vehicles sold
Amarok (2.0L)	2011 – 2012	8,694
Caddy, including the maxi Caddy (1.6L and 2.0L)	2010 – 2015	8,558
CC (2.0L)	2011 - 2015	1,241
Eos (2.0L)	2008 – 2014	845
Golf (1.6L and 2.0L)	2009 – 2013	11,539
Jetta (1.6L and 2.0L)	2010 – 2015	2,527
Passat (2.0L)	2008 – 2015	10,863
Passat CC (2.0L)	2008 - 2012	804
Polo (1.6L)	2009 – 2014	2,618
Tiguan (2.0L)	2008 – 2015	9,916
Total vehicles sold		57,605

Schedule 3

Advertisements

No.	Document Id	Date of Publication	Document Type	Model
1.	VOL.001.002.0001	3/07/2008 (May 2008, and for model year 2009)	Brochure	Eos
2.	VOL.001.002.0031	10/02/2009 (Feb 2009)	Brochure	Golf
3.	VOL.002.003.0263	17/02/2009 (Press release Feb 2009)	Press Release	Golf
4.	VOL.001.002.0062	20/02/2009	Magazine	Golf
5.	VOL.001.002.0060	25/02/2009 (presumed)	Print Ad	Golf
6.	VOL.001.002.0068	10/03/2009	Print Ad	Golf
7.	VOL.001.002.0067	10/03/2009	Print Ad	Golf
8.	VOL.001.002.0061	13/03/2009	Letter to existing customers	Golf
9.	VOL.001.002.0085	17/03/2009 (published in Feb 2009 for 2009 model)	Brochure	Passat
10.	VOL.001.002.0070	31/03/2009 (presumed)	Print Ad	Golf
11.	VOL.001.002.0071	1/04/2009 (presumed)	Print Ad	Golf 90 TSI
12.	VOL.001.002.0073	14/04/2009	Print Ad	Golf
13.	VOL.001.002.0076	30/09/2009	Print Ad	Golf
14.	VOL.001.003.0082	15/10/2009	Brochure	Golf
15.	VOL.001.002.0080	19/11/2009	Brochure	Jetta
16.	VOL.001.003.0274	26/11/2009	Brochure	Tiguan
17.	VOL.001.003.0262	17/12/2009	Print Ad	Multiple models
18.	VOL.001.003.0261	4/01/2010 (presumed)	Print Ad	Multiple models
19.	VOL.001.003.0259	4/01/2010 (presumed)	Print Ad	Multiple models
20.	VOL.001.003.0260	6/01/2010	Print Ad	Multiple models
21.	VOL.001.003.0258	11/01/2010 (published in late 2009)	Print Ad	Multiple models
22.	VOL.001.003.0046	28/01/2010 (presumed published in Feb 2010)	Brochure	Golf Wagon
23.	VOL.001.003.0164	28/01/2010 (presumed published in Feb 2010)	Brochure	Passat
24.	VOL.002.003.0241	9/02/2010	Press Release	Golf Wagon
25.	VOL.001.003.0264	26/03/2010 (presumed)	TV Commercial	Golf BlueMotion
26.	VOL.001.003.0205	16/04/2010 (presumed published in May 2010)	Brochure	Polo

No.	Document Id	Date of Publication	Document Type	Model
27.	VOL.002.003.0308	10/05/2010	Press Release	Polo
28.	VOL.002.003.0130	7/06/2010	Press Release	Golf GTD
29.	VOL.001.003.0245	25/06/2010 (presumed)	Print Ad	Polo
30.	VOL.001.003.0247	25/06/2010 (presumed)	Print Ad	Polo
31.	VOL.001.004.0235	23/08/2010	Brochure	Polo
32.	VOL.001.004.0266	24/08/2010	Brochure	Tiguan
33.	VOL.001.003.0006	10/09/2010 (presumed published in Oct 2010)	Brochure	Eos
34.	VOL.001.004.0109	15/09/2010 (presumed published in Oct 2010)	Brochure	Golf
35.	VOL.001.004.0073	16/09/2010 (presumed published in Oct 2010)	Brochure	Golf Wagon
36.	VOL.002.005.0284	1/12/2010	Brochure	Caddy
37.	VOL.002.005.0021	2/12/2010 (presumed published in Oct 2010)	Specifications	Caddy
38.	VOL.002.005.0264	12/10/2015 (presumed published in December 2010)	Brochure	Caddy
39.	VOL.002.005.0043	7/12/2010	Brochure	Caddy
40.	VOL.002.003.0078	14/12/2010	Press Release	Caddy
41.	VOL.002.001.0111	8/02/2011	Website	Polo 66 TDI
42.	VOL.002.003.0037	19/02/2011	Press Release	Amarol
43.	VOL.002.005.0104	1/03/2011	Brochure	Amrok
44.	VOL.002.005.0015	1/04/2011	Specifications	Caddy
45.	VOL.002.003.0195	15/04/2011	Press Release	Passat
46.	VOL.001.004.0212	18/04/2011	Brochure	Passat
47.	VOL.002.003.0168	17/05/2011	Press Release	Eos
48.	VOL.002.003.0183	17/05/2011	Press Release	Golf BlueMotion
49.	VOL.002.001.0202	26/05/2011 (presumed)	Website	Golf BlueMotion
50.	VOL.001.004.0059	30/05/2011	Print Ad	Golf BlueMotion
51.	VOL.001.004.0048	30/05/2011	Print Ad	Golf BlueMotion
52.	VOL.001.004.0050	30/05/2011	Print Ad	Golf BlueMotion
53.	VOL.002.001.0219	30/05/2011	Print Ad	Golf
54.	VOL.001.004.0061	1/06/2011	Print Ad	Golf BlueMotion
55.	VOL.002.001.0225	3/06/2011	Radio	Golf
56.	VOL.002.005.0032	10/06/2011 (presumed)	Specifications	Caddy
57.	VOL.001.004.0033	10/06/2011 (presumed)	TV Commercial	Golf
58.	VOL.001.004.0038	10/06/2011 (presumed)	TV Commercial	Golf

No.	Document Id	Date of Publication	Document Type	Model
59.	VOL.001.005.0170	19/08/2011	Brochure	Eos
60.	VOL.001.005.0391	22/08/2011	Brochure	Passat
61.	VOL.001.005.0029	22/08/2011	Brochure	Passat CC
62.	VOL.001.005.0242	24/08/2011	Brochure	Golf
63.	VOL.001.005.0206	29/08/2011	Brochure	Golf Wagon
64.	VOL.001.005.0479	29/08/2011	Brochure	Polo
65.	VOL.001.004.0166	22/09/2011	Brochure	Jetta
66.	VOL.002.003.0558	6/10/2011	Press Release	Tiguan
67.	VOL.001.005.0567	10/10/2011	Brochure	Tiguan
68.	VOL.002.001.0282	13/10/2011	Website	Tiguan
69.	VOL.001.005.0611	21/10/2011	Brochure	Tiguan
70.	VOL.001.004.0043	26/10/2011 (presumed)	TV Commercial	Golf BlueMotion
71.	VOL.001.005.0346	2/12/2011	Brochure	Jetta
72.	VOL.001.005.0435	15/12/2011	Brochure	Passat
73.	VOL.001.005.0655	19/12/2011	Brochure	Tiguan
74.	VOL.001.005.0294	24/01/2012	Brochure	Golf
75.	VOL.002.005.0136	1/02/2012	Brochure	Amarok
76.	VOL.002.005.0168	1/02/2012	Brochure	Caddy
77.	VOL.002.005.0304	1/02/2012	Brochure	Caddy
78.	VOL.001.005.0523	2/03/2012	Brochure	Polo
79.	VOL.001.006.0001	1/07/2012	Brochure	CC
80.	VOL.001.006.0085	1/07/2012	Brochure	Eos
81.	VOL.001.006.0552	1/07/2012	Brochure	Tiguan
82.	VOL.002.003.0589	3/07/2012	Press Release	CC
83.	VOL.002.003.0001	6/07/2012	Press Release	Amarok
84.	VOL.001.005.0072	12/07/2012	Brochure	CC
85.	VOL.001.006.0121	19/07/2012	Brochure	Eos
86.	VOL.001.006.0205	24/07/2012	Brochure	Golf
87.	VOL.001.006.0157	13/08/2012	Brochure	Golf Wagon
88.	VOL.002.005.0192	1/09/2012	Brochure	Caddy
89.	VOL.001.006.0265	1/09/2012	Brochure	Jetta
90.	VOL.001.006.0397	1/09/2012	Brochure	Passat
91.	VOL.001.004.0028	2/11/2012 (presumed)	TV Commercial	Golf BlueMotion
92.	VOL.002.005.0429	8/11/2012 (presumed)	Print Ad	Multiple models
93.	VOL.002.005.0328	1/12/2012	Brochure	Caddy
94.	VOL.002.005.0436	14/12/2012	Print Ad	Amarok

No.	Document Id	Date of Publication	Document Type	Model
95.	VOL.001.006.0485	1/01/2013	Brochure	Polo
96.	VOL.002.005.0430	27/03/2013 (presumed)	Print Ad	Amarok
97.	VOL.001.006.0529	30/04/2013	Brochure	Polo
98.	VOL.001.007.0001	3/05/2013	Brochure	CC
99.	VOL.001.006.0596	10/07/2013	Brochure	Tiguan
100.	VOL.001.007.0082	28/08/2013	Brochure	Jetta
101.	VOL.001.007.0174	28/08/2013	Brochure	Passat
102.	VOL.001.007.0302	28/08/2013	Brochure	Tiguan
103.	VOL.001.006.0353	30/09/2013	Brochure	Jetta
104.	VOL.001.007.0045	1/01/2014	Brochure	Eos
105.	VOL.002.005.0216	1/02/2014	Brochure	Caddy
106.	VOL.002.005.0360	1/02/2014	Brochure	Caddy Van
107.	VOL.001.007.0126	1/04/2014	Brochure	Jetta
108.	VOL.001.007.0346	30/04/2014	Brochure	Tiguan
109.	VOL.001.008.0001	1/05/2014	Brochure	CC
110.	VOL.001.007.0218	8/05/2014	Brochure	Passat
111.	VOL.002.005.0392	1/08/2014	Brochure	Caddy
112.	VOL.002.005.0240	1/08/2014	Brochure	Caddy
113.	VOL.001.008.0123	1/09/2014	Brochure	Tiguan
114.	VOL.001.008.0062	11/11/2014	Brochure	Passat
115.	VOL.001.008.0167	13/05/2015	Specifications	Tiguan