

NOTICE OF FILING

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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

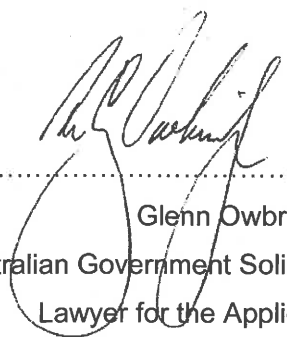
to the characteristics and suitability for their purpose of the Vehicles, in contravention of s 33 of the ACL.

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	Re-Certification Date of Approvals	ADR 79 Certification
Q3 8U	43984	15 January 2014	79/03

Released under the FOI Act