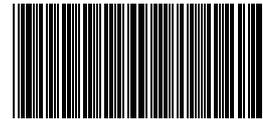




Filed: 3 July 2020 3:10 PM



D0001AMYJQ

Amended Defence

COURT DETAILS

Court	Supreme Court of NSW
Division	Equity
List	Equity General
Registry	Supreme Court Sydney
Case number	2018/00322648

TITLE OF PROCEEDINGS

First Plaintiff	Philip Dwyer
First Defendant	VOLKSWAGEN GROUP AUSTRALIA PTY LTD trading as VOLKSWAGEN AUSTRALIA ABN 14093117876

FILING DETAILS

Filed for	VOLKSWAGEN GROUP AUSTRALIA PTY LTD trading as VOLKSWAGEN AUSTRALIA, Defendant 1
Legal representative	BRUCE LLEWELLYN LLOYD
Legal representative reference	
Telephone	02 9353 4000

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Amended Defence (VW Amended Defence 030720.pdf)

[attach.]

Form 7A (version 5)
UCPR 14.3

AMENDED DEFENCE TO AMENDED STATEMENT OF CLAIM

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
List	General (Class Action)
Registry	Sydney
Case number	2018/00322648

TITLE OF PROCEEDINGS

Plaintiff	Philip Dwyer
Defendant	Volkswagen Group Australia Pty Limited trading as Volkswagen Australia ABN 14093117876

FILING DETAILS

Filed for	Volkswagen Group Australia Pty Limited trading as Volkswagen Australia ABN 14093117876 (Volkswagen), Defendant
Filed in relation to	Plaintiff's Claim
Legal representative	Bruce Lloyd, Clayton Utz
Legal representative's reference	219/80201156
Contact's name and telephone	Bruce Lloyd, (02) 9353 4219
Contact email	bloyd@claytonutz.com

HEARING DETAILS

If the proceedings do not already have a listing date, they are to be listed at

PLEADINGS AND PARTICULARS

A. PRELIMINARY MATTERS

1. Headings are used in this Amended Defence for convenience only. They do not form part of the response to the Plaintiff's Amended Statement of Claim filed on ~~22 October 2018~~ 28 May 2020 (ASOC).
2. Unless otherwise indicated (including by context), the Defendant adopts the defined terms used in the ASOC, but does not admit any factual assertions contained in, or in any way implied by, any defined term used in the ASOC and repeated in this Amended Defence.
3. In this Amended Defence, the Defendant uses "Volkswagen" to refer to Volkswagen Australia Group Pty Ltd.

B. COMMON QUESTIONS

1. Volkswagen does not admit:
 - (a) that the questions as framed by the Plaintiff involve common issues of law or fact; or
 - (b) insofar as they do, that those questions are common with respect to all Group Members.

C. PLEADINGS

The Proceeding and the Parties

1. In answer to the allegations in paragraph 1 of the ASOC, Volkswagen:
 - (a) admits that the Plaintiff has purported to commence this proceeding as a representative proceeding in his own right and on behalf of the Group Members under Part 10 of the *Civil Procedure Act 2005* (NSW);
 - (b) ~~says that by letter dated 7 December 2018, the Plaintiff informed Volkswagen that he does not press any claim in respect of Volkswagen Transporter or Volkswagen Crafter vehicles and will amend the SOC at an appropriate time to omit such claims [Not used];~~
 - (c) ~~says that by reason of the matter in paragraph (b) above, Volkswagen does not plead to any allegations in the SOC insofar as they concern claims in respect of Volkswagen Transporter or Volkswagen Crafter vehicles [Not used];~~
 - (d) says that to the extent the Plaintiff uses the defined term 'Takata Airbag' in this paragraph and otherwise in the ASOC, Volkswagen adopts the term '**Volkswagen Takata Airbag Inflator**' rather than 'Takata Airbag' to describe the airbag inflators manufactured by Takata

Corporation or TK Holdings, Inc. or their related entities (together, **Takata**) which formed part of airbag modules and ultimately airbags, which were installed in those Volkswagen motor vehicles that have been or will be the subject of an airbag-related product recall listed in paragraph 1(b)(ii) of the ASOC;

- (e) says that to the extent the Plaintiff uses the defined term 'Defective Vehicle' in this paragraph and otherwise in the ASOC:
 - (i) Volkswagen does not admit any factual assertions contained in, or in any way implied by, that defined term by responding to it or repeating it in this Amended Defence;
 - (ii) adopts the defined term '**Relevant Volkswagen Vehicle**' rather than 'Defective Vehicle' in this Amended Defence to describe the Volkswagen motor vehicles fitted with a Volkswagen Takata Airbag Inflator listed in paragraph 1(b)(ii) of the ASOC; and
- (f) otherwise does not admit the allegations in paragraph 1.

2. In answer to the allegations in paragraph 2 of the ASOC, Volkswagen:

- (a) admits that the Plaintiff purchased a Volkswagen Passat Sedan make VLK, manufactured in 2013 (**Plaintiff's Vehicle**);
- (b) says that:
 - (i) the Plaintiff's Vehicle was first registered in about May 2013;
 - (ii) Volkswagen supplied the Plaintiff's Vehicle by way of sale by auction to Barloworld Motor (Aust) Pty Ltd trading as Barloworld Volkswagen, Mascot, New South Wales (**Barloworld Volkswagen**) in about early October 2013; and
 - (iii) the Plaintiff purchased the Plaintiff's Vehicle second-hand from Barloworld Volkswagen in about late October 2013.
- (c) denies the allegations in paragraph 2(f);
- (d) does not plead to paragraph 2(h) as it contains no allegations against it; and
- (e) otherwise does not admit the allegations in paragraph 2 of the ASOC.

Particulars

*The Plaintiff's Vehicle has the Vehicle Identification Number (VIN)
WVWZZ3CZDP040531.*

3. In answer to the allegations in paragraph 3 of the ASOC, Volkswagen:
- (a) admits that some purchasers of Relevant Volkswagen Vehicles were consumers within the meaning of section 3(1)(a) or (b) of the Australian Consumer Law in Schedule 2 of the *Competition and Consumer Act 2010 (Cth) (ACL)* or section 4B of the *Trade Practices Act 1974 (Cth) (TPA)*;
 - (b) says that some purchasers of Relevant Volkswagen Vehicles:
 - (i) were not consumers within the meaning of section 3(1)(a) or (b) of the ACL; or
 - (ii) were only consumers within the meaning of section 4B of the TPA by reason that they purchased a "commercial road vehicle" as used in section 4B of the TPA,
 and therefore are not Group Members by reason of paragraph 1(b)(i) of the ASOC; and
 - (c) otherwise does not admit the allegations in paragraph 3.

Particulars

Any Relevant Volkswagen Vehicle acquired for use principally in the transport of goods on public roads are goods that consist of a commercial road vehicle as that term is used in section 4B of the TPA.

Further, or in the alternative, Relevant Volkswagen Vehicles described under subsection 1(b)(ii), (C), (D), (J) and (K) of the ASOC are goods that consist of a commercial road vehicle as that term is used in section 4B of the TPA.

4. In answer to the allegations in paragraph 4 of the ASOC, Volkswagen:
- (a) admits that it is a company duly incorporated in Australia;
 - (b) admits that it is a trading corporation within the meaning of s 4(1) of the TPA;
 - (c) admits that it is a wholly-owned subsidiary of Volkswagen Finance Luxembourg S.A;
 - (d) says that Volkswagen Finance Luxembourg S.A is a company incorporated pursuant to the laws of and registered in Luxembourg;
 - (e) admits that Volkswagen Finance Luxembourg S.A has no place of business in Australia;
 - (f) denies that Volkswagen Finance Luxembourg S.A manufactured any of the Relevant Volkswagen Vehicles;

- (g) says that Volkswagen Aktiengesellschaft (**Volkswagen AG**), a company incorporated pursuant to the laws of and registered in the Federal Republic of Germany, manufactured the Relevant Volkswagen Vehicles;
- (h) admits that it did not manufacture any of the Relevant Volkswagen Vehicles;
- (i) other than vehicles imported by private importers, admits that it imported the Relevant Volkswagen Vehicles into Australia;
- (j) admits that by operation of sections 74A(4) of the TPA and 7(1)(e) of the ACL it is a manufacturer of the Relevant Volkswagen Vehicles;
- (k) says that it supplied in trade or commerce, other than by way of sale by auction, each model of the Relevant Volkswagen Vehicles to other persons who acquired the goods for re-supply;
- (l) insofar as paragraph 4(g)(ii) of the ASOC is premised on paragraphs 3(b)(ii) and 9(a)(ii) of the ASOC, admits that it supplied in trade or commerce,
 - (i) other than by way of sale by auction; and
 - (ii) by way of sale by auction;
 some models of the Relevant Volkswagen Vehicles to some persons who were consumers within the meaning of sections 4B of the TPA and/or section 3 of the ACL; and

Particulars

Volkswagen supplied approximately 9,831 vehicles by direct sale to consumers, including:

- (i) *7,015 other than by way of sale by auction; and*
 - (ii) *2,816 by way of sale by auction.*
- (m) otherwise does not admit the allegations in paragraph 4.
5. In answer to the allegations in paragraph 5 of the ASOC, Volkswagen repeats 4(k) and 4(l) of the Amended Defence and otherwise does not admit paragraph 5 of the ASOC.
 6. Volkswagen does not admit the allegations in paragraph 6 of the ASOC.

THE RELEVANT VOLKSWAGEN VEHICLES

7. In answer to the allegations in paragraph 7 of the ASOC, Volkswagen:
- (a) denies that the Volkswagen Takata Airbag Inflators fitted to Relevant Volkswagen Vehicles have the propensity to exhibit and/or a risk of exhibiting the behaviours pleaded in paragraphs 7(a)(i) and (ii) of the ASOC;
 - (b) says that the Volkswagen Takata Airbag Inflators and their installation in the Relevant Volkswagen Vehicles have specific material design features and characteristics;

Particulars

The material design features and characteristics of Volkswagen Takata Airbag Inflators include:

- (i) *design of the casing;*
 - (ii) *design of the propellant, including size and shape; and*
 - (iii) *design of the propellant cushioning.*
- (c) says that a Safety Warning Notice was published on 6 August 2017 by the responsible Minister pursuant to sections 129(1)(a) and 129(1)(b) of the ACL (**Safety Warning Notice**), and relies on the contents of the Safety Warning Notice for its full force and effect, as if set out in full herein;
 - (d) denies that there have been any injuries or deaths caused by Volkswagen Takata Airbag Inflators installed in Relevant Volkswagen Vehicles by reason of, or attributable to, the behaviour described in paragraphs 7(a)(i) and (ii) of the ASOC, either in Australia or overseas; and
 - (e) otherwise does not admit the allegations in paragraph 7 of the ASOC.

8. In answer to the allegations in paragraph 8 of the ASOC, Volkswagen admits that each of the Relevant Volkswagen Vehicles is or was fitted with at least one Volkswagen Takata Airbag Inflator of the SDI type.
9. In answer to the allegations in paragraph 9 of the ASOC, Volkswagen:
- (a) admits that:
 - (i) some of the Relevant Volkswagen Vehicles are goods which:
 - A. were acquired for an amount that did not exceed \$40,000; or
 - B. are of a kind ordinarily acquired for personal, domestic or household use or consumption;
 - (ii) the Relevant Volkswagen Vehicles are goods of a kind commonly bought and commonly supplied for the purpose of being driven;
 - (b) denies that each of the vehicles described in paragraph 1(b)(ii)(C), (D), (J) and (K) of the ASOC were goods:
 - (i) of a kind ordinarily acquired for personal, domestic or household use or consumption; or
 - (ii) within the meaning of section 74A(2)(a) of the TPA;
 - (c) denies the allegation in paragraph 9(c) of the ASOC;
 - (d) admits that the Relevant Volkswagen Vehicles are goods within the meaning of sections 4 of the TPA and section 2 of the ACL; and
 - (e) otherwise does not admit the allegations in paragraph 9 of the ASOC.
10. In answer to the allegations in paragraph 10 of the ASOC, Volkswagen:
- (a) says that a notice was issued by the responsible Minister pursuant to section 122 of the ACL on 27 February 2018 (**Compulsory Recall Notice**);
 - (b) relies on the Compulsory Recall Notice for its full force and effect, as if set out in full herein; and
 - (c) otherwise denies the allegations in paragraph 10 of the ASOC.

11. In answer to the allegations in paragraph 11 of the ASOC, Volkswagen:
- (a) admits that at various times it marketed, distributed and promoted the Relevant Volkswagen Vehicles within Australia during the periods in which those vehicles were offered for sale as new vehicles;
 - (b) says that Volkswagen has, at all relevant times, complied with the requirements set out in the Compulsory Recall Notice;
 - (c) says that the Relevant Volkswagen Vehicles recalled in the Compulsory Recall Notice:
 - (i) have been, or will be, fitted with replacement inflators that use guanidine nitrate as an alternative propellant (**Volkswagen Replacement Airbag**); and
 - (ii) no Volkswagen Replacement Airbag has or will use ammonium nitrate as a propellant (there being no "like for like" replacements as is the case with some other manufacturers), and
 - (d) otherwise denies the allegations in paragraph 11 of the ASOC.

FAILURE TO SUPPLY GOODS OF MERCHANTABLE QUALITY - section 74D TPA

12. In answer to the allegations in paragraph 12 of the ASOC, Volkswagen:
- (a) repeats paragraphs 7, 8, 9 and 10 above; and
 - (b) otherwise denies the allegations in paragraph 12 of the ASOC.
13. In answer to the allegations in paragraph 13 of the ASOC, Volkswagen:
- (a) says that:
 - (i) Takata was a "manufacturer" of the Volkswagen Takata Airbag Inflators within the meaning of section 7 of the ACL and/or section 74A of the TPA;
 - (ii) the Volkswagen Takata Airbag Inflators were "goods" within the meaning of section 2(1) of the ACL and for the purposes of section 74D of the TPA;
 - (iii) if and insofar as the Volkswagen Takata Airbag Inflators were not of merchantable quality for the purposes of section 74D of the TPA (which is denied), then Group Members may recover compensation by action against Takata under section 74D of the TPA;

(b) says that:

- (i) insofar as the ASOC purports to bring an action that a Relevant Volkswagen Vehicle was not of merchantable quality within the meaning of section 74D of the TPA, and that action has not been commenced within 10 years after the time of the first supply to a consumer of the Relevant Volkswagen Vehicle within the meaning of section 74J(3) of the TPA, section 74J(3) of the TPA operates as a defence to the action;
- (ii) insofar as any action pursuant to section 74D of the TPA has not been commenced within 3 years after the day on which the cause of action first accrued for the purposes of section 74J(1) of the TPA, then any claim for relief is barred;

(c) says that in the event that the Plaintiff or Group Members suffered loss or damage (which is denied), the defence pleaded in paragraph 33 below applies (**Failure to Mitigate Defence**); and

(d) otherwise denies the allegations in paragraph 13.

14. In answer to the allegations in paragraph 14, Volkswagen:

- (a) repeats paragraphs 12 and 13 above; and
- (b) otherwise denies the allegations in paragraph 14 of the ASOC.

FAILURE TO SUPPLY GOODS OF ACCEPTABLE QUALITY - section 54 ACL

15. In answer to the allegations in paragraph 15 of the ASOC, Volkswagen:

- (a) repeats paragraphs 3, 4 and 5 above;
- (b) says that if, on or after 1 January 2011, a person supplies, in trade or commerce, goods to a consumer, and the supply does not occur by way of auction, there is a guarantee that the goods are of acceptable quality pursuant to section 54(1) of the ACL; and
- (c) otherwise denies the allegations in paragraph 15 of the ASOC.

16. In answer to the allegations in paragraph 16 of the ASOC, Volkswagen:

- (a) repeats paragraphs 7, 8, 9 and 10 above; and
- (b) otherwise denies the allegations in paragraph 16 of the ASOC.

17. In answer to the allegations in paragraph 17 of the ASOC, Volkswagen:

- (a) repeats paragraph 16 above; and

- (b) otherwise denies the allegations in paragraph 17 of the ASOC.
18. In answer to the allegations in paragraph 18 of the ASOC, Volkswagen:
- (a) says that:
 - (i) the Group Members, including the Plaintiff, may not recover damages by action against Volkswagen for any non-compliance with the Acceptable Quality Guarantee (which is denied) because any such non-compliance was only because of an act, default or omission of, or representation made by, Takata, for the purposes of section 271(2)(a) of the ACL;

Particulars

Takata's relevant act, default, or omission, or representation included, but are not limited to:

- (i) *Takata's conduct in being the person with responsibility for the design, development, production and selling of Volkswagen Takata Airbag Inflators;*
- (ii) *Takata's conduct in falsifying reports on design and production testing; and*
- (iii) *Takata's omission to disclose safety issues with Volkswagen Takata Airbag Inflators which had been identified by Takata.*

Further particulars may be supplied following discovery, the service of evidence and the service of compulsory third party processes.

- (b) says that insofar as any action by the Plaintiff or Group Members pursuant to section 54 of the ACL has not been commenced pursuant to sections 271 and 272 of the ACL, within 3 years after the day on which the affected person first became aware, or ought reasonably to have become aware, that the guarantee to which the action relates had not been complied with for the purposes of section 273 of the ACL (which is denied), then any claim for relief is time barred;
- (c) says that in the event that the Plaintiff or Group Members suffered damage (which is denied), the Failure to Mitigate Defence pleaded at paragraph 33 below applies; and
- (d) otherwise denies the allegations in the paragraph 18 of the ASOC.

MISLEADING OR DECEPTIVE CONDUCT

19. In answer to the allegations in paragraph 19 of the ASOC, Volkswagen:

- (a) repeats paragraphs 4, 7, 8, 9, 10 and 11 above;
- (b) says that:
 - (i) to the extent that the Plaintiff pleads contraventions of section 53(a) of the TPA and/or section 29(1)(a) of the ACL, those provisions require the identification of a false or misleading representation that goods are, relevantly, of a particular standard, quality or grade;
 - (ii) paragraph 19 does not identify any false or misleading representation(s) that goods are of a particular standard, quality or grade, nor the particular standard, quality or grade relied upon for the purposes of section 53(a) of the TPA and/or section 29(1)(a) of the ACL;
 - (iii) to the extent that the Plaintiff pleads contraventions of section 52 of the TPA and/or section 18 of the ACL, those provisions require the identification of misleading or deceptive conduct;
 - (iv) paragraph 19 does not identify any misleading or deceptive conduct for the purposes of section 52 of the TPA and/or section 18 of the ACL;
 - (v) no reasonable cause of action for contravention of section 52 or 53(a) of the TPA or section 18 or 29 of the ACL (as the case may be) is disclosed in the ASOC; and
- (c) otherwise denies the allegations in paragraph 19.

20. In answer to the allegations in paragraph 20 of the ASOC, Volkswagen:

- (a) repeats paragraphs 4, 7, 8, 9, 10, 11 and 19 above; and
- (b) otherwise denies the allegations in paragraph 20 of the ASOC.

21. In answer to the allegations in paragraph 21 of the ASOC, Volkswagen:

- (a) repeats paragraphs 4, 7, 8, 9, 10, 11 and 19 above; and
- (b) otherwise denies the allegations in paragraph 21 of the ASOC.

22. In answer to the allegations in paragraph 22 of the ASOC, Volkswagen:

- (a) repeats paragraphs 4, 7, 8, 9, 10, 11 and 19 above; and

- (b) otherwise denies the allegations in paragraph 22 of the ASOC.
23. In answer to the allegations in paragraph 23 of the ASOC, Volkswagen:
- (a) repeats paragraphs 4, 7, 8, 9, 10, 11 and 19 above; and
- (b) otherwise denies the allegations in paragraph 23 of the ASOC.
24. In answer to the allegations in paragraph 24 of the ASOC, Volkswagen:
- (a) repeats paragraph 4, 7, 8, 9, 10, 11 and 19 above; and
- (b) otherwise denies the allegations in paragraph 24 of the ASOC.
25. In answer to the allegations in paragraph 25 of the ASOC, Volkswagen:
- (a) repeats paragraphs 4, 7, 8, 9, 10, 11, 19, 20, 21 and 22 above; and
- (b) otherwise denies the allegations in paragraph 25 of the ASOC.
26. In answer to the allegations in paragraph 26 of the ASOC, Volkswagen:
- (a) repeats paragraphs 4, 7, 8, 9, 10, 11 and 19 above; and
- (b) otherwise denies the allegations in paragraph 26 of the ASOC.
27. In answer to the allegations in paragraph 27 of the ASOC, Volkswagen:
- (a) repeats paragraphs 19 to 26 above;
- (b) says that:
- (i) insofar as the Plaintiff or a Group Member seeks to recover compensation under section 87 of the TPA or 237 of the ACL, if the action was not commenced within 6 years after the day on which the cause of action that relates to the conduct accrued for the purposes of section 87 of the TPA or section 237 of the ACL, that action is time barred;
- (ii) says that insofar as the Plaintiff or a Group Member seeks to recover loss or damage under section 82 of the TPA or section 236 of the ACL, if the action was not commenced within 6 years after the day on which the cause of action that relates to the conduct accrued for the purposes of section 82 of the TPA or section 236 of the ACL, that action is time barred; and
- (c) says further that if any loss or damage has been suffered (which is denied), then:

- (i) insofar as the Plaintiff or Group Members have been offered (or will be offered) a Volkswagen Replacement Airbag, but have not taken up that offer of replacement within a reasonable time, then any loss or damage suffered by the Plaintiff or that Group Member after being notified of the offer to replace their Volkswagen Takata Airbag Inflator has been suffered partly or wholly as a result of their failure to have the Volkswagen Takata Airbag Inflator replaced (or replaced within a reasonable time);
 - (ii) in those premises, the amount of any loss or damage the Plaintiff or a Group Member may recover under s 82(1) of the TPA or s 236(1) of the ACL is to be reduced to the extent that the Court thinks just and equitable having regard to the Plaintiff's or Group Member's share in the responsibility for their loss or damage as a result of a failure to take reasonable care, pursuant to ss 82(1B) of the TPA and 137B of the *Competition and Consumer Act 2010* (Cth);
- (d) says in the event that the Plaintiff or Group Members suffered loss or damage (which is denied), the Failure to Mitigate Defence pleaded at paragraph 33 below applies; and
- (e) otherwise denies the allegations in paragraph 27.

UNCONSCIONABLE CONDUCT

28. In answer to the allegations in paragraph 28 of the ASOC, Volkswagen:
- (a) repeats paragraphs 7 and 8 above; and
 - (b) otherwise denies the allegations in paragraph 28 of the ASOC.
29. In answer to the allegations in paragraph 29 of the ASOC, Volkswagen:
- (a) repeats paragraph 28 above; and
 - (b) otherwise denies the allegations in paragraph 29 of the ASOC.
30. In answer to the allegations in paragraph 30 of the ASOC, Volkswagen:
- (a) repeats the matters in paragraphs 7, 8, 9, 10, 28 and 29 above; and
 - (b) otherwise denies the allegations in paragraph 30 of the ASOC.
- 30A. In answer to the allegations in the second numbered paragraph 30 of the ASOC, Volkswagen:
- (a) repeats paragraph 30 above;

- (b) says that if (which is denied) the alleged conduct of Volkswagen was unconscionable, then it denies the inference which is alleged to arise from that conduct; and
 - (c) otherwise denies the allegations in the second numbered paragraph 30 of the ASOC.
31. In answer to the allegations in paragraph 31 of the ASOC, Volkswagen:
- (a) repeats the matters in paragraphs 7, 8, 9, 10, 28, 29, 30 and 30A above; and
 - (b) otherwise denies the allegations in paragraph 31 of the ASOC.
32. In answer to the allegations in paragraph 32 of the ASOC, Volkswagen:
- (a) says that:
 - (i) insofar as the Plaintiff or a Group Member seeks to recover compensation under section 87 of the TPA or 237 of the ACL, if the action was not commenced within 6 years after the day on which the cause of action that relates to the conduct accrued for the purposes of section 87 of the TPA or section 237 of the ACL, that action is time barred;
 - (ii) insofar as the Plaintiff or a Group Member seeks to recover loss or damage under section 82 of the TPA or section 236 of the ACL, if the action was not commenced within 6 years after the day on which the cause of action that relates to the conduct accrued for the purposes of section 82 of the TPA or section 236 of the ACL, that action is time barred;
 - (b) says that in the event that the Plaintiff or Group Members suffered loss or damage (which is denied), the Failure to Mitigate Defence pleaded at paragraph 33 below applies; and
 - (c) otherwise denies the allegations in paragraph 32 of the ASOC.

FAILURE TO MITIGATE AND CAUSATION

33. In answer to the entirety of the allegations made in the ASOC, if the Plaintiff or Group Members establish that they have suffered any loss or damage (which is denied), Volkswagen says that:
- (a) Volkswagen has recalled or intends to recall the Relevant Volkswagen Vehicles in order to replace the driver or passenger side Volkswagen Takata Airbag Inflator with a Volkswagen Replacement Airbag in accordance with the *Consumer Goods (Motor Vehicles with Affected Takata Airbag Inflators and Specified Spare Parts) Recall Notice 2018*;
 - (b) to the extent that the Plaintiff or a Group Member has not responded (or does not respond) to such a recall, Volkswagen remains (or will remain) ready, willing and able to replace the

Volkswagen Takata Airbag Inflator in their vehicle as and when the Plaintiff or that Group Member responds to the recall;

- (c) it would be unreasonable for the Plaintiff or a Group Member to not respond to the recall within a reasonable period of time in order to have any such Volkswagen Takata Airbag Inflator in the Relevant Volkswagen Vehicles replaced;
- (d) to the extent that the Plaintiff or a Group Member has not responded (or does not respond) to such a recall, within a reasonable time or at all, any loss or damage they suffer will not have been caused by Volkswagen and they have (or will have) failed to mitigate any loss or damage they have suffered; and
- (e) to the extent that the Plaintiff or a Group Member has not responded (or does not respond) to such a recall, within a reasonable time or at all, Volkswagen will rely on the failure of the Plaintiff or any such Group Member to mitigate any loss or damage they may have suffered.

34. Further or in the alternative, to the extent that the Plaintiff or any Group Member:

- (a) has had the Volkswagen Takata Airbag Inflator replaced in any Relevant Volkswagen Vehicle; or
- (b) has not had the Volkswagen Takata Airbag Inflator replaced in any Relevant Volkswagen Vehicle once offered,

Volkswagen denies that the Plaintiff or that Group Member has suffered any loss or damage, whether caused by Volkswagen or at all.

APPORTIONMENT

35. In the event that the Plaintiff establishes that Volkswagen engaged in misleading or deceptive conduct as pleaded in paragraphs 19, 20 and 21 of the ASOC (which is denied) and is entitled to claim loss or damage as is pleaded in paragraphs 26 and 27 of the ASOC (which is denied), then in those circumstances only, Volkswagen:

- (a) repeats paragraph 13(a) above;
- (b) says that Takata:
 - (i) either directly or through its related entities, designed, developed and manufactured the Volkswagen Takata Airbag Inflators that were used as a component part in the Relevant Volkswagen Vehicles, including the propellant in those inflators;

- (ii) either directly or through its related entities, assembled those Volkswagen Takata Airbag Inflators into Takata airbag modules and supplied the Takata airbags to Volkswagen and/or its related entities for use as a component part in the Relevant Volkswagen Vehicles; and
 - (iii) either directly or through its related entities, supplied, in trade or commerce, Volkswagen Takata Airbag Inflators to consumers in Australia, by virtue of the Volkswagen Takata Airbag Inflators being a component of the Relevant Volkswagen Vehicles;
- (c) says that at all material times, Takata:
- (i) is and was a specialised supplier of automotive safety systems, that designed, manufactured, tested, marketed, distributed and sold airbag systems (including those with the Volkswagen Takata Airbag Inflators) for use in vehicles;
 - (ii) is and was one of the largest suppliers of airbag systems in the world (there being only a small number of suppliers of airbag systems in the world);
 - (iii) either directly or through its related entities designed, manufactured, tested, marketed, distributed and sold the airbag systems (including the Volkswagen Takata Airbag Inflators) to car manufacturers, including Volkswagen and/or its related entities; and
 - (iv) either directly or through its related entities manufactured airbag systems, including inflators and inflator propellant, in manufacturing plants that it owned or controlled;
- (d) says that at all material times:
- (i) airbag inflators were and are complex in nature and therefore require specialist expertise to design, develop, manufacture and test;
 - (ii) Volkswagen and/or its related entities relied upon its supplier, Takata, to design, develop, manufacture and test airbag inflators for use in airbag systems in vehicles manufactured by Volkswagen and/or its related entities for distribution or sale, including for distribution or sale to Australian consumers;
 - (iii) Takata knew or ought to have known that Volkswagen and/or its related entities would use the Volkswagen Takata Airbag Inflators in vehicles manufactured by Volkswagen and/or its related entities for distribution or sale to Australian customers;
 - (iv) Volkswagen and/or its related entities provided Takata with certain technical specifications, including relating to durability, safety and performance specifications that the airbag inflators and airbag modules must meet and satisfy, which included

specific durability, safety and performance specifications for airbag inflators (**Inflator Specifications**); and

- (e) says that Takata had agreed and represented to Volkswagen and/or its related entities that those Inflator Specifications would be met.

Particulars

Further particulars may be provided following the service of evidence, discovery and the service of compulsory third party processes.

- (f) says that Takata's airbag systems were only purchased by Volkswagen and installed in Volkswagen vehicles by Volkswagen and/or its related entities because Takata had agreed and represented to Volkswagen and/or its related entities that those Inflator Specifications would be met.

Particulars

Further particulars may be provided following the service of evidence, discovery and the service of compulsory third party processes.

- (g) says that, if the design and production of certain of the Volkswagen Takata Airbag Inflators did not meet the Inflator Specifications or otherwise were unsafe or prone to rupture and there were safety issues with the continued use or function of certain of the Volkswagen Takata Airbag Inflators (which is denied), Takata had knowledge of this at a point in time of which Volkswagen is presently not aware.

Particulars

Further particulars may be provided following the service of evidence, discovery and the service of compulsory third party processes.

- (h) says that at no point in time did Takata warn Volkswagen and/or its related entities that Volkswagen Takata Airbag Inflators were not safe and appropriate for use in motor vehicles or had a defect;
- (i) says that if the Plaintiff is successful in his claim for misleading or deceptive conduct (which is denied) he will have established that the conduct of Takata pleaded in paragraphs (e) to (h) was misleading or deceptive within the meaning of section 52 of the TPA and/or section 18 of the ACL and/or false or misleading in contravention of section 53(a) of the TPA and/or section 29(1)(a) of the ACL;

- (j) says that in the absence of Takata's conduct pleaded in paragraph (i) above, Volkswagen and/or its related entities would not have installed the Volkswagen Takata Airbag Inflators in the Relevant Volkswagen Vehicles;
- (k) says further that in the absence of Takata's conduct pleaded in paragraph (i) above the Plaintiff and Group Members would not have suffered the loss or damage that they claim in this proceeding;
- (l) says further or alternatively, at all material times, that Takata:
 - (i) owed a duty of care to consumers in Australia to exercise due care and skill in designing, manufacturing, testing, marketing, distributing and selling the Volkswagen Takata Airbag Inflators and Takata airbags;
 - (ii) was aware, or ought to have been aware, that the Volkswagen Takata Airbag Inflators could be fitted in vehicles to be purchased by consumers in Australia, such as the Relevant Volkswagen Vehicles;
 - (iii) was aware, or ought to have been aware, that consumers in Australia were reliant on it in designing, manufacturing, testing, marketing, distributing and selling Takata airbags, including the Volkswagen Takata Airbag Inflators and propellant, with due care and skill;
 - (iv) could reasonably foresee that the Plaintiff and Group Members may suffer loss or damage if Takata did not exercise due care and skill in designing, manufacturing, testing, marketing, distributing and selling the Takata airbags, including the Volkswagen Takata Airbag Inflators and propellant; and
 - (v) breached its duty of care to the Plaintiff and Group Members by not exercising due care and skill in designing, manufacturing, testing, marketing, distributing and selling the Takata airbags;

Particulars

Further particulars may be provided following the service of evidence, discovery and the service of compulsory third party processes.

- (m) says further that in the absence of Takata's conduct pleaded in paragraph (l) above the Plaintiff and Group Members would not have suffered the loss or damage that they claim in this proceeding;

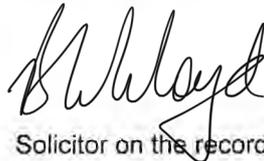
- (n) says further that in the absence of Takata's breach of duty pleaded in paragraph (l) above the Plaintiff and Group Members would not have suffered the loss or damage that they claim in this proceeding;
- (o) says that by reason of the matters pleaded in paragraphs (a) to (n) above, if Volkswagen has any liability to the Plaintiff or Group Members, then Takata is also liable to the Plaintiff and Group Members for that loss and damage by reason of Takata's acts or omissions and is a concurrent wrongdoer for the purposes of section 87CB(3) of the TPA and/or section 87CB(3) of the *Competition and Consumer Act 2010* (Cth);
- (p) says that a claim for damages pursuant to section 82 of the TPA or section 236 of the ACL for misleading or deceptive conduct is an apportionable claim pursuant to section 87CB(1) of the TPA or section 87CB(1) of the *Competition and Consumer Act 2010* (Cth); and
- (q) says that if the Plaintiff or Group Members have suffered any loss or damage as alleged and if that loss was caused by the conduct of Volkswagen and Volkswagen is liable for that loss as alleged (which is also denied), then the liability of Volkswagen (if any) in relation to that loss should be reduced to reflect that proportion of the loss the Court considers just having regard to the extent of Takata's responsibility for the loss, pursuant to section 87CD(1) of the TPA and/or section 87CD(1) of the CCA.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

~~I have advised the plaintiff that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.~~

Signature



Capacity

Solicitor on the record

Date of signature

~~21 December 2018~~ 3 July 2020

AFFIDAVIT VERIFYING

Name Paul du Preez
Address 24 Muir Road, Chullora NSW 2190
Occupation Company Secretary

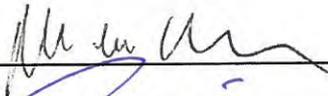
Date

I affirm

1. I am the Company Secretary of Volkswagen Group Australia Pty Ltd and am authorised to verify this defence on its behalf.
2. I believe that the allegations of fact contained in the amended defence are true.
3. I believe that the allegations of fact that are denied in the amended defence are untrue.
4. After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the amended defence are true.

Affirmed at Sydney

Signature of deponent



Signature of witness



Name of witness

Adrian Kuti

Address of witness

1 Bligh Street

Sydney NSW 2000

Capacity of witness

Solicitor

As a witness, I certify that:

1. I have signed a copy of the document signed by the person who made this affidavit (the **deponent**). I confirm that I witnessed the deponent sign the document over an audio visual link (BlueJeans) in accordance with *clause 2 of Schedule 1 to the Electronic Transactions Regulation 2017*.

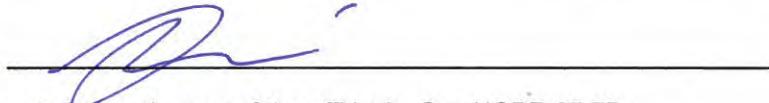
And as a witness, I certify the following matters concerning the the deponent:

1. I saw the face of the deponent over an audio visual link (BlueJeans).
2. I have confirmed the deponent's identity using the following identification document shown to me over an audi visual link (BlueJeans):

NSW Drivers Licence (Licence No. 12224280)

Identification document relied on (may be original or certified copy)

Signature of witness



Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

FURTHER DETAILS ABOUT FILING PARTY**Filing party**

Name Volkswagen Group Australia Pty Ltd ABN 14 093 117 876
 Address 24 Muir Road
 CHULLORA NSW 2190

Legal representative for filing party

Name Bruce Llewellyn Lloyd
 Practising certificate number 21174
 Firm Clayton Utz
 Contact solicitor Adrian Kuti
 Address Level 15
 1 Bligh Street
 Sydney NSW 2000
 DX address DX 370
 Sydney
 Telephone (02) 9353 5778
 Fax (02) 8220 6700
 Email akuti@claytonutz.com
 Electronic service address blloyd@claytonutz.com / akuti@claytonutz.com