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Canberra ACT 2601

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Our ref: #1001940
Contact officer: William Herron
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12 September 2016

www.accc.gov.au

Sent via email to: foi+request-2209-2e30c369@righttoknow.org.au

Dear JS

Decision on freedom of information request

I refer to email dated 2 September 2016 in which you request access, under the *Freedom of Information Act 1982* (Cth), to the following:

'seek a copy of initiating documents in the proceedings Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft.'

Decision

I have decided to release these documents to you in accordance with the Schedule (Attachment A). Your review rights are set out in Attachment B.

I am authorised under s.23 of the Act to make this decision.

Understanding the schedule

In relation to the Schedule, please note:

- (a) Column 1 of the Schedule refers to each document by a document number created for the purpose of processing this request;
- (b) Column 2 of the Schedule gives, where applicable, the name and organisation of the author of the document;
- (c) Column 3 of the Schedule gives, where applicable, the name and organisation of the addressee of the document;
- (d) Column 4 of the Schedule shows the date appearing on the document;
- (e) Column 5 of the Schedule briefly describes the document or, where applicable, each part of a composite document;
- (f) Column 6 of the Schedule gives the number of pages of the document or, where applicable, each part of a composite document;
- (g) Column 7 of the Schedule shows my decision on whether, and what form, access has been granted to the document, where applicable;

(h) Column 8 of the Schedule sets out my findings on material questions of fact and the reasons for my decision. The subsection or paragraph referred to is the subsection or paragraph of the Act relied upon in support of each claim of exemption from disclosure. I have outlined my reasons for decision in attachment B.

Under the Act the first 5 hours (\$100.00) of processing your request are free. As the cost of processing your request is less than \$100.00, there are no charges for processing your request.

Publication of documents released under FOI

In accordance with s.11C of the Act, I have decided to publish the documents released on the ACCC's Disclosure Log. This will occur within ten business days of the documents being released to you.

Yours sincerely

A handwritten signature in blue ink, appearing to be 'WH', is written above the printed name.

William Herron

FOI Coordinator
ACCC Legal Group

Sent by email 12/09/2016

ATTACHMENT A **Schedule of documents**

Doc No	Author	Addressee	Date	Description	No of folios	Access	Findings, Reasons and Brief Description
1	ACCC		1.9.16	Notice Concise Statement re VW proceedings	12	Granted	
2	ACCC		1.9.16	Notice Originating Application re VW proceedings	10	Granted	

ATTACHMENT B

INFORMATION ON RIGHTS OF REVIEW

1. ACCC Internal Review

Under s.54A of the FOI Act, you can apply for an internal review of my decision to grant access to documents on which you were consulted. If you do not agree with our decision, please write to the ACCC within 30 days of receipt of this letter indicating that you seek an internal review of this decision.

If you make an application for review, another officer of the ACCC will review and make another decision in regards to these documents.

There is no charge payable for requesting an internal review. No particular form is required to apply for review. You will need to set why the decision should be changed.

Please send any correspondence to:

FOI Coordinator

Australian Competition & Consumer Commission

GPO Box 3131

Canberra ACT 2601

We will not release the documents in contention until the time to apply for internal or Information Commissioner (IC) review has expired and we have not received a review application. Alternatively, if an application for internal or Information Commissioner review is made, access will not be given unless the decision is confirmed on review and either no application is made for Administrative Appeals Tribunal (AAT) review, or application for AAT review is dismissed, or the decision is confirmed on AAT review.

If you make an application for internal review and we do not make a decision within 30 days or such further period as the IC allows, the original decision is considered affirmed. In such circumstances, you can seek review of our deemed decision by the IC.

2. Review by the Information Commissioner

You may ask for a review of a decision by the Australian Information Commissioner (IC). You do not have to go through our internal review process first for this process. If you do choose to seek an internal review, you can still seek IC review for the internal review decision if we refuse access to the documents.

You must apply in writing and you can lodge your application in one of the following ways:

Online: www.oaic.gov.au

Post: GPO Box 5218, Sydney NSW 2001

Fax: +61 2 9284 9666

Email: enquiries@oaic.gov.au

If you disagree with the Information Commissioner's review decision, you can appeal to the Administrative Appeals Tribunal (AAT).

The Tribunal is a completely independent review body with the power to make a fresh decision. A filing fee of \$861.00 (as at 1 July 2014) should accompany your application, unless you are granted legal aid or you come within an exempt category of persons (check with the Tribunal registry in your State). The Registrar or Deputy Registrar may waive the fee on the ground that its payment would impose financial hardship on you. The fee may be refunded if you are successful.

3. Complaint to the Information Commissioner

You may request the Information Commissioner to investigate action taken by the ACCC in relation to this Freedom of Information request. There is no fee for making a complaint. The Information Commissioner will consider your complaint and, if appropriate, conduct an investigation into it. Any investigation will be completely independent.

You must lodge your complaint in writing and do so in one of the following ways:

Online: www.oaic.gov.au

Post: GPO Box 5218, Sydney NSW 2001

Fax: +61 2 9284 9666

Email: enquiries@oaic.gov.au

NOTICE OF FILING

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

Details of Filing

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



A handwritten signature in blue ink, which appears to read "Warwick Soden".

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

Registrar

Important Information

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

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

CONCISE STATEMENT

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



NO NSD

OF 2016

AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION

Applicant

VOLKSWAGEN AKTIENGESELLSCHAFT

and another named in Schedule 1

Respondents

IMPORTANT FACTS GIVING RISE TO THE CLAIM

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

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

Filed on behalf of the Applicant, ACCC

File ref: 15188969

Prepared by: Glenn Owbridge
AGS lawyer within the meaning of s 551 of the *Judiciary Act*
1903

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

5. NOx is an air pollutant which is limited by Australian and European emissions control standards due to its significant impact on the environment and human health. The emissions standards applicable during the Sales Period were *Vehicle Standard (Australian Design Rule 79/01 – Emissions Control for Light Vehicles) 2005*, *Vehicle Standard (Australian Design Rule 79/02 – Emissions Control for Light Vehicles) 2005*, and *Vehicle Standard (Australian Design Rule 79/03 – Emissions Control for Light Vehicles) 2011* (together, **ADR 79**), as well as Council Directive 70/220/EEC as amended by EU Directive 98/69/EC (**Euro 4**) and EU Regulation 715/2007 (**Euro 5**) (together, the **Standards**).
6. The EGR System was controlled by software which caused it to adopt one of two modes (**Defeat Software**). The Defeat Software was designed to reduce NOx emissions produced by the Vehicles during testing to below the limits specified in the Standards. It did this by causing the EGR System to adopt **Mode 1** when the Vehicles were operated in accordance with the New European Drive Cycle driving pattern (**NEDC**). The NEDC is the unique operating cycle prescribed under the Standards to be used in testing vehicles to assess compliance with emissions limits set by the Standards, including NOx emissions.
7. The Defeat Software caused the EGR System to adopt **Mode 2** when it detected that the Vehicles were *not* being operated in accordance with the NEDC, such as when they were in normal vehicle operation and use. Once the EGR System adopted Mode 2, it remained in Mode 2 until the Vehicles were turned off and restarted. The Vehicles produced materially higher levels of NOx emissions in Mode 2 than in Mode 1.
8. To enable the Vehicles to be imported into and supplied in Australia, VWAG obtained approval to place identification plates on the Vehicles from the Commonwealth of Australia (**Commonwealth**) by certifying that they complied with the NOx emissions limits specified in the Standards. Once VWAG had obtained identification plate approval for the Vehicles, it caused VWA to have identification plates placed on them, which indicated that the Vehicles complied with all applicable legal requirements for road vehicles in Australia. VWAG, or VWA as its nominated agent, imported the Vehicles into Australia.
9. VWAG also obtained inclusion of the Vehicles in the Commonwealth's Green Vehicle Guide (**GVG**) by certifying that they complied with the NOx emissions limits in Euro 5. The GVG was a publicly available website which gave the Vehicles an air pollution rating based on their compliance with Euro 5.

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

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

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

RELIEF SOUGHT FROM THE COURT

17. The ACCC seeks the relief set out in the accompanying application, comprising:
 - (a) declarations pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth);
 - (b) pecuniary penalties pursuant to s 224 of the ACL;
 - (c) an order for corrective advertising pursuant to s 246 of the ACL;
 - (d) an order that the reasons for judgment, with the Court's seal affixed, be retained on the Court file for the purposes of s 137H of the CCA; and
 - (e) costs.

PRIMARY LEGAL GROUNDS FOR RELIEF SOUGHT

18. By engaging in the conduct set out above, VWAG engaged in conduct in Australia and/or was carrying on business in Australia within the meaning of s 5(1) of the CCA.
19. By reason of the matters in paras 2, 8, 9, 12, 13 and 16, VWAG, in trade or commerce engaged in conduct which was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL, made false or misleading representations about the Vehicles in connection with their supply or possible supply in contravention of ss 29(1)(a) and 29(1)(g) of the ACL, and engaged in conduct which was liable to mislead the public as to the characteristics and suitability for their purpose of the Vehicles in contravention of s 33 of the ACL.
20. By reason of the matters in paras 2, 3, 8, 14 and 15, VWA, in trade or commerce engaged in conduct which was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL, made false or misleading representations about

the Vehicles in connection with their supply or possible supply in contravention of ss 29(1)(a) and 29(1)(g) of the ACL, and engaged in conduct which was liable to mislead the public as to the characteristics and suitability for their purpose of the Vehicles, in contravention of s 33 of the ACL.

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

ALLEGED HARM SUFFERED

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

Date: 31 August 2016



Glenn Owbridge

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

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

SCHEDULE 1

FEDERAL COURT OF AUSTRALIA

DISTRICT REGISTRY: NEW SOUTH WALES

DIVISION: GENERAL

NO NSD

of 2016

Respondents

Second Respondent

Volkswagen Group Australia Pty Ltd (ACN 093 117
876)

Schedule 2

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

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

Schedule 3

Advertisements

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

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

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

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

NOTICE OF FILING AND HEARING

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

Filing and Hearing Details

Document Lodged:	Originating Application - Form 15 - Rule 8.01(1)
File Number:	NSD1462/2016
File Title:	Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft & Anor
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	Case Management Hearing
Time and date for hearing:	23/09/2016, 9:30 AM
Place:	Court Room Not Assigned, Level 17 Law Courts Building Queen's Square, Sydney



A handwritten signature in blue ink, which appears to read "David Soden".

Dated: 1/09/2016 1:55:14 PM AEST

Registrar

Important Information

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

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

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



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

ORIGINATING APPLICATION

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

NO NSD OF 2016

**AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION**

Applicant

VOLKSWAGEN AKTIENGESELLSCHAFT

and another named in Schedule 1
Respondents

To the Respondents

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

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

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

TIME AND DATE FOR HEARING:

PLACE:

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

Date:

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

This is an application for:

Filed on behalf of the Applicant, Glenn Owbridge
Prepared by: Glenn Owbridge
AGS lawyer within the meaning of s 55l of the *Judiciary Act*
1903

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

File ref: 15188969

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

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

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

DETAILS OF CLAIM

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

Declarations

1. A declaration that, in the Sales Period, the first respondent Volkswagen Aktiengesellschaft (**VWAG**) knew and failed to disclose to the Commonwealth of Australia (**Commonwealth**), VWA's authorised dealers, or the Australian public, including consumers, that:
 - (a) the Exhaust Gas Recirculation system (**EGR System**) in each of the Vehicles was controlled by software (**Defeat Software**) which caused it to adopt different modes, depending on whether or not the Vehicles were being tested for compliance with emissions limits set by Australian and European standards, namely *Vehicle Standard (Australian Design Rule 79/01 – Emissions Control for Light Vehicles) 2005*, *Vehicle Standard (Australian Design Rule 79/02 – Emissions Control for Light Vehicles) 2005* and *Vehicle Standard (Australian Design Rule 79/03 – Emissions Control for Light Vehicles) 2011* (collectively, **ADR 79**), as well as Council Directive 70/220/EEC as amended by EU Directive 98/69/EC (**Euro 4**) and EU Regulation 715/2007 (**Euro 5**) (together, the **Standards**);
 - (b) the mode adopted when the Vehicles were being tested (**Mode 1**) resulted in the production of materially lower emissions of nitrogen oxides (**NOx**) than the mode adopted at all other times (**Mode 2**);
 - (c) the Vehicles produced levels of NOx emissions which were within the limits set by the Standards in Mode 1, but not in Mode 2;



- (d) VWAG designed, installed and concealed the Defeat Software so that it would not be detected when the Vehicles were tested for compliance with the Standards;
- (e) the Defeat Software, on its own or together with the EGR System, was a “defeat device”, the use of which was prohibited by the Standards;
- (f) the Vehicles did not comply with the Standards; and
- (g) because the Vehicles did not comply with ADR 79:
 - i. the importation and supply of new Vehicles was contrary to ss 7, 14(1)(a) and 18(1)(a) of the *Motor Vehicle Standards Act 2009* (Cth) (**MVS Act**);
 - ii. the new and second-hand Vehicles did not comply with the requirements for registration under State and Territory vehicle registration legislation; and
 - iii. it was an offence for a person to use the Vehicles on a road under State and Territory road transport legislation,

in circumstances where:

- (h) VWAG designed and manufactured the Vehicles, and supplied them to the second respondent, Volkswagen Group Australia Pty Ltd (**VWA**), for sale to consumers for use as road vehicles in Australia;
- (i) VWAG obtained from the Commonwealth approval to place identification plates on the Vehicles, pursuant to s 10A of the MVS Act, by certifying that they complied with the NOx emissions limits in the Standards;
- (j) VWAG obtained from the Commonwealth inclusion of the Vehicles in the Commonwealth’s Green Vehicle Guide (**GVG**) by certifying that the Vehicles complied with the NOx emissions limits in Euro 5;
- (k) VWAG caused VWA to have identification plates placed on the Vehicles;
- (l) VWAG imported, or permitted VWA as its nominated agent to import, the Vehicles into Australia; and
- (m) each of the Commonwealth, VWA’s authorised dealers, and the Australian public, including consumers, would reasonably have expected VWAG to disclose the matters in subparagraphs (a) to (g) to them, if they were the case,

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

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



- (o) was liable to mislead the public as to the characteristics and suitability for their purpose of the Vehicles, in contravention of s 33 of the ACL.

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

- (a) designing, manufacturing, and supplying the Vehicles to VWA, for sale to consumers for use as road vehicles in Australia;
- (b) obtaining from the Commonwealth approval to place identification plates on the Vehicles, pursuant to s 10A of the MVS Act, by certifying that they complied with the NOx emissions limits in the Standards;
- (c) obtaining from the Commonwealth inclusion of the Vehicles in the Commonwealth's GVG by certifying that the Vehicles complied with the NOx emissions limits in Euro 5;
- (d) causing VWA to have identification plates placed on the Vehicles;
- (e) importing, or permitting VWA as its nominated agent to import, the Vehicles to Australia;
- (f) providing information for and reviewing and approving VWA's marketing of the Vehicles; and
- (g) failing to disclose to the matters in subparagraphs 1(a) to 1(g),

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

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

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

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



- (l) engaged in conduct which was liable to mislead the public as to the characteristics and suitability for their purpose of the Vehicles, in contravention of s 33 of the ACL.

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

- (a) importing the Vehicles into Australia as VWAG's nominated agent;
- (b) having identification plates placed on the Vehicles;
- (c) marketing, distributing and, through its authorised dealers, selling the Vehicles to consumers for use as road vehicles in Australia; and
- (d) not disclosing the matters in subparagraphs 1(a) to 1(g),

represented to consumers, or otherwise engaged in conduct which was likely or liable to cause consumers to believe, that the design and manufacture of new and second-hand Vehicles was such that they complied with all applicable legal requirements for road vehicles in Australia, including ADR 79, when that was not the case, and thereby, in trade or commerce:

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

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

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



(e) complied with Euro 5; and

(f) during normal on-road driving conditions, would produce NOx emissions at levels at or below the limits specified by Euro 4 and/or Euro 5,

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

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

(h) in connection with the supply or possible supply of the Vehicles, or in connection with the promotion of the supply of the Vehicles, made false or misleading representations that the Vehicles:

i. were of a particular standard, quality, grade or composition in contravention of s 29(1)(a) of the ACL; and

ii. had approval, performance characteristics, uses or benefits which they did not have, in contravention of s 29(1)(g) of the ACL; and

(i) engaged in conduct which was liable to mislead the public as to the characteristics and suitability for their purpose of the Vehicles, in contravention of s 33 of the.

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

(a) contravened section 106(1) of the ACL, by supplying the Vehicles;

(b) contravened section 106(2) of the ACL, by offering the Vehicles for supply; and

(c) contravened section 106(3) of the ACL, by manufacturing, possessing or having control of the Vehicles,

because the Vehicles did not comply with ADR 79.

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

(a) contravened section 106(1) of the ACL, by supplying the Vehicles;

(b) contravened section 106(2) of the ACL, by offering the Vehicles for supply; and

(c) contravened section 106(3) of the ACL, by possessing or having control of the Vehicles,

because the Vehicles did not comply with ADR 79.



7. A declaration that, in the Sales Period, VWAG participated in each of VWA's contraventions of the ACL, identified in paragraphs 3, 4 and 6 above, with knowledge of each of the essential elements of those contraventions, and thereby aided, abetted, counselled or procured VWA's contraventions, or was directly or indirectly knowingly concerned in, or party to, those contraventions, within the meaning of s 224(1) of the ACL.

Findings of fact

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

Other orders

9. An order that VWAG pay to the Commonwealth, within 30 days of the date of this order, a pecuniary penalty in such amount as the Court considers appropriate, pursuant to s 224 of the ACL, in respect of each of the contraventions of the ACL identified in paragraphs 1, 2, 5 and 7 above.
10. An order that VWA pay to the Commonwealth, within 30 days of the date of this order, a pecuniary penalty in such amount as the Court considers appropriate, pursuant to s 224 of the ACL, in respect of each of the contraventions of the ACL identified in paragraphs 3, 4 and 6 above.
11. An order, pursuant to s 246 of the ACL, that VWA within 28 days of the date of this order take all reasonable steps to cause to be published, at its own expense, a corrective notice in a manner and form approved by the Court.
12. An order that the respondents pay the Applicant's costs of and incidental to these proceedings.
13. Such further or other orders as the Court considers appropriate.

Definitions

14. In this Originating Application:

(a) "State and Territory vehicle registration legislation" means the Road Transport (Vehicle Registration) Regulation 2007 (NSW), r 6(1); Road Safety (Vehicles) Regulation 2009 (Vic), rr 14(1) and 29(1) (formerly Road Safety (Vehicles) Regulations 1999 (Vic), rr 202(1) and 214(1)); Transport Operations (Road Use Management – Vehicle Registration) Regulation 2010 (Qld), r 9 (formerly Transport Operations (Road Use Management – Vehicle Registration) Regulation 1999, r 8); *Motor Vehicles Act 1959* (SA), s 24(1); Road Traffic (Vehicles) Regulations 2014 (WA), r 34 (formerly Road Traffic (Licensing) Regulations 1975, r 9(2)); Vehicles and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010 (Tas), r 52(1) (formerly Vehicles and Traffic (Driver Licensing and Vehicle Registration) Regulations 2000 (Tas), r 45(1)); Road Transport (Vehicle Registration) Regulation 2000 (ACT), r 26(1); and *Motor Vehicles Act 1949* (NT), s 8(a); and



(b) "State and Territory road transport legislation" means the Road Transport (Vehicle Registration) Regulation 2007 (NSW), r 6(1); Road Safety (Vehicles) Regulation 2009 (Vic), r 258(2) (formerly Road Safety (Vehicles) Regulations 1999 (Vic), r 819(3)); Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 2010 (Qld), r 5(1) (formerly Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 1999, r 5(1)); *Road Transport Act 1961* (SA), ss 116(1), 117(1) and 118(1); Road Traffic (Vehicles) Regulations 2014 (WA), r 232 (formerly Road Traffic (Vehicle Standards) Regulations 2002, r 8); Vehicles and Traffic (Vehicle Standards) Regulations 2014 (Tas), r 4(1)(a) (formerly Vehicles and Traffic (Vehicle Standards) Regulation 2001 (Tas), r 4(1)(a)); Road Transport (Vehicle Registration) Regulation 2000 (ACT), r 109(2); and Motor Vehicles (Standards) Regulations (NT), r 35.

APPLICANT'S ADDRESS

The Applicant's address for service is:

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

Email: Glenn.Owbridge@ags.gov.au

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

Tel: 07 3360 5654

Fax: 07 3360 5795

DX 119 Brisbane


The Applicant's address is:

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

SERVICE ON THE RESPONDENTS

It is intended to serve this application on all Respondents.

Date: 31 August 2016


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



Schedule 1

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

No NSD of 2016

Respondents

Second Respondent

Volkswagen Group Australia Pty Ltd (ACN 093 117
876)