



Australian
Competition &
Consumer
Commission

23 Marcus Clarke Street
Canberra ACT 2601

GPO Box 3131
Canberra ACT 2601

Our ref: #1002204
Contact officer: Will Herron
Contact phone: 02 6243 1244

tel: (02) 6243 1111
fax: (02) 6243 1199

17 March 2017

www.accc.gov.au

JS

Via email to: foi+request-3211-629b327f@righttoknow.org.au

Dear JS

Decision on freedom of information request

I refer to your email dated 9 March 2017 in which you request access, under the *Freedom of Information Act 1982* (Cth), to the following:

'Under FOI I seek a copy of initiating documents in the proceedings Australian Competition and Consumer Commission v Audi Aktiengesellschaft (Audi AG), its Australian subsidiary Audi Australia Pty Ltd (Audi Australia), and their owner, German company Volkswagen Aktiengesellschaft (VWAG).'

Decision

I have decided to release these documents to you in full 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;

Charges

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



Will Herron

FOI Coordinator
ACCC Legal Group

Sent by email 17/03/2017

ATTACHMENT A

Schedule of documents

Doc No	Author	Addressee	Date	Description	No of folios	Access	Findings, Reasons and Brief Description
1	Australian Competition and Consumer Commission	Audi Aktiengesellschaft & ors	8.3.2017	Notice of filing and hearing Originating Application	13	Granted	
2	Australian Competition and Consumer Commission	Audi Aktiengesellschaft & ors	8.3.2017	Notice of filing Concise Statement	12	Granted	

ATTACHMENT B

INFORMATION ON RIGHTS OF REVIEW

1. ACCC Internal Review

Under s.54 of the FOI Act, you can apply for an internal review of my decision by writing 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

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 AND HEARING

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

Filing and Hearing Details

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



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

Registrar

Important Information

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

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

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

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

ORIGINATING APPLICATION

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

NO NSD

OF 2017

**AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION**

Applicant

AUDI AKTIENGESELLSCHAFT
and others named in Schedule 1
Respondents

To the Respondents

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

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

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

TIME AND DATE FOR HEARING:

PLACE:

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

Date:

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

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

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

File ref: 15188969

Telephone: 03 9242 1462
Lawyer's Email:
Glenn.Owbridge@ags.gov.au
Facsimile: 07 3360 5795
DX 119 Brisbane

21262372

This is an application for:

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

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

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

DETAILS OF CLAIM

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

Declarations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Findings of fact

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

Other orders

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

Definitions

19. In this Originating Application:

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

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

APPLICANT'S ADDRESS

The Applicant's address for service is:

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

Email: Glenn.Owbridge@ags.gov.au

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

Tel: 03 9242 1462

Fax: 07 3360 5795

DX 119 Brisbane

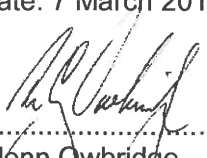
The Applicant's address is:

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

SERVICE ON THE RESPONDENTS

It is intended to serve this application on all Respondents.

Date: 7 March 2017


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

Schedule 1

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

No NSD of 2017

Respondents

Second Respondent

Audi Australia Pty Ltd

Third Respondent

Volkswagen Aktiengesellschaft

Released under the FOI Act

NOTICE OF FILING

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

Details of Filing

Document Lodged: Concise Statement
File Number: NSD322/2017
File Title: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v
AUDI AKTIENGESELLSCHAFT & ORS
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF
AUSTRALIA



Dated: 8/03/2017 3:09:22 PM AEDT

Registrar

Important Information

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

The 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 2017



AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION

Applicant

AUDI AKTIENGESELLSCHAFT

and others named in Schedule 1

Respondents

IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. This proceeding concerns the conduct of the first respondent, Audi Aktiengesellschaft (**Audi AG**), its subsidiary, the second respondent, Audi Australia Pty Ltd (**Audi Australia**), and their ultimate parent the third respondent, Volkswagen Aktiengesellschaft (**VWAG**), in connection with the marketing, distribution and sale in Australia of the Audi brand diesel vehicles specified in **Schedule 2**, including the Q5 model (**Audi Q5 Vehicles**) (collectively, **Vehicles**), during the period from 1 January 2011 to 3 October 2015 (**Sales Period**).
2. VWAG is incorporated in Germany. It manufactured 1.6 litre and 2.0 litre "EA189" engines (**Engines**) for the Vehicles. VWAG also designed and installed in the Engines Defeat Software (defined in para 7 below). VWAG supplied the Engines to Audi AG for installation in the Vehicles.
3. Audi AG is a company incorporated in Germany. It designed and manufactured the Vehicles and installed the Engines incorporating the Defeat Software. Audi AG also supplied the Vehicles to Audi Australia, 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)*.
4. Audi Australia imported, marketed, distributed and, through its authorised dealers, sold the Vehicles to consumers for use as road vehicles in Australia. In the Sales Period, Audi Australia's authorised dealers sold 12,368 Vehicles in Australia of which 5,056 were Audi Q5

Filed on behalf of the Applicant, ACCC

File ref: 15188969

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Vehicles. Second-hand Vehicles¹ were also bought and sold in Australia for use as road vehicles during the Sales Period.

5. Each of the Vehicles contained an Exhaust Gas Recirculation System (**EGR System**), which controlled the amount of nitrogen oxides (**NOx**) produced in the engine's combustion chamber. The Audi Q5 Vehicles also contained a Selective Catalytic Reduction System (**SCR System**), which was designed to reduce the NOx produced by each of those vehicles' engines by modulating the dosing of AdBlue reducing agent in the SCR catalytic converter.
6. 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. Australian Design Rule 79 (**ADR 79**) contained applicable NOx emissions standards during the Sales Period, the relevant versions of ADR 79 listed in **Schedule 3**. The applicable European Standard during the Sales Period was EU Regulation 715/2007 and as amended by and including EU Regulation 692/2008 (**Euro 5**) (together, the **Standards**).
7. 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 and (in Audi Q5 Vehicles) the SCR 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. The Defeat Software caused the EGR System and (in Audi Q5 Vehicles) the SCR System to adopt **Mode 2** when it detected that the Vehicles were *not* being operated in accordance with the NEDC. The Vehicles produced materially higher levels of NOx emissions in Mode 2 than in Mode 1. Once in Mode 2, the Vehicles continued in that mode until turned off and restarted.
8. To enable the Vehicles to be imported into and supplied in Australia, Audi AG, through Allied Automotive Consulting Services Pty Ltd (**Allied Automotive**) acting as its agent or at its direction, obtained approval to place identification plates on the Vehicles from the Commonwealth of Australia (**Commonwealth**) by certifying, and in respect of some Vehicles recertifying (as set out in **Schedule 5**), that they complied with the NOx emissions limits specified in the Standards. Audi AG, through Audi Australia, then caused or permitted the Vehicles to have identification plates placed on them. Those plates indicated that the Vehicles complied with all applicable legal requirements for road vehicles in Australia. Audi AG or Audi Australia imported the Vehicles into Australia.

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.

9. Audi AG, through Allied Automotive acting as its agent or at its direction, also obtained inclusion of the Vehicles in the Commonwealth's Green Vehicle Guide (**GVG**), a publicly available website giving the Vehicles an air pollution rating based on their compliance with Euro 5, by certifying that they complied with the NOx emissions limits in 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, either on its own, or together with the EGR System and (in Audi Q5 Vehicles) the SCR System, was a "defeat device", the use of which was prohibited by each of the Standards. Alternatively, the Defeat Software on its own, or together with the EGR System and (in Audi Q5 Vehicles) the SCR System, was a "Defeat Device Equivalent" as it defeated the objectives of ADR 79 and Euro 5.
12. Audi AG concealed the Defeat Software so that it would not be detected when the Vehicles were tested for compliance with the Standards. Neither Audi AG nor Audi Australia disclosed to the Commonwealth, Audi Australia's authorised dealers or consumers any of the matters in paras 7, 8 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 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 Audi Australia for sale in Australia, producing and providing information for Audi Australia's marketing of the Vehicles as set out in para 16, and not disclosing the matters in para 12, Audi AG expressly and/or impliedly represented, or otherwise engaged in conduct which was likely or liable to cause the Commonwealth and 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 Audi AG's nominated agent), marketing and distributing the Vehicles for sale by its authorised dealers in Australia, and not disclosing the matters in para 12, Audi Australia 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, and/or distributing or causing to be distributed, the advertisements and marketing materials identified in **Schedule 4 (Advertisements)**, Audi AG expressly or impliedly represented to consumers that the Vehicles **(a)** were environmentally friendly, environmentally responsible or environmentally sustainable, **(b)** produced low emissions, **(c)** complied with Euro 5, and/or **(d)** during normal on-road driving conditions, would produce NOx emissions at levels at or below the limits specified by Euro 5. Those representations were false by reason of the matters in paras 7, 8 or 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/or distributing the Advertisements, Audi Australia relied on information provided, directly or indirectly, by Audi AG that the Vehicles complied with the Standards, without further inquiry. Audi AG knew and intended that Audi Australia would rely on and distribute this information in marketing the Vehicles.

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, Audi AG and VWAG engaged in conduct in Australia and/or were carrying on business in Australia within the meaning of s 5(1) of the CCA.
19. By reason of the matters in paras 3, 8, 9, 12 and 13, Audi AG, 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, 4, 8, 14 and 15, Audi Australia, 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

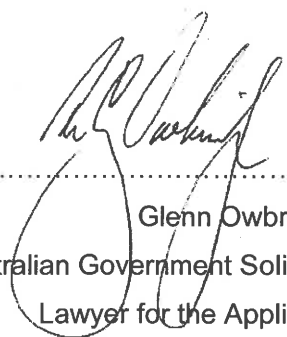
to the characteristics and suitability for their purpose of the Vehicles, in contravention of s 33 of the ACL.

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 3, 4, and 11, each of Audi AG and Audi Australia, 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 3, 8, 9, 11, 12, 13 and 16, Audi AG participated in each of Audi Australia's contraventions of the ACL, with knowledge of each of the essential elements of those contraventions, and thereby aided, abetted, counselled or procured Audi Australia's contraventions, or was indirectly knowingly concerned in, or party to, those contraventions within the meaning of s 224(1) of the ACL.
23. By reason of the matters in paras 2, 3, 4 and 7, VWAG participated in each of Audi AG's and Audi Australia's contraventions of the ACL, with knowledge of each of the essential elements of those contraventions, and thereby aided, abetted, counselled or procured each of Audi AG's and Audi Australia's contraventions, or was indirectly knowingly concerned in, or party to, those contraventions within the meaning of s 224(1) of the ACL.
24. Each of Audi AG and VWAG's contraventions of the ACL were deliberate or reckless, or occurred in circumstances where Audi AG and VWAG consciously courted the risk of misleading consumers.

ALLEGED HARM SUFFERED

25. 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. Audi AG, Audi Australia and VWAG secured a commercial advantage over their competitors by their false and misleading conduct and representations.

Date: 7 March 2017


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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, Alexander Tate and Kimberley Cole of the AGS, 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 2017

Respondents

Second Respondent

Audi Australia Pty Ltd

Third Respondent

Volkswagen Aktiengesellschaft

Released under the FOI Act

**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
A1	2011 – 2015	367
A3	2011 – 2013	639
A4	2011 – 2015	2,348
A5	2012 – 2015	619
A6	2011 – 2015	681
Q3	2012 – 2015	2,614
Q5	2011 – 2015	5,056
TT	2011 – 2014	44
Total vehicles sold		12,368

Released under the FOIA

SCHEDULE 3 – RELEVANT ADR 79 EMISSIONS STANDARDS APPLICABLE DURING SALES PERIOD

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

Vehicle Standard (Australian Design Rule 79/03 – Emissions Control for Light Vehicles) 2011

Released under the FOI Act

SCHEDULE 4 – ADVERTISEMENTS

Part A: Representations that the Vehicles were environmentally friendly, environmentally responsible, or environmentally sustainable

No.	Document Id	Date of Publication	Document Type	Model	Advertisement produced by
1.	AUD.001.001.2496	21/11/2011	Brochure	A4	Audi AG
2.	AUD.001.001.2330	24/07/2012	Brochure	A4	Audi AG
3.	AUD.001.001.5473	24/07/2012	Brochure	Q3	Audi AG
4.	AUD.001.001.2168	3/04/2013	Brochure	A3	Audi AG
5.	AUD.001.001.5379	14/04/2014	Brochure	Q3	Audi AG
6.	AUD.001.001.2101	17/06/2014	Brochure	A3	Audi AG
7.	AUD.001.001.2735	17/06/2014	Brochure	A5	Audi AG
8.	AUD.001.001.2975	17/06/2014	Brochure	A5	Audi AG
9.	AUD.001.001.5781	17/06/2015	Brochure	Q5	Audi AG
10.	AUD.001.001.5846	18/09/2015	Brochure	Q5	Audi AG

Part B: Representations that the Vehicles produced low emissions

No.	Document Id	Date of Publication	Document Type	Model	Advertisement produced by
11.	AUD.001.001.0409	10/02/2011	Brochure	A1	Audi AG
12.	AUD.001.001.5305	16/06/2011	Brochure	Q3	Audi AG
13.	AUD.001.001.2496	21/11/2011	Brochure	A4	Audi AG
14.	AUD.001.001.0566	6/02/2012	Brochure	A3	Audi AG
15.	AUD.001.001.2330	24/07/2012	Brochure	A4	Audi AG
16.	AUD.001.001.5473	24/07/2012	Brochure	Q3	Audi AG
17.	AUD.001.001.7263	24/07/2012	Brochure	TT	Audi AG
18.	AUD.001.001.5379	14/04/2014	Brochure	Q3	Audi AG
19.	AUD.001.001.2101	17/06/2014	Brochure	A3	Audi AG
20.	AUD.001.001.2735	17/06/2014	Brochure	A5	Audi AG
21.	AUD.001.001.2975	17/06/2014	Brochure	A5	Audi AG
22.	AUD.001.001.5911	28/07/2014	Brochure	Q5	Audi AG
23.	AUD.001.001.2257	18/11/2014	Brochure	A4	Audi AG

No.	Document Id	Date of Publication	Document Type	Model	Advertisement produced by
24.	AUD.001.001.2635	19/12/2014	Brochure	A5	Audi AG
25.	AUD.001.001.5781	17/06/2015	Brochure	Q5	Audi AG
26.	AUD.001.001.5846	18/09/2015	Brochure	Q5	Audi AG

Part C: Representations that the Vehicles complied with Euro 5 and/or in normal use, or when driven in normal driving conditions, would produce NOx emissions at or below the limits specified by Euro 5

No.	Document Id	Date of Publication	Document Type	Model	Advertisement produced by
27.	AUD.001.001.0409	10/02/2011	Brochure	A1	Audi AG
28.	AUD.001.001.5305	16/06/2011	Brochure	Q3	Audi AG
29.	AUD.001.001.0123	19/08/2011	Brochure	A1	Audi AG
30.	AUD.001.001.2496	21/11/2011	Brochure	A4	Audi AG
31.	AUD.001.001.0566	6/02/2012	Brochure	A3	Audi AG
32.	AUD.001.001.3246	31/05/2012	Brochure	A6	Audi AG
33.	AUD.001.001.0001	24/07/2012	Brochure	A1	Audi AG
34.	AUD.001.001.2330	24/07/2012	Brochure	A4	Audi AG
35.	AUD.001.001.5473	24/07/2012	Brochure	Q3	Audi AG
36.	AUD.001.001.7263	24/07/2012	Brochure	TT	Audi AG
37.	AUD.001.001.2168	3/04/2013	Brochure	A3	Audi AG
38.	AUD.001.001.5379	14/04/2014	Brochure	Q3	Audi AG
39.	AUD.001.001.2101	17/06/2014	Brochure	A3	Audi AG
40.	AUD.001.001.2735	17/06/2014	Brochure	A5	Audi AG
41.	AUD.001.001.2975	17/06/2014	Brochure	A5	Audi AG
42.	AUD.001.001.5911	28/07/2014	Brochure	Q5	Audi AG
43.	AUD.001.001.2257	18/11/2014	Brochure	A4	Audi AG
44.	AUD.001.001.2635	19/12/2014	Brochure	A5	Audi AG
45.	AUD.001.001.5781	17/06/2015	Brochure	Q5	Audi AG
46.	AUD.001.001.5846	18/09/2015	Brochure	Q5	Audi AG

SCHEDULE 5 - RECERTIFICATION OF AUDI DIESEL VEHICLES WITH EA189 ENGINES IN AUSTRALIA PURSUANT TO ADR 79

Vehicle Type	Identification Plate Approval No.	Re-Certification Date of Approvals	ADR 79 Certification
Q3 8U	43984	15 January 2014	79/03

Released under the FOI Act