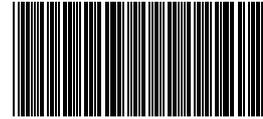




Filed: 22 October 2018 12:31 PM



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Form 3A/B UCPR 6.2

STATEMENT OF CLAIM

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	Plaintiff[s]
Legal representative	Damian Scattini
Legal representative reference	
Telephone	(02)91463888
Your reference	VW

NOTICE OF LISTING

This matter has been listed for Directions (Equity Registrar) at Supreme Court Sydney on 20 November 2018 at 09:30 AM.

AFFIDAVIT

Deponent Name	Philip Dwyer
Sworn/Affirmed on	19 October 2018

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Statement of Claim (e-Services), along with any other documents listed below, were filed by the Court.

Statement of Claim (UCPR 3A/3B) (2018.10.22 Statement of Claim (VW).pdf)

[attach.]

Form 3A (version 7)
UCPR 6.2

STATEMENT OF CLAIM

COURT DETAILS

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

TITLE OF PROCEEDINGS

Plaintiff	Philip Dwyer
Defendant	Volkswagen Group Australia Pty Ltd ABN 14 093 117 876

FILING DETAILS

Filed for	Philip Dwyer
Legal representative	Damian Scattini, Quinn Emanuel Urquhart & Sullivan LLP
Legal representative reference	07435-00001
Contact name and telephone	Damian Scattini 02 9146 3888
Contact email	damianscattini@quinnemanuel.com

TYPE OF CLAIM

Other (Equity General List)

Representative proceeding under Part 10 of the *Civil Procedure Act 2005* (NSW)

RELIEF CLAIMED

- 1 An order for compensation pursuant to section 87 of the *Trade Practices Act 1974* (Cth) (**TPA**) and/or section 237 of the Australian Consumer Law, being Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (**ACL**);
- 2 Further or in the alternative, damages pursuant to section 82 of the TPA and/or section 236 of the ACL;
- 3 Further or in the alternative, compensation pursuant to section 74D(1) of the TPA;

- 4 Further or in the alternative, damages pursuant to sections 271 and 272 of the ACL;
- 5 Interest in accordance with section 100 of the *Civil Procedure Act 2005* (NSW);
- 6 Costs;
- 7 Any other orders the Court considers appropriate.

COMMON QUESTIONS, PLEADINGS AND PARTICULARS

A. COMMON QUESTIONS

The questions of law or fact common to the claims of Group Members, or to potential subgroup members, in this proceeding are:

1. Whether the Defendant supplied Defective Vehicles;
2. Whether the Defective Vehicles are goods of a kind which are commonly bought and commonly supplied for the purpose of:
 - a. driving or permitting to be driven;
 - b. driving or permitting to be driven without being exposed to unnecessary danger or harm attributable to its construction; and/or
 - c. carrying passengers in the vehicle without exposing them to unnecessary danger or harm attributable to its construction;
3. Whether the Defective Vehicles:
 - a. are not safe to drive; and/or
 - b. if driven, expose the driver and any passengers to unnecessary danger and harm attributable to their construction with at least one Takata Airbag;
4. Whether the Defendant did not take any or adequate steps to:
 - a. warn members of the public that the Defective Vehicles were not safe to drive and/or safe for passengers;
 - b. prevent the Defective Vehicles being driven;
 - c. ensure that Defective Vehicles were not sold as second-hand vehicles;

5. Whether any Defective Vehicles acquired by Group Members before 1 January 2011 were not of merchantable quality within the meaning of section 74D of the *Trade Practices Act 1974* (Cth) (**TPA**);
6. Whether the Defendant is liable pursuant to section 74D of the TPA to compensate any Group Members who acquired a Defective Vehicle before 1 January 2011;
7. Whether:
 - a. a reasonable consumer fully acquainted with the state and condition of the Defective Vehicles would not regard the Defective Vehicles as:
 - i. acceptably fit for all the purposes for which goods of that kind are commonly supplied;
 - ii. free from defects; and/or
 - iii. safe;
 - b. the Defendant breached the Acceptable Quality Guarantee (as defined at paragraph 15 of the Pleadings) provided for in section 54(1) of the Australian Consumer Law, being Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (**ACL**) in respect of any Defective Vehicles supplied to Group Members on or after 1 January 2011;
8. Whether the Defendant is liable to pay damages pursuant to section 271 and section 272 of the ACL to Group Members to whom it supplied Defective Vehicles on or after 1 January 2011;
9. Whether, during the Relevant Period, the Defendant engaged in Misleading Conduct (as defined at paragraph 19 of the pleading below), Misleading Conduct by Silence (as defined at paragraph 22 of the pleading below) and/or made Misleading Representations (as defined at paragraph 20 of the pleading below);
10. Whether the Misleading Conduct, the Misleading Conduct by Silence, and/or the Misleading Representations was:
 - a. false or misleading in contravention of section 53(a) of the TPA and/or section 29(1)(a) of the ACL;
 - b. misleading or deceptive, or likely to mislead or deceive, in contravention of section 52 of the TPA and/or section 18 of the ACL;

- c. misleading as to the nature, the characteristics and/or the suitability for purpose of the Defective Vehicles in contravention of section 55 of the TPA and/or section 33 of the ACL;
11. Whether it can be inferred that each Group Member relied on the Misleading Conduct, the Misleading Conduct by Silence, and/or the Misleading Representations in purchasing their respective Defective Vehicle;
 12. Whether the Defendant engaged in Unconscionable Conduct (as defined at paragraph 30 of the pleading below) in contravention of section 51AB of the TPA and/or section 21 of the ACL;
 13. Whether the Group Members are entitled to recover from the Defendant:
 - a. compensation pursuant to section 87 of the TPA and/or section 237 of the ACL; and/or
 - b. loss or damage pursuant to section 82 of the TPA and/or section 236 of the ACL.

B. PLEADINGS

THE PROCEEDING AND THE PARTIES

1. The Plaintiff brings this proceeding as a representative proceeding pursuant to Part 10 of the *Civil Procedure Act 2005* (NSW):
 - a. in his own right;
 - b. on behalf of:
 - i. consumers (within the meaning of section 4B of the TPA or sections 3(1)(a) or (b) of the ACL, who did not acquire a commercial road vehicle as that term is used in section 4B of the TPA);
 - ii. who at any time during the period 1 November 2000 to 31 May 2018 inclusive (**Relevant Period**) acquired (within the meaning of section 4 of the TPA or section 2 of the ACL) in Australia a Volkswagen Group Australia Pty Limited (**Volkswagen**) motor vehicle fitted with a front driver or passenger airbag manufactured or supplied by Takata Corporation and/or its related entities or

subsidiaries, including TK Holdings, Inc (**Takata Airbag**), and which is the subject of a recall as follows (together, **Defective Vehicle**);

Particulars

- (A) *the recall issued in respect of Volkswagen Polo A04 models with model year 2007 to 2009 on 1 August 2018, pursuant to section 128 of the ACL, being Product Recall Australia Number 2018/16912 published 30 August 2018;*
- (B) *the recall issued in respect of Volkswagen Transporter models with model year 2008 to 2015 on 1 August 2018, pursuant to section 128 of the ACL, being Product Recall Australia Number 2018/16912 published 30 August 2018;*
- (C) *the recall issued in respect of Volkswagen Caravelle models with model year 2008 to 2009 on 1 August 2018, pursuant to section 128 of the ACL, being Product Recall Australia Number 2018/16912 published 30 August 2018;*
- (D) *the recall issued in respect of Volkswagen Multivan models with model year 2008 to 2009 on 1 August 2018, pursuant to section 128 of the ACL, being Product Recall Australia Number 2018/16912 published 30 August 2018;*
- (E) *the recall to be issued in respect of Volkswagen CC models with model year 2009 to 2016;*
- (F) *the recall to be issued in respect of Volkswagen B6 Passat models with model year 2010;*
- (G) *the recall to be issued in respect of Volkswagen Golf models with model year 2009 to 2013;*
- (H) *the recall to be issued in respect of Volkswagen Up! models with model year 2013 to 2014;*
- (I) *the recall to be issued in respect of Volkswagen B7 Passat models with model year 2011 to 2015;*

- (J) *the recall to be issued in respect of Volkswagen T5 Multivan models with model year 2010 to 2015;*
- (K) *the recall to be issued in respect of Volkswagen Caravelle models with model year 2010 to 2015;*
- (L) *the recall to be issued in respect of Volkswagen Polo A5 models with model year 2010 to 2014;*
- (M) *the recall to be issued in respect of Volkswagen Golf Cabriolet models with model year 2012 to 2015;*
- (N) *the recall to be issued in respect of Volkswagen Eos models with model year 2010 to 2014;*
- (O) *the recall to be issued in respect of Volkswagen Crafter models with model year 2006 to 2016;*

iii. and, who:

- A. prior to or on 31 May 2018, had not sold or otherwise disposed of the Defective Vehicle; or
- B. after 31 May 2018, sold or otherwise disposed of the Defective Vehicle;

(Group Members).

2. The Plaintiff:

- a. purchased, in October 2013, a Defective Vehicle, being a Volkswagen Passat Sedan Make VLK, manufactured in 2013 (**Plaintiff's Vehicle**);
- b. purchased the Plaintiff's Vehicle new at Sydney City Volkswagen, Mascot, New South Wales;
- c. paid \$45,000 for the Plaintiff's Vehicle;
- d. acquired the Plaintiff's Vehicle for personal use;
- e. acquired the Plaintiff's Vehicle for the purpose of:

- i. driving the Plaintiff's Vehicle or permitting the Plaintiff's Vehicle to be driven;
- ii. driving the Plaintiff's Vehicle or permitting the Plaintiff's Vehicle to be driven without being exposed to unnecessary danger or harm attributable to its construction; and/or
- iii. carrying passengers in the Plaintiff's Vehicle without exposing them to unnecessary danger or harm attributable to its construction;

which purpose or purposes was or were expressly or impliedly known to the Defendant;

- f. in acquiring the Plaintiff's Vehicle, relied on the Misleading Conduct as pleaded in paragraph 19 below, the Misleading Conduct by Silence as pleaded in paragraph 22 below and/or the Misleading Representations as pleaded in paragraph 20 below;
- g. was not aware, at the time of purchase of the Plaintiff's Vehicle, that the Plaintiff's Vehicle was fitted with one or more Takata Airbags;
- h. is included in any reference to Group Members in the remainder of this pleading.

3. Each Group Member:

- a. acquired a Defective Vehicle by:
 - i. purchasing a new Defective Vehicle;
 - ii. purchasing a second-hand Defective Vehicle; or
 - iii. taking on a lease in respect of a new Defective Vehicle on hire or on hire-purchase;
- b. acquired a Defective Vehicle:
 - i. for \$40,000 or less; or
 - ii. where the Defective Vehicle was of a kind ordinarily acquired for personal, domestic or household use or consumption;

- c. did not acquire a Defective Vehicle, or hold themselves out as acquiring a Defective Vehicle for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land;
- d. acquired a Defective Vehicle for the purpose of:
 - i. driving the Defective Vehicle or permitting the Defective Vehicle to be driven;
 - ii. driving the Defective Vehicle or permitting the Defective Vehicle to be driven without being exposed to unnecessary danger or harm attributable to its construction; and/or
 - iii. carrying passengers in the Defective Vehicle without exposing them to unnecessary danger or harm attributable to its construction;

which purpose or purposes was or were expressly or impliedly known to the Defendant;

- e. by reason of the matters pleaded in:
 - i. paragraph 3(b) above; and
 - ii. paragraph 9(a) below,

acquired a Defective Vehicle as a consumer within the meaning of section 4B of the TPA or sections 3(1)(a) or (b) of the ACL, which was not a commercial road vehicle as that term is used in section 4B of the TPA;
- f. acquired a Defective Vehicle from a person other than by way of sale by auction.

4. The Defendant:

- a. is a company duly incorporated in Australia;
- b. is a trading corporation within the meaning of section 4 of the TPA;
- c. is and was at all material times a wholly-owned subsidiary of Volkswagen Finance Luxemburg S.A., which:

- i. is a Luxembourg based company;
 - ii. has no place of business in Australia;
 - iii. manufactured the Defective Vehicles (**Imported Defective Vehicles**);
- d. did not manufacture the Imported Defective Vehicles;
 - e. imported the Imported Defective Vehicles into Australia;
 - f. by reason of the matters pleaded in (c) and (e) above, manufactured the Imported Defective Vehicles within the meaning of section 74A of the TPA or section 7 of the ACL;
 - g. supplied, other than by way of sale by auction, in the course of business, and in trade or commerce:
 - i. Defective Vehicles to other persons who acquired the goods for re-supply; and/or
 - ii. Defective Vehicles to Group Members who by reason of paragraphs 3(b) above and 9(a) below were consumers within the meaning of section 4B of the TPA or section 3 of the ACL.
5. The Defective Vehicles were supplied to Group Members in trade or commerce.
6. As at the date of the commencement of this proceeding, seven or more Group Members have claims in the nature of those described in this Statement of Claim.

THE DEFECTIVE VEHICLES

7. Takata Airbags:
- a. use ammonium nitrate as the propellant with the consequence that the inflators within the Takata Airbags:
 - i. have a propensity to explode thereby propelling metal shrapnel towards the occupants of the Defective Vehicle;
 - ii. have a propensity to malfunction on deployment of the Takata Airbag, by deploying too rapidly and/or with excessive force;

Particulars

Particulars will be provided following evidence, including expert evidence.

- b. were the subject of a safety warning to the public published on 6 August 2017 by the Commonwealth of Australia Minister for Small Business pursuant to sections 129(1)(a) and 129(1)(b) of the ACL which:
- i. stated, amongst other things:
- “Warning*
- Pursuant to s 129(1)(b), the Minister warns of the possible risks involved in the use of motor vehicles containing Takata airbags supplied in Australia.*
- This Safety Warning has been issued because there have been serious injuries and deaths caused by faulty Takata airbags installed in motor vehicles, both in Australia and overseas.*
- The inflator components in Takata airbags may deteriorate and subsequently misdeploy in an incident, with the result that metal fragments from the inflator housing may propel out of the airbag, causing injury or death to the drivers/riders or passengers.*
- Investigation*
- The Australian Competition and Consumer Commission (ACCC) is investigating whether motor vehicles containing a Takata airbag will or may cause injury to any person, or a reasonably foreseeable use (or misuse) of those goods will or may cause injury to any person.”*
- ii. related to all of the motor vehicles containing a Takata Airbag which were then currently subject to a product safety recall;
- iii. related to the Defective Vehicles;
- c. have caused approximately 100 million vehicles to be subject of product safety recalls worldwide, including at least 4 million vehicles in Australia, fitted with Takata Airbags;

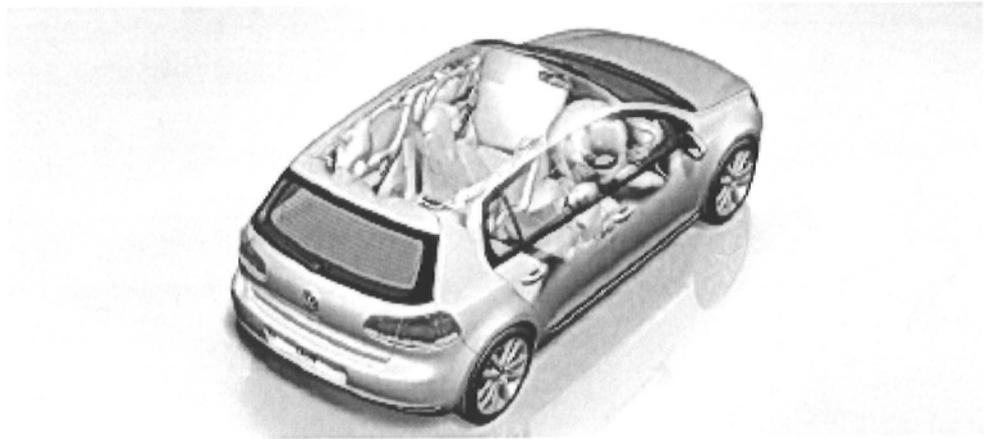
- d. have caused at least 230 documented injuries as a result of Takata Airbags exploding during their deployment and propelling shrapnel and metal fragments within the vehicle in which they were contained;
 - e. have caused at least 23 reported deaths worldwide as a result of Takata Airbags exploding during their deployment and propelling shrapnel and metal fragments within the vehicle in which they were contained;
 - f. have caused at least one death in Australia.
8. Each of the Defective Vehicles is or was fitted with at least one Takata Airbag.
9. The Defective Vehicles:
- a. are goods:
 - i. acquired for an amount that did not exceed \$40,000; or
 - ii. of a kind ordinarily acquired for personal, domestic or household use or consumption;
 - b. are goods of a kind which are commonly bought and commonly supplied for the purpose of:
 - i. driving or permitting to be driven;
 - ii. driving or permitting to be driven without being exposed to unnecessary danger or harm attributable to their construction; and/or
 - iii. carrying passengers without exposing them to unnecessary danger or harm attributable to their construction;
 - c. by reason of the matters pleaded in paragraphs 7 and 8 above:
 - i. are not safe to drive; and/or
 - ii. if driven, expose the driver and any passengers to unnecessary danger and harm attributable to their construction with at least one Takata Airbag;
 - d. are goods within the meaning of:

- i. by reason of paragraph 9(a) above, section 74A(2)(a) of the TPA;
 - ii. section 4 of the TPA;
 - iii. section 2 of the ACL.
10. A compulsory safety recall to the public (**Compulsory Recall**), was issued by Michael Sukkar, Assistant Minister to the Treasurer pursuant to section 122 of the ACL, dated 27 February 2018, in respect of certain of the Defective Vehicles identified therein.
11. The Defendant:
- a. marketed, distributed and promoted Defective Vehicles within Australia at various times during the Relevant Period;

Particulars

The Defendant marketed its vehicles using print and electronic media, sponsorship and other forms of advertising targeted at consumers. By way of example:

(1) *The following appeared on the Defendant's website in 2011:*



Passive Safety – Design measures taken to protect the occupants of vehicles from injury, or to reduce the risk of injury.

Airbags
All Golf models feature seven airbags – front, front side and front and rear curtain airbags. An airbag is dedicated to protect the driver's knees so that in the event of a crash, the resulting forces are distributed more evenly and less stress is transferred to the hips.



[see:

<http://web.archive.org/web/20110110203614/http://www.volkswagen.c>

om.au/content/medialib/vwd4/au/common/brochures/golf/_jcr_content/renditions/rendition.file/golf_brochure.pdf]

(II) *Further particulars will be provided following discovery.*

b. held the Defective Vehicles out as being:

- i. safe to drive; and
- ii. safe for passengers;

Particulars

- (A) *The particulars to paragraph 11(a) above are repeated.*
- (B) *The Defendant held out the Defective Vehicle as being safe to drive and safe for passengers by importing, promoting, offering for sale, or providing in whatever way to a wholesaler or supplier, the Defective Vehicles, and by failing to take the actions required as pleaded in paragraph 11(c) below.*
- (C) *The Defendant's actions described above constituted a holding out as pleaded in paragraph 11(b), by reference to all the circumstances of the case, including:*
 - (i) *the reputation of the Defendant's brand (i.e. Volkswagen) as a make of vehicle that is safe to drive and safe for passengers;*
 - (ii) *that consumers who purchase vehicles have the reasonable expectation that such vehicles may be used for the purposes listed in paragraph 3(d) above;*
 - (iii) *that consumers who purchase vehicles with airbags have the reasonable expectation that the airbag will deploy properly and will not malfunction during deployment as pleaded in paragraph 7(a)(ii) above;*
 - (iv) *further or in the alternative, that if a vehicle could not be used for the purpose described in (ii) above, or that if the airbag did not have the characteristics described in (iii) above, a reasonable person in the position of any*

Group Member would expect that matter to be notified to them or otherwise publicised.

(D) Further particulars will be provided following evidence and discovery.

- c. did not take any or adequate steps to:
- i. warn members of the public that the Defective Vehicles were not safe to drive;
 - ii. prevent the Defective Vehicles being driven;
 - iii. ensure that Defective Vehicles were not sold as second-hand vehicles;
 - iv. warn members of the public that the Defective Vehicles were not safe for passengers.

Particulars

The Defendant did not:

- (A) promptly notify registered owners of a Defective Vehicle that the Defective Vehicle is fitted with at least one Takata Airbag;*
- (B) promptly notify the general public and registered owners of Defective Vehicles as to the nature and risks associated with Takata Airbags, including advertising in print and other media the dangers associated with Takata Airbags;*
- (C) promptly withdraw from importing, manufacturing, marketing and offering for sale vehicles fitted with at least one Takata Airbag;*
- (D) immediately recall Defective Vehicles;*
- (E) promptly replace Takata Airbags with non-Takata Airbags;*
- (F) promptly withdraw from sale any Defective Vehicle that had not been repaired as described in (E) above;*

- (G) *promptly direct dealerships and other car suppliers with which the Defendant had contact or influence to cease selling or offering for sale the Defective Vehicles, or to warn customers of the risks associated with Takata Airbags identified in paragraph 7 above;*
- (H) *promptly report to the ACCC and other consumer interest organisations the information set out in (A), (B) and (D) above, with a view to the information being disseminated to owners and potential owners or users of the Defective Vehicles; and*
- (I) *promptly cease the activities referred to in paragraphs 11(a) and (b) above.*

FAILURE TO SUPPLY GOODS OF MERCHANTABILITY – section 74D TPA

12. By reason of the matters pleaded in paragraphs 7, 8 and 10 above, the Defective Vehicles were not of merchantable quality within the meaning of section 74D(3) of the TPA.
13. Any Group Member who acquired a Defective Vehicle before 1 January 2011 suffered loss or damage by reason that the Defective Vehicle they acquired was not of merchantable quality.

Particulars of loss and damage

- (A) *The difference between the amount which each Group Member paid or is liable to pay for that Group Member's Defective Vehicle, and the true value of the Defective Vehicle as at the date of purchase, insofar as that difference is attributable to the matter pleaded in paragraph 12 above (which is a matter for evidence, including expert evidence);*
- (B) *Loss of use of the Defective Vehicle; and/or*
- (C) *Any expenditure for which a Group Member has, or is likely to, become liable as a result of:*
 - (i) *the reasonable unwillingness of a Group Member to drive their Defective Vehicle where that reasonable unwillingness was connected with the fact that the Defective Vehicle was fitted with at least one Takata Airbag; and/or*

(ii) *the time, cost and inconvenience of attending at a service centre or other place to have a replacement airbag fitted, including any:*

(I) *transportation costs (such as taxi, private hire car and/or public transport fares) incurred due to the inability to use the Defective Vehicle during or in connection with its repair;*

(II) *fuel costs incurred in driving, or towing costs incurred in towing, the Defective Vehicle to the location nominated by the Defendant for the replacement of the Takata Airbag;*

(III) *compensation for missed work while attending to the fitting of the replacement airbag.*

14. By reason of the matters pleaded in paragraphs 3(e), 4, 5, 9(d), 12 and 13 above, the Defendant is liable, pursuant to section 74D(1) of the TPA, to compensate any Group Members who acquired a Defective Vehicle before 1 January 2011 for the loss and damage referred to in paragraph 13 above.

FAILURE TO SUPPLY GOODS OF ACCEPTABLE QUALITY – section 54 ACL

15. By reason of the matters pleaded in paragraphs 3(e), 4 and 5 above, there is a guarantee that the Defective Vehicles supplied to Group Members on or after 1 January 2011 are of acceptable quality pursuant to section 54(1) of the ACL (**Acceptable Quality Guarantee**).

16. By reason of the matters pleaded in paragraphs 7, 8, 9(b), 9(c) and 10 above, a reasonable consumer fully acquainted with the state and condition of the Defective Vehicles would not regard the Defective Vehicles as:

- a. acceptably fit for all the purposes for which goods of that kind are commonly supplied;
- b. free from defects;
- c. safe.

17. By reason of the matters pleaded in paragraph 16 above, the Defective Vehicles did not comply with the Acceptable Quality Guarantee.

18. By reason of the matters pleaded in paragraphs 4(e), 4(f), 4(g), 15 and 17 above, Group Members who acquired a Defective Vehicle on or after 1 January 2011 are entitled under sections 271 and 272 of the ACL to recover damages from the Defendant.

Particulars of loss and damage

- (A) *The difference between the price which each Group Member paid or is liable to pay for that Group Member's Defective Vehicle, and the true value of the Defective Vehicle as at the date of purchase, insofar as that difference is attributable to the matter pleaded in paragraph 17 above (which is a matter for evidence, including expert evidence);*
- (B) *In the alternative, the difference between the lower of the price which each Group Member paid or is liable to pay for that Group Member's Defective Vehicle, or the average retail price of vehicles of the same make, model and year of manufacture as the Defective Vehicle at the time of supply, and the true value of the Defective Vehicle insofar as that difference is attributable to the matters pleaded in paragraph 17 above;*
- (C) *Further or in the alternative to (A) or (B) above, the Plaintiff repeats particulars (B) and (C) to paragraph 13 above.*

MISLEADING OR DECEPTIVE CONDUCT

19. By the conduct pleaded in paragraphs 4(e), 4(f), 4(g) and 11 above the Defendant engaged in conduct which was:
- a. false or misleading in contravention of section 53(a) of the TPA and/or section 29(1)(a) of the ACL;
 - b. misleading or deceptive, or likely to mislead or deceive, in contravention of section 52 of the TPA and/or section 18 of the ACL;

(Misleading Conduct)

by reason of the matters pleaded in paragraphs 7, 8, 9(b), 9(c) and 10 above.

20. Further, or in the alternative to paragraph 19 above, by the conduct pleaded in paragraph 19 above, the Defendant represented that:

- a. the Defective Vehicle was safe to drive;
- b. it was safe to transport passengers in the Defective Vehicle;
- c. the airbag in the Defective Vehicle did not contain any defect that made the airbag(s) or the vehicle unsafe;
- d. the construction of the Defective Vehicle would not expose the driver or passengers to unnecessary harm;
- e. the Defective Vehicle's airbag(s) would deploy properly in the event of an accident or collision; and/or
- f. the Defendant would notify any purchaser (past or prospective) of any issue with the Defective Vehicle's construction that had the potential to affect the vehicle's safety at the time of purchase, or as soon as the Defendant became aware of it,

(Misleading Representations).

21. Each of the Misleading Representations was:

- a. false or misleading in contravention of section 53(a) of the TPA and/or section 29(1)(a) of the ACL;
- b. misleading or deceptive, or likely to mislead or deceive, in contravention of section 52 of the TPA and/or section 18 of the ACL,

by reason of the matters pleaded in paragraphs 7, 8, 9(b), 9(c) and 10 above.

22. Further, or in the alternative to paragraphs 20 and 21:

- a. by the conduct pleaded in paragraph 19, the Plaintiff and Group Members had a reasonable expectation that if any of the matters pleaded in paragraph 20(a) to (f) did not exist, or were not so, that fact would be disclosed;
- b. the Defendant's failure to disclose that any of the matters pleaded in paragraph 20(a) to (f) did not exist, or were not so, was misleading or deceptive, or likely to mislead or deceive, in contravention of section 52 of the TPA and/or section 18 of the ACL,

(Misleading Conduct by Silence).

23. The Misleading Conduct and Misleading Conduct by Silence was conduct engaged in, and the Misleading Representations were made, by the Defendant in trade or commerce, within the meaning of:
- a. section 52 of the TPA;
 - b. section 53 of the TPA;
 - c. section 18 of the ACL; and/or
 - d. section 29 of the ACL.
24. Further or in the alternative to the matters pleaded in paragraphs 19 and 23 above, the Misleading Conduct was conduct which was, by reason of the matters pleaded in paragraphs 7, 8, 9(b), 9(c) and 10 above, misleading as to:
- a. the nature;
 - b. the characteristics;
 - c. the suitability for purpose;
- of the Defective Vehicles in contravention of section 55 of the TPA and/or section 33 of the ACL.
25. Each Group Member relied on the Misleading Conduct, the Misleading Conduct by Silence, and/or the Misleading Representations in purchasing their respective Defective Vehicles.

Particulars

It can be inferred from all the surrounding circumstances that each Group Member relied upon the Misleading Conduct, the Misleading Conduct by Silence, and/or the Misleading Representations. Those surrounding circumstances include:

- (A) *the matters set out in paragraph 3(b) and 3(d);*
- (B) *the reputation of the Defendant's brand (i.e. Volkswagen) as a make of vehicle that is safe to drive and safe for passengers;*

- (C) *that consumers who purchase vehicles have the reasonable expectation that such vehicles may be used for the purposes listed in paragraph 3(d) above;*
- (D) *that consumers who purchase vehicles with airbags have the reasonable expectation that the airbag will deploy properly and will not malfunction during deployment as pleaded in paragraph 7(a)(ii) above;*
- (E) *further or in the alternative, that if the vehicle could not be used for the purpose described in (C) above, or that if the airbag did not have the characteristics described in (D) above, a reasonable person in the position of any Group Member would expect that matter to be notified to them or otherwise publicised.*

26. By reason of the matters pleaded in paragraphs 2, 3, 19 to 25 above, each of the Group Members suffered loss and damage.

Particulars of loss and damage

(A) The difference between the price which each Group Member paid or is liable to pay for that Group Member's Defective Vehicle, and the true value of the Defective Vehicle as at the date of purchase, insofar as that difference is attributable to the matters pleaded in paragraphs 19 to 25 above (which is a matter for evidence, including expert evidence);

(B) Further or in the alternative to (A) above, the Plaintiff repeats particulars (B) and (C) to paragraph 13 above.

27. By reason of the matters pleaded in paragraphs 19 to 26 above, each Group Member is entitled to:

- a. an order pursuant to section 87 of the TPA and/or section 237 of the ACL that the Defendant is obliged to compensate any Group Member for the loss and damage referred to in the particulars to paragraph 26 above;

- b. further or in the alternative, an award in the amount of loss or damage suffered by each Group Member referred to in paragraph 26 above pursuant to section 82 of the TPA and/or section 236 of the ACL.

UNCONSCIONABLE CONDUCT

28. From in or around:

- a. November 2008; or
- b. April 2013; or
- c. June 2014; or
- d. October 2017; or
- e. July 2018

the Defendant knew, or ought to have known, of the matters referred to in paragraphs 7(a) and 8 above and, by reason of those matters, knew, or ought to have known, that the Defective Vehicles:

- i. were not safe to drive; and/or
- ii. if driven, would expose the driver and any passengers to unnecessary danger and harm attributable to their construction with at least one Takata Airbag.

Particulars

- (I) *In November 2008, Honda issued the first recall for Takata driver side inflators with improperly manufactured propellant wafers. Due to manufacturing errors, these inflators could rupture when activated. Honda expanded these recalls in 2009, 2010 and 2011. The fact of these recalls was public knowledge.*
- (II) *In April 2013, Takata filed a defect report in the USA stating that certain passenger side airbag modules may rupture as a result of manufacturing errors that are aggravated by exposure to hot and humid environments. This was public knowledge, or was information which was reasonably available to the Defendant.*

- (III) *In June 2014, the USA National Highway Traffic Safety Administration began investigating vehicle manufacturers, after reports of ruptures of Takata airbags in hot and humid regions. As of 18 November 2014, the investigation had expanded to include ten automakers. This was public knowledge, or was information which was reasonably available to the Defendant.*
- (IV) *On 9 October 2017, the Defendant issued a submission to the ACCC which stated, inter alia, that "Volkswagen Group vehicles do not contain alpha population airbags nor Takata frontal airbags propelled by PSAN with calcium sulphate desiccant. ... the airbags fitted to Volkswagen, Skoda and Audi brand vehicles supplied in Australia do not pose safety risks to vehicle occupants such that recall is warranted at this time".*
- (V) *In or around July 2018, the Defendant notified the Australian Competition and Consumer Commission that it intended to initiate recall action for the vehicles set out in paragraph 1(b)(ii) above.*
- (VI) *The fact of each of the future recalls, as set out in paragraph 1(b)(ii) above, and the Compulsory Recall.*
- (VII) *The Defendant's knowledge referred to in this paragraph is a reasonable inference from the matters set out in (I) – (VI) above, those matters being concerned with the safety of vehicles of which the Defendant was the importer, and which the Defendant marketed, distributed and promoted.*
- (VIII) *Further particulars will be provided following discovery.*
29. As at each of the dates alleged in paragraph 28 above, consumers in Australia were unaware of, and had no means of knowing, the matters which the Defendant knew or ought to have known as alleged and accordingly were in a weaker position than the Defendant.
30. By reason of the matters pleaded in paragraphs 7, 8, 9(b), 9(c), 10, 28 and 29 above, on and from:
- a. November 2008; or alternatively
 - b. April 2013; or alternatively

- c. June 2014; or alternatively
- d. October 2017; or alternatively
- e. July 2018,

the conduct described in paragraphs 4(e), 4(f), 4(g) and 11 above constituted:

- i. unconscionable conduct in connection with the supply or possible supply of goods to a person in contravention of section 51AB of the TPA; and/or
- ii. unconscionable conduct in connection with the supply or possible supply of goods to a person in contravention of section 21 of the ACL;

(Unconscionable Conduct).

30. Had the Defendant not engaged in the Unconscionable Conduct, it can be inferred that:

- a. no Group Member would have purchased a Defective Vehicle;
- b. in the alternative, no Group Member would have paid the price which each Group Member paid or is liable to pay for that Group Member's Defective Vehicle.

Particulars

The inference can be drawn from all the surrounding circumstances, which include:

- (A) *the matters set out in paragraph 3(b), 3(d), 11(b) and 11(c) above;*
- (B) *that consumers would not knowingly purchase a vehicle that was unsafe to drive and/or unsafe for passengers, or that contained an airbag that would not deploy properly or would malfunction during deployment as pleaded in paragraph 7(a)(ii) above.*

31. By reason of the matters pleaded in paragraphs 2, 3, 28, 29 and 30 above, each of the Group Members who, in or after:

- a. November 2008; or alternatively
- b. April 2013; or alternatively

- c. June 2014; or alternatively
- d. October 2017,

acquired a Defective Vehicle suffered loss and damage by reason of the Unconscionable Conduct.

Particulars of loss and damage

- (A) *The difference between the price which each Group Member paid or is liable to pay for that Group Member's Defective Vehicle, and the true value of the Defective Vehicle as at the date of purchase, insofar as that difference is attributable to the matters pleaded in paragraph 30 above (which is a matter for evidence, including expert evidence);*
- (B) *Further or in the alternative to (A) above, the Plaintiff repeats particulars (B) and (C) to paragraph 13 above.*

32. By reason of the matters pleaded in paragraphs 29, 30 and 31 above, Group Members who, in or after:

- a. November 2008; or alternatively
- b. April 2013; or alternatively
- c. June 2014; or alternatively;
- d. July 2017,

acquired a Defective Vehicle are entitled to:

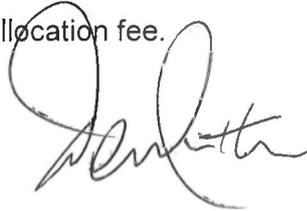
- i. an order pursuant to section 87 of the TPA and/or section 237 of the ACL that the Defendant is obliged to compensate any Group Member for the loss and damage referred to in the particulars to paragraph 31 above;
- ii. further or in the alternative, an award in the amount of the loss or damage sustained by each Group Member referred to in paragraph 31 above pursuant to section 82 of the TPA and/or section 236 of the ACL.

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 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

19 October 2018

NOTICE TO DEFENDANT

If you do not file a defence within 28 days of being served with this statement of claim:

- **You will be in default in these proceedings.**
- **The court may enter judgment against you without any further notice to you.**

The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.

HOW TO RESPOND

Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

You can respond in one of the following ways:

- 1 If you intend to dispute the claim or part of the claim,** by filing a defence and/or making a cross-claim.
- 2 If money is claimed, and you believe you owe the money claimed,** by:
 - Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.
 - Filing an acknowledgement of the claim.
 - Applying to the court for further time to pay the claim.
- 3 If money is claimed, and you believe you owe part of the money claimed,** by:
 - Paying the plaintiff that part of the money that is claimed.
 - Filing a defence in relation to the part that you do not believe is owed.

Court forms are available on the UCPR website at www.ucprforms.justice.nsw.gov.au or at any NSW court registry.

REGISTRY ADDRESS

Street address	Supreme Court of NSW Law Courts Building 184 Phillip Street SYDNEY NSW 2000
Postal address	GPO Box 3 SYDNEY NSW 2001

AFFIDAVIT VERIFYING

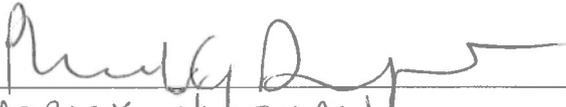
Name Philip Dwyer
 Address 47 Crebert Street
 Mayfield East NSW 2304
 Occupation Professor
 Date 19 OCTOBER 2018
 Telephone (02) 9146 3888

I affirm:

- 1 I am the plaintiff.
- 2 I believe that the allegations of fact in the statement of claim are true.

AFFIRMED at

Signature of deponent


 PATRICK MEEHAN

Name of witness

Address of witness

Capacity of witness

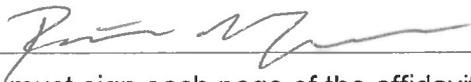
17/293 ABERCROMBIE ST DARLINGTON
 SYDNEY NSW 2008
 LAWYER

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

- 1 I saw the face of the deponent.
- 2 I have confirmed the deponent's identity using the following identification document:

Driver's licence: 2 030 801 372

Signature of witness



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

FURTHER DETAILS ABOUT PLAINTIFF**Plaintiff**

Name Philip Dwyer
Address 47 Crebert Street
Mayfield East NSW 2304

Legal representative for plaintiff

Name Damian Scattini
Practising certificate number 83237
Firm Quinn Emanuel Urquhart & Sullivan
Address Level 15, 111 Elizabeth Street,
Sydney NSW 2000

Telephone 02 9146 3500
Fax 02 9146 3600
Email damianscattini@quinnemanuel.com
Electronic service address damianscattini@quinnemanuel.com

DETAILS ABOUT DEFENDANT**Defendant**

Name **Volkswagen Group Australia Pty Limited**
ABN 14 093 117 876
Address 24 Muir Road
Chullora NSW 2190

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