

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 1/08/2017 3:39:17 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:	Statement of Claim - Form 17 - Rule 8.06(1)(a)
File Number:	NSD1459/2015
File Title:	Alister Dalton & Anor v Volkswagen AG & Anor
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading "Warwick Soden".

Dated: 1/08/2017 3:51:39 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.



Form 17  
Rule 8.05(1)(a)

## **Further Amended Statement of claim**

No. NSD1459 of 2015

Federal Court of Australia

District Registry: NSW

Division: General

**Alister Dalton and another**  
Applicants

**Volkswagen AG and another**  
Respondents

### **FURTHER AMENDED STATEMENT OF CLAIM**

#### **PART A. THE PARTIES**

##### **The proceeding**

1. This Proceeding is commenced as a Representative Proceeding pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) by the First Applicant, Alister Dalton, on his own behalf, the Second Applicant, Joanna Dalton, on her own behalf and on behalf of the Group Members (as defined in paragraph 2 below).

##### **The Applicants and other Group Members**

2. The First and Second Applicants (**the Applicants**) and the persons whom they represent (**the Group Members**) are persons who:
  - a. prior to 3 October 2015, acquired an interest in an affected VW diesel vehicle (as defined in paragraph 35 below); and

Filed on behalf of	_____	Alister Dalton and another, Applicants
Prepared by	_____	Jason Geisker
Law firm	_____	Maurice Blackburn Pty Ltd, Lawyers
Tel	(02) 9261 1488	Fax (02) 9261 3318
Email	<a href="mailto:jgeisker@mauriceblackburn.com.au">jgeisker@mauriceblackburn.com.au</a>	
<b>Address for service</b>	Level 32, 201 Elizabeth Street, Sydney NSW 2000	

b. still had an interest in that vehicle as at 3 October 2015,

but not including:

c. the Respondents, or any wholly or partly owned subsidiary of either of the Respondents;

d. any Volkswagen authorised dealer;

e. any Judge of the Federal Court of Australia; or

f. any group member in proceedings NSD1308 of 2015 (the **VW-Skoda BL Proceedings**) who has retained ~~by~~ Bannister Law as its legal representative in the VW-Skoda BL Proceedings as at the date of the filing of this Further Amended Statement of Claim, except for those group members who have also retained Maurice Blackburn as its legal representative in proceedings NSD1459 of 2015 (the **VW MB Proceedings**) or NSD 1473 of 2015 (the Skoda MB Proceeding) as at the date of filing this Further Amended Statement of Claim.

(the Group).

#### *Particulars*

- (i) *On 28 June 2011, the First Applicant, Mr Dalton, purchased a diesel Volkswagen VW Passat wagon 125TDI Highline from a VW dealership in Newcastle, NSW, PPT Investments Pty Ltd trading as Kloster Volkswagen, 49 Tudor Street, Hamilton, New South Wales;*
- (ii) *On the same day, the Second Applicant, Ms Dalton, purchased a diesel Volkswagen Golf Comfortline 103TDI DSG from the same VW dealership in Newcastle, NSW;*
- (iii) *In the case of the Group Members, particulars of their interest in affected VW vehicles (as defined in paragraph 35), may be provided following the resolution of common questions.*

3. As at the date of the commencement of this proceeding there were seven or more Group Members.

#### **The Respondents**

4. The First Respondent, Volkswagen AG (**VW AG**), at all material times:

- a. is and was a company incorporated pursuant to the laws of, and registered in, the Federal Republic of Germany and capable of being sued;
- b. is and was a foreign corporation within the meaning of s 4 of the *Trade Practices Act 1974* (Cth) (**TPA**);
- c. is and was a corporation within the meaning of s 4 of the *Competition and Consumer Act 2010* (Cth) (the **CCA**);
- d. is and was a foreign corporation within the meaning of s 4 of the CCA;
- e. is and was a corporation within the meaning of s 5 of the *Motor Vehicle Standards Act 1989* (Cth) (the **Motor Vehicle Standards Act**);
- f. is and was the principal company of the Volkswagen Group and ultimately owned the Second Respondent, VW Australia;
- g. [Deleted];
- h. is and was a “manufacturer” of the affected VW diesel vehicles within the meaning of s 74A of the TPA and s 7 of the *Australian Consumer Law* (**ACL**) being Schedule 2 of the CCA, on the basis that:
  - (i) VW AG manufactured the affected VW diesel vehicles for the purpose of their supply to consumers in Australia;
  - (ii) further, or alternatively, VW AG is and was in the business of marketing and distributing automotive products including the affected VW diesel vehicles, internationally and in Australia, but did not have a place of business in Australia; and
  - (iii) further, or alternatively, VW AG caused or permitted its brand or mark to be applied to the affected VW diesel vehicles.
- i. supplied affected VW diesel vehicles to Australia;
- j. further or alternatively, distributed affected VW diesel vehicles in Australia;
- k. further or alternatively, advertised and promoted affected VW diesel vehicles in Australia;

l. imported and supplied new vehicles within the meaning of the Motor Vehicle Standards Act;

m. is and was subject to the TPA and the ACL because:

- (i) VW AG was carrying on a business in Australia;
- (ii) further or alternatively, the conduct pleaded in paragraphs 4(i) to (k) occurred in Australia; and
- (iii) further or alternatively, by affixing compliance plates to the affected VW diesel vehicles supplied in Australia, VW AG made the VW Compliance Representation (as pleaded in paragraph 50) in Australia.

n. [Deleted]

5. The Second Respondent, Volkswagen Group Australia Pty Ltd ACN 093 117 876 (**VW Australia**), at all material times:

- a. is and was a company registered pursuant to the *Corporations Act 2001* (Cth) (**Corporations Act**) and capable of being sued;
- b. is and was a trading corporation within the meaning of s 4 of the TPA;
- c. is and was a corporation within the meaning of s 4 of the CCA;
- d. is and was a corporation within the meaning of s 5 of the Motor Vehicle Standards Act;
- e. is and was a “manufacturer” of the affected VW diesel vehicles (as defined in paragraph 35), within the meaning of s 74A of the TPA and s 7 of the ACL being Schedule 2 of the CCA, on the basis that:
  - (i) VW Australia held itself out to Australian consumers as the manufacturer of the affected VW diesel vehicles; and/or
  - (ii) VW AG did not have a place of business in Australia and VW Australia imported the affected VW diesel vehicles into Australia; and/or

- (iii) VW Australia caused or permitted its brand or mark to be applied to the affected VW diesel vehicles.
  - f. is and was a “supplier”, within the meaning of s 4 of the TPA and ss 4 and 4C of the CCA and s 2 of the ACL, of the affected VW diesel vehicles;
  - g. distributed affected VW diesel vehicles in Australia;
  - h. further or alternatively, advertised and promoted affected VW diesel vehicles in Australia;
  - i. imported and supplied new vehicles within the meaning of the Motor Vehicle Standards Act, including the affected VW diesel vehicles;
  - j. is and was a wholly-owned subsidiary of Volkswagen Finance Luxembourg S.A., which is a wholly-owned subsidiary of VW AG; and
  - k. is and was in the business of marketing, importing and distributing automotive products including the affected VW diesel vehicles in Australia.
6. The Respondents are, and were at all material times, related parties within the meaning of s 50 of the Corporations Act.

## **PART B. COMPLIANCE REGIME FOR NEW CARS SOLD IN AUSTRALIA**

### **Motor Vehicle Standards Act**

7. At all material times, the Motor Vehicle Standards Act prohibited a person from supplying to the market a new vehicle that did not comply with national standards and prohibited a person from supplying to the market a vehicle that did not have fitted an identification plate of a type prescribed by the Motor Vehicle Standards Act, namely a plate certifying compliance with those national standards (**compliance plate**).

#### *Particulars*

- (i) *Motor Vehicle Standards Act ss 10A(1) and 14.*

8. At all material times, the Motor Vehicle Standards Act prohibited the importation of a new road vehicle that did not comply with national standards and prohibited the importation of a new road vehicle that did not have a compliance place fitted.

#### *Particulars*

(i) *Motor Vehicle Standards Act s 18.*

9. At all material times, the Motor Vehicle Standards Act:

- a. required the importer of a road vehicle to do all things reasonable and necessary to ensure that when the vehicle was supplied to market it still complied with national standards and still had a compliance plate fitted;
- b. prohibited the importer from modifying the vehicle in any way that made it not comply with national standards.

*Particulars*

(i) *Motor Vehicle Standards Act s 17.*

9A. At all material times, approval of the Minister was required in order for a compliance plate to be fitted on a vehicle (**compliance plate approval**).

*Particulars*

(i) *Motor Vehicle Standards Act s 10(1) and s 10A.*

9B. At all material times, an application for compliance plate approval was required to be in accordance with the approved form and to be accompanied by material sufficient to establish compliance with the national standards or relevant parts of national standards in relation to which the application was made.

*Particulars*

(i) *Motor Vehicle Standards Regulations 1989 (Cth) reg 4.*

9C. At all material times:

- (a) the approved form for compliance plate approval was to be submitted through the Road Vehicle Certification System (**RVCS**) administered by the Vehicle Safety Standards Branch (**VSSB**) of the Commonwealth Department of Infrastructure and Regional Development (**DIRD**); and
- (b) in order to submit an approved form for compliance plate approval through RVCS, a manufacturer had to register with RVCS as a “licensee”;

- (c) a licensee was required to submit, via the RVCS, a “summary of evidence” report in relation to each of the national standards applicable to the relevant type of vehicle for which compliance plate approval was sought;
- (d) if approval was given under s 10A(1) of the *Motor Vehicle Standards Act* (**Section 10A(1) Approval**), the licensee was responsible for ensuring that compliance plates were only fixed to vehicles that met the requirements of the Motor Vehicle Standards Act, or the compliance plate approval; and
- (e) VW AG was the registered licensee responsible for the affected VW diesel vehicles.

9D. At all material times, if a licensee failed to comply with a condition to which a compliance plate approval was subject, the Minister could cancel, suspend or vary the compliance plate approval for the relevant type of vehicle.

*Particulars*

- (i) *Motor Vehicle Standards Act s 11.*

9E. At all material times, compliance plate approval for the affected VW diesel vehicles has been subject to a condition that identification plates would not be placed on vehicles which do not comply with all of the Australian Design Rules (**Australian Design Rules** or **ADR**), specified in Schedule 4 to the Section 10A(1) Approval.

*Particulars*

- (i) *DIRD Section 10A(1) Approvals numbered 42538, 40471, 36666, 32502, 35053, 43434, 35384, 41882, 39378, 35612, and 32641.*
- (ii) *Further particulars may be provided following discovery.*

9F. At all material times, compliance plate approval for the affected VW diesel vehicles has been subject to a condition that identification plates would not be placed on vehicles which are in any way different from the vehicle described in the final form of the application for compliance plate approval without the prior approval of DIRD.

*Particulars*

- (i) *DIRD Section 10A(1) Approvals numbered 42538, 40471, 36666, 32502, 35053, 43434, 35384, 41882, 39378, 35612, and 32641.*

- (ii) *Further particulars may be provided following discovery.*

9G. At all material times, compliance plate approval for the affected VW diesel vehicles has been subject to a condition that the licensee, through detailed quality control and testing, would ensure continuing compliance with the Australian Design Rules specified in Schedule 4 to the Section 10A(1) Approval.

*Particulars*

- (i) *DIRD Section 10A(1) Approvals numbered 42538, 40471, 36666, 32502, 35053, 43434, 35384, 41882, 39378, 35612, and 32641.*
- (ii) *Further particulars may be provided following discovery.*

**National Standards – Australian Design Rule 79**

10. At all material times, ADR 79 was a national standard for the purposes of the Motor Vehicle Standards Act.

*Particulars*

- (i) *The making of national standards is provided for in s 7 of the Motor Vehicle Standards Act which empowers the Minister to determine vehicle standards for road vehicles or vehicle components.*
- (ii) *ADR 79/00 was originally determined in Road Vehicle (National Standards) Determination No 2 of 1999.*
- (iii) *ADR 79/00 was remade in December 2005 as Vehicle Standard (ADR 79/00 – Emission Control for Light Vehicles) 2005, to comply with the requirements of the Legislative Instruments Act 2003.*
- (iv) *The applicable versions of ADR 79 were:*
  - 1. *Vehicle Standard (ADR 79/01 – Emission Control for Light Vehicles) 2005;*
  - 2. *Vehicle Standard (ADR 79/02 – Emission Control for Light Vehicles) 2005; and*
  - 3. *Vehicle Standard (ADR 79/03 – Emission Control for Light Vehicles) 2011.*

11. At all material times, the Australian Design Rules were a mandatory safety standard for the purposes of s 65C of the TPA and 106 of the ACL.

*Particulars*

- (i) *At relevant times during the currency of the TPA, pursuant to s 41 of the Motor Vehicle Standards Act, a national standard was taken to be a prescribed consumer product safety standard for the purposes of s 65C of the TPA;*
  - (ii) *Pursuant to s 41 of the Motor Vehicle Standards Act, a national standard is taken to be a safety standard for the purposes of s 106 of the ACL.*
12. At all material times, ADR 79 was applicable to the affected VW diesel vehicles, being M and N category vehicles with a Gross Vehicle Mass less than or equal to 3.5 tonnes.

*Particulars*

- (i) *Australian Design Rule 79/01, 79/02 and 79/03, reg 2.1.*
13. At all material times, ADR 79 applied to the affected VW diesel vehicles as follows:
- a. ADR 79/01: new model VW diesel vehicles manufactured between 1 January 2006 and 30 June 2008 and all other VW diesel vehicles manufactured between 1 January 2007 and 30 June 2010;
  - b. ADR 79/02: new model VW diesel vehicles manufactured between 1 July 2008 and 31 October 2013 and all other VW diesel vehicles manufactured between 1 July 2010 and 31 October 2013;
  - c. ADR 79/03: new model VW diesel vehicles manufactured between 1 November 2013 and 31 October 2016.

**Requirements of ADR 79**

14. At all material times, ADR 79 specified maximum permitted levels of exhaust emissions, including oxides of nitrogen (**NO<sub>x</sub>**), depending on the Gross Vehicle Mass of the vehicle.

*Particulars*

- (i) *ADR 79/01, 79/02 and 79/03, Appendix A, rules 5.1.1, 5.1.2, 5.2.3, 5.3 and 5.3.1.4.*

14A. At all material times, all vehicles to which ADR 79 applied, including compression ignition (or diesel) powered vehicles, were required to undergo a 'Type I' test in accordance with the test procedure specified in ADR 79 in order to verify the average exhaust emissions from the vehicle after a cold start.

*Particulars*

- (i) *ADR 79/01, 79/02 and 79/03, Appendix A, rules 5.2.3 and 5.3.1.1.*

14B. At all material times, the Type I test involved vehicles performing a specified driving cycle (known as the New European Driving Cycle or **NEDC**) on a chassis dynamometer, which was made up of a particular sequence and timing of speeds, acceleration and deceleration.

*Particulars*

- (i) *ADR 79/01 and 79/02, Appendix A, rules 5.3.1.2, 5.3.1.2.1, 5.3.1.2.2, 5.3.1.2.3, 5.3.1.3 and Annex 4.*
- (ii) *ADR 79/03, Appendix A, rules 5.3.1.2, 5.3.1.2.1, 5.3.1.2.2, 5.3.1.2.3, 5.3.1.3 and Annex 4a.*

14C. At all material times, for diesel vehicles undergoing a Type I test, the total volume of exhaust gases collected during the test procedure was measured in accordance with a procedure specified in ADR 79 and the levels of exhaust emissions, including NO<sub>x</sub>, from vehicles were recorded.

*Particulars*

- (i) *ADR 79/01, 79/02, Appendix A, rules 5.3.1.2.4 and Annex 4.*
- (ii) *ADR 79/03, Appendix A, rules 5.3.1.2.4 and Annex 4a.*

14D. At all material times, the resulting masses of gaseous emissions and, in the case of diesel vehicles, the mass of particulates, obtained from the Type I test had to be less than the limits prescribed by ADR 79, subject to prescribed tolerances.

*Particulars*

(i) *ADR 79/01, 79/02 and 79/03, Appendix A, rules 5.3.1.4, 5.3.1.4.1.*

14E. At all material times, vehicle manufacturers, in submitting an application for compliance plate approval in accordance with the procedure described at paragraphs 9A to 9G, were required to provide, in the summary of evidence report submitted in relation to ADR 79:

- a. Type I test results, showing compliance with the maximum permitted levels of exhaust emissions, including NO<sub>x</sub>, pursuant to ADR 79; or
- b. where an applicant had previously obtained approval from a regulator in another country pursuant to the United Nations Economic Commission for Europe (**ECE**) Regulation 83 (the relevant versions of which were relevantly identical to Appendix A of ADR 79 at material times), a copy of the relevant ECE approval number previously obtained as evidence of compliance with the maximum permitted levels of exhaust emissions, including NO<sub>x</sub>, contained in ADR 79.

15. [Deleted]

16. [Deleted]

17. At all material times, ADR 79 required that the components liable to affect the emission of pollutants be so designed, constructed and assembled as to enable the vehicle, in normal use, despite the vibration to which they may be subjected, to comply with the provisions of ADR 79.

*Particulars*

(i) *ADR 79/01, 79/02 and 79/03, Appendix A, rule 5.1.1.*

17A. At all material times, ADR 79 required that the technical measures taken by the manufacturer shall be such as to ensure that in conformity with the provisions of ADR 79, exhaust gas and evaporative emissions were effectively limited throughout the normal life of the vehicle and under normal conditions of use.

*Particulars*

(i) *ADR 79/01, 79/02 and 79/03, Appendix A, rule 5.1.2.*

18. At all material times, ADR 79 prohibited the use of a defeat device in a new vehicle.

*Particulars*

(i) ADR 79/01, 79/02 and 79/03, Appendix A, rule 5.1.2.1.

### **The objective of ADR 79**

- 18A. Diesel vehicles produce a range of pollutant emissions which include emissions of NO<sub>x</sub>, being nitric oxide (chemical symbol: NO) and nitrogen dioxide (chemical symbol: NO<sub>2</sub>).
- 18B. Nitrogen dioxide is a pungent acid gas, which in the atmosphere may:
- a. irritate respiratory systems;
  - b. exacerbate asthma in susceptible individuals;
  - c. increase susceptibility to cardiovascular disease symptoms and respiratory infections; and
  - d. reduce lung function.
- 18C. Nitrogen dioxide is also a precursor to photochemical smog and therefore further contributes to the adverse effects of substances comprising photochemical smog (principally ozone, whose effects include irritation of the eyes and airways, exacerbation of asthma symptoms in susceptible people, increased susceptibility to infection, and acute respiratory symptoms such as coughing, and also has adverse effects on vegetation and other materials).
- 18D. Motor vehicles are a major contributor to NO<sub>x</sub> emissions in the environment, especially in urban areas.
- 18E. The objective of ADR 79, and its diesel fuel elements, is to reduce the adverse effects of motor vehicle emissions on urban air quality and human health, including the adverse effects of NO<sub>x</sub> referred to above (the **ADR 79 Objective**).

### **The NEDC Driving Cycle**

- 18F. The NEDC was developed by the European Commission and the United Nations Economic Commission for Europe and provides a basis for verifying compliance with emission limits set by motor vehicle regulations and standards.
- 18G. The NEDC is based on a simulation of normal driving conditions, that is, the driving cycle is intended to simulate on a chassis dynamometer normal operating conditions

on the road.

18H. The NEDC is divided into two parts, the first part simulates the driving conditions in an urban area and the second part simulates the driving conditions in extra-urban (that is, outside of urban) areas.

18I. At all material times, it was a purpose of the NEDC to:

- a. quantify vehicle emissions to be expected from a vehicle under normal driving conditions; and
- b. assure reproducibility and comparability of emissions test results.

18J. At all material times, the testing procedures provided in ADR 79, based on the NEDC, seek to give effect to the ADR 79 Objective.

18K. The prohibition on a defeat device in ADR 79 is intended to give effect to the ADR 79 Objective by ensuring that a motor vehicle's performance in the Type I test is indicative of the vehicle's performance in comparable normal driving conditions.

## **Registration Requirements**

19. At all material times, it was an offence under State and Territory laws for a person to use a motor vehicle on a road that did not comply with the applicable vehicle standards for the vehicle.

### *Particulars*

- (i) *Road Transport (Vehicle Registration) Regulation 2007 (NSW), Reg. 52(1);*
- (ii) *Road Safety (Vehicles) Regulations 2009 (Vic), Reg 258(2) (formerly, Road Safety (Vehicles) Regulations 1999 (Vic), Reg 819(3));*
- (iii) *Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 2010 (Qld), Reg. 5(1) (formerly Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 1999, Reg. 5(1));*
- (iv) *Road Traffic Act 1961 (SA), s 116(1), 117(1) and 118(1);*

- (v) *Road Traffic (Vehicles) Regulations 2014 (WA), Reg 232 (formerly, Road Traffic (Vehicle Standards) Regulations 2002, Reg. 8);*
- (vi) *Road Transport (Vehicle Registration) Regulation 2000 (ACT), Reg 109(2);*
- (vii) *Motor Vehicles (Standards) Regulations (NT), Reg 35;*
- (viii) *Vehicles and Traffic (Vehicle Standards) Regulations 2014 (Tas), Reg 4(1)(a) (formerly, Vehicles and Traffic (Vehicle Standards) Regulation 2001 (Tas), Reg 4(1)(a))*

20. At all material times, ADR 79 applied to the design and construction of motor vehicles and accordingly was an applicable vehicle standard for the purposes of State and Territory laws.

#### *Particulars*

- (i) *Road Transport (Vehicle Registration) Regulation 2007 (NSW), Schedule 2, clause 11 and 12;*
- (ii) *Road Safety (Vehicles) Regulation 2009 (Vic), Schedule 2, clause 19 and 20 (formerly, Road Safety (Vehicles) Regulations 1999 (Vic), Schedule 8, clause 19 and 20);*
- (iii) *Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 2010 (Qld), Schedule 1, clause 7 and 8 (formerly, Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 1999 (Qld), Schedule 1, clause 7 and 8);*
- (iv) *Road Traffic (Light Vehicle Standards) Rules 2013 (SA), Reg 19 and 20 (formerly, Road Traffic (Light Vehicle Standards) Rules 1999 (SA), Reg. 19 and 20);*
- (v) *Road Traffic (Vehicles) Regulations 2014 (WA), Reg 236 and 238 (formerly, Road Traffic (Vehicle Standards) Rules 2002 (WA) Rule 13 and 14, respectively);*
- (vi) *Road Transport (Vehicle Registration) Regulation 2000 (ACT), Schedule 1, clause 1.15 and 1.16;*
- (vii) *Motor Vehicles (Standards) Regulations - Australian Vehicle Standards Rule (1989) (NT), Reg 19 and 20;*

- (viii) *Vehicles and Traffic (Vehicle Standards) Regulation 2001 (Tas), Reg 19 and 20.*

21. At all material times, it was an offence under State and Territory laws for a person to use an unregistered motor vehicle on a road.

*Particulars*

- (i) *Road Transport Act 2013 (NSW), s 68(1) (formerly, Road Transport (Vehicle Registration) Act 1997 (NSW), s 18);*
- (ii) *Road Safety Act 1986 (Vic), s 7(1);*
- (iii) *Transport Operations (Road Use Management—Vehicle Registration) Regulation 2010 (Qld), Reg. 11 (formerly Transport Operations (Road Use Management – Vehicle Registration) Regulation 1999 (Qld), Reg 13);*
- (iv) *Motor Vehicles Act 1959 (SA), s. 9;*
- (v) *Road Traffic (Vehicles) Act 2012 (WA), s. 4 (formerly, Road Traffic Act 1974 (WA), s 15);*
- (vi) *Road Transport (Vehicle Registration) Act 1999 (ACT), s. 18(1);*
- (vii) *Traffic Act (NT), s. 33(1);*
- (viii) *Vehicle and Traffic Act 1999 (Tas), s. 27(1).*

22. At all material times, for a motor vehicle to be eligible for registration without conditions under State and Territory laws, except in the Northern Territory, it was required to comply with the applicable vehicle standards for the vehicle.

*Particulars*

- (i) *Road Transport (Vehicle Registration) Regulation 2007 (NSW), Reg. 6(1);*
- (ii) *Road Safety (Vehicles) Regulation 2009 (Vic), Reg. 14(1) and 29(1) (formerly Road Safety (Vehicles) Regulations 1999 (Vic) Reg. 202(1) and 214(1), respectively);*
- (iii) *Transport Operations (Road Use Management—Vehicle*

*Registration) Regulation 2010 (Qld), Reg. 9 (formerly, Transport Operations (Road Use Management—Vehicle Registration) Regulation 1999 (Qld), Reg. 8);*

- (iv) *Motor Vehicles Act 1959 (SA), s 24(1);*
- (v) *Road Traffic (Vehicles) Regulations 2014 (WA), Reg. 34 (formerly, Road Traffic (Licensing) Regulations 1975 (WA), Reg 9(2));*
- (vi) *Road Transport (Vehicle Registration) Regulation 2000 (ACT), Reg. 26(1);*
- (vii) [Deleted]
- (viii) *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010 (Tas), Reg. 52(1) (formerly, Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2000 (Tas), Reg. 45(1)).*

23. At all material times, an application for registration or renewal of registration could be refused under State and Territory laws, except in the Northern Territory, if the vehicle did not comply with the applicable vehicle standards.

#### *Particulars*

- (i) *Road Transport (Vehicle Registration) Regulation 2007 (NSW), Reg 6(1), 12(1) and 30(7);*
- (ii) *Road Safety (Vehicles) Regulation 2009 (Vic), Reg 14(1), 29(1) and 69(4) (formerly Road Safety (Vehicles) Regulations 1999 (Vic) Reg 202, 214(1) and 227(7), respectively);*
- (iii) *Transport Operations (Road Use Management—Vehicle Registration) Regulation 2010 (Qld), Reg. 17(1) and 43(11) (formerly, Transport Operations (Road Use Management—Vehicle Registration) Regulation 1999 (Qld), Reg. 14(1) and 37(11), respectively);*
- (iv) *Motor Vehicles Act 1959 (SA), s 24(3);*
- (v) *Road Traffic (Vehicles) Act 2012 (WA), s 5(3)(a)(i) (formerly, the Road Traffic Act 1974 (WA), s. 17(2));*

- (vi) *Road Transport (Vehicle Registration) Regulation 2000 (ACT), Reg 26(1), 32(1)(a) and 68(9)(a);*
- (vii) [Deleted]
- (viii) *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010 (Tas), Reg 57(1), 59(2) and 68(2) (formerly, Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2000 (Tas), Reg. 49(1), 51(2)(a) and 60(2), respectively).*

24. At all material times, a motor vehicle's registration could be suspended or cancelled under State and Territory laws, except in the Northern Territory, if the vehicle did not comply with the applicable vehicle standards.

*Particulars*

- (i) *Road Transport (Vehicle Registration) Regulation 2007 (NSW), Reg 41(1);*
- (ii) *Road Safety (Vehicles) Regulation 2009 (Vic), Reg. 114(b), 115(1) and 117 (formerly Road Safety (Vehicles) Regulations 1999 (Vic) Reg. 245(1)(b) and 245(2), respectively);*
- (iii) *Transport Operations (Road Use Management—Vehicle Registration) Regulation 2010 (Qld), Reg 58(1) and (2) (formerly, Transport Operations (Road Use Management—Vehicle Registration) Regulation 1999 (Qld), Reg. 48(1) and (2));*
- (iv) *Motor Vehicles Act 1959 (SA), s 55A(1);*
- (v) *Road Traffic (Vehicles) Act 2012 (WA), s 9(1) and (2) (formerly, the Road Traffic Act 1974 (WA), s. 23A);*
- (vi) *Road Transport (Vehicle Registration) Regulation 2000 (ACT), Reg 84(1)(b);*
- (vii) *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010 (Tas), Reg 52(1)(a) and 72(1)(b) (formerly, Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2000 (Tas), Reg. 45(1)(a) and 64(1)(b)).*

25. At all material times, a motor vehicle's registration could be refused or suspended or cancelled if, at the relevant time:
- a. under New South Wales laws:
    - (i) the vehicle is not an eligible vehicle;
    - (ii) the relevant authority reasonably believes that information given in the application for registration is false or misleading;
    - (iii) a defect notice issued in relation to the vehicle has not been complied with and the date for compliance specified in the notice has expired;
    - (iv) the relevant authority reasonably believes that the ownership, possession, control or description of the registrable vehicle (or of any part of the registrable vehicle) as recorded on the Register is uncertain;
    - (v) the registration has been issued erroneously;
  - b. under Victorian laws:
    - (i) the vehicle is not eligible for registration;
    - (ii) the relevant authority reasonably believes that information given in the application is false or misleading;
    - (iii) the relevant authority reasonably believes that the vehicle or part of the vehicle has, or may have, been illegally imported;
    - (iv) a vehicle defect notice relating to the vehicle has not been complied with and the date for compliance specified in the notice has expired;
    - (v) the relevant authority reasonably believes the ownership, possession, control or description of the vehicle as recorded on the register is uncertain;
    - (vi) the relevant authority reasonably believes the vehicle or part of the vehicle has, or may have, been illegally imported;
  - c. under Queensland laws:
    - (i) the relevant authority reasonably believes information given in the application is false or misleading;

- (ii) the approval was issued because of a document or representation that is false or misleading or obtained or made in another improper way;
  - (iii) a defect notice issued in relation to the vehicle has not been complied with and the date for compliance specified in the notice had expired;
- d. under South Australian laws:
  - (i) the relevant authority reasonably believes that information disclosed in the application for registration or any evidence provided by the applicant is or may be inaccurate, incomplete or misleading;
  - (ii) the relevant authority reasonably believes that information recorded in the register of motor vehicles in relation to the vehicle is or may be inaccurate, incomplete or misleading;
  - (iii) the vehicle was registered in error;
  - (iv) the vehicle has been suspended and the reason for suspension still exists following a period of notice;
- e. under Australian Capital Territory laws:
  - (i) the vehicle is not an eligible vehicle;
  - (ii) the relevant authority believes on reasonable grounds that information given in, or in relation to, the application for registration is false, misleading or incomplete in a material particular;
  - (iii) a defect notice issued in relation to the vehicle has not been complied with and the date for compliance specified in the notice has expired;
  - (iv) the ownership, possession, control or description of the vehicle as recorded in the register is uncertain;
  - (v) the vehicle has been registered in error;
- f. under Northern Territory laws:
  - (i) the registration of a motor vehicle has been obtained by fraud or deception;
  - (ii) the motor vehicle has been registered in error;
  - (iii) [Deleted]

g. under Tasmanian laws:

- (i) the relevant authority reasonably believes that information given in or in relation to the application for registration is false or misleading;
- (ii) the vehicle has been registered in error;
- (iii) the vehicle is no longer eligible for registration;
- (iv) the responsibility for the vehicle or the description of the vehicle as recorded in the register of motor vehicles and trailers is uncertain;
- (v) a vehicle defect notice has been issued in respect of the vehicle, the time for compliance with the notice has passed, and the notice has not been complied with.

*Particulars*

- (i) *Road Transport (Vehicle Registration) Regulation 2007 (NSW), reg 12(1) and 41(1);*
- (ii) *Road Safety (Vehicles) Regulation 2009 (Vic), reg 29, 69(4), 114 and 117 (formerly, Road Safety (Vehicles) Regulations 1999 (Vic) reg 214(2), 227(7), 245(1) and 245(2), respectively);*
- (iii) *Transport Operations (Road Use Management) Act 1995 (Qld) s 18(1) and Transport Operations (Road Use Management—Vehicle Registration) Regulation 2010 (Qld), Reg. 17(1) and Schedule 7, clause 1 (formerly, Transport Operations (Road Use Management—Vehicle Registration) Regulation 1999 (Qld), reg 47);*
- (iv) *Motor Vehicles Act 1959 (SA), s 24(3) and 55A(1);*
- (v) *Road Transport (Vehicle Registration) Regulation 2000 (ACT), reg 32(1), 84(1);*
- (vi) *Motor Vehicles Act (NT), s 102(2), 128A(14);*
- (vii) *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010 (Tas), reg 57(2), 68(2) and 72(1) (formerly, Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2000 (Tas), reg 49(2) and 60(2), respectively).*

26. At all material times, State and Territory laws, except in the Northern Territory, gave authorised officers and police officers the power to inspect a motor vehicle to determine if it complied with the applicable vehicle standards, and on discovering that it did not, the power to:
- a. issue a warning or a defect notice;
  - b. impose conditions on the use of the vehicle; or
  - c. prohibit the use of the vehicle.

*Particulars*

- (i) *Road Transport Act 2013 (NSW), s 76(4) (formerly, Road Transport (Vehicle Registration) Act 1997 (NSW) s 26 (2)) and the Road Transport (Vehicle Registration) Regulation 2007 (NSW), Reg 70;*
- (ii) *Road Safety Act 1986 (Vic), s 13(2) and 14;*
- (ii) *Transport Operations (Road Use Management) Act 1995 (Qld) s 34(2), s 36(1) and Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 2010 (Qld), Reg 8 (formerly, Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 1999 (Qld), Reg. 14);*
- (iv) *Road Traffic Act 1961 (SA), s 40Q(2) and 145;*
- (v) *Road Traffic (Administration) Act 2008 (WA), s 52(2) and Road Traffic (Vehicles) Act 2012 (WA), s 71(1) (formerly Road Traffic (Vehicle Standards) Regulations 2002, Reg 61 and 62(1));*
- (vi) *Road Transport (Vehicle Registration) Act 1999 (ACT), s 25;*
- (vii) [Deleted]
- (vii) *Vehicles and Traffic Act 1999 (Tas), s 49(1)(f) and Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010 (Tas), Reg. 85 (formerly, Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2000 (Tas), Reg. 68).*

**PART C. DEFECT DEVICES INSTALLED IN VW VEHICLES**

27. During the period from approximately 2008 to 2015, VW AG installed in certain VW diesel vehicles a form of software in the vehicle's management system designed to

detect when the vehicle was undergoing an emissions test and activate or maximise parts of the emission control systems in the vehicle so as to reduce the output of NOx in a way that did not occur, or did not occur to the same extent, in normal use of the vehicle or in normal driving conditions (**defeat device**).

#### *Particulars*

- (i) In about 22 September 2015, VW AG announced that some eleven million vehicles worldwide were affected by “irregularities concerning a particular software used in diesel engines” and that “a noticeable deviation between bench test results and actual road use was established solely for this type of engine”, being the EA 189 engine;*
- (iA) On 3 October 2015, VW Australia announced that, effective immediately, there had been a “temporary suspension” of the sale of affected diesel vehicles fitted with 1.6 or 2.0 litre EA189 diesel engines. VW Australia announced that the suspension would “remain until the emission issues” were addressed in those vehicles.*
- (ii) On about 7 October 2015, VW Australia announced that 77,149 affected vehicles had been sold in Australia. Two days later, on about 9 October 2015, VW Australia revised this figure upwards to 83,593 vehicles;*
- (iiA) The engines in the affected vehicles operate in two modes: mode 1, in which the vehicle is operated in accordance with the NEDC, and which was designed to control NOx emissions in order to meet the relevant emissions standards; and mode 2, in which the vehicle operates at all other times, and which was not designed to control NOx emissions, or meet the relevant emissions standards;*
- (iiB) The affected vehicles operated in mode 1 upon starting and thereafter so long as various parameters corresponding to the NEDC were met, but otherwise operated in mode 2 until the vehicle was stopped and restarted in accordance with the NEDC parameters;*
- (iiC) NOx emissions are optimised in mode 1 through varying: (i) the operation of the vehicle’s exhaust gas recirculation system; (ii) fuel rail pressure; and (iii) the fuel injection strategy;*
- (iii) Further particulars of the exact number of affected VW diesel vehicles sold in Australia with the defeat device installed, and its operation, will be*

*supplied in due course, including following discovery.*

28. Under normal driving conditions, the defeat device de-activated parts of the vehicle's emission control system, or reduced the effectiveness of the emission control system, with the result that the vehicle's performance was enhanced but the vehicle emitted higher levels of NOx.

*Particulars*

- (i) *When operating in mode 2 the affected vehicles generally emit higher levels of NOx emissions than when operating in mode 1.*

29. Prior to 3 September 2015, VW AG concealed from, or alternatively, failed to disclose to, consumers and regulators that it had installed a defeat device in certain VW diesel vehicles, and the effect of that defeat device.
30. VW AG's concealment of, or alternatively, failure to reveal the existence of, the installation of the defeat device was deliberate.
31. A purpose and function of the defeat device was to convince regulators who tested the emission levels of VW vehicles fitted with the defeat device, or alternatively relied on test data submitted to them as to those emission levels, that these vehicles had lower emissions of NOx in normal use than was the case.
32. Further, a purpose and function of the defeat device was to convince relevant regulators who tested the emission levels of VW vehicles fitted with the defeat device or alternatively relied on test data submitted to them as to those emission levels and/or approvals previously granted by other regulators, that those vehicles complied with relevant emission control restrictions for NOx, when this was not the case.

*Particulars*

*The relevant emission control restrictions include:*

- (i) *European emissions standards, Euro IV (commenced January 2005), Euro V (commenced September 2011) and Euro VI (commenced September 2014);*

(ii) [Deleted]

(iii) ADR 79.

33. The parts of the emission control systems that are activated or maximised by the defeat device, when the device detects an emission test, operate so as to reduce NOx emissions, but if activated or maximised in normal driving conditions would reduce NOx emissions at the expense of vehicle performance, fuel economy, the durability of vehicle components, and/or the comfort and driveability of the vehicle.
34. A purpose and function of the defeat device was to persuade the relevant regulators and consumers that VW vehicles fitted with such a device had a combination of emissions control, performance, and fuel economy that was in fact impossible for that vehicle to achieve in normal use or normal driving conditions.

#### **PART D. AFFECTED VW DIESEL VEHICLES IN AUSTRALIA**

35. At all material times, VW AG manufactured for sale in Australia the following types of diesel vehicles which were fitted with a four cylinder "EA 189" 1.6L or 2.0L engine and which contained the defeat device (as defined in paragraph 27 above) (the **affected VW diesel vehicles**):
- a. Golf (including Golf Wagon);
  - b. Polo;
  - c. Jetta;
  - d. Passat CC;
  - e. Volkswagen CC;
  - f. Passat;
  - g. Eos;
  - h. Tiguan;
  - i. Caddy; and

j. Amarok.

**Defeat device**

36. At all material times, VW AG was aware that the affected VW diesel vehicles had a defeat device.
37. At all material times, VW AG was aware that the purpose and function of the defeat device was as pleaded in paragraphs 31 to 34 above.
38. [Deleted]
39. [Deleted]
40. By reason of the matters pleaded in paragraphs 27 and 28, the affected VW diesel vehicles failed to comply with the requirements of ADR 79 in one or more of the following respects:
  - a. without the use of the defeat device, the affected VW diesel vehicles would not have met the requirements of the Type I test for the maximum permitted level of NOx set by ADR 79;
  - b. the components of the EA 189 engine liable to affect the emission of pollutants, and therefore the EA 189 engine itself, were not designed, constructed and assembled as to enable the vehicle, in normal use, to comply with the provisions of ADR 79;
  - c. the defeat device was a 'defeat device' within the meaning of ADR 79; and
  - d. VW AG did not ensure, in conformity with the provisions of ADR 79, that exhaust gases were effectively limited throughout the normal life of the vehicle and under normal conditions of use.

## *Particulars*

- (i) In or about May 2014, independent researchers at the Centre for Alternative Fuels, Engines and Emissions at West Virginia University (WVU) conducted an emissions study on vehicles including a Volkswagen 2012 Jetta and a 2013 Passat with an EA 189 engine. The study was commissioned by the International Council for Clean Transportation. The emissions testing of the two Volkswagen vehicles revealed NOx emissions of between 0.344 and 1.505 g/km, depending on drive conditions, which exceed the maximum levels permitted under ADR 79;*
- (ii) On or about 3 September 2015, VW AG admitted that four cylinder diesel vehicles from model years 2009 to 2015 were designed and manufactured with a defeat device;*
- (iii) On or about 3 October 2015, the VW Australia suspended the sale of vehicles fitted with 1.6L or 2.0L EA189 diesel engines in Australia;*
- (iv) The website for Volkswagen.com.au contained the following information under the heading 'Diesel Information':*

*"As you may be aware, there have been press reports about the emissions of a selection of Volkswagen diesel vehicles.*

*Volkswagen Australia deeply regrets these issues and wants to ensure that our owners are well-informed about our action plan and next steps regarding this topic.*

*Is my vehicle affected?*

*If you currently own a 1.6L or 2.0L 4 cylinder TDI Volkswagen, your vehicle may be affected.*

*Q: What is the problem on the affected vehicles?*

*A: The emission levels may not meet the regulatory requirements when the affected vehicle is driven under normal conditions;*

- (ivA) A product safety recall on the Australian Competition and Consumer Commission website contains the following information under the*

*heading: 'Volkswagen Group Australia Pty Ltd—1.6L and 2.0L Diesel Engines in Various VW Vehicles; PRA number: 2015/14950; Date published: 9th Oct 2015':*

***“What are the defects?***

*The emissions levels may not meet the regulatory requirements when the affected vehicle is driven under normal conditions.*

***What are the hazards?***

*The vehicle may not comply with emissions standards when driven under normal conditions.*

***Supplier***

*Volkswagen Group Australia Pty Ltd*

***Traders who sold this product***

*Authorised Volkswagen dealers*

***Where the product was sold***

*Nationally”*

(v) *Further particulars may be provided following discovery.*

40A. In the alternative to paragraph 40(c), if the defeat device did not fall within the definition of a defeat device in ADR 79, it was nonetheless a device which:

- a. had the effect that the affected VW diesel vehicles produced lower NOx emissions under NEDC test conditions than under normal on-road driving conditions;
- b. had the effect that, but for the use of the defeat device, the affected VW diesel vehicles would not have complied with the emission limits set by ADR 79; and
- c. defeated the purpose of the prohibition on the use of defeat devices as pleaded above in paragraph 18K

**(defeat device equivalent).**

### **Compliance plates fixed to affected VW diesel vehicles**

41. Notwithstanding the matters pleaded in paragraphs 27 to 40A, in purported compliance with ADR 79, VW AG, and further or alternatively VW Australia, sought and obtained approval from the Commonwealth to fix compliance plates to affected VW diesel vehicles.
42. VW AG, and further or alternatively VW Australia, in seeking approval from the Commonwealth to fix compliance plates to affected VW diesel vehicles, did not disclose:
  - a. that the affected VW diesel vehicles were fitted with a defeat device contrary to ADR 79 (as pleaded above in paragraph 40) or, alternatively, a defeat device equivalent (as pleaded above in paragraph 40A);
  - b. that the affected VW diesel vehicles did not comply with ADR 79 as pleaded in paragraph 40.
43. Having obtained approval from the Commonwealth to do so, VW AG, and further or alternatively, VW Australia, fitted the affected VW diesel vehicles with compliance plates prior to their supply, distribution or sale.

### **Affected VW Diesel Vehicles Failed to Comply with Registration Requirements**

44. By failing to comply with ADR 79, the affected VW diesel vehicles failed to comply (and continue to fail to comply) with the requirements for registration and/or use of a motor vehicle on a road under the relevant State and Territory regulations as pleaded in paragraphs 19 to 26.
45. By reason of the matters pleaded in the previous paragraph, the affected VW diesel vehicles were not and are not lawfully able to be registered in Australia, and/or driven on public roads in Australia, other than in the Northern Territory, at any time.

### **PART E. TPA and ACL CLAIMS**

46. The conduct of VW AG and VW Australia as pleaded in this Statement of Claim was conduct in trade and commerce.
47. At all material times, affected VW diesel vehicles were:

- a. “goods” within the meaning of s 4 of the TPA and s 2 of the ACL, in that they were vehicles;
  - b. “goods” within the meaning of s 74A(2)(a) of the TPA, in that they were goods of a kind ordinarily acquired for personal, domestic or household use;
  - c. “consumer goods” within the meaning of s 2 of the ACL, in that they were goods that were intended to be used, and were of a kind likely to be used, for personal, domestic or household use or consumption; and
  - d. goods that were intended to be used, or were of a kind likely to be used, by a consumer within the meaning of s 65C of the TPA.
48. At all material times, the Applicants and Group Members acquired their interests in the affected VW diesel vehicles as consumers, within the meaning of s 4B of the TPA in that:
- a. the amount paid to acquire the affected VW diesel vehicles did not exceed \$40,000; or
  - b. the affected VW diesel vehicles were of a kind ordinarily acquired for personal, domestic or household use; or
  - c. the affected VW diesel vehicles were acquired for use principally in the transport of goods on public roads;
- or further or alternatively, the Group Members are persons who acquired their interests in the affected diesel VW vehicles from, or derived title to the affected VW vehicles through or under, a consumer for the purposes of sections 74D and 74G of the TPA.
49. At all material times, the Applicants and Group Members acquired their interests in the affected VW diesel vehicles as consumers, within the meaning of s 3 of the ACL, in that:
- a. the amount paid to acquire the affected VW diesel vehicles did not exceed \$40,000; or
  - b. the affected VW diesel vehicles were of a kind ordinarily acquired for personal, domestic or household use; or

- c. the affected VW diesel vehicles were acquired for use principally in the transport of goods on public roads;

or further or alternatively, the Group Members are persons who acquired their interests in the affected VW diesel vehicles from (other than for the purpose of re-supply), or derived title to the affected VW diesel vehicles through or under, a consumer and are thus “affected persons” within the meaning of sub-paragraphs (b) or (c) of the definition of “affected person” in section 2 of the ACL.

## **PART E1. MISLEADING OR DECEPTIVE CONDUCT**

### **VW Compliance Representation by VW AG/VW Australia**

- 50. By the conduct pleaded in paragraphs 4(i) to (k) and 43, VW AG manufactured, supplied and otherwise dealt with the affected VW diesel vehicles as vehicles that were for use as road vehicles in Australia, and further or alternatively affixed a compliance plate certifying compliance with Australian vehicle standards, and thereby made a representation to all persons acquiring or dealing with the affected VW diesel vehicles that the affected VW diesel vehicles complied with the applicable legal requirements for road vehicles in Australia (**the VW Compliance Representation**).
- 51. Further, or alternatively, by the conduct pleaded in paragraphs 5(g) and (h) above, VW Australia distributed, promoted and otherwise dealt with the affected VW diesel vehicles as vehicles that were for use as road vehicles in Australia, and that had affixed a compliance plate certifying compliance with Australian vehicle standards, and thereby made the VW Compliance Representation.
- 52. The Applicants and Group Members purchased or otherwise acquired interests in the affected VW diesel vehicles because of the VW Compliance Representation.
- 53. By reason of the matters pleaded above in paragraph 40, the VW Compliance Representation was false or misleading.
- 54. By reason of the conduct pleaded in paragraphs 50 and 53, VW AG engaged in conduct in trade or commerce that was misleading or deceptive, or alternatively was likely to mislead or deceive, in contravention of s 52 of the TPA and s 18 of the ACL.
- 55. By reason of the conduct pleaded in paragraphs 51 and 53, VW Australia engaged in conduct in trade or commerce that was misleading or deceptive, or alternatively was likely to mislead or deceive, in contravention of s 52 of the TPA and s 18 of the ACL.

### **VW ADR 79 Compliance Representation by VW AG/VW Australia**

56. By reason of the matters pleaded in paragraph 41 above, VW AG, and further or alternatively VW Australia, represented to the Commonwealth that the affected VW diesel vehicles were compliant with ADR 79 (the **VW ADR 79 Compliance Representation**).

#### *Particulars*

- (i) The representation was made with respect to each model of affected VW diesel vehicles;*
- (ii) The representation was contained in each application for these models submitted pursuant to s 10A of the Motor Vehicle Standards Act;*
- (iii) Further particulars may be provided following discovery and subpoenas in the proceedings, including production of the relevant applications.*

57. The Commonwealth relied upon the VW ADR 79 Compliance Representation in:

- a. granting approval to each model of affected VW diesel vehicles in accordance with s 10A of the Motor Vehicle Standards Act; and
- b. granting approval for VW AG, or further and alternatively, VW Australia, to fit a compliance plate to each model of affected VW diesel vehicles.

58. By reason of the matters pleaded in paragraph 40, the VW ADR 79 Compliance Representation was false or misleading, in that the affected VW diesel vehicles were not compliant with ADR 79.

59. By reason of the conduct pleaded in paragraphs 56 and 58, VW AG, and further and alternatively VW Australia, engaged in conduct in trade or commerce that was misleading or deceptive, or alternatively was likely to mislead or deceive, in contravention of s 52 of the TPA and s 18 of the ACL.

### **VW Non-Modification Representation by VW AG/VW Australia**

- 59A. By reason of the matters pleaded in paragraph 41 above, VW AG, and further or alternatively VW Australia, represented to the Commonwealth that the affected VW

diesel vehicles had not been modified to operate in a different mode to that used in normal driving conditions when undergoing testing for compliance with emissions standards (**the VW Non-Modification Representation**).

*Particulars*

- (i) *The representation was made with respect to each model of affected VW diesel vehicles;*
- (ii) *The representation was contained in each application for these models submitted pursuant to s 10A of the Motor Vehicle Standards Act;*
- (iii) *Further particulars may be provided following discovery and subpoenas in the proceedings, including production of the relevant applications.*

59B. The Commonwealth relied upon the VW Non-Modification Representation in:

- a. granting approval to each model of affected VW diesel vehicles in accordance with s 10A of the Motor Vehicle Standards Act; and
- b. granting approval for VW AG, or further and alternatively, VW Australia, to fit a compliance plate to each model of affected VW diesel vehicles.

59C. By reason of the matters pleaded in paragraphs 27-28, 31-34 and 40 or alternatively 40A above, the VW Non-Modification Representation was false or misleading, in that the affected VW diesel vehicles had been modified by the installation of the defeat device.

59D. By reason of the conduct pleaded in paragraphs 59A and 59C, VW AG, and further and alternatively VW Australia, engaged in conduct in trade or commerce that was misleading or deceptive, or alternatively was likely to mislead or deceive, in contravention of s 52 of the TPA and s 18 of the ACL.

**Misleading or deceptive silence by VW AG/VW Australia**

60. Further or in the alternative, by manufacturing the affected VW diesel vehicles for supply to and sale in Australia, and applying for and obtaining approval to affix compliance plates to those vehicles as pleaded in paragraph 41, VW AG created a reasonable expectation:

- a. on the part of the Commonwealth; and
- b. on the part of persons acquiring an interest in an affected VW diesel vehicle,

that:

- c. the affected VW diesel vehicles complied with the applicable legal requirements for road vehicles in Australia; and
- d. further or alternatively, that the affected VW diesel vehicles did not contain a defeat device, or alternatively a defeat device equivalent.

61. Given that reasonable expectation on the part of the Commonwealth and the persons referred to in the previous paragraph, VW AG's failure to disclose that the affected VW diesel vehicles had been fitted with a defeat device, or alternatively a defeat device equivalent, was misleading or deceptive conduct or conduct that was likely to mislead or deceive in that:

- a. if the Commonwealth had been aware that the affected VW diesel vehicles contained the defeat device, or a defeat device equivalent, then the Commonwealth would not have approved the affected VW diesel vehicles as complying with ADR 79 and the vehicles would not have been sold in Australia; and
- b. if the Applicants and Group Members had been aware that the affected VW diesel vehicles contained the defeat device, or a defeat device equivalent, then they would not have acquired an interest in an affected VW diesel vehicle.

62. By reason of the conduct pleaded in paragraphs 60 and 61, VW AG engaged in conduct in trade or commerce that was misleading or deceptive, or alternatively was likely to mislead or deceive, in contravention of s 52 of the TPA and s 18 of the ACL.

63. Further or in the alternative, by distributing the affected VW diesel vehicles in Australia, and applying for and obtaining Commonwealth approval to affix compliance plates to those vehicles, VW Australia created a reasonable expectation:

- a. on the part of the Commonwealth; and
- b. on the part of persons acquiring an interest in an affected VW diesel vehicle,

that:

- c. the affected VW diesel vehicles complied with the applicable legal requirements for road vehicles in Australia; and
  - d. further or alternatively, that the affected VW diesel vehicles did not contain a defeat device, or alternatively a defeat device equivalent.
64. Given that reasonable expectation on the part of the Commonwealth and the persons referred to in the previous paragraph, VW Australia's failure to disclose that the affected VW diesel vehicles had been fitted with a defeat device, or alternatively a defeat device equivalent, was misleading or deceptive conduct or conduct that was likely to mislead or deceive in that:
- a. if the Commonwealth had been aware that the affected VW diesel vehicles contained the defeat device, or alternatively a defeat device equivalent, then the Commonwealth would not have approved the affected VW diesel vehicles as complying with ADR 79 and the vehicles would not have been sold in Australia; and
  - b. if the Applicants and Group Members had been aware that the affected VW diesel vehicles contained a defeat device, or alternatively a defeat device equivalent, then they would not have acquired an interest in an affected VW diesel vehicle.
65. By reason of the conduct pleaded in paragraphs 63 and 64, VW Australia engaged in conduct in trade or commerce that was misleading or deceptive, or alternatively was likely to mislead or deceive, in contravention of s 52 of the TPA and s 18 of the ACL.

#### **False or misleading representation**

66. Further or in the alternative, by reason of the conduct pleaded in paragraph 50, VW AG made a false or misleading representation in trade or commerce in connection with the promotion of the supply of motor vehicles, that the affected VW diesel vehicles:
- a. were of a particular standard and quality, in that VW AG falsely represented that the affected VW diesel vehicles were compliant with applicable legal requirements for road vehicles in Australia, when that was not the case, in contravention of s 53(a) of the TPA and s 29(1)(b) of the ACL;

- b. had certain performance characteristics, uses or benefits, in that VW AG falsely represented that the affected VW diesel vehicles were able to be registered and used on public roads in Australia, when that was not the case, in contravention of s 53(c) of the TPA and s 29(1)(g) of the ACL.

67. Further or in the alternative, by reason of the conduct pleaded in paragraph 56, VW AG made a false or misleading representation in trade or commerce in connection with the promotion of the supply of motor vehicles, that the affected VW diesel vehicles:

- a. were of a particular standard or quality, in contravention of s 53(a) of the TPA and s 29(1)(b) of the ACL; and
- b. had particular performance characteristics and benefits, contravention of s 53(c) of the TPA and s 29(1)(g) of the ACL,

in that VW AG represented the following matters, each of which was not in fact true:

- c. that the affected VW diesel vehicles did not contain a defeat device;
- d. that the components of the affected VW diesel vehicles liable to affect the emission of pollutants were designed, constructed and assembled as to enable the vehicles, in normal use, despite the vibration to which they may be subjected, to comply with the provisions of ADR 79; and
- e. that the technical measures taken by the manufacturer of the affected VW vehicles were such as to ensure that in conformity with the provisions of ADR 79, exhaust gas and evaporative emissions were effectively limited throughout the normal life of the vehicles and under normal conditions of use.

68. Further or in the alternative, by reason of the conduct pleaded in paragraph 51, VW Australia made a false or misleading representation in trade or commerce in connection with the promotion of the supply of motor vehicles, that the affected VW diesel vehicles:

- a. were of a particular standard and quality, in that VW Australia falsely represented that the affected VW diesel vehicles were compliant with

applicable legal requirements for road vehicles in Australia, when that was not the case, in contravention of s 53(a) of the TPA and s 29(1)(b) of the ACL;

- b. had certain performance characteristics, uses or benefits, in that VW Australia falsely represented that the affected VW diesel vehicles were compliant with the ADRs in all respects such that they were able to be registered and used on public roads in Australia, when that was not the case, in contravention of s 53(c) of the TPA and s 29(1)(g) of the ACL.

69. Further or in the alternative, by reason of the conduct pleaded in paragraph 56, VW Australia made a false or misleading representation in trade or commerce in connection with the promotion of the supply of motor vehicles, that the affected VW diesel vehicles:

- a. were of a particular standard or quality, in contravention of s 53(a) of the TPA and s 29(1)(b) of the ACL; and
- b. had particular performance characteristics and benefits, in contravention of s 53(c) of the TPA and s 29(1)(g) of the ACL,

in that VW Australia represented the following matters, each of which was not in fact true:

- c. that the affected VW diesel vehicles did not contain a defeat device; and
- d. that the components of the affected VW diesel vehicles liable to affect the emission of pollutants were designed, constructed and assembled as to enable the vehicles, in normal use, despite the vibration to which they may be subjected, to comply with the provisions of ADR 79; and
- e. that the technical measures taken by the manufacturer of the affected VW diesel vehicles were such as to ensure that in conformity with the provisions of ADR 79, exhaust gas and evaporative emissions were effectively limited throughout the normal life of the vehicles and under normal conditions of use.

## **PART F. UNCONSCIONABLE CONDUCT**

70. The Applicants repeat paragraphs 4(g) to (l), 27 to 37, and 40 to 45.
71. The conduct by VW AG referred to in the previous paragraph occurred in circumstances where:
- a. VW AG concealed from regulators and from the Applicants and Group Members that various VW vehicles, including the affected VW diesel vehicles, had a defeat device, or alternatively, a defeat device equivalent;
  - b. that concealment was deliberate;
  - c. the purpose and function of the defeat device was as pleaded in paragraphs 31 to 34;
  - d. that purpose and function was achieved in the case of the Commonwealth, because the Commonwealth accepted at face value the results of emissions tests conducted by or for VW AG, unaware that the affected VW diesel vehicles had a defeat device, or alternatively, a defeat device equivalent, and that the results provided to the Commonwealth would not be indicative of NOx emissions in normal driving conditions;
  - e. VW AG thereby cheated on emissions tests in the process of obtaining regulatory approval to sell the affected VW diesel vehicles in Australia, and thereby obtained approval to sell the affected VW diesel vehicles in Australia as a result of that cheating;
  - f. the Commonwealth, and thereby the public (including consumers), were primarily reliant upon VW AG to conduct or procure any testing with integrity and without devices designed to subvert the testing;
  - g. VW AG also cheated on European emissions tests, in circumstances where affected VW diesel vehicles were advertised in Australia as complying with European emission standards and such compliance was a very relevant matter for consumers in Australia in considering whether to purchase an affected VW diesel vehicle;
  - h. consumers in Australia were in a considerably weaker position than VW AG, and had no means of knowing about the existence of the defeat device or that VW AG was engaged in cheating on emissions tests;

- i. the presence of the defeat device allowed VW AG to engage in an unfair comparison with other brands of vehicles in favour of VW AG, in that the performance and fuel economy figures that VW AG was able to promote for the affected VW diesel vehicles, and further and alternatively the cost of components for the vehicles and thus the final price of the vehicles and further and alternatively the comfort and driveability, were better than they would be if the vehicles did not have the defeat device and were complying at all times with emissions requirements. VW AG therefore engaged in unfair competition in order to garner additional sales and profits;
- ii. VW Australia published advertisements and marketing materials which falsely represented to consumers that the affected VW diesel vehicles were environmentally friendly, had clean burning engines, and/or produced low emissions, and complied with European emission standards. In producing this material, VW Australia relied on information that had been supplied by VW AG, which VW AG knew and intended that VW would rely upon. VW AG also reviewed and approved some of VW Australia's advertising and marketing materials before they were published. This advertising also allowed VW AG to engage in unfair competition with other vehicle manufacturers in order to garner additional sales and profits;
- j. as a consequence of the conduct of VW AG, Australian consumers have purchased large numbers of affected VW diesel vehicles that:
  - (i) have higher pollution outputs than consumers would have anticipated;
  - (ii) alternatively, if the vehicles are modified so as to remove the defeat device, will perform differently and feel different to drive than they did when purchased.

#### *Particulars*

- (i) *On 8 October 2015, the Chief Executive Officer of Volkswagen US said in testimony before the US congress that there may be a performance reduction resulting from the modification to fix the problem of excessive emissions;*
- (ii) *Further particulars may be provided following discovery.*

- k. in normal operation of the affected VW diesel vehicles, the defeat device operates so as to release significant and unnecessary quantities of pollutants into the atmosphere, thus contributing to poor air quality in Australia and unnecessarily exposing Australians to health risks and health effects, all so that VW AG could make additional sales and profits. VW AG thus deliberately, or knowingly, or recklessly, compromised the health and safety of Australians and the quality of the Australian environment for profit.
- 72. By reason of the matters referred to in the previous paragraph, VW AG, in trade or commerce, engaged in conduct in connection with the supply of goods that was, in all the circumstances, unconscionable, in contravention of s 51AB of the TPA, and s 21 of the ACL.
- 73. [Deleted]
- 74. [Deleted]
- 75. [Deleted]

**PART G.            FAILURE TO COMPLY WITH STATUTORY WARRANTIES AND  
GUARANTEES**

- 76. At all material times until 1 January 2011:
  - a. VW AG, in trade and commerce, manufactured and supplied the affected VW diesel vehicles to VW Australia, or alternatively, to VW authorised dealers and other retailers selling VW vehicles; and
  - b. VW authorised dealers and other retailers selling VW vehicles supplied the affected VW diesel vehicles to consumers.
- 77. Further, or alternatively, at all material times until 1 January 2011:
  - a. VW Australia, in trade and commerce, manufactured and supplied the affected VW diesel vehicles to VW authorised dealers and other retailers selling VW vehicles; and
  - b. VW authorised dealers and other retailers selling VW vehicles supplied the affected VW diesel vehicles to consumers.
- 78. At material times from 1 January 2011, affected VW diesel vehicles of which VW AG

and/or VW Australia were the manufacturer, were supplied to consumers, in trade and commerce, by VW authorised dealers and by other retailers selling VW vehicles, including second hand dealers.

**Action in respect of goods of unmerchantable quality: TPA**

79. By reason of the matters pleaded in paragraphs 40 and 40A, the affected VW diesel vehicles were not of merchantable quality because they:
- a. were unable lawfully to be registered or used on public roads in Australia; and
  - b. further or alternatively, possessed a defeat device in contravention of ADR 79.
80. Further, by reason of the matters pleaded in paragraphs 40 and 40A, the affected VW diesel vehicles were not of merchantable quality because they:
- a. were unable to be registered or used on public roads in Australia other than in the Northern Territory;
  - b. further or alternatively, possessed a defeat device in contravention of ADR 79.
81. As pleaded in paragraphs 88 to 122, the Applicants and Group Members suffered loss or damage by reason of the fact that the affected VW diesel vehicles were not of merchantable quality.
82. Accordingly, by reason of the matters pleaded above in paragraphs 76, and 79 to 81, VW AG is liable to compensate the Applicants and:
- a. Group Members who acquired their interest in an affected VW diesel vehicle prior to 1 January 2011;
  - b. Group Members who acquired their interest in an affected VW diesel vehicle on or after 1 January 2011 in circumstances where the vehicle was one to which paragraph 76 applies,
- for the loss or damage, in accordance with s 74D of the TPA.
83. Further or alternatively, by reason of the matters pleaded above in paragraphs 77, and 79 to 81, VW Australia is liable to compensate the Applicants and:
- a. Group Members who acquired their interest in an affected VW diesel vehicle prior to 1 January 2011;

- b. Group Members who acquired their interest in an affected VW diesel vehicle on or after 1 January 2011 in circumstances where the vehicle was one to which paragraph 77 applies,

for the loss or damage, in accordance with s 74D of the TPA.

**Guarantee as to acceptable quality: ACL**

- 84. By reason of the matters pleaded in paragraph 78, there was a statutory guarantee that the affected VW diesel vehicles were of acceptable quality, as specified by s 54 of the ACL.
- 85. By reason of the matters pleaded in paragraphs 40 and 40A, the affected VW diesel vehicles failed to comply with the guarantee as to acceptable quality imposed by s 54 of the ACL, in that the vehicles were not of acceptable quality because they:
  - a. were unable lawfully to be registered or used on public roads in Australia; and
  - b. further or alternatively, possessed a defeat device in contravention of ADR 79.
- 86. Further, by reason of the matters pleaded in paragraphs 40 and 40A, the affected VW diesel vehicles failed to comply with the guarantee as to acceptable quality imposed by s 54 of the ACL, in that the vehicles were not fit for the purposes for which goods of that type are commonly supplied or free from defects, as it was reasonable to expect, because they:
  - a. were unable lawfully to be registered or used on public roads in Australia other than in the Northern Territory; and
  - b. further or alternatively, possessed a defeat device in contravention of ADR 79.
- 87. For the purposes of s 271(1) of the ACL, the Applicants and Group Members are affected persons in relation to the affected VW diesel vehicles.
- 88. Accordingly, by reason of the failure to comply with the guarantee imposed by s 54 of the ACL, the Applicants and Group Members who acquired their interest in an affected VW diesel vehicle on or after 1 January 2011 are entitled under s 271 of the ACL to recover damages from VW AG.
- 89. Further, or alternatively, by reason of the failure to comply with the guarantee imposed by s 54 of the ACL, the Applicants and Group Members who acquired their interest in an affected VW diesel vehicle on or after 1 January 2011 are entitled under s 271 of

the ACL to recover damages from VW Australia.

**Action in respect of non-compliance with express warranty: TPA**

90. By reason of placing compliance plates on the affected VW diesel vehicles, VW AG, and further or alternatively VW Australia, in trade and commerce, gave an express warranty, within the meaning of s 74G of the TPA, that the affected VW diesel vehicles complied with the applicable national standards.
91. By reason of the conduct pleaded in paragraph 40, VW AG, and further or alternatively VW Australia, failed to comply with the express warranty it gave or made because the affected VW diesel vehicles failed to comply with ADR 79, which was a national standard for the purposes of the Motor Vehicle Standards Act.
92. As pleaded below in paragraphs 118 to 122 below, the Applicants and Group Members suffered loss or damage by reason of VW AG's, and further or alternatively, VW Australia's, failure to comply with its express warranty.
93. By reason of the matters pleaded in paragraphs 76, 77, and 90 to 92, VW AG, and further or alternatively VW Australia is liable under s 74G of the TPA to compensate the Applicants and:
  - a. Group Members who acquired their interest in an affected VW diesel vehicle prior to 1 January 2011; and/or
  - b. Group Members who acquired their interest in an affected VW diesel vehicle on or after 1 January 2011 in circumstances where the vehicle was one to which paragraphs 76 and/or 77 applies,for the loss or damage which they have suffered.

**Failure to comply with express warranty: ACL**

94. By reason of the matters pleaded in paragraph 78, there was a statutory guarantee imposed by s 59 of the ACL that VW AG would comply with any express warranty it gave or made in relation to the affected VW diesel vehicles.
95. By reason of placing compliance plates on the affected VW diesel vehicles, VW AG, and further or alternatively VW Australia gave or made an express warranty that the affected VW diesel vehicles complied with the applicable national standards.
96. By reason of the conduct pleaded in paragraph 40, VW AG, and further or alternatively

VW Australia, failed to comply with the express warranty it gave or made because the affected VW diesel vehicles failed to comply with ADR 79, which was a national standard for the purposes of the Motor Vehicle Standards Act.

97. For the purposes of s 271(1) of the ACL, the Applicants and Group Members are affected persons in relation to the affected VW diesel vehicles.
98. Accordingly, by reason of the failure to comply with the guarantee imposed by s 59 of the ACL, the Applicants and Group Members who acquired their interest in an affected VW diesel vehicle on or after 1 January 2011 are entitled under s 271 of the ACL to recover damages from VW AG, and further or alternatively VW Australia.

#### **PART H. FAILURE TO COMPLY WITH SAFETY STANDARDS**

99. By reason of the matters pleaded in paragraphs 4(g) to (k), 5(e) to (h), 11, 27, 40 and 47:
  - a. the affected VW diesel vehicles were consumer goods for which there was a safety standard in force, namely ADR 79, and which did not comply with the standard, for the purposes of s 106 of the ACL;
  - b. the affected VW diesel vehicles were goods that were intended to be used, or were of a kind likely to be used, by a consumer for which there was a prescribed consumer product safety standard in force, namely ADR 79, and which did not comply with the product safety standard, for the purposes of s 65C of the TPA;
  - c. VW AG supplied the affected VW diesel vehicles in contravention of s 65C of the TPA and s 106(1) of the ACL;
  - d. VW AG manufactured, possessed and had control over the affected VW diesel vehicles in contravention of s 106(3) of the ACL;
  - e. VW Australia supplied the affected VW diesel vehicles in contravention of s 65C of the TPA and s 106(1)(3) of the ACL; and
  - f. VW Australia possessed and had control over the affected VW diesel vehicles in contravention of s 106(3) of the ACL.
100. The Applicants and Group Members suffered loss or damage, as set out below at paragraphs 118 to 122, which loss or damage they would not have suffered had the vehicles complied with ADR 79 and which was a result of a defect in the vehicles

(being the presence of the defeat device).

## **PART I. TORT OF DECEIT**

### **Deceit by VW Australia (as agent of VW AG)**

101. [Deleted]

102. [Deleted]

103. [Deleted]

104. VW Australia is and was at all material times:

- a. VW AG's exclusive distributor in Australia, including of affected VW diesel vehicles; and
- b. VW AG's agent.

105. VW AG knew and intended that VW Australia would make the VW Compliance Representation in the course of VW Australia's importation and distribution of the affected VW diesel vehicles to persons acquiring such a vehicle.

106. VW AG thereby authorised VW Australia, and/or intended VW Australia to make the VW Compliance Representation to the Applicants and Group Members when VW AG:

- a. knew it was untrue by reason of the matters pleaded in paragraphs 36 to 37;
- b. intended that the Applicants and Group Members would rely on it in deciding to acquire an affected VW diesel vehicle.

107. As pleaded in paragraphs 118 to 122, the Applicants and Group Members have suffered loss and damage by reason of their acquisition of an affected VW diesel vehicle.

108. By reason of the matters pleaded in paragraphs 104 to 106, VW AG is liable for the Applicants' and Group Members' loss and damage arising from their reliance on the VW Compliance Representation made by VW Australia.

### **Deceit by VW AG**

109. As pleaded in paragraph 50, VW AG made the VW Compliance Representation to the Applicants and Group Members:

- a. knowing it to be untrue;

- b. intending that the Applicants and Group Members would rely on it in deciding to acquire an affected VW diesel vehicle.

110. As pleaded in paragraph 52, the Applicants and Group Members did in fact rely on the VW Compliance Representation to purchase or otherwise acquire an interest in an affected VW diesel vehicle.

111. As pleaded in paragraphs 118 to 122, the Applicants and Group Members have suffered loss and damage by reason of their acquisition of an interest in an affected VW diesel vehicle, for which VW AG is liable.

## **PART J.           EQUITABLE MISREPRESENTATION**

### **Misrepresentation by VW Australia (including as agent of VW AG)**

111A. As pleaded in paragraph 51, VW Australia made the VW Compliance Representation (as defined in paragraph 50) to the Applicants and Group Members intending the Applicants and Group Members would rely on it in deciding to acquire an affected VW diesel vehicle.

111B. As pleaded in paragraph 52, the Applicants and Group Members did in fact rely on the VW Compliance Representation to acquire an interest in an affected VW diesel vehicle.

111C. As pleaded in paragraph 53, the VW Compliance Representation was false.

111D. By reason of the matters pleaded in paragraphs 111A to 111C, VW Australia is liable to account to the Applicants and the Group Members for the profit it obtained by reason of the conduct pleaded in paragraph 111A.

111E. Further and alternatively, VW Australia is and was at all material times:

- a. VW AG's exclusive distributor in Australia, including of affected VW diesel vehicles; and
  - b. VW AG's agent.
- 111F. VW AG knew and intended that VW Australia would make the VW Compliance Representation in the course of VW Australia's importation and distribution of the affected VW diesel vehicles to persons acquiring an interest in such a vehicle.
- 111G. VW AG thereby authorised VW Australia, and/or intended VW Australia to make the VW Compliance Representation to the Applicants and Group Members when VW AG:
  - a. knew it was untrue by reason of the matters pleaded in paragraphs 36 to 37; and
  - b. intended that the Applicants and Group Members would rely on it in deciding to acquire an affected VW diesel vehicle.
- 111H. As pleaded in paragraph 52, the Applicants and Group Members did in fact rely on the VW Compliance Representation to purchase or otherwise acquire an interest in an affected VW diesel vehicle.
- 111I. As pleaded in paragraph 53, the VW Compliance Representation was false.
- 111J. By reason of the matters pleaded in paragraphs 111E to 111I, VW AG is liable to account to the Applicants and the Group Members for the profit it obtained as a result of the conduct pleaded in paragraphs 111E to 111G.

**Misrepresentation by VW AG**

- 111K. As pleaded in paragraph 50, VW AG made the VW Compliance Representation to the Applicants and Group Members intending the Applicants and Group Members would rely on it in deciding to acquire an affected VW diesel vehicle.
- 111L. Further, VW AG made the VW Compliance Representation to the Applicants and Group Members knowing it to be untrue by reason of the matters pleaded in paragraphs 36 to 37.

- 111M. As pleaded in paragraph 52, the Applicants and Group Members did in fact rely on the VW Compliance Representation to purchase or otherwise acquire an interest in an affected VW diesel vehicle.
- 111N. As pleaded in paragraph 58, the VW Compliance Representation was false.
- 111O. Further, or alternatively, by reason of the matters pleaded in paragraphs 111K to 111N, VW AG is liable to account to the Applicants and the Group Members for the profit it obtained as a result of the conduct pleaded in paragraphs 111K and 111L.

**VW ADR 79 Compliance Misrepresentation by VW AG/VW Australia**

- 111P. Further, or alternatively, as pleaded in paragraph 56, VW AG, and further or alternatively, Australia made the VW ADR 79 Compliance Representation or further or alternatively the VW Non-Modification Representation to the Commonwealth intending that the Commonwealth would rely upon either or both representations in deciding whether to approve the affected VW diesel vehicles.
- 111Q. As pleaded in paragraph 57, the Commonwealth relied upon the VW ADR 79 Compliance Representation in:
- a. granting approval to each model of affected VW diesel vehicles in accordance with the Motor Vehicle Standards Act;
  - b. granting approval for VW Australia to fit a compliance plate to each model of affected VW diesel vehicles.
- 111R. As pleaded in paragraph 58, the VW ADR 79 Compliance Representation was false.
- 111S. VW AG knew the VW ADR 79 Compliance Representation to be false.
- 111T. As pleaded in paragraph 59B, the Commonwealth relied upon the Non-Modification Representation in:
- a. granting approval to each model of affected VW diesel vehicles in accordance with the Motor Vehicle Standards Act;
  - b. granting approval for VW Australia to fit a compliance plate to each model of affected VW diesel vehicles.
- 111U. As pleaded in paragraph 59C, the VW Non-Modification Representation was false.

111V. VW AG knew the VW Non-Modification Representation to be false.

111W. By reason of the matters pleaded in paragraphs 111P to 111S, VW Australia is liable to account to the Applicants and the Group Members for the profit it obtained by reason of the conduct pleaded in paragraphs 111P to 111V.

111X. Further, or alternatively, by reason of the matters pleaded in paragraphs 111P and 111T to 111V, VW AG is liable to account to the Applicants and the Group Members for the profit it obtained as a result of the conduct pleaded in paragraphs 111P to 111V.

## **PART K. ACCESSORIAL LIABILITY**

112. VW AG engaged in the following conduct:

- a. it manufactured affected VW diesel vehicles for sale in Australia, containing defeat devices, as pleaded in paragraph 35 above;
- b. further or alternatively VW AG sought and obtained approval to fix compliance plates to the affected VW diesel vehicles, as pleaded in paragraph 41 above; and/or
- c. further or alternatively VW AG fitted affected VW diesel vehicles with compliance plates.

113. Further, VW AG engaged in the conduct alleged in the previous paragraph with the knowledge that VW Australia would supply the affected VW diesel vehicles to VW dealers and other retailers, who in turn would sell the affected VW diesel vehicles to Australian consumers.

114. By reason of the matters alleged in paragraphs 112 and 113 above, VW AG was knowingly concerned in, or a party to, or aided, abetted, counselled or procured, the following contraventions:

- a. VW Australia's contravention of s 52 of the TPA and s 18 of the ACL, in relation to the VW Compliance Representation, as pleaded in paragraph 55 above;
- b. VW Australia's contravention of s 52 of the TPA and s 18 of the ACL, in relation the VW ADR 79 Compliance Representation, as pleaded in paragraph 59 above;

- c. VW Australia's contravention of s 52 of the TPA and s 18 of the ACL, in relation to VW Australia's silence, as pleaded in paragraph 65 above;
- d. VW Australia's contraventions of s 53(a) and (c) of the TPA, and s 29(1)(b) and (g) of the ACL, in relation to VW's false or misleading representation, as pleaded in paragraphs 68 and 69 above;
- e. [Deleted]
- f. VW Australia's contravention of s 65C of the TPA and s 106 of the ACL, as pleaded in paragraph 99 above.

115. [Deleted]

116. [Deleted]

117. [Deleted]

**PART L.            LOSS OR DAMAGE SUFFERED BY THE APPLICANTS AND GROUP MEMBERS AND RELIEF SOUGHT**

118. The Applicants and Group Members acquired an interest in an affected VW diesel vehicle that had no or negligible value, at the time that the interest was acquired, as the vehicle was not lawfully able to be registered in Australia and/or used on a public road in Australia other than in the Northern Territory.
119. By reason of the matters pleaded in the previous paragraph, each of the Applicants and Group Members have suffered loss and damage equivalent to the entire consideration given by them to acquire their interest in an affected VW diesel vehicle.
120. Further or in the alternative, the loss and damage suffered by each of the Applicants and Group Members is the difference between the consideration given by them to acquire their interest in an affected VW diesel vehicle and the value of the vehicle at the time of acquiring the interest (had the defects in the vehicle been known).
121. Further or in the alternative, the loss and damage suffered by each of the Applicants and Group Members is the diminution in the value of their interest in the relevant affected VW diesel vehicle by virtue of, or resulting from, the revelation that the affected VW diesel vehicles contain a defeat device.

*Particulars*

*The loss and damage includes the impact of the negative publicity flowing from:*

- (i) the revelation of the use of the defeat device; and/or*
- (ii) the necessary work required to rectify the vehicle to ensure the proper functioning of pollution control mechanisms,*

*on the second-hand value of the relevant vehicle.*

122. Further or in the alternative, the loss and damage of the Applicants and each of the Group Members includes any expense or inconvenience suffered by them as a consequence of any recall of the relevant vehicle or any other steps to rectify any defects in the relevant vehicle.
123. The Applicants and Group Members have suffered the loss and damage pleaded in paragraphs 118 to 122 above by the conduct, or alternatively because of the conduct, of the Respondents pleaded in paragraphs 54, 55, 66, 68, 72 and 75 above.
124. Further or in the alternative, in the absence of the conduct pleaded in paragraph 59 and/or paragraph 59D above, the Commonwealth would not have approved the affected VW diesel vehicles as compliant with ADR 79 and the vehicles would not have been sold in Australia, and the Applicants and Group Members have thereby suffered the loss and damage pleaded in paragraphs 118 to 122 above by the conduct, or alternatively because of the conduct of the Respondents pleaded in paragraphs 59, 67, 69, 72 and 75 above.
125. Further or in the alternative, by reason of the matters pleaded in paragraphs 61 and 64, the Applicants and Group Members have suffered the loss and damage pleaded in paragraphs 118 to 122 above by the conduct, or alternatively because of the conduct, of the Respondents pleaded in paragraphs 62 and 65 above.
126. Further or in the alternative, the Applicants repeat paragraphs 81 to 83.
127. Further or in the alternative, the Applicants and Group Members have suffered the loss and damage pleaded in paragraphs 118 to 122 above which they are entitled to recover from the Respondents as pleaded in paragraphs 88 and 89 above.
128. Further or in the alternative, the Applicants repeat paragraphs 92 and 93.
129. Further or in the alternative, the Applicants and Group Members have suffered the loss

and damage pleaded in paragraphs 118 to 122 above which they are entitled to recover from the Respondents as pleaded in paragraph 98 above.

130. Further or in the alternative, the Applicants and Group Members have suffered the loss and damage pleaded in paragraphs 118 to 122 above by the conduct, or alternatively because of the conduct, of the Respondents pleaded in paragraphs 99 and 100 above.
131. Further or in the alternative, the Applicants repeat paragraphs 107 to 108 and 111.
132. Further or in the alternative, by reason of the matters pleaded in paragraphs 123 to 125 and 130 above, the Applicants and Group Members have suffered the loss and damage pleaded in paragraphs 118 to 122 above by reason of the conduct of the Respondents pleaded in paragraphs 112 to 114 above.
133. By engaging in the conduct pleaded in paragraphs 101 to 111 above, VW AG and VW Australia showed a conscious and contumelious disregard for the rights of the Applicants and Group Members, which conduct is deserving of punishment by an award of exemplary damages.

## **Relief**

134. The Applicants claim, in his/her own right and on behalf of the Group Members, the relief specified in the application, namely:
  - aa. declaratory relief as to the conduct of the respondents in contravention of the TPA and the ACL;
  - a. an order pursuant to s 87 of the TPA and ss 237 and 243 of the ACL requiring the respondents to refund money or property received as consideration for the acquisition of an interest in affected VW diesel vehicles;
  - b. further or alternatively, damages;
  - c. further, exemplary damages;
  - d. alternatively, orders:
    - (i) that an account be taken of the profits earned by the respondents attributable to the respondents' misrepresentations; and
    - (ii) further, an order that the respondents pay to the Applicants and Group Members such amount as is found to be owing after just allowances;
  - e. costs; and
  - f. such other orders as the Court thinks fit.

Date: ~~21 October 2016~~ 1 August 2017



Jason Geisker

**MAURICE BLACKBURN PTY LTD**

Solicitor for the Applicants

This pleading was prepared by Maurice Blackburn, Sandy Dawson SC and Declan Roche of counsel and settled by Cameron Moore SC.

### **Certificate of lawyer**

I Jason Geisker certify to the Court that, in relation to the Further Amended statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: ~~21 October 2016~~ 1 August 2017



Jason Geisker

## **Schedule**

No. NSD 1459 of 2015

Federal Court of Australia

District Registry: NSW

Division: General

### **Applicants**

Second Applicant: **Joanna Dalton**

### **Respondents**

Second Respondent: **Volkswagen Group Australia Pty Ltd ACN 093 117 876**

Date: ~~21 October 2016~~ 1 August 2017