

## NOTICE OF FILING AND HEARING

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. 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: NSD1462/2016  
File Title: Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft & Anor  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA  
Reason for Listing: Case Management Hearing  
Time and date for hearing: 23/09/2016, 9:30 AM  
Place: Court Room Not Assigned, Level 17 Law Courts Building Queen's Square, Sydney



A handwritten signature in blue ink, appearing to read 'Warwick Soden'.

Dated: 1/09/2016 1:55:14 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 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 2016**

**AUSTRALIAN COMPETITION AND CONSUMER  
COMMISSION**

Applicant

**VOLKSWAGEN AKTIENGESELLSCHAFT**

and another 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

This is an application for:

Filed on behalf of the Applicant, Glenn Owbridge  
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

File ref: 15188969

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



- 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 vehicles specified in Schedule 2 to the accompanying Concise Statement (**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 Volkswagen Aktiengesellschaft (**VWAG**) knew and failed to disclose to the Commonwealth of Australia (**Commonwealth**), VWA's authorised dealers, or the Australian public, including consumers, that:
  - (a) the Exhaust Gas Recirculation system (**EGR System**) in each of the Vehicles was controlled by software (**Defeat Software**) which caused it 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 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**);
  - (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) VWAG designed, installed and concealed the Defeat Software so that it would not be detected when the Vehicles were tested for compliance with the Standards;
- (e) the Defeat Software, on its own or together with the EGR System, was a “defeat device”, the use of which was prohibited by the Standards;
- (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:

- (h) VWAG designed and manufactured the Vehicles, and supplied them to the second respondent, Volkswagen Group Australia Pty Ltd (**VWA**), for sale to consumers for use as road vehicles in Australia;
- (i) VWAG 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 the Standards;
- (j) VWAG 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;
- (k) VWAG caused VWA to have identification plates placed on the Vehicles;
- (l) VWAG imported, or permitted VWA as its nominated agent to import, the Vehicles into Australia; and
- (m) each of the Commonwealth, VWA’s authorised dealers, and the Australian public, including consumers, would reasonably have expected VWAG to disclose the matters in subparagraphs (a) to (g) to them, if they were the case,

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

- (n) was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL; and



(o) 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, VWAG, by:

- (a) designing, manufacturing, and supplying the Vehicles to VWA, for sale 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) 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;
- (d) causing VWA to have identification plates placed on the Vehicles;
- (e) importing, or permitting VWA as its nominated agent to import, the Vehicles to Australia;
- (f) providing information for and reviewing and approving VWA's marketing of the Vehicles; and
- (g) failing to disclose to 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 complied with:

- (h) all applicable legal requirements for road vehicles in Australia, including ADR 79; and
- (i) the NOx emissions in Euro 5,

when those matters were not the case, and thereby, in trade or commerce:

- (j) engaged in conduct which was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL;
- (k) 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



- (l) 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.

3. A declaration that, in the Sales Period, VWA, by:

- (a) importing the Vehicles into Australia as VWAG's nominated agent;
- (b) having identification plates placed on the Vehicles;
- (c) marketing, distributing and, through its authorised dealers, selling the Vehicles to consumers for use as road vehicles in Australia; and
- (d) not disclosing 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 complied with all applicable legal requirements for road vehicles in Australia, including ADR 79, when that was not the case, and thereby, in trade or commerce:

- (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 ACL.

4. A declaration that, in the Sales Period, by publishing or causing to be published the advertisements and marketing materials identified in Schedule 3 of the Concise Statement (**Advertisements**), VWA represented to consumers that the Vehicles:

- (a) were environmentally friendly, environmentally responsible, and environmentally sustainable;
- (b) had clean burning diesel engines;
- (c) produced low emissions;
- (d) complied with Euro 4;





(e) complied with Euro 5; and

(f) 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,

when those representations were false by reason 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:

(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.

5. A declaration that, in the Sales Period, VWAG:

(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.

6. A declaration that, in the Sales Period, VWA:

(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.



7. A declaration that, in the Sales Period, VWAG participated in each of VWA's contraventions of the ACL, identified in paragraphs 3, 4 and 6 above, with knowledge of each of the essential elements of those contraventions, and thereby aided, abetted, counselled or procured VWA'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

8. 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

9. 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 paragraphs 1, 2, 5 and 7 above.
10. An order that VWA 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 3, 4 and 6 above.
11. An order, pursuant to s 246 of the ACL, that VWA 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.
12. An order that the respondents pay the Applicant's costs of and incidental to these proceedings.
13. Such further or other orders as the Court considers appropriate.

### Definitions

14. 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), rr 14(1) and 29(1) (formerly Road Safety (Vehicles) Regulations 1999 (Vic), rr 202(1) and 214(1)); Transport Operations (Road Use Management – Vehicle Registration) Regulation 2010 (Qld), r 9 (formerly Transport Operations (Road Use Management – Vehicle Registration) Regulation 1999, 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)); Road Transport (Vehicle Registration) Regulation 2000 (ACT), r 26(1); and *Motor Vehicles Act 1949* (NT), s 8(a); and





(b) "State and Territory road transport legislation" means the Road Transport (Vehicle Registration) Regulation 2007 (NSW), r 6(1); Road Safety (Vehicles) Regulation 2009 (Vic), r 258(2) (formerly Road Safety (Vehicles) Regulations 1999 (Vic), r 819(3)); Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 2010 (Qld), r 5(1) (formerly Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 1999, r 5(1)); *Road Transport Act 1961* (SA), ss 116(1), 117(1) and 118(1); Road Traffic (Vehicles) Regulations 2014 (WA), r 232 (formerly Road Traffic (Vehicle Standards) Regulations 2002, r 8); Vehicles and Traffic (Vehicle Standards) Regulations 2014 (Tas), r 4(1)(a) (formerly Vehicles and Traffic (Vehicle Standards) Regulation 2001 (Tas), r 4(1)(a)); Road Transport (Vehicle Registration) Regulation 2000 (ACT), r 109(2); 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: 07 3360 5654

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: 31 August 2016

A handwritten signature in blue ink, appearing to read "G. Owbridge", written over a dotted line.

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 2016**

**Respondents**

Second Respondent

Volkswagen Group Australia Pty Ltd (ACN 093 117  
876)