

## NOTICE OF FILING

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Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



*Sia Lagos*

Registrar

### Important Information

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 of the filing of the document is determined pursuant to the Court's Rules.



**Amended Statement of claim**

No. 1109 of 2024

Federal Court of Australia  
District Registry: New South Wales  
Division: General

**Geoffrey Fisher** and another  
Applicants

**Isuzu Motors Ltd (Japanese Public Company Limited by Shares)**  
Respondent

**A. INTRODUCTION**

1. Australia has adopted the United Nations Economic Commission for Europe Regulation No 83 - *Uniform provisions concerning the approval of vehicles with regard to the emission of pollutants according to engine fuel requirements*, Revision 4, incorporating the 06 series of amendments. That regulation, as amended, is currently set out in Vehicle Standard (Australian Design Rule 79/04 — Emission Control for Light Vehicles) 2011, Volume 2.
2. ADR 79/04 requires that diesel vehicles satisfy a 'Type I test', which specifies certain emissions limits, including as to nitrogen oxides (**NOx**). NOx compounds are formed in the cylinder of the engine of a vehicle during the high temperature combustion process. NOx is harmful to humans and to the environment. The impacts of NOx on human health include damage to the human respiratory tract and chronic breathing problems. NOx is also harmful to vegetation and reacts with other compounds to form acid rain and smog. ADR 79/04 is directed at curbing these environmental harms.
3. In addition to requiring that vehicles pass certain tests to ensure that they meet prescribed emissions standards, the regulation expressly prohibits the use of a 'defeat device', which is defined to mean:

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*... any element of design which senses temperature, vehicle speed, engine rotational speed, transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use...*

4. ADR 79/04 is a 'national road vehicles standard', within the meaning of the *Road Vehicles Standards Act 2018* (Cth), and its predecessor legislation. This legislation, coupled with the rules promulgated thereunder, prohibit various actions in relation to vehicles that do not comply with national road vehicles standards, such as importing or supplying such vehicles. State and Territory regulations further prohibit matters such as using non-compliant vehicles.
5. In this proceeding, the applicants allege, on their own behalf and on behalf of Group Members, that Isuzu Motors Ltd (registered in Japan) deployed 'defeat devices' in their vehicles sold into Australia. The effect of those devices was that the Affected Vehicles emitted higher levels of NOx pollutants in normal driving conditions than they did under the test conditions applied for the purposes of obtaining regulatory approval and significantly higher levels of pollutants than were permitted under the relevant regulations and contrary to Isuzu's representation that the vehicles complied with the national standards.
6. By this proceeding, purchasers of Isuzu vehicles seek damages and compensation from Isuzu Motors Ltd. Isuzu's conduct, which made the Affected Vehicles available for sale in Australia, misled Group Members into believing that the vehicles complied with applicable emissions standards. Further, Isuzu misled the Federal Government when seeking approval<sup>1</sup> for the Affected Vehicles, and its Australian Distributor, Isuzu Ute Australia Pty Ltd, when procuring their distribution of the Affected Vehicles by representing that the Affected Vehicles complied with applicable emissions standards. Isuzu failed to tell the Federal Government and its Australian Distributor about the presence of the defeat devices in the Affected Vehicles, which rendered them non-compliant. Had the respondent not engaged in the misleading or deceptive conduct, the Group Members would not have acquired the Affected Vehicles. They are entitled to compensation for the loss they have suffered as a result.

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<sup>1</sup> In this Statement of Claim, the applicants allege, on behalf of themselves and Group Members, that the inclusion of "defeat devices" in the Affected Vehicles made them ineligible for certain Federal Government approvals. References to such issued approvals should be read, where applicable, as being to 'purported' approvals.

7. For ease of reference, **Schedule 3** to this Statement of Claim contains a paginated table of contents.

## **B. THE APPLICANTS AND THE GROUP MEMBERS**

1. This proceeding is commenced as a representative proceeding against the respondent pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCA**) by the applicants on their behalf and on behalf of other persons (the applicants and group members being referred to collectively as the **Group Members** unless expressly stated otherwise), each of whom being a person who:
  - a. during the period between 1 January 2016 and the date of commencement of these proceedings (**Relevant Period**) acquired, from Isuzu Ute Australia Pty Ltd (ACN 129 563 739) (**Australian Distributor**) or one of its retailers or dealers in Australia, and retain an equitable or legal interest (including under a hire-purchase agreement, but excluding a mere leasehold interest) in one or more of the following types of vehicles:
    - i. Isuzu D-MAX vehicles with a model year (**MY**) of 2017 or later;
    - ii. Isuzu 2016.5 MU-X vehicles; or
    - iii. Isuzu MU-X vehicles with a MY of 2017 or later,

**(Affected Vehicles)**, or
  - b. at any time during the Relevant Period acquired in Australia title to an Affected Vehicle from, through or under a person who acquired the vehicle in the circumstances referred to in sub-paragraph (a) above, save that the Group Members exclude:
    - c. the respondent;
    - d. any entity owned or partly owned by the respondent;
    - e. any distributor of the respondent and any dealer authorised by any such distributor;
    - f. any person described in s 33E(2) of the FCA;
    - g. the applicants' legal representatives; and
    - h. any person who is a judge (including the Chief Justice) of the Federal Court of Australia or of the High Court of Australia.
2. The first applicant:
  - a. is a natural person able to sue;
  - b. acquired one Affected Vehicle during the Relevant Period; and

- c. was a consumer as that term is defined in s 3 of the Australian Consumer Law (ACL).

**Particulars**

The particulars to this paragraph are set out in **Schedule 1, Part A** to this Statement of Claim.

3. The second applicant:
- a. is and was at all relevant times a corporation able to sue;
  - b. has the ACN 168 381 584;
  - c. acquired two Affected Vehicles during the Relevant Period; and
  - d. was a consumer as that term is defined in s 3 of the ACL.

**Particulars**

The particulars to this paragraph are set out in **Schedule 1, Part B** to this Statement of Claim.

4. As at the date of the commencement of this proceeding, there are seven or more Group Members.

**C. THE RESPONDENT**

5. The respondent is and was at all relevant times a corporation able to be sued.
6. The respondent is a trading corporation within the meaning of s 4 of the *Competition and Consumer Act 2010* (Cth) (**CCA**).
7. The respondent is and was at all relevant times a corporation carrying on business in Australia, within the meaning of s 5 of the CCA, by virtue of one or more of the following matters:

01. it was the respondent's business:

- i. to design or cause to be designed vehicles under the 'Isuzu' brand, including the Affected Vehicles; and
- ii. to manage the 'Isuzu' brand internationally, including in Australia, including through:
  - A. registering and maintaining the trade marks "Isuzu", "D-MAX" and "MU-X" worldwide, including in Australia; and

- B. registering and maintaining its trade marks as set out in Schedule 1, Part E worldwide, including in Australia; and
- C. designing vehicles, including the Affected Vehicles, such that one or more of the trade marks in A and B above, would be affixed to vehicles sold worldwide, including in Australia;
- D. authorising or permitting the use of those trade marks in A and B in each jurisdiction, including Australia; and
- iii. to ensure that its designs achieved regulatory compliance and to seek approvals to enable the lawful sale and operation of vehicles, including the Affected Vehicles, internationally, including in Australia;
- 02. the respondent caused or permitted the Affected Vehicles to be manufactured, knowing that they would be sold into the Australian market;
- 03. the respondent knew the Affected Vehicles were to be imported into Australia and to no other place;
- a. the respondent either
  - i. carried on business in Australia on its own account by selling cars into the market; or
  - ii. engaged another or other entities knowing and intending the same would import the Affected Vehicles into Australia for the purpose of the sale of the Affected Vehicles in the Australian market or in the alternative for the purpose of sale to Australian consumers;
- b. [Not used – see paragraph 7B below]the respondent made relevant representations in Australia regarding the Affected Vehicles
- b1. the respondent obtained Australian Government Compliance Plates (as defined at paragraph 18 below), where required by Australian law, with the intention and knowledge that they would be placed onto Affected Vehicles, and in circumstances where those Compliance Plates were in fact placed onto the Affected Vehicles;
- c. the respondent is applied to the Federal Government for, and is the vehicle approval holder for, approvals relevant to the Affected Vehicles;
- d. the respondent is the owner of relevant trade marks and trades upon those trade marks in carrying on business in Australia in that:
  - i. the respondent registered relevant trade marks in Australia with the Australian Government;

- ii. the respondent is the owner of relevant trade marks and trades upon those trade marks; and
- iii. "A trade mark is a sign used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided by any other person": Trade Marks Act 1995 (Cth), s 17;
- iv. the respondent permitted the trade marks registered by the respondent to be used, and they were in fact used, in the course of the trade of the Affected Vehicles in Australia;
- v. the promotional materials for each of the Affected Vehicles included and traded upon the respondent's trade marks;
- vi. the respondent was interested (as the owner of valuable intellectual property) in the good standing and enhancement of its brand and trade marks worldwide, including in Australia;
- vii. the respondent engaged others to promote or cause the promotion of the Affected Vehicles;
- viii. the respondent engaged others to promote or cause the promotion of the Affected Vehicles using the respondent's trade marks in Australia; and
- ix. the respondent knowingly permitted, or did not take steps to prevent, the respondent's trade marks being used in connection with the promotion and sale of the Affected Vehicles in Australia;
- e. the respondent assisted or was involved in the Australian Distributor's operations in Australia; and
- f. the respondent was held out as the manufacturer of the Affected Vehicles by the Australian Distributor in Australia and the respondent:
  - i. caused, permitted or enabled that holding out; and/or
  - ii. knew it was so held out and in those circumstances omitted to take any steps that would have prevented that holding out;
- g. the respondent earned revenue from each Affected Vehicle sold into Australia; and
- h. the respondent developed or caused to be developed certain vehicles or vehicle parts exclusively for consumers in Australia market, and which were customised for the needs of consumers in Australia.

### **Particulars**

The particulars to this paragraph are set out in **Schedule 1, Part C** to this Statement of Claim.

- 7A. Further and in the alternative to paragraph 7 above, the respondent is and was at all relevant times a corporation carrying on business in Australia within the meaning of s 5 of the CCA, because the respondent's business involved carrying out acts within Australia as a service provider to the Australian Distributor, by virtue of the following facts:
- a. the Australian Distributor could not carry on its business of distributing the Affected Vehicles in Australia without the assistance or involvement of the respondent in its operations in Australia pleaded below;
  - b. the respondent permitted its name to be used by the Australian Distributor in relation to the promotion and sale of Affected Vehicles;
  - c. the respondent permitted its trade marks to be used by the Australian Distributor in relation to the promotion and sale of Affected Vehicles;
  - d. the respondent provided to the Australian Distributor, directly or indirectly, documentation or details necessary for the documentation required for the importation and sale of vehicles to Australia, being:
    - i. the vehicles' technical specifications such as weight and engine power;
    - ii. regulatory specifications;
    - iii. details of any Federal Government approval for the vehicle;
    - iv. Compliance Plates (as defined in paragraph 18 below) or the information necessary for the etching of compliance plates; and
    - v. information necessary for the entry of the Affected Vehicles on the RAV (as defined at paragraph 11 below).
  - e. the respondent authorised and held out the Australian Distributor as its representative in Australia for the purposes of:
    - i. customer and dealer relations;
    - ii. applying Compliance Plates to the Affected Vehicles so that they could be sold in Australia; and
    - iii. entering information concerning the Affected Vehicles on the RAV utilising the Respondent's type approvals;



- f. the Australian Distributor used the services of the respondent to start the process of exporting/importing the vehicles from their overseas place of manufacture to Australia;
- g. the respondent knew, authorised and intended that the Affected Vehicles would be sold into Australia;
- h. the respondent knew, ensured, authorised and intended that the Affected Vehicles would be sold as new cars in Australia by the Australian Distributor;
- i. the respondent authorised the Australian Distributor as the sole conduit (i.e. distributor or wholesaler) of the Affected Vehicles to the Australian market; and
- j. repeat paragraph 7(b1) and (c).

### **Particulars**

The particulars to this paragraph are set out in **Schedule 1, Part C** to this Statement of Claim.

- 7B. The respondent is and was at all relevant times a corporation carrying on business in Australia, within the meaning of s 5 of the CCA, by virtue of one or more of the following matters:
- a. repeat the matters subjoined to paragraphs 7 and 7A;
  - b. to the extent the Court finds the respondent made each of the following representations, the respondent made the following representations within Australia, regarding the Affected Vehicles, as defined in the paragraphs noted below:
    - i. the General Representation, and the respondent engaged in the following conduct comprising the General Representation within Australia: repeat each of paragraphs 32 a, b, c, d, e, f and g.
    - ii. the Federal Government Representation, and the respondent engaged in the following conduct comprising the Federal Government Representation within Australia: repeat each of paragraphs 45 a, b, c, d and e, as well as paragraph 46.
    - iii. the Australian Distributor Representation, and the respondent engaged in the following conduct comprising the Australian Distributor Representation within Australia: paragraph 86; and
  - c. the respondent's conduct pleaded in 7A above caused or contributed to the respondent earning revenue from the sale of Affected Vehicles in Australia.

7C. The Affected Vehicles:

- a. were manufactured by the respondent (as that term is used in paragraph 9 below);
- b. were supplied by the respondent to the Australian Distributor for the purpose of their importation into Australia;
- c. in the alternative to (b), were caused to be imported into Australia by the respondent as an essential or key part of its business;
- d. were sold in one or more distributorships in each State and Territory;

**Particulars**

At the time of pleading, there were 49 distributorships in New South Wales, 31 in Victoria, 37 in Queensland, 20 in Western Australia, 17 in South Australia, 4 in Tasmania, 2 in the Australian Capital Territory and 3 in the Northern Territory.

- e. were imported into each State and Territory with the knowledge and authorisation of the respondent, who authorised the Affected Vehicles to be sold by the Australian Distributor, being a distributor that only sold Isuzu-branded Vehicles and sold those vehicles in distributorships in each State and Territory;
- f. were sold by the Australian Distributor to the Group Members in each State and Territory;
- g. were registered by Group Members from time-to-time in each State and Territory;
- h. were only capable of being registered as pleaded in paragraph (g) above because the respondent had caused each Affected Vehicle to be affixed with a Compliance Plate or to be entered on the RAV;
- i. were sold into each State and Territory through the Australian Distributor because the respondent nominated the Australian Distributor for such distribution and sale;
- j. would not have been sold to the Group Members in each State and Territory if the respondent had not made one or more of the General Representation in paragraph 32, the Federal Government Representation in paragraph 45 and the Australian Distributor Representation in paragraph 86;
- k. were branded with one or more of the trade marks in Schedule 1, Part E, and in each State and Territory:
  - i. the respondent was the owner of relevant trade marks and traded upon those trade marks;

- ii. the respondent permitted the trade marks to be used, and they were in fact used, in the course of the trade of the Affected Vehicles in Australia;
  - iii. the promotional materials for each of the Affected Vehicles included and traded upon the respondent's trade marks;
  - iv. the respondent was interested (as the owner of valuable intellectual property) in the good standing and enhancement of its brand and trade marks;
  - v. the respondent engaged others to promote or cause the promotion of the Affected Vehicles;
  - vi. the respondent engaged others to promote or cause the promotion of the Affected Vehicles using the respondent's trade marks; and
  - vii. the respondent knowingly permitted, or did not take steps to prevent, the respondent's trade marks being used in connection with the promotion and sale of the Affected Vehicles; and
  - l. the respondent was held out as the manufacturer of the Affected Vehicle by the Australian Distributor in each State and Territory and the respondent:
    - i. caused, permitted or enabled that holding out; and/or
    - ii. knew it was so held out and in those circumstances omitted to take any steps that would have prevented that holding out; and
  - m. the respondent earned revenue on each Affected Vehicle that was sold new in each State and Territory.
8. By reason of the matters pleaded in ~~the preceding~~ paragraphs 7, 7A, 7B, and 7C (or any one of them), the respondent is a person:
- a. carrying on business in each State and Territory; or
  - b. otherwise connected with the jurisdiction of each State and Territory,
- within the meaning of the State and Territory ACL.

### **Particulars**

The particulars to this paragraph are set out in **Schedule 1, Part D** to this Statement of Claim.

Repeat the particulars subjoined to paragraph 7.

9. The respondent is a manufacturer of the Affected Vehicles within the meaning of ss 7(1)(a), 7(1)(b), 7(1)(c), and 7(1)(d) of the ACL, or any one of them, because the respondent:
- a. produced or assembled the Affected Vehicles;
  - b. held itself out to the public as the manufacturer of the Affected Vehicles;
  - c. caused, or alternatively permitted, to be applied to the Affected Vehicles supplied by the Australian Distributor, a name or brand or mark being:
    - i. a name by which the respondent carries on business; or
    - ii. a brand or mark of the respondent; and/or
  - d. caused or permitted the Australian Distributor, in connection with:
    - i. the supply or possible supply of the Affected Vehicles by the Australian Distributor; or
    - ii. the promotion of the supply or use of the Affected Vehicles by the Australian Distributor,
- to hold out the respondent to the public as the manufacturer of the goods.

### **Particulars**

The particulars to this paragraph are set out in **Schedule 1, Part E** to this Statement of Claim.

## **D. AUSTRALIAN DESIGN REQUIREMENTS**

### **D.1. Standards**

10. Each of the following standards was a 'national standard' within the meaning of s 7 of the *Motor Vehicle Standards Act 1989* (Cth) (**MVS Act**) and/or a 'national road vehicle standard' within the meaning of s 12 of the *Road Vehicle Standards Act 2018* (Cth) (**RVS Act**), applicable during the Relevant Period:
- a. *Vehicle Standard (Australian Design Rule 79/03 - Emission Control for Light Vehicles) 2011* (Cth) (**ADR 79/03**), which applied to new model vehicles produced on or after 1 November 2013 but before 1 November 2016; and
  - b. *Vehicle Standard (Australian Design Rule 79/04 – Emission Control for Light Vehicles) 2011* (Cth) (**ADR 79/04**), which applied to vehicles produced with a 'Date of Manufacture' on or after 1 November 2016,
- (each of them and together comprising **Australian Design Rule 79**).

### **Particulars**

The particulars to this paragraph are set out in **Schedule 1, Part F** to this Statement of Claim.

11. Throughout the Relevant Period, Australian Design Rule 79 applied to the design and construction of motor vehicles and accordingly was an applicable vehicle standard for the purposes of State and Territory Laws, except:
  - a. in the Australian Capital Territory, for vehicles which, despite non-compliance with Australian Design Rule 79, had been entered onto the Register of Approved Vehicles (**RAV**) within the meaning of s 14 of the RVS Act; and
  - b. in the Northern Territory, for vehicles which, despite non-compliance with Australian Design Rule 79, had been entered onto the RAV and complied with the conditions for approval of entry (if any).

### **Particulars**

The particulars to this paragraph are set out in **Schedule 1, Part G** to this Statement of Claim.

#### **D.2. Offence to use if non-compliant with standards**

12. Throughout the Relevant Period, it was an offence under State and Territory laws for a person to use on a road a motor vehicle that did not comply with the applicable vehicle standards for the vehicle, including Australian Design Rule 79 as described in paragraph 11 above.

### **Particulars**

The particulars to this paragraph are set out in **Schedule 1, Part H** to this Statement of Claim.

#### **D.3. Vehicle registration**

13. Throughout the Relevant Period, it was an offence under State and Territory laws for a person to use an unregistered motor vehicle on a road.

### **Particulars**

The particulars to this paragraph are set out in **Schedule 1, Part I** to this Statement of Claim.

14. Throughout the Relevant Period, for a motor vehicle to be eligible for registration without conditions under State and Territory laws, it was required to comply with the applicable vehicle standards for the vehicle, including Australian Design Rule 79 as described in paragraph 11 above.

**Particulars**

The particulars to this paragraph are set out in **Schedule 1, Part J** to this Statement of Claim.

15. Throughout the Relevant Period, an application for registration or renewal of registration could be refused under State and Territory laws if the vehicle did not comply with the applicable vehicle standards, including Australian Design Rule 79 as described in paragraph 11 above.

**Particulars**

The particulars to this paragraph are set out in **Schedule 1, Part K** to this Statement of Claim.

16. Throughout the Relevant Period, a motor vehicle's registration could be suspended or cancelled under State and Territory laws if the vehicle did not comply with the applicable vehicle standards, including Australian Design Rule 79 as described in paragraph 11 above.

**Particulars**

The particulars to this paragraph are set out in **Schedule 1, Part L** to this Statement of Claim.

**D.4. Inspection for compliance with standards and prohibition if not compliant**

17. Throughout the Relevant Period, State and Territory laws gave authorised officers and police officers the power to inspect a motor vehicle to determine if it complied with the applicable vehicle standards, including Australian Design Rule 79 as described in paragraph 11 above, and on discovering that it did not, the power to prohibit the use of the vehicle.

**Particulars**

The particulars to this paragraph are set out in **Schedule 1, Part M** to this Statement of Claim.

**D.5. Importation requires compliance with standards or exemption**

18. Throughout the Relevant Period prior to 1 July 2021:

- a. it was an offence under Commonwealth law to supply to the market a motor vehicle that either did not comply with the applicable vehicle standards for the vehicle, or did not have an identification plate within the meaning of s 10 of the MVS Act (**Compliance Plate**);
- b. it was an offence under Commonwealth law to import into Australia a motor vehicle that did not comply with the applicable vehicle standards for the vehicle, or did not have a Compliance Plate; and
- c. in order to be fitted with a Compliance Plate, vehicles were required to comply with the applicable vehicle standards for the vehicle, subject to limited exceptions set out in the MVS Act, s 10A.

**Particulars**

The particulars to this paragraph are set out in **Schedule 1, Part N** to this Statement of Claim.

19. From 1 July 2021 onwards:

- a. it was an offence under Commonwealth law to import into Australia a motor vehicle if either:
  - i. between 1 July 2021 and 30 June 2023 (the transitional period), the vehicle had not received an approval under the MVS Act which approval:
    - A. was in force immediately before commencement of the RVS Act or was granted after commencement of the RVS Act pursuant to the relevant transitional provisions; and
    - B. was taken to continue in force during the RVS Act's transitional period subject to the provisions of the MVS Act; or
  - ii. the importer was not the holder of a road vehicle type approval that was in force and applied to the vehicle, or authorised by such a holder, or the holder of a relevant import approval;
- b. the grant of a road vehicle type approval required either that:
  - i. the type of vehicle complied with the applicable national road vehicle standards, as in force at the time the Secretary approved the application; or

- ii. the type of vehicle substantially complied with the applicable national road vehicle standards, as in force at the time the Secretary decided the application, if the Secretary decided that:
    - A. the type of vehicle's non-compliance was only in minor or inconsequential respects; or
    - B. the type of vehicle complied to an extent that made it suitable for use on a public road in Australia;
- c. a vehicle could be entered on the RAV on the basis that it was a vehicle of a particular type only if it satisfied the requirements of the type approval pathway, including that a road vehicle type approval that was in force applied to that type of vehicle;
- d. it was an offence under Commonwealth law for a person to enter or authorise the entry of information on the RAV relating to (or purportedly relating) to a vehicle, knowing that the information is incorrect; and
- e. it was an offence under Commonwealth law to provide a vehicle to another person in Australia for the first time if the vehicle was not entered on the RAV, unless certain exceptions applied.

#### **Particulars**

The particulars to this paragraph are set out in **Schedule 1, Part O** to this Statement of Claim.

#### **D.6. Recall notice for non-compliant vehicles**

20. The Minister may issue a recall notice for a road vehicle if it appears to the Minister that the vehicle does not comply with applicable national road vehicle standards. It is an offence to fail to comply with any such recall notice.

#### **Particulars**

- (1) RVS Act, ss 37, 38.
- (2) *Road Vehicle Standards Rules 2019* (Cth) (**RVS Rules**), r 206.



## **E. DEFEAT DEVICES**

### **E.1. Standards apply to Affected Vehicles and are required for vehicles to be sold, used or registered**

21. Throughout the Relevant Period, Australian Design Rule 79 applied to each of the Affected Vehicles.

#### **Particulars**

Each of the Affected Vehicles was an M or N category vehicle with a gross vehicle mass less than or equal to 3.5 tonnes, within the meaning of reg 2.1 of Australian Design Rule 79.

22. Throughout the Relevant Period, each of the Affected Vehicles was required to comply with Australian Design Rule 79 in order lawfully to be sold in Australia.

#### **Particulars**

Repeat paragraphs 10, 18, 19 and 21 above.

23. Throughout the Relevant Period, each of the Affected Vehicles was required to comply with Australian Design Rule 79, as described in paragraph 11 above, in order lawfully to be driven on public roads in Australia.

#### **Particulars**

Repeat paragraphs 10 to 12 and 21 above.

24. Throughout the Relevant Period, each of the Affected Vehicles was required to comply with Australian Design Rule 79, as described in paragraph 11 above, in order lawfully to be registered in Australia.

#### **Particulars**

Repeat paragraphs 10, 11, 14 and 21 above.

### **E.2. Defeat devices are prohibited**

25. Throughout the Relevant Period, Australian Design Rule 79 prohibited the use of 'defeat devices' in vehicles.

#### **Particulars**

Australian Design Rule 79, Appendix A, rr 2.16, 5.1.2.1.

26. Throughout the Relevant Period, Australian Design Rule 79 defined a defeat device to mean “any element of design which senses temperature, vehicle speed, engine rotational speed, transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use” (**Defeat Device**).

**Particulars**

Australian Design Rule 79, Appendix A, r 2.16.

27. Throughout the Relevant Period, Australian Design Rule 79 provided that such an element of design may not be considered a Defeat Device if the need for the device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle (**Damage and Safety Exception**).

**Particulars**

Australian Design Rule 79, Appendix A, r 2.16.1.

**E.3. The Affected Vehicles contained defeat devices**

28. From the time of supply, each Affected Vehicle of the applicants contained, and further the Affected Vehicles contained, elements that individually or in combination constituted a defeat device or defeat devices as defined in Australian Design Rule 79 (**Isuzu Defeat Devices**).

**Particulars**

The Isuzu Defeat Devices comprised one or more of the following elements of design:

- (1) ‘cycle detection’, where an Affected Vehicle’s Engine Control Unit (**ECU**) detects whether or not the vehicle has been prepared or operated in a manner consistent with the performance of the New European Driving Cycle (**NEDC**) and its preconditioning phase, which is an element of the ‘Type I test’ prescribed for emissions testing by Australian Design Rule 79. If the ECU does not detect the preparation for and/or operation in accordance with the NEDC, the ECU switches the vehicle’s emissions control system to a mode that reduces the effectiveness of the system (an **Alternative Mode**); and

- (2) further elements of design and particulars to this paragraph are set out in **Schedule 1, Part P** to this Statement of Claim.

29. None of the Isuzu Defeat Devices fell within the Damage and Safety Exception.
30. By reason of the Isuzu Defeat Devices, each of the Affected Vehicles failed to comply with Australian Design Rule 79.
31. The respondent programmed (or caused or permitted to be programmed) each of the Affected Vehicles to incorporate and use the Isuzu Defeat Devices.

**Particulars**

Repeat paragraph 9 above.

**F. MISLEADING, FALSE OR DECEPTIVE CONDUCT – DEFEAT DEVICES**

**F.1. General Representation**

32. The respondent, during the Relevant Period:
- a. imported or caused the importation of the Affected Vehicles into Australia;
  - b. in relation to the period prior to 1 July 2021, sought and purported to obtain approval for Compliance Plates for Affected Vehicles identifying the vehicles' compliance with the MVS Act, and during the period prior to 1 July 2023, affixed or caused to be affixed Compliance Plates to such Affected Vehicles;

**Particulars to (b)**

The respondent lodged applications with the Department of Infrastructure and Transport for ~~an Identification Plate~~ a Compliance Plate Approval, and in so doing, the respondent provided evidence items certifying that Affected Vehicles complied with the Australian Design Rules including Australian Design Rule 79.

- c. from the period from 1 July 2021 to 31 December 2021, sought and obtained the transition of any 'old approval' for Compliance Plates to be fitted to the Affected Vehicles to a 'new approval' for the Affected Vehicles under the RVS Act;

**Particulars to (c)**

- (1) 'Old approval' and 'new approval' have the meanings in *Road Vehicle Standards (Consequential and Transitional Provisions) Act 2018* (Cth) (**RVS Transitional Act**), Schedule 3, Item 5(1).

- (2) The respondent provided to the Department of Infrastructure, Transport, Regional Development and Communications a signed declaration that the respondent satisfied the RVS Rules' conditions applying to road vehicle type approvals.
- d. in relation to the period from 1 July 2021, sought and purported to obtain road vehicle type approval under the RVS Act for the types of Affected Vehicles;

**Particulars to (d)**

The respondent applied to the Department of Infrastructure, Transport, Regional Development and Communications for the grant of road vehicle type approval to allow the Affected Vehicles to be entered on the RAV by satisfaction of the type approval pathway. The applications were accompanied by supporting documents purporting to demonstrate compliance with the Australian Design Rules including Australian Design Rule 79.

- e. in relation to the period from 1 July 2021, entered or authorised the entry of information on the RAV relating to Affected Vehicles by representing that each such vehicle satisfied the requirements of the type approval pathway;
- f. supplied the Affected Vehicles to the market in Australia; and
- g. permitted the Affected Vehicles to be promoted to the public in Australia using its name and trade\_marks as cars capable of being legally used by consumers in Australia intending to drive at least on public roads.

**Particulars**

Further particulars to this paragraph are set out in **Schedule 1, Part C** to this Statement of Claim.

33. By reason of the matters referred to in paragraph 32 above, and each of them, the respondent represented that the Affected Vehicles complied with the "national standards" within the meaning of s 7 of the MVS Act, or the "national road vehicle standards" within the meaning of s 12 of the RVS Act (**General Representation**).
34. The General Representation was made in trade or commerce.
35. By reason of the matters referred to in paragraphs 28 and 30 above (that each Affected Vehicle contained the Isuzu Defeat Devices and therefore did not comply with Australian Design Rule 79), the General Representation was and is false.

36. By reason of the matters referred to in paragraphs 32 to 35 above, the respondent has engaged in conduct that was misleading or deceptive or was likely to mislead or deceive, in contravention of s 18 of the ACL.
37. By reason of the matters referred to in paragraphs 32 to 35 above, the respondent engaged in conduct that was liable to mislead the public (including by reason of the matters pleaded in paragraphs 18 and 19 above) as to the nature, the manufacturing process, the characteristics and/or the suitability for purpose of each of the Affected Vehicles, in contravention of s 33 of the ACL.

### **Particulars**

The particulars to this paragraph are set out in **Schedule 1, Part Q** to this Statement of Claim.

38. By reason of the matters referred to in paragraphs 32 to 35 above, the respondent made a false or misleading representation that each of the Affected Vehicles:
- a. was of a particular standard or quality;
  - b. had particular performance characteristics, uses or benefits; and/or
  - c. had a particular use,
- in contravention of s 29(1)(a) and (g) respectively of the ACL.
39. The representation referred to in paragraph 38 above was made in connection with the supply or possible supply of goods or in connection with the promotion of the supply or use of goods.
40. By reason of the General Representation, each of the Group Members acquired an interest in one or more of the Affected Vehicles.

### **Particulars**

But for the respondent making the General Representation in the circumstances pleaded in paragraph 32 above, by reason of one or more of the matters pleaded in paragraphs 12 to 19 above, the Affected Vehicles would not have been available for sale in Australia.

41. Further and in the alternative, by reason of the General Representation, the Australian Distributor and its dealers made the Affected Vehicles available for sale in Australia.

### **Particulars**

Repeat the particulars to paragraph 40 above.

42. In the premises, but for the General Representation, the Group Members would not have acquired an interest in the Affected Vehicles, or alternatively would not have paid the price they did for that interest.

**Particulars**

The applicants would not have acquired each Affected Vehicles owned by them, but for the General Representation.

43. In the premises and by reason of the contraventions referred to in paragraphs 36 to 38 above, and each of them, each of the Group Members has suffered loss or damage.

**Particulars**

- (1) The Group Members paid more for the interest they acquired in each of the Affected Vehicles than the true value of that interest at the time.
  - (2) Further particulars will be provided with the applicants' evidence.
44. The respondent is liable to compensate the Group Members for the loss referred to in paragraph 43 above.

**Particulars**

ACL, s 236.

**F.2. Federal Government Representation**

45. As was required for the respondent to supply the Affected Vehicles to the Australian market, the respondent caused information to be submitted to the Federal Government purporting to show that the Affected Vehicles complied with Australian Design Rule 79 (**Federal Government Representation**) by:
- a. in relation to the period prior to 1 July 2021, submitting or causing information to be submitted to the Federal Government purporting to demonstrate that the Affected Vehicles were not 'nonstandard vehicles';
  - b. in relation to the period prior to 1 July 2021, submitting or causing information to be submitted to the Federal Government purporting to show that the Affected Vehicles were entitled to a Compliance Plate;
  - c. in relation to the period from 1 July 2021 to 31 December 2021, submitting or causing information to be submitted to the Federal Government purporting to show that the Affected Vehicles were entitled to be transitioned to a 'new approval' under the RVS Act;

- d. during the period from 1 July 2021, submitting or causing information to be submitted to the Federal Government purporting to show that the Affected Vehicles were types of vehicles that were entitled to a grant of road vehicle type approval; and/or
- e. during the period from 1 July 2021, entering or authorising the entry of Affected Vehicles on the RAV by purporting to show that the vehicles satisfied the requirements of the type approval pathway.

### **Particulars**

The particulars to this paragraph are set out in **Schedule 1, Part R** to this Statement of Claim.

- 46. By reason of the matters referred to in paragraph 45 above, and each of them, the respondent, by the Federal Government Representation, represented that the Affected Vehicles complied with the “national standards” within the meaning of s 7 of the MVS Act, or the “national road vehicle standards” within the meaning of s 12 of the RVS Act.
- 47. The Federal Government Representation was made in trade or commerce.
- 48. By reason of the matters referred to in paragraphs 28 and 30 above (that each Affected Vehicle contained the Isuzu Defeat Devices and therefore did not comply with Australian Design Rule 79), the Federal Government Representation was and is false.
- 49. By reason of the matters referred to in paragraphs 45 to 48 above, the respondent has engaged in conduct that was misleading or deceptive or was likely to mislead or deceive the Federal Government, in contravention of s 18 of the ACL.
- 50. By reason of the matters referred to in paragraphs 45 to 48 above, the respondent made a false or misleading representation that each of the Affected Vehicles:
  - a. was of a particular standard or quality; and/or
  - b. had particular performance characteristics, uses or benefits,
 in contravention of s 29(1)(a) and (g) respectively of the ACL.
- 51. The representation pleaded in paragraph 45 above was made in connection with the supply or possible supply of goods or in connection with the promotion of the supply or use of goods.
- 52. By reason of the matters referred to in paragraphs 45 to 48 above, the respondent engaged in conduct that was liable to mislead the public (including by reason of the matters pleaded in paragraphs 18 and 19 above) as to the nature, the manufacturing

process, the characteristics and/or the suitability for purpose of each of the Affected Vehicles, in contravention of s 33 of the ACL.

53. By reason of the Federal Government Representation, each of the Affected Vehicles received Federal Government approval by:
- a. being affixed with a Compliance Plate;
  - b. a road vehicle type approval being granted for that type of vehicle; and/or
  - c. being entered on the RAV.

#### **Particulars**

The particulars to this paragraph are set out in **Schedule 1, Part S** to this Statement of Claim.

54. Had the Affected Vehicles not received Federal Government approval, the Affected Vehicles would not have been made available for sale in Australia.
55. In the premises, had the Federal Government Representation not been made, the Group Members would not have acquired an interest in the Affected Vehicles.

#### **Particulars**

The applicants would not have acquired each Affected Vehicles owned by them, but for the Federal Government Representation.

56. In the premises and by reason of the contraventions referred to in paragraphs 49, 50 and 52 above and each of them, each of the Group Members has suffered loss or damage.

#### **Particulars**

Repeat the particulars to paragraph 43 above.

57. The respondent is liable to compensate the Group Members for the loss referred to in paragraph 56 above.

#### **Particulars**

ACL, s 236 and 237.

### **F.3. Federal Government Omission**

58. Repeat paragraph 45 above.



59. During the Relevant Period, at no time when the respondent made a submission to the Federal Government did it inform the Federal Government that any Affected Vehicle/s the subject of the said submission:

a. had a defeat device;

**Particulars to (a)**

Defeat device is defined in paragraphs 25 to 27 above.

b. were 'nonstandard vehicles';

**Particulars to (b)**

Repeat the particulars to paragraph 45(a) above, set out in **Schedule 1, Part R** to this Statement of Claim.

c. were not entitled to a Compliance Plate;

**Particulars to (c)**

Repeat the particulars to paragraph 45(b) above, set out in **Schedule 1, Part R** to this Statement of Claim.

d. were not vehicles of a type or types that were entitled to road vehicle type approval;

e. could not be entered onto the RAV by satisfaction of the requirements of the type approval pathway; and/or

**Particulars to (d) and (e)**

Repeat the particulars to paragraph 45(c) and (e) above, set out in **Schedule 1, Part R** to this Statement of Claim.

f. did not comply with Australian Design Rule 79,

(each omission, separately or together, being the **Federal Government Omission**).

60. At the time or times specified in paragraph 59, the Federal Government had a reasonable expectation that the respondent would disclose to it that the Affected Vehicle/s the subject of the said submission:

a. had a defeat device, if such a vehicle had a defeat device;

b. was a 'nonstandard vehicle', if the Affected Vehicle was a 'nonstandard vehicle';

c. was not entitled to a Compliance Plate, if it was not entitled to a Compliance Plate;

- d. was not a vehicle of a type that was entitled to road vehicle type approval, if it was not of such a type;
- e. could not be entered onto the RAV by satisfaction of the type approval pathway, if it did not in fact satisfy the type approval pathway; and/or
- f. did not comply with Australian Design Rule 79, if it did not comply with Australian Design Rule 79.

#### **Particulars**

The particulars to this paragraph are in **Schedule 1, Part T** of the Statement of Claim.

- 61. The conduct pleaded in paragraphs 58 and 59 above was in trade or commerce.
- 62. The respondent knew, or alternatively, ought to have known, of the matters referred to in paragraphs 28 and 30 above (that each Affected Vehicle contained the Isuzu Defeat Devices and therefore did not comply with Australian Design Rule 79), and yet did not inform the Federal Government that each or any Affected Vehicle had any one or more of the qualities referred to in sub-paragraphs (a) to (f) of paragraph 59 above.

#### **Particulars**

The particulars to this paragraph are in **Schedule 1, Part U** of the Statement of Claim.

- 63. If an Affected Vehicle/s the subject of the submission had any one or more of the qualities referred to in sub-paragraphs (a) to (f) of paragraph 59 above, then such a fact or facts would have been material to the decision of the Federal Government to grant an approval as set out in paragraph 66 below, with respect to the Affected Vehicles.
- 64. In the alternative to paragraph 60 above, at the time or times specified in paragraph 59, the respondent was under an obligation to make submissions to the Federal Government that:
  - a. were true and correct in their material particulars;
  - b. were not misleading in any material particular;
  - c. did not omit any matter or thing without which the statement would be misleading in any material particular; and/or
  - d. if an Affected Vehicle/s was tested, each variant covered by the application made by the respondent to the Federal Government would not produce a less favourable

result than the result set out in the documents identified within the application to demonstrate compliance with the national road vehicle standards.

### **Particulars**

The particulars to this paragraph are in **Schedule 1, Part T** of the Statement of Claim.

65. In respect of the previous paragraph, if an Affected Vehicle had a defeat device, then:
- a. such a fact would be a particular that would have been material to the decision of the Federal Government as to whether to grant an approval as set out in paragraph 66 below with respect to the Affected Vehicle; and
  - b. if the Affected Vehicle were properly tested, it would produce a result less favourable than the result set out in the documents identified within the respondent's application/s to demonstrate compliance with the national road vehicle standards.

### **Particulars**

Defeat device is defined in paragraphs 25 to 27 above.

66. Had the respondent told the Federal Government any or any combination of the matters in sub-paragraphs (a) to (f) of paragraph 59 above applied to an Affected Vehicle at the time or times referred to in paragraph 59 above, then each of the Affected Vehicles would not have received Federal Government approval by:
- a. being affixed with a Compliance Plate;
  - b. a road vehicle type approval being granted for that type of vehicle; and/or
  - c. being entered on the RAV.

### **Particulars**

The particulars to this paragraph are set out in **Schedule 1, Part S** to this Statement of Claim.

67. By reason of the matters referred to in paragraphs 58 to 66 above, the respondent has engaged in conduct that was misleading or deceptive or was likely to mislead or deceive the Federal Government, in contravention of s 18 of the ACL.
68. The conduct referred to at paragraphs 58 and 59 above was made in connection with the supply or possible supply of goods or in connection with the promotion of the supply or use of goods.

69. By reason of the matters referred to in paragraphs 58 to 66 above, the respondent engaged in conduct that was liable to mislead the public (including by reason of the matters pleaded in paragraphs 18 and 19 above) as to the nature, the manufacturing process, the characteristics and/or the suitability for purpose of each of the Affected Vehicles, in contravention of s 33 of the ACL.
70. Had the Affected Vehicles not received Federal Government approval, the Affected Vehicles would not have been made available for sale in Australia.
71. In the premises, had the Federal Government Omission not been made, the Group Members would not have acquired an interest in the Affected Vehicles.

**Particulars**

The applicants would not have acquired each Affected Vehicles owned by them, but for the Federal Government Omission.

72. In the premises and by reason of the contraventions referred to in paragraphs 67 and 69 above, each of the Group Members has suffered loss or damage.

**Particulars**

Repeat the particulars to paragraph 43 above.

73. The respondent is liable to compensate the Group Members for the loss referred to in paragraph 72 above.

**Particulars**

ACL, ss 236 and 237.

**F.4. Federal Government – failure to correct or qualify Federal Government Representation**

74. Repeat paragraphs 58 to 65 above.
75. At the time or times specified in paragraph 59 above, and thereafter, the Federal Government had a reasonable expectation that the respondent would correct or qualify the Federal Government Representation if the Affected Vehicle/s the subject of the said submission referred to in paragraph 59 above had one or more of the qualities referred to in sub-paragraphs (a) to (f) of paragraph 59 above.

**Particulars**

The particulars to this paragraph are in **Schedule 1, Part T** of the Statement of Claim.

76. The respondent failed to correct or qualify the Federal Government Representation.
77. The conduct pleaded in paragraph 76 above was in trade or commerce.
78. Had the respondent not failed to correct or qualify the Federal Government Representation, and had in fact told the Federal Government any or any combination of the matters in sub-paragraphs (a) to (f) of paragraph 59 above applied to an Affected Vehicle at the time or times referred to in paragraph 59 above, then each of the Affected Vehicles would not have received Federal Government approval by:
- a. being affixed with a Compliance Plate;
  - b. a road vehicle type approval being granted for that type of vehicle; and/or
  - c. being entered on the RAV.

#### **Particulars**

The particulars to this paragraph are set out in **Schedule 1, Part S** to this Statement of Claim.

79. By reason of the matters referred to in paragraphs 74 to 78 above, the respondent has engaged in conduct that was misleading or deceptive or was likely to mislead or deceive the Federal Government, in contravention of s 18 of the ACL.
80. Had the Affected Vehicles not received Federal Government approval, the Affected Vehicles would not have been made available for sale in Australia.
81. In the premises, had the respondent not failed to correct or qualify the Federal Government Representation, the Group Members would not have acquired an interest in the Affected Vehicles.

#### **Particulars**

The applicants would not have acquired each Affected Vehicles owned by them, but for the respondent's failure to correct or qualify the Federal Government Representation.

82. In the premises and by reason of the contravention referred to in paragraph 79 above, each of the Group Members has suffered loss or damage.

#### **Particulars**

Repeat the particulars to paragraph 43 above.

83. The respondent is liable to compensate the Group Members for the loss referred to in paragraph 82 above.

**Particulars**

ACL, ss 236 and 237.

**F.5. Australian Distributor Representation**

84. The Australian Distributor (Isuzu Ute Australia Pty Ltd (ACN 129 563 739)) was the distributor of the Affected Vehicles in Australia during the Relevant Period.
85. The respondent provided materials and specifications to the Australian Distributor during the Relevant Period.

**Particulars**

The particulars to this paragraph are in **Schedule 1, Part V** of the Statement of Claim.

86. In the premises, the respondent represented to the Australian Distributor that each Affected Vehicle:
- a. had received Federal Government approval for supply into the Australian market;
  - b. complied with the Australian Design Rules including Australian Design Rule 79;
  - c. was entitled to a Compliance Plate;
  - d. was of a type that was entitled to road vehicle type approval; and/or
  - e. could be entered onto the RAV by satisfaction of the type approval pathway,
- by at least each time that each Affected Vehicle was made available to the Australian Distributor (each representation, separately or together, being the **Australian Distributor Representation**).

**Particulars**

The particulars to this paragraph are in **Schedule 1, Part V** of the Statement of Claim.

87. By reason of the matters referred to in paragraphs 28 and 30 above (that each Affected Vehicle contained the Isuzu Defeat Devices and therefore did not comply with Australian Design Rule 79), the Australian Distributor Representation was and is false.

88. By reason of the matters referred to in paragraphs 85 to 87 above, the respondent has engaged in conduct that was misleading or deceptive or was likely to mislead or deceive the Australian Distributor, in contravention of s 18 of the ACL.
89. By reason of the matters referred to in paragraphs 85 to 87 above, the respondent made a false or misleading representation that each of the Affected Vehicles:
- a. were of a particular standard or quality; and/or
  - b. had particular performance characteristics, uses or benefits,
- in contravention of s 29(1)(a) and (g) respectively of the ACL.
90. The Australian Distributor Representation was made in trade or commerce.
91. Had the Australian Distributor Representation not been made, the Affected Vehicles would not have been made available for sale in Australia.

#### **Particulars**

The Australian Distributor would not have stocked the vehicles or made them available for sale.

92. In the premises, had the Australian Distributor Representation not been made, the Group Members would not have acquired an interest in the Affected Vehicles.
93. In the premises and by reason of the contraventions referred to in paragraphs 88 to 89 above and each of them, each of the Group Members has suffered loss or damage.

#### **Particulars**

Repeat the particulars to paragraph 43 above.

94. The respondent is liable to compensate the Group Members for the loss referred to in paragraph 93 above.

#### **Particulars**

ACL, ss 236 and 237.

### **F.6. Australian Distributor Omission**

95. Repeat paragraphs 85 and 86 above.
96. During the Relevant Period, at no time did the respondent inform the Australian Distributor that any Affected Vehicle/s:

- a. had not received Federal Government approval for supply into the Australian market;
- b. were not entitled to a Compliance Plate;

**Particulars to (a)**

Repeat the particulars to paragraph 45(b), set out in **Schedule 1, Part R** to this Statement of Claim.

- c. were not vehicles of a type or types that were entitled to road vehicle type approval; and/or
- d. could not be entered onto the RAV by satisfaction of the type approval pathway.

**Particulars to (c) and (d)**

Repeat the particulars to paragraph 45(c) and (e), set out in **Schedule 1, Part R** to this Statement of Claim.

(each omission, separately or together, being the **Australian Distributor Omission**).

97. At the times specified in paragraph 86 above, the Australian Distributor had a reasonable expectation that the respondent would disclose to it if any Affected Vehicle made available to it for sale:
- a. had not received Federal Government approval for supply into the Australian market, if it had not received that approval;
  - b. was not entitled to a Compliance Plate, if it was not entitled to a Compliance Plate;
  - c. was not a vehicle of a type that was entitled to road vehicle type approval, if it was not of such a type; and/or
  - d. could not be entered onto the RAV by satisfaction of the type approval pathway, if it did not in fact satisfy the type approval pathway.

**Particulars**

- (1) Repeat paragraphs 62, 85 and 86 above.
- (2) Further particulars may be provided.

98. The conduct pleaded in paragraphs 85, 86 and 96 above was in trade or commerce.
99. If an Affected Vehicle/s made available to the Australian Distributor for sale had any one or more of the qualities referred to in sub-paragraphs (a) to (d) of paragraph 96 above, then such a fact or facts would have been material to the decision of the Australian



Distributor to accept the vehicle as stock and to market, promote and sell (or otherwise dispose of an interest in) the vehicle.

100. The respondent knew, or alternatively, ought to have known of the matters referred to in paragraphs 28 and 30 above (that each Affected Vehicle contained the Isuzu Defeat Devices and therefore did not comply with Australian Design Rule 79), and yet did not inform the Australian Distributor that each or any Affected Vehicles had any one or more of the qualities referred to in sub-paragraphs (a) to (d) of paragraph 96 above.

#### **Particulars**

The particulars to this paragraph are in **Schedule 1, Part U** of the Statement of Claim.

101. By reason of the matters referred to in paragraphs 95 to 100 above, the respondent has engaged in conduct that was misleading or deceptive or was likely to mislead or deceive the Australian Distributor, in contravention of s 18 of the ACL.
102. Had the respondent told the Australian Distributor any or any combination of the matters in sub-paragraphs (a) to (d) of paragraph 96 above applied to an Affected Vehicle before the Australian Distributor agreed to accept any such vehicle as stock or sold (or otherwise disposed of an interest in) such vehicle, then the Australian Distributor would have not accepted the Affected Vehicle for its stock and/or sold (or otherwise disposed of any interest in) the Affected Vehicle to Group Members.

#### **Particulars**

The applicants would not have acquired each Affected Vehicles owned by them, but for the Australian Distributor Omission.

103. In the premises and by reason of the contravention referred to in paragraph 101 above, each of the Group Members has suffered loss or damage.

#### **Particulars**

Repeat the particulars to paragraph 43 above.

104. The respondent is liable to compensate the Group Members for the loss referred to in paragraph 103 above.

#### **Particulars**

ACL, ss 236 and 237.

**F.7. Australian Distributor – failure to correct or qualify the Australian Distributor Representation**

105. Repeat paragraphs 95 to 100 above.
106. At the times specified in paragraph 86 above and at all times thereafter, the Australian Distributor had a reasonable expectation that the respondent would correct or qualify Australian Distributor Representation if any of the Affected Vehicles that it had not yet been supplied or that it had not yet sold (or otherwise disposed of an interest in) had one or more of the qualities referred to in sub-paragraphs (a) to (d) of paragraph 96 above.
107. The respondent failed to correct or qualify the Australian Distributor Representation.
108. The conduct pleaded in paragraph 107 above was in trade or commerce.
109. Had the respondent not failed to correct or qualify the Australian Distributor Representation, and had in fact told the Australian Distributor any or any combination of the matters in sub-paragraphs (a) to (d) of paragraph 96 above applied to each Affected Vehicle at the times specified in paragraph 86 above, then the Australian Distributor would have not accepted the Affected Vehicles for its stock and/or sold (or otherwise disposed of any interest in) the Affected Vehicles to Group Members.

**Particulars**

The applicants would not have acquired each Affected Vehicles owned by them, but for the respondent's failure to correct or qualify the Australian Distributor Representation.

110. By reason of the matters referred to in paragraphs 105 to 109 above, the respondent has engaged in conduct that was misleading or deceptive or was likely to mislead or deceive the Australian Distributor, in contravention of s 18 of the ACL.
111. In the premises and by reason of the contravention referred to in paragraph 110 above, each of the Group Members has suffered loss or damage.

**Particulars**

Repeat the particulars to paragraph 43 above.

112. The respondent is liable to compensate the Group Members for the loss referred to in paragraph 111 above.

**Particulars**

ACL, ss 236 and 237.

**G. ACCEPTABLE QUALITY – ISUZU DEFEAT DEVICES**

113. The Affected Vehicles were supplied to consumers as defined in s 3(1) of the ACL (**Consumers**).

**Particulars**

The particulars to this paragraph are set out in **Schedule 1, Part W** to this Statement of Claim.

114. The supply of the Affected Vehicles referred to in paragraph 113 above, to the extent it was the first supply of that Affected Vehicle to a Consumer, was in trade or commerce.
115. Insofar as the supply referred to in paragraphs 113 to 114 above was other than by way of sale by auction, it was the subject of a statutory guarantee that the Affected Vehicle was of acceptable quality (**Guarantee of Acceptable Quality**).

**Particulars**

ACL, s 54(1).

116. By reason of the matters pleaded in paragraphs 28 and 30 above (that each Affected Vehicle contained the Isuzu Defeat Devices and therefore did not comply with Australian Design Rule 79), the Affected Vehicles were not of acceptable quality, because they were not, from the time of supply:
- a. “fit for all the purposes for which goods of that kind are commonly supplied”; and/or
  - b. “free from defects”,
- within the meaning of s 54(2)(a) and (c) respectively of the ACL.
117. Group Members who are Consumers, or who acquired an Affected Vehicle from a Consumer (other than for the purpose of re-supply) or who derived title to an Affected Vehicle through or under a Consumer (together, ‘**Affected Persons**’), suffered loss or damage because the Affected Vehicles in which each of them acquired an interest:
- a. did not comply with the Guarantee of Acceptable Quality; and
  - b. as a result, the value of the Affected Vehicles was reduced below the price paid or payable by the Consumers.

**Particulars**

Repeat the particulars to paragraph 43 above.

118. In the premises, Group Members who are Affected Persons are entitled to recover damages from the respondent as manufacturer, in respect of the breach of the Guarantee of Acceptable Quality.

**Particulars**

ACL, s 271.

119. The loss or damage that Group Members who are Affected Persons suffered, resulting from the failure to comply with the Guarantee of Acceptable Quality, included:
- a. the reduction in the value of the goods, below the price which the Affected Persons paid to acquire their interest in the Affected Vehicles, or the average retail price of those vehicles at the time of supply, whichever is lower; and
  - b. consequential loss or damage.

**Particulars**

- (1) ACL, s 272.
- (2) Further particulars will be provided.

**H. EXPRESS WARRANTY – ISUZU DEFEAT DEVICES**

120. The Affected Vehicles were supplied to Consumers.

**Particulars**

The particulars to this paragraph are set out in **Schedule 1, Part W** to this Statement of Claim.

121. By reason of the matters pleaded in paragraph 32 above, the respondent made or gave an “express warranty” that the Affected Vehicles complied with the “national standards” within the meaning of s 7 of the MVS Act, or the “national road vehicle standards” within the meaning of s 12 of the RVS Act (**Express Warranty**).

**Particulars**

- (1) The term “express warranty” and the implication thereof within the meaning of and by force of ss 2 and 59 of the ACL.
- (2) Further particulars to this paragraph are set out in **Schedule 1, Part C** to this Statement of Claim at paragraphs (3) and (4).

122. Further or alternatively, the suppliers that sold (or otherwise disposed of interests in) Affected Vehicles made or gave the Express Warranty by asserting or representing in the sales brochures that the Affected Vehicles were compliant with the Euro 5 emissions standard, which is equivalent to the standard contained in Australian Design Rule 79.

### **Particulars**

Express representations were made in each brochure that related to each Affected Vehicle. By way of example:

- (1) In relation to the MY 2017 D-MAX, the following representations were made expressly in the accompanying brochure:
  - (a) "Emission level Euro 5";
  - (b) "advanced Euro5-compliant unit";
  - (c) "Isuzu is fully committed to lowering emissions over the course of a vehicle's life cycle - from materials procurement to disposal and recycling. This philosophy is no better illustrated than in our Isuzu D-MAX;" and
  - (d) "The "pursuit of people's trust" is the underlying trait of product development at Isuzu. As a matter of principle, the vehicles we manufacture must be worthy of the trust of our drivers. This philosophy guides us in perfecting our technology and creating vehicles with a conscience".
- (2) In relation to the MY 2022 D-MAX, the following representations were made expressly in the accompanying brochure:
  - (a) "Emission level: Euro 5";
  - (b) "Both the 3-litre and 1.9-litre turbo-diesel engines are Euro 5 compliant, helping every D-MAX deliver efficient fuel economy across the range"; and
  - (c) "The whole range is powered by Isuzu's robust 3-litre turbo-diesel engine, while the 4x2 SX Single Cab Chassis range gains exclusive access to a 1.9-litre engine option which provides lower emissions and better fuel efficiency."

- (3) In relation to the MY 2017 MU-X, the following representations were made expressly in the accompanying brochure:
    - (a) “Emission level Euro5”; and
    - (b) “Euro5-compliant Isuzu diesel engine”.
  - (4) In relation to the MY 2022 MU-X, the following representation was made expressly in the accompanying brochure:
    - (a) “Emission level Euro 5”.
  - (5) A list of relevant representations in all brochures presently available to the applicants is in **Schedule 2** to this Statement of Claim.
  - (6) Further particulars to be provided following discovery.
- 123. The Express Warranty was a representation, assertion or undertaking that related to the “quality, state, condition, performance or characteristics” of the Affected Vehicles, within the meaning of “express warranty” in s 2 of the ACL.
  - 124. The Express Warranty was made or given in connection with the supply of the Affected Vehicles, or in connection with the promotion by any means of the supply or use of the Affected Vehicles.
  - 125. The natural tendency of the Express Warranty was to induce persons to acquire the Affected Vehicles.
  - 126. The Express Warranty was given or made in relation to goods within the meaning of s 2 of the ACL.
  - 127. By reason of the matters pleaded in paragraphs 113, 114 and 120 to 126 above, in relation to Consumers who did not acquire their vehicles by way of sale by auction, the respondent guaranteed as manufacturer that it would comply with the Express Warranty.

### **Particulars**

ACL, s 59.

- 128. By reason of the matters pleaded in paragraphs 28 and 30 above (that each Affected Vehicle contained the Isuzu Defeat Devices and therefore did not comply with Australian Design Rule 79), the respondent did not comply with the guarantee that it would comply with the Express Warranty.

129. Because of the matters pleaded in paragraph 128 above, those Group Members who are Affected Persons have suffered loss, because the Affected Vehicles in which each of them acquired an interest:
- a. did not comply with the Express Warranty; and
  - b. as a result, the value of the Affected Vehicles was reduced below the price paid or payable by the Consumers.

**Particulars**

Repeat the particulars to paragraph 43 above.

130. In the premises, the respondent as manufacturer is liable to compensate those Group Members who are Affected Persons for:
- a. the reduction in the value of the goods resulting from the failure to comply with the Express Warranty, below the price which the Consumers paid to acquire their interest in the Affected Vehicles, or the average retail price of those vehicles at the time of supply, whichever is lower; and
  - b. consequential loss or damage.

**Particulars**

- (1) ACL, ss 271 and 272.
- (2) Repeat the particulars to paragraph 43 above.

**I. CONTRAVENTION OF A SAFETY STANDARD – ISUZU DEFEAT DEVICES**

131. At all relevant times, Australian Design Rule 79, being a “national standard” and/or a “national road vehicle standard”, was taken to be a “safety standard” for the purposes of s 106 of the ACL.

**Particulars**

- (1) MVS Act, s 41.
  - (2) RVS Act, s 77.
132. By reason of the matters pleaded in paragraphs 28 and 30 above (that each Affected Vehicle contained the Isuzu Defeat Devices and therefore did not comply with Australian Design Rule 79), the Affected Vehicles did not comply with the safety standards referred to at paragraph 131 above.

133. The Affected Vehicles were, or alternatively included, vehicles that were “consumer goods”, within the meaning of s 2 of the ACL (**Consumer Vehicles**).

**Particulars**

- (1) In relation to the applicants’ claim, each of the applicants’ Affected Vehicles was a vehicle intended to be used, or are of a kind likely to be used, for personal use.
  - (2) Further particulars may be provided with the applicants’ evidence.
134. By reason of the matters pleaded in paragraphs 132 and 133 above, the respondent,
- a. in trade or commerce, supplied Consumer Vehicles in contravention of s 106(1) of the ACL; or

**Particulars to (a)**

The particulars to this paragraph are set out in **Schedule 1, Part C** to this Statement of Claim.

- b. alternatively, in or for the purposes of trade or commerce, manufactured, possessed or had control of the Consumer Vehicles in contravention of s 106(3) of the ACL.
135. By reason of the conduct of the respondent, referred to in paragraph 134 above, Group Members who acquired an interest in Consumer Vehicles have suffered loss or damage.

**Particulars**

- (1) Repeat the particulars to paragraph 43 above.
  - (2) As the respondent has supplied Consumer Vehicles in contravention of the s 106(1) of the ACL, the Group Members have each suffered loss and damage because of a defect in the goods (the defect being the Isuzu Defeat Devices), and the Group Members would not have suffered loss or damage if the goods had complied with the safety standard, then s 106(7) of the ACL deems Group Members to have suffered the loss and damage because of the supply.
136. By reason of the conduct of the respondent pleaded in paragraph 135 above, the respondent is liable to compensate the Group Members who acquired an interest in Consumer Vehicles for that loss and damage.

**Particulars**

ACL, ss 236 and 237.



## **J. UNCONSCIONABLE CONDUCT**

137. In the premises of:

- a. paragraphs 28, 30 and 31 above (regarding the Isuzu Defeat Devices);
- b. paragraphs 32, 33, 35 and 40 above (regarding the General Representation);
- c. paragraphs 45, 46, 48 and 53 above (regarding the Federal Government Representation);
- d. paragraphs 59, 60, and 62 to 66 above (regarding the Federal Government Omission);
- e. paragraphs 75, 76, 78 and 81 above (regarding the failure to correct or qualify the Federal Government Representation);
- f. paragraphs 85, 86, 87 and 92 above (regarding the Australian Distributor Representation);
- g. paragraphs 96, 97, 100 and 102 above (regarding the Australian Distributor Omission);
- h. paragraphs 106, 107 and 109 above (regarding the failure to correct or qualify the Australian Distributor Representation);
- i. the Isuzu Defeat Devices significantly increasing the Affected Vehicles' NOx exhaust gas emissions throughout the normal life of the vehicle and under normal conditions of use, beyond that permitted by the tests prescribed for the Affected Vehicles by Australian Design Rule 79 from time to time;
- j. the Affected Vehicles each being said by the respondent in compliance information submitted to the Federal Government to emit less emissions than they in fact do because of an unfair manipulation of the 'coast down' test as stipulated by Annex 4a – Appendix 7 of ADR 79/04. The purpose of this manipulation was to attain artificially advantageous test conditions for the NEDC Type I test for the Affected Vehicles; and/or
- k. the fact that removal of the Isuzu Defeat Devices would or could cause damage to the Affected Vehicles,

the respondent caused:

- l. the Affected Vehicles to receive Federal Government approval by:
  - i. being affixed with a Compliance Plate;
  - ii. road vehicle type approvals being granted for vehicles of those types; and/or

- iii. being entered on the RAV;

**Particulars to (I)**

The particulars to this subparagraph are set out in **Schedule 1, Part S** to this Statement of Claim.

- m. the Australian Distributor to agree to market, promote and sell (or otherwise dispose of interests in) the vehicles in Australia;
- n. the Australian Distributor to market, promote and sell (or otherwise dispose of interests in) the Affected Vehicles to consumers in Australia; and
- o. the Group Members to acquire the Affected Vehicles, the Group Members being unaware that:
  - i. it was unlawful for the Affected Vehicles to be imported to, or supplied to the market in, Australia;
  - ii. it was unlawful for the Affected Vehicles to be used on the road in Australia;
  - iii. the Affected Vehicles could not be registered in the States and Territories of Australia;
  - iv. the Affected Vehicles could be recalled;
  - v. the use of the Affected Vehicles could be prohibited if such vehicle is inspected and found to be non-compliant; and
  - vi. the registration of Affected Vehicles could be suspended or cancelled.

**Particulars**

Further particulars to this paragraph are set out in **Schedule 1, Part X** to this Statement of Claim.

- 138. In doing so, the respondent engaged in conduct which was, in all the circumstances, unconscionable (**Unconscionable Conduct**).
- 139. The Unconscionable Conduct was in trade or commerce, in connection with the supply or possible supply of the Affected Vehicles to Group Members, in contravention of s 21 of the ACL.

140. By reason of the conduct of the respondent referred to in paragraph 137 above, Group Members have suffered and are continuing to suffer loss or damage.

**Particulars**

Repeat the particulars to paragraph 43 above.

141. The respondent is liable to compensate the Group Members for that loss or damage.

**Particulars**

ACL, ss 236 and 237.

**K. GENERAL MATTERS**

142. The respondent is liable for exemplary and aggravated damages.

**Particulars**

The particulars to this paragraph are set out in **Schedule 1, Part Y** to this Statement of Claim.

Date: ~~13 August 2024~~ 6 June 2025



Signed by Martin del Gallego, Lawyer for the Applicants

This pleading was prepared by Christopher Withers, Quintin Rares and Stephen Thomson, Counsel.

**Certificate of lawyer**

I **Martin del Gallego** certify to the Court that, in relation to the statement of claim filed on behalf of the Applicants, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: ~~13 August 2024~~ 6 June 2025



Signed by Martin del Gallego  
Lawyer for the Applicants

## SCHEDULE 1: DETAILED PARTICULARS

### A. Particulars to paragraph 2 (First applicant)

- (1) See table below in relation to the particulars of the first applicant:

<b>Name</b>	Geoffrey Fisher
<b>Model</b>	2019 D-Max
<b>Vehicle Type</b>	D-Max 4x4 LSU Crew Ute Hi-Ride
<b>Purchase</b>	First-hand purchase through Isuzu dealer (Ken Muston Automotive)
<b>Purchase Price</b>	\$54,975.72 incl. GST
<b>Purchase Date</b>	On or around 13 December 2019
<b>VIN</b>	MPATFS85JKT007834
<b>Compliance Plate</b>	Dated July 2019 – Isuzu Motors Limited (the respondent) approval no. 43971

- (2) The Compliance Plate affixed to the vehicle is below:



- (3) Repeat the particulars to paragraphs 113 and 120 (see **Schedule 1, Part W** to this Statement of Claim).
- (4) References to the *Australian Consumer Law* or ACL in the pleading are references to Schedule 2 of the CCA, whereby that law applies:
- (a) as a law of the Commonwealth pursuant to s 131(1) of the CCA to supplies of Affected Vehicles by corporations; and
  - (b) as a law of each State or Territory pursuant to:
    - (i) s 28 of the *Fair Trading Act 1987* (NSW) (**NSW ACL**);

- (ii) s 7 of the *Fair Trading (Australian Consumer Law) Act 1992* (ACT) (**ACT ACL**);
- (iii) s 27 of the *Consumer Affairs and Fair Trading Act 1990* (NT) (**NT ACL**);
- (iv) s 16 of the *Fair Trading Act 1989* (Qld) (**Qld ACL**);
- (v) s 14 of the *Fair Trading Act 1987* (SA) (**SA ACL**);
- (vi) s 6 of the *Australian Consumer Law (Tasmania) Act 2010* (Tas) (**Tas ACL**);
- (vii) s 8 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) (**Vic ACL**); and
- (viii) s 19 of the *Fair Trading Act 2010* (WA) (**WA ACL**),

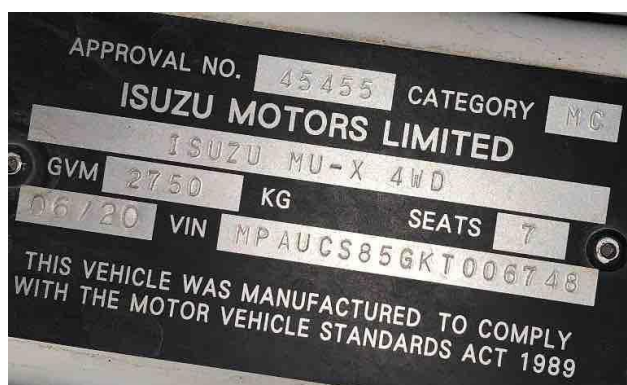
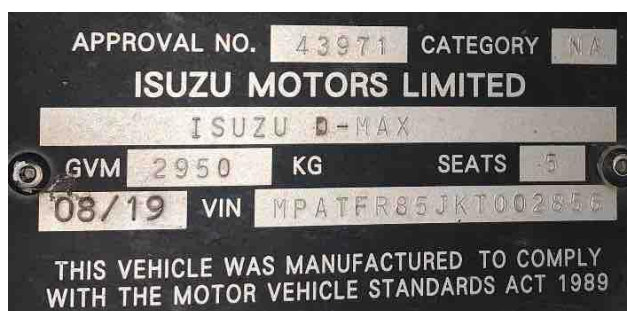
(together, **State and Territory ACL**).

**B. Particulars to paragraph 3 (Second applicant)**

- (1) See table below:

<b>Name</b>	CDR GEOTECHNICAL & ENVIRONMENTAL SERVICES PTY LTD	
<b>Model</b>	2019 D-Max	2020 MU-X
<b>Vehicle Type</b>	D-Max SX Hi-Ride (4x2)	MU-X LS-T (4x4)
<b>Purchase</b>	First-hand purchase through Isuzu Essendon	First-hand purchase through Isuzu Essendon
<b>Purchase Price</b>	\$38,990.01 incl. GST	\$53,990.01 incl. GST
<b>Purchase Date</b>	On or around 3 August 2020	On or around 9 July 2020
<b>VIN</b>	MPATFR85JKT002856	MPAUCS85GKT006748
<b>Compliance Plate</b>	Dated August 2019 – Isuzu Motors Limited (the respondent) approval no. 43971	Dated June 2020 – Isuzu Motors Limited (the respondent) approval no. 45455

- (2) The Compliance Plates on the vehicles are:



- (3) The ABN of the company is 40 168 381 584.
- (4) Repeat the particulars to paragraphs 113 and 120 (Supply to Group Members as Consumers) (see **Schedule 1, Part W** to this Statement of Claim).

**C. Particulars to paragraphs 7, 7A, 32, 121 and 134 (Respondent carrying on business in Australia; General Representation; Express Warranty provided by the Respondent; Respondent's supply of Consumer Vehicles)**

- (1) The respondent was carrying on business in Australia on its own account by selling cars or causing cars to be sold into the market.
- (2) Repeat the Federal Government Representation and the Australian Distributor Representation.
- (3) The respondent was and/or is the Federal Government vehicle approval holder in relation to the following approvals:
- (a) Approval Number 43971 (D-Max) – commenced 21 February 2012;
  - (b) Approval Number 50736 (D-Max) – commenced 17 March 2020;
  - (c) Approval Number 51560 (D-Max) – commenced 8 June 2021;
  - (d) Approval Number VTA-051560 (D-Max) – commenced 3 September 2021;

- (e) Approval Number 45452 (MU-X 2WD) and 45455 (MU-X 4WD) – commenced around 16 August 2013;
  - (f) Approval Number 51675 (MU-X 2WD) and 51676 (MU-X 4WD) – commenced 10 July 2021;
  - (g) Approval Number 51342 (MU-X 2WD) and 51343 (MU-X 4WD) – commenced 17 February 2021; and
  - (h) Approval Number VTA-051675 (MU-X 2WD) and VTA-051676 (MU-X 4WD) – commenced 20 August 2021.
- (4) Repeat the particulars to paragraph 37 of the Statement of Claim, as set out in **Schedule 1, Part Q**.
- (5) In the premises of the matters particularised in paragraphs (2), (3) and (4) of **Schedule 1 Part C** above, say that the Federal Government Representation was made by the respondent to the Federal Government because the respondent was carrying on the business of selling cars into the Australian market and could not do so without the approval of the Federal Government.
- (6) The respondent is the owner of the trade marks 'Isuzu',<sup>2</sup> 'Isuzu Ute',<sup>3</sup> 'Isuzu D-Max'<sup>4</sup> and 'MU-X'<sup>5</sup> (see **Schedule 1, Part E** to this Statement of Claim at paragraphs (b) and (c)) and trades upon those names in carrying on business in Australia by causing vehicles to be imported into Australia carrying those trade\_marks and trading upon those trade\_marks.
- (7) The respondent earns significant revenues from selling its D-MAX and MU-X vehicles into the Australian market.
- (8) The Australian Distributor could not carry on its business of distributing Isuzu vehicles (including the Affected Vehicles) in Australia without the assistance or involvement of the respondent in its operations in Australia, in that:
- (a) the respondent permitted its name to be used by the Australian Distributor in relation to the promotion and sale of vehicles;
  - (b) the respondent permitted its trade\_marks to be used by the Australian Distributor in relation to the promotion and sale of vehicles;

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<sup>2</sup> Trade Mark 1761155, IR Number 1293778.

<sup>3</sup> Trade Mark 2054395.

<sup>4</sup> Trade Mark 968440, IR Number 807982; Trade Mark 2088065, IR Number 1529848.

<sup>5</sup> Trade Mark 2181853, IR Number 1593072.



- (c) the respondent held the Australian Distributor out as its representative in Australia for the purposes of customer and dealer relations;
  - (d) the respondent used and uses the services of the Australian Distributor to complete the process of exporting/importing the vehicles from their overseas place of manufacture to Australia, and the Australian Distributor uses the services of the respondent to start the process of exporting/importing the vehicles from their overseas place of manufacture to Australia; and
  - (e) the respondent utilised the Australian Distributor as the sole conduit (i.e. distributor or wholesaler) of its light vehicles to the Australian market.
- (9) The respondent exports vehicles to Australia and is accordingly responsible for part of the importation process directly.
- (10) The respondent provides to the Australian Distributor documentation or details necessary for the documentation required for the importation and sale of vehicles to Australia, being the vehicles' technical specifications such as weight and engine power, and regulatory specifications; details of any Federal Government approval for the vehicle, compliance plates or the information necessary for the etching of compliance plates.
- (11) The respondent organises or participates in the organisation of each importation with the Australian Distributor.
- (12) The respondent provides marketing materials to the Australian Distributor and permits the use of marketing materials for the purposes of that marketing material being reformatted and customised to the Australian market by the Australian Distributor:
- (a) the marketing materials consist of materials for brochures which are displayed on the website of the respondent and the Australian Distributor;
  - (b) the materials provided by the respondent to the Australian Distributor include pictures, copywrite, regulatory compliance specifications/information (including compliance with Euro 5) and technical specifications;
  - (c) the Australian Distributor distributes and publishes marketing materials within Australia based on the materials or usage rights or permissions provided to it by the respondent; and

- (d) the Australian Distributor could not publish its brochures without material or information (and the right to use said material and information) provided to it by the respondent.
- (13) The respondent supplied Consumer Vehicles to the Australian Distributor.
- (14) The respondent exclusively develops vehicles for the Australian market that are customised for its needs as set out by the Australian Distributor whose website says *“In a world first for Isuzu, the Isuzu D-MAX & MU-X launched with Euro5 emissions compliant drivetrain developed exclusively for Australia. With an upgraded 3.0L turbo diesel producing 430Nm of torque and a new 6-speed automatic & manual transmissions, the new D-MAX & MU-X aimed to impress in the demanding Australian market”*.
- (15) Further particulars may be provided after discovery.

**D. Particulars to paragraph 8 (Respondent otherwise connected with the jurisdiction of each State and Territory)**

- (1) The term “otherwise connected” is used within the meaning of:
  - (a) s 32 of the NSW ACL;
  - (b) s 11 of the ACT ACL;
  - (c) s 31 of the NT ACL;
  - (d) s 20 of the Qld ACL;
  - (e) s 18 of the SA ACL;
  - (f) s 10 of the Tas ACL;
  - (g) s 12 of the Vic ACL; and
  - (h) s 24 of the WA ACL.

**E. Particulars to paragraph 9 (Manufacturer)**

- (1) As to (a), the respondent exercised control over all stages of the design, componentry, and manufacturing process for the Affected Vehicles.

(2) As to (b) to (d):

- (a) At all relevant times the word “Isuzu” was a sticker applied to the Affected Vehicles, and which the respondent caused or permitted to be applied to the Affected Vehicles.
- (b) At all relevant times the Affected Vehicles were affixed with one or more of the following marks, or other trade\_marks registered to the respondent in Australia:

(i) **ISUZU**<sup>6</sup>

(ii) **ISUZU**  
**D-MAX**<sup>7</sup>

(iii) **MU-X**<sup>8</sup>

- (c) At all relevant times Affected Vehicles were sold or leased with warranty and service booklets that bore the following mark, or other trade\_marks registered to the respondent in Australia:

**ISUZU**  
**UTE**

9

<sup>6</sup> Trade Mark 1761155, IR Number 1293778.

<sup>7</sup> Trade Mark 2088065, IR Number 1529848.

<sup>8</sup> Trade Mark 2181853, IR Number 1593072.

<sup>9</sup> Trade Mark 2054395.

- (d) At all relevant times Affected Vehicles were sold or leased with vehicle manuals that were published by the respondent and that bore the respondent's registered trade\_mark set out at paragraph (b)(i) above.

(3) Further particulars may be provided.

**F. Particulars to paragraph 10 (Australian Design Rule 79 as applicable vehicle standard)**

(1) As to (b):

- (a) From 1 July 2021, ADR 79/04 continued in force as if it were a national road vehicle standard determined under *Road Vehicle Standards Act 2018* (Cth), s 12; RVS Transitional Act, Schedule 3, Item 2.

**G. Particulars to paragraph 11 (Australian Design Rule 79 as applicable vehicle standard)**

(1) NSW:

- (a) *Road Transport (Vehicle Registration) Regulation 2017* (NSW), Schedule 2, clauses 21 and 22; and
- (b) *Road Transport (Vehicle Registration) Regulation 2007* (NSW), Schedule 2, clauses 11 and 12.

(2) Victoria:

- (a) *Road Safety (Vehicles) Regulations 2021* (Vic), Schedule 1, clauses 21 and 22;
- (b) *Road Safety (Vehicles) Interim Regulations 2020* (Vic), Schedule 2, clauses 16 and 17; and
- (c) *Road Safety (Vehicles) Regulation 2009* (Vic), Schedule 2, clauses 19 and 20.

(3) Queensland:

- (a) *Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 2021* (Qld), Schedule 1, clauses 21 and 22; and
- (b) *Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 2010* (Qld), Schedule 1, clauses 7 and 8.

## (4) South Australia:

- (a) *Road Traffic (Light Vehicle Standards) Rules 2018* (SA), rr 21 and 22; and
- (b) *Road Traffic (Light Vehicle Standards) Rules 2013* (SA), rr 19 and 20.

## (5) Western Australia:

- (a) *Road Traffic (Vehicles) Regulations 2014* (WA), rr 236 and 238.

## (6) Australian Capital Territory:

- (a) *Road Transport (Vehicle Registration) Regulation 2000* (ACT), Schedule 1, clauses 1.15, 1.16 and 1.16A.

## (7) Northern Territory:

- (a) *Motor Vehicles (Standards) Regulations - Australian Vehicle Standards Rule 1989* (NT), r 27 and Schedule 6, rr 13, 19, 20 and 22.

## (8) Tasmania:

- (a) *Vehicle and Traffic (Vehicle Standards) Regulations 2024* (Tas), rr 14 and 15; and
- (b) *Vehicle and Traffic (Vehicle Standards) Regulations 2014* (Tas), rr 19 and 20.

#### **H. Particulars to paragraph 12 (Offence to use vehicle if non-compliant with standards)**

## (1) NSW:

- (a) *Road Transport (Vehicle Registration) Regulation 2017* (NSW), r 60; and
- (b) *Road Transport (Vehicle Registration) Regulation 2007* (NSW), r 52(1).

## (2) Victoria:

- (a) *Road Safety (Vehicles) Regulations 2021* (Vic), r 294(1);
- (b) *Road Safety (Vehicles) Interim Regulations 2020* (Vic), r 253(1); and
- (c) *Road Safety (Vehicles) Regulations 2009* (Vic), r 258(2).

- (3) Queensland:
  - (a) *Transport Operations (Road Use Management—Vehicle Standards and Safety) Regulation 2021* (Qld), r 8; and
  - (b) *Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 2010* (Qld), r 5(1).
- (4) South Australia:
  - (a) *Road Traffic Act 1961* (SA), s 116(1), 117(1) and 118(1).
- (5) Western Australia:
  - (a) *Road Traffic (Vehicles) Regulations 2014* (WA), r 232.
- (6) Australian Capital Territory:
  - (a) *Road Transport (Vehicle Registration) Regulation 2000* (ACT), r 109(2).
- (7) Northern Territory:
  - (a) *Motor Vehicles (Standards) Regulations 2003* (NT), r 35.
- (8) Tasmania:
  - (a) *Vehicles and Traffic (Vehicle Standards) Regulations 2024* (Tas), r 5; and
  - (b) *Vehicles and Traffic (Vehicle Standards) Regulations 2014* (Tas), r 4.

**I. Particulars to paragraph 13 (Offence to use unregistered vehicle)**

- (1) NSW:
  - (a) *Road Transport Act 2013* (NSW), s 68(1).
- (2) Victoria:
  - (a) *Road Safety Act 1986* (Vic), s 7(1).
- (3) Queensland:
  - (a) *Transport Operations (Road Use Management--Vehicle Registration) Regulation 2021* (Qld), r 10; and

- (b) *Transport Operations (Road Use Management—Vehicle Registration) Regulation 2010* (Qld), r 11.

(4) South Australia:

- (a) *Motor Vehicles Act 1959* (SA), s 9.

(5) Western Australia:

- (a) *Road Traffic (Vehicles) Act 2012* (WA), s 4.

(6) Australian Capital Territory:

- (a) *Road Transport (Vehicle Registration) Act 1999* (ACT), s 18(1).

(7) Northern Territory:

- (a) *Traffic Act 1987* (NT), s 33(1).

(8) Tasmania:

- (a) *Vehicle and Traffic Act 1999* (Tas), s 27(1).

**J. Particulars to paragraph 14 (Eligibility for vehicle registration)**

(1) NSW:

- (a) *Road Transport (Vehicle Registration) Regulation 2017* (NSW), r 6(1); and
- (b) *Road Transport (Vehicle Registration) Regulation 2007* (NSW), r 6(1).

(2) Victoria:

- (a) *Road Safety (Vehicles) Regulations 2021* (Vic), rr 24 and 48;
- (b) *Road Safety (Vehicles) Interim Regulations 2020* (Vic), rr 14 and 31; and
- (c) *Road Safety (Vehicles) Regulation 2009* (Vic), rr 14(1) and 29(1).

(3) Queensland:

- (a) *Transport Operations (Road Use Management—Vehicle Standards and Safety) Regulation 2021* (Qld), r 18; and
- (b) *Transport Operations (Road Use Management—Vehicle Registration) Regulation 2010* (Qld), r 9.

## (4) South Australia:

- (a) *Motor Vehicles Act 1959* (SA), s 24(1).

## (5) Western Australia:

- (a) *Road Traffic (Vehicles) Regulations 2014* (WA), r 34; and
- (b) *Road Traffic Act 1974* (WA), s 17(2).

## (6) Australian Capital Territory:

- (a) *Road Transport (Vehicle Registration) Regulation 2000* (ACT), r 26(1).

## (7) Northern Territory:

- (a) *Motor Vehicles Act 1949* (NT), s 8.

## (8) Tasmania:

- (a) *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2021* (Tas), r 77; and
- (b) *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010* (Tas), r 52.

**K. Particulars to paragraph 15 (Refusal of vehicle registration)**

## (1) NSW:

- (a) *Road Transport (Vehicle Registration) Regulation 2017* (NSW), rr 6(1), 12(1) and 30(6); and
- (b) *Road Transport (Vehicle Registration) Regulation 2007* (NSW), rr 6(1), 12(1) and 30(7).

## (2) Victoria:

- (a) *Road Safety (Vehicles) Regulations 2021* (Vic), rr 24, 48(1) and 84(4);
- (b) *Road Safety (Vehicles) Interim Regulations 2020* (Vic), rr 14(1), 31(1), and 65(4); and
- (c) *Road Safety (Vehicles) Regulation 2009* (Vic), rr 14(1), 29(1) and 69(4).



## (3) Queensland:

- (a) *Transport Operations (Road Use Management—Vehicle Registration) Regulation 2021* (Qld), rr 18(1), 23(1) and 34(2); and
- (b) *Transport Operations (Road Use Management—Vehicle Registration) Regulation 2010* (Qld), rr 17(1) and 43(11).

## (4) South Australia:

- (a) *Motor Vehicles Act 1959* (SA), s 24(3).

## (5) Western Australia:

- (a) *Road Traffic (Vehicles) Act 2012* (WA), s 5(3)(a)(i).

## (6) Australian Capital Territory:

- (a) *Road Transport (Vehicle Registration) Regulation 2000* (ACT), rr 26(1), 32(1)(a) and 68(9)(a).

## (7) Northern Territory:

- (a) *Motor Vehicles Act 1949* (NT), ss 8 and 102(2)(c).

## (8) Tasmania:

- (a) *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2021* (Tas), rr 82(2), 84(2) and 100(2); and
- (b) *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010* (Tas), rr 57(1), 59(2) and 68(2).

**L. Particulars to paragraph 16 (Suspension or cancellation of vehicle registration)**

## (1) NSW:

- (a) *Road Transport (Vehicle Registration) Regulation 2017* (NSW), r 45(1); and
- (b) *Road Transport (Vehicle Registration) Regulation 2007* (NSW), r 41(1).

## (2) Victoria:

- (a) *Road Safety (Vehicles) Regulations 2021* (Vic), rr 129(1)(b), 130(1) and 132;

- (b) *Road Safety (Vehicles) Interim Regulations 2020* (Vic), rr 112(1)(b), 113(1) and 115; and
  - (c) *Road Safety (Vehicles) Regulation 2009* (Vic), rr 114(b), 115(1) and 117.
- (3) Queensland:
  - (a) *Transport Operations (Road Use Management—Vehicle Registration) Regulation 2021* (Qld), r 5; and
  - (b) *Transport Operations (Road Use Management—Vehicle Registration) Regulation 2010* (Qld), r 58.
- (4) South Australia:
  - (a) *Motor Vehicles Act 1959* (SA), s 55A(1).
- (5) Western Australia:
  - (a) *Road Traffic (Vehicles) Act 2012* (WA), s 9.
- (6) Australian Capital Territory:
  - (a) *Road Transport (Vehicle Registration) Regulation 2000* (ACT), r 84(1)(b).
- (7) Northern Territory:
  - (a) *Motor Vehicles Act 1949* (NT), ss 102 and 128A.
- (8) Tasmania:
  - (a) *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2021* (Tas), rr 77(1)(a) and 104(1)(b); and
  - (b) *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010* (Tas), rr 52(1)(a) and 72(1)(b).
- M. Particulars to paragraph 17 (Inspection and prohibition of non-compliant vehicles)**
  - (1) NSW:
    - (a) *Road Transport Act 2013* (NSW), s 76(4);
    - (b) *Road Transport (Vehicle Registration) Act 1997* (NSW), s 26;

- (c) *Road Transport (Vehicle Registration) Regulation 2017* (NSW), r 80; and
  - (d) *Road Transport (Vehicle Registration) Regulation 2007* (NSW), r 70.
- (2) Victoria:
- (a) *Road Safety Act 1986* (Vic), ss 13(2) and 14.
- (3) Queensland:
- (a) *Transport Operations (Road Use Management) Act 1995* (Qld), s 34(2), s 36(1);
  - (b) *Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 2021* (Qld), rr 9 and 11; and
  - (c) *Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 2010* (Qld), r 8.
- (4) South Australia:
- (a) *Road Traffic Act 1961* (SA), ss 40Q(2) and 145.
- (5) Western Australia:
- (a) *Road Traffic (Vehicle Standards) Regulations 2002* (WA), r 61;
  - (b) *Road Traffic (Administration) Act 2008* (WA), s 52(2); and
  - (c) *Road Traffic (Vehicles) Act 2012* (WA), s 71(1).
- (6) Australian Capital Territory:
- (a) *Road Transport (Vehicle Registration) Act 1999* (ACT), s 25.
- (7) Northern Territory:
- (a) *Motor Vehicles Act 1949* (NT), ss 128 and 128A.
- (8) Tasmania:
- (a) *Vehicles and Traffic Act 1999* (Tas), s 49(1)(f);
  - (b) *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2021* (Tas), r 117; and

- (c) *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010* (Tas), r 85.

**N. Particulars to paragraph 18 (MVS Act)**

- (1) As to (a): MVS Act, s 14.
- (2) As to (b): MVS Act, s 18.
- (3) As to (c):
  - (a) If new vehicles of a particular type did not comply with the national standards, then the Minister could give written approval for a Compliance Plate for vehicles of that type only if satisfied that the non-compliance was only in minor and inconsequential respects: MVS Act, s 10A(2) and (3).

**O. Particulars to paragraph 19 (RVS Act)**

- (1) As to (a):
  - (a) RVS Act, s 22.
  - (b) RVS Transitional Act, Schedule 3, Items 4 – 6.
- (2) As to (b):
  - (a) RVS Rules, rr 15, 19.
  - (b) A type of vehicle was suitable for use on a public road in Australia only if it would not pose an unacceptable risk to public safety and would be appropriate for such use
- (3) As to (c):
  - (a) RVS Act, ss 14, 15.
  - (b) RVS Rules, rr 15, 19.
- (4) As to (d): RVS Act, s 17.
- (5) As to (e): RVS Act, s 24 (subject to the exceptions in s 24(3) and (4)).

**P. Particulars to paragraph 28 (Vehicles contained defeat devices)**

- (1) The Isuzu Defeat Devices comprised ~~the~~ one or more of the following elements of design:
  - (a) 'cycle detection' (defined in the body of the Statement of Claim), as is further described at paragraph (6) below; and
  - (b) 'thermal window detection', where an Affected Vehicle's ECU activates an Alternative Mode when it senses that the ambient air temperature is outside a certain range. The Alternative Mode is activated when the ECU senses that the ambient air temperature is around 18 degrees Celsius or lower. Whether an Alternative Mode is also activated when the ambient air temperature is above 30 degrees Celsius is currently unknown to the applicants. Further particulars may be provided following discovery, or with the applicants' evidence. This element of design is further described at paragraph (7) below.
- (2) The precise mechanisms by which the vehicle:
  - (a) detects whether or not the vehicle has been prepared for or is being operated in a manner consistent with performance of the NEDC; or
  - (b) senses that the ambient air temperature is around 18 degrees Celsius or lower,

is are not currently known to the applicants. Further particulars may be provided following discovery, or with the applicants' evidence.
- (3) The material features of the 'Alternative Mode' are a combination of one or more features, including the following: (i) reduction of the level of exhaust gas recirculation (**EGR**); (ii) other in-cylinder combustion alterations, such as the timing of fuel injection into the engine chamber; and/or (iii) alterations to the purging strategy of any lean NOx trap. Which of the Isuzu Defeat Devices uses which one of these features, in what combination, or whether they utilise any other bespoke features, is not currently known to the applicants. Further particulars may be provided following discovery, or with the applicants' evidence.
- (4) Whether the vehicle has one or more Alternative Modes is not currently known to the applicants. Further particulars may be provided following discovery, or with the applicants' evidence.
- (5) The Alternative Mode reduces the effectiveness of the emissions control system as follows: (i) reducing ~~exhaust gas recirculation~~ EGR increases the temperature of combustion, and the emission of NOx; (ii) changing the timing of diesel injection into the engine can deliver higher power, while increasing NOx; and/or (iii) reducing the level of

NOx absorbed by any lean NOx trap. To the extent that there are other features of the Alternative Mode unknown to the applicants, they are not presently able to identify how they reduce the effectiveness of the emissions control system. Further particulars may be provided following discovery, or with the applicants' evidence.

(6) Further particulars to be provided following discovery. As to the 'cycle detection' element of design, the best particulars that the applicants are currently able to provide are that cycle detection operates in the Affected Vehicles at least in the following way:

- (a) When an Affected Vehicle is prepared for the performance of the NEDC as set out in Australian Design Rule 79, Appendix A, Annex 4a, rule 6 (NEDC Cycle), the Affected Vehicle performs the prescribed conditioning procedure set out in Appendix A, Annex 4a, rule 6.3.1 of Australian Design Rule 79 (NEDC Conditioning Procedure), during which:
  - (i) the vehicle performs the extra-urban phase of the NEDC three times;  
and
  - (ii) the vehicle is immediately parked and its ignition switched off, followed by a conditioning period of at least six hours in accordance with the conditions described in the fourth paragraph to Appendix A, Annex 4a, rule 6.3.1 of Australian Design Rule 79.
- (b) When the Affected Vehicle performs the NEDC Conditioning Procedure, the vehicle's ECU detects the NEDC Conditioning Procedure, and so the vehicle's ECU does not switch the vehicle's emission control system to an Alternative Mode.
- (c) When the Affected Vehicle performs the NEDC Cycle save that it does not first perform the NEDC Conditioning Procedure, the vehicle's ECU detects that the vehicle has not performed the NEDC Conditioning Procedure and so the vehicle's ECU switches the vehicle's emission control system to an Alternative Mode.
- (d) The cycle detection element of design involves the Affected Vehicle's ECU sensing: (i) speed, distance travelled, or time, (ii) some combination of one or more of those parameters; or (iii) some other parameter or combination of parameters, for the purpose of activating, modulating, delaying or deactivating the operation of a part of the emission control system, so as to reduce its effectiveness in normal operations and use.
- (e) Further particulars to be provided following discovery.

(7) As to the ‘thermal window’ element of design, the best particulars that the applicants are currently able to provide are that the thermal window operates in the Affected Vehicles at least in the following way:

- (a) A condition of the NEDC Cycle is that the test cell temperature is between 20 degrees Celsius and 30 degrees Celsius (**Thermal Window Condition**).
- (b) Where an Affected Vehicle performs the NEDC Cycle (including, for the avoidance of doubt, the NEDC Conditioning Procedure), save that the Thermal Window Condition is not met because the test cell temperature is below 18 degrees Celsius, the vehicle’s ECU does not detect the Thermal Window Condition and so switches the vehicle’s emission control system to an Alternative Mode.
- (c) The thermal window detection element of design involves the ECU sensing the ambient temperature or a related temperature value for the purpose of activating, modulating, delaying or deactivating the operation of a part of the emission control system, so as to reduce its effectiveness in normal operations and use.
- (d) Further particulars to be provided following discovery.

**Q. Particulars to paragraph 37 (General Representation liable to mislead the public)**

(1) The respondent, by seeking and obtaining the Federal regulatory approvals pleaded in paragraphs 32(b) and (c):

- (a) enabled Compliance Plates to be physically affixed to the relevant Affected Vehicles, which Compliance Plates stated that the vehicle was “manufactured to comply with the [MVS Act]”, and the respondent caused those plates to be so affixed; or
- (b) enabled the relevant Affected Vehicles to be entered on the RAV, a publicly searchable database, and the respondent caused those entries to be made,

thereby, fulfilling a necessary pre-condition to the Affected Vehicles being lawfully imported into, and supplied in, Australia.

(2) By reason of the matters particularised in paragraph (1) above, or further or alternatively, by reason of the facts of importation and supply of the vehicles to the market in Australia, members of the public, comprising potential buyers for vehicles in the nature of the Affected Vehicles, were likely to understand that any Affected Vehicles available for sale in Australia by the respondent, the Australian Distributor or its affiliated dealers complied with all relevant standards applicable to the sale of such vehicles.

- (3) Further particulars may be provided.

**R. Particulars to paragraph 45 (Federal Government Representation) (see also paragraphs 59 (Federal Government Omission) and 96 (Australian Distributor Omission))**

- (1) As to (a):
  - (a) MVS Act, s 14.
  - (b) 'Nonstandard' in relation to a road vehicle is defined in s 5 of the MVS Act to mean "not complying with the national standards and not taken to comply with the national standards by virtue of an approval given under subsection 10A(2)".
  - (c) *Motor Vehicle Standards Regulations 1989* (Cth), r 4.
- (2) As to (b):
  - (a) MVS Act, s 14.
  - (b) *Motor Vehicle Standards Regulations 1989* (Cth), r 4.
- (3) As to (c):
  - (a) RVS Transitional Act, Schedule 3, Item 5.
- (4) As to (d) and (e):
  - (a) RVS Act, Part 2, Division 3.
  - (b) RVS Rules, Part 3, Div 2.
- (5) Generally, repeat the particulars to paragraph 7 (see **Schedule 1, Part C** to this Statement of Claim at paragraphs (3) to (5)).

**S. Particulars to paragraphs 53, 66, 78 and 137(l) (Affixing of Compliance Plate and entry on the RAV)**

- (1) As to the affixing of a Compliance Plate: MVS Act, s 10A.
- (2) As to the grant of a road vehicle type approval, satisfaction of the type approval pathway and entry onto the RAV: RVS Act, Part 2, Division 3; RVS Rules, Part 3, Div 2.



**T. Particulars to paragraphs 60, 64 and 75 (Nature of the submission made to the Federal Government)**

- (1) Prior to 1 July 2021, the process for Federal Government vehicle approvals to be granted to the respondent in relation to the Affected Vehicles required the respondent, when applying for approval, to certify that the tested vehicle/s complied with applicable Australian Design Rules (which include Australian Design Rule 79):
  - (a) the respondent provided the Federal Government the required certifications;
  - (b) the Federal Government granted approvals to affix Compliance Plates on Affected Vehicles on the condition that such Affected Vehicles conformed with relevant Australian Design Rules, including Australian Design Rule 79 (or its predecessor); and
  - (c) it was a condition of the grant of such approvals that the respondent would “by detailed quality control” tests, ensure continuing compliance with relevant Australian Design Rules, including Australian Design Rule 79 (or its predecessor).
- (2) Since at least 1 July 2021, the Federal Government’s ROVER platform form, which an applicant is required to complete in order to obtain Federal Government approval, requires the following to be filled out by the applicant (who was and is the respondent in these proceedings):
  - (a) the applicant is required to expressly state their ‘extent of compliance’ with the Australian Design Rules including Australian Design Rule 79. Where there is not full compliance with the standard, the applicant must provide further information directly relating to the specifics of the standard and where the non-compliance has been identified;
  - (b) compliance information is required to be entered into the form. Where an applicant has been required to enter information in a format that is believed to be incorrect by the applicant, they are to provide the correct information along with an explanation in the comments section; and
  - (c) at the end of the form are detailed declarations that must be signed for the applicant:
    - (i) the applicant on the form declared that their vehicle complied with the applicable national road standards and, insofar as that was not correct,

they declared that they identified and gave an explanation as to any non-compliance;

- (ii) the prospective holder of any approval declares that they will notify the Federal Government as soon as possible if their vehicle does not or likely does not comply with the applicable national road vehicle standards; and
- (iii) the applicant must declare the information submitted to the Federal Government in their application is “true and correct”, that they have “not omitted any matter or thing from this application without which it would be misleading in any material particular”, that “if tested, each variant covered by the application would not produce a less favourable result than the result set out in the documents identified within the application to demonstrate compliance with the national road vehicle standards”.

- (3) From 1 July 2021, it was an offence to sign a false or misleading declaration in an application for approval under the RVS Rules: RVS Act, s 31.
- (4) Where each Affected Vehicle was approved by the Federal Government, the respondent agreed to the following conditions:
  - (a) the respondent was not to place ~~an identification plate~~ Compliance Plate on vehicles which did not comply with Australian Design Rule 79; and
  - (b) the respondent was obliged to do quality control and testing including on a continuous basis to ensure compliance with Australian Design Rule 79.
- (5) Further particulars to be provided following discovery, including as to the actual forms signed on behalf of the respondent during the Relevant Period.

**U. Particulars to paragraphs 62 and 100 (Knowledge or constructive knowledge of the Isuzu Defeat Devices)**

- (1) The respondent's actual knowledge of the matters referred to in paragraphs 28 and 30 of the Statement of Claim (that each Affected Vehicle contained the Isuzu Defeat Devices and therefore did not comply with Australian Design Rule 79) can be inferred from the following matters, or, alternatively, the respondent ought to have known of those matters for the following reasons:
  - (a) the respondent designed or caused the design of each element of the Affected Vehicles;

- (b) the Federal Government requires a manufacturer applying for vehicle type approval to demonstrate control over all stages of the design, componentry, and manufacturing process and was able to ensure the design, componentry and manufacturing process will consistently produce the type of component;
- (c) the respondent tested or caused the testing of certain of the Affected Vehicles for the purpose of it showing that they complied with each element required by Australian Design Rule 79;
- (d) the respondent put itself forward to the Federal Government as an entity that was able to correctly certify compliance with Australian Design Rule 79 and thereby to positively represent compliance with that rule;
- (e) the respondent made a declaration to the Federal Government that:
  - (i) the Affected Vehicles did comply with Australian Design Rule 79;
  - (ii) the above statement was true and correct;
  - (iii) it did not omit any matter or thing which would be misleading in any material particular, and
  - (iv) if tested, each variant of such an Affected Vehicle covered by the approval would not produce a less favourable result than the result set out in the documents submitted to the Federal Government to demonstrate compliance with Australian Design Rule 79; and
- (f) because designing and implementing an emissions control system is technically complex, it is reasonable to expect a manufacturer in the position of the respondent to have sufficiently detailed knowledge of how such systems in its manufactured vehicles operate to ensure that its vehicles did not use such a defeat device.

**V. Particulars to paragraphs 85 and 86 (Respondent's provision of materials to Australian Distributor)**

- (1) The respondent provided to the Australian Distributor:
  - (a) technical specifications as to each Affected Vehicle including its size, weight and engine power;
  - (b) regulatory specifications such as each Affected Vehicle's purported compliance with Australian Design Rule 79 and the Euro 5 specification; and

- (c) the Compliance Plates for each Affected Vehicle, or the materials and/or information required for the etching thereof.

**W. Particulars to paragraphs 113 and 120 (Supply to Group Members as Consumers)**

- (1) The Affected Vehicles were vehicles:
  - (a) the price paid or payable for which was \$40,000 or less, prior to 1 July 2021;
  - (b) the price paid or payable for which was \$100,000 or less, from 1 July 2021; and/or
  - (c) which were of a kind ordinarily acquired for personal, domestic or household use, such that the purchasers of such vehicles are taken to have acquired those vehicles as 'consumers' for the purposes of the ACL, pursuant to s 3(1).
- (2) In their claims, each applicant relies on subsection 3(1)(b) of the ACL.
- (3) Persons alleged to be consumers in a proceeding under the ACL are presumed to be so unless the contrary is established, pursuant to s 3(10) of the ACL.

**X. Particulars to paragraph 137 (Unconscionable conduct)**

- (1) As to (j), specifically, the best particulars that the applicants are currently able to provide as a matter of inference from the facts currently available to them are as follows:
  - (a) ~~m~~Manipulation of the 'coast down' test resulted in the dynamometer applying lower forces to the vehicle for the purpose of the test. Consequently, this action resulted in lower emission results compared to those that would have been obtained if the correct dynamometer settings had been employed.
  - (b) The reference to 'coast down test' is a reference to the procedure for measuring the vehicle road load for the purpose of the NEDC Cycle (see Appendix A, Annex 4a, rules 5.1 (first paragraph), 6.2.1.1, and Appendix 7 of Australian Design Rule 79) (Coast Down Test).
  - (c) Appendix A, Annex 4a of Australian Design Rule 79 requires the NEDC Cycle to be performed on a chassis dynamometer configured either with:
    - (i) road loads submitted by the vehicle's manufacturer following the performance of the Coast Down Test (Coast Down Road Loads); or

- (ii) standard road loads determined by vehicle reference mass (which are defined in Appendix A, Annex 4a – rules 5.1 (second paragraph), 6.2.1.2 and Table 3 of Australian Design Rule 79) (Standard Road Loads).
- (d) The Standard Road Loads should be approximately equivalent to the Coast Down Road Loads. Therefore, when an Affected Vehicle on a chassis dynamometer configured with either the Standard Road Loads or the Coast Down Road Loads is operated in a manner consistent with the performance of the NEDC Cycle and the Affected Vehicle's ECU has not activated an Alternative Mode, the Affected Vehicle should not emit materially higher NOx than permitted by Australian Design Rule 79.
- (e) In fact, when an Affected Vehicle on a chassis dynamometer configured with the Standard Road Loads is operated in a manner consistent with the performance of the NEDC Cycle and the Affected Vehicle's ECU has not activated an Alternative Mode, the Affected Vehicle emits materially higher NOx than permitted by Australian Design Rule 79.
- (f) From this it can be inferred that, when the respondent carried out the relevant NEDC Cycle, the results of which it submitted to the Federal Government in order to receive approvals for the Affected Vehicles:
  - (i) those tests were performed using a chassis dynamometer that was not configured with the Standard Road Loads;
  - (ii) those tests were performed using a chassis dynamometer that was instead configured with Coast Down Road Loads;
  - (iii) the Coast Down Road Loads actually used were not approximately equivalent to, and were materially different from, the Standard Road Loads; and
  - (iv) accordingly, those tests were performed using a chassis dynamometer that was configured in a way that provided artificially advantageous test conditions for the Affected Vehicles' emissions (in that the emissions were lower than if the dynamometer was configured using the Standard Road Loads or approximately equivalent road loads).
- (g) It is to be inferred from the matters in (f) above that the Coast Down Test was unfairly manipulated to attain artificially advantageous test conditions for the NEDC Cycle for the Affected Vehicles.

- (h) The actual Coast Down Road Loads used by the respondent, and the precise manner in which the 'Coast Down Test' component of the NEDC Cycle has been unfairly manipulated, are not known by the Applicants and are matters which ought to be within the knowledge of the Respondent. The Applicants have provided the best particulars they can as a matter of inference from the facts presently known by them. Further particulars will be provided following discovery.
- (2) Further particulars to be provided following discovery or with the Applicants' evidence.
- (3) As to (k), specifically, the removal of the Isuzu Defeat Devices would tend to increase the frequency of the use of the emissions control system and the intensity of the operation of the system, which would:
  - (a) increase the propensity of component failure in the Affected Vehicles (in particular the EGR and lean NOx trap);
  - (b) increase the Affected Vehicles' use of fuel; and
  - (c) decrease the available power of the Affected Vehicles.
- (4) Further particulars to be provided following discovery or with the Applicants' evidence.

**Y. Particulars to paragraph 142 (Aggravated and exemplary damages)**

- (1) The Affected Vehicles were designed to contain the Isuzu Defeat Devices.
- (2) The Isuzu Defeat Devices significantly increased the Affected Vehicles' NOx exhaust gas emissions throughout the normal life of the vehicle and under normal conditions of use, beyond that permitted by the tests prescribed for the Affected Vehicles by Australian Design Rule 79 from time to time.
- (3) The respondent did not inform the Group Members that the Isuzu Defeat Devices existed and as a result of not informing the Group Members of that, the respondent could make profits by causing the Group Members to acquire vehicles in circumstances where:
  - (a) if they had not engaged in the misleading, false or deceptive conduct alleged in Part F to this Statement of Claim, then the Group Members never would have bought the vehicles (as no ordinary person buys a vehicle of the kind of a D-MAX or MU-X knowing it is illegal to drive it);

- (b) if they had manufactured, programmed and/or sold equivalent vehicles that complied with Australian Design Rule 79, they would have made less profit due to higher costs, lower revenue, or both; and
  - (c) the presence of the Isuzu Defeat Devices in the Affected Vehicles meant that it was unlawful for the Affected Vehicles to be imported to, or supplied to the market in, Australia.
- (4) The respondent ought to be punished for breaching the emissions regulations in circumstances where those breaches led to the Group Members unknowingly causing excessive NOx emissions to cause damage to the environment and human health, and thereby harming the community as a whole. An award of exemplary damages is necessary to deter such conduct in the future, and therefore to prevent or reduce the loss or damage likely to be suffered by injured persons such as the Group Members, in circumstances where, otherwise, there will not be enough of a disincentive for car manufacturers not to install defeat devices in their vehicles.
- (5) It hurt the feelings of the first applicant when he found out that he had been duped into buying a vehicle that had the Isuzu Defeat Devices. He felt like he was cheated and lied to. He was upset that there was no way he could have found out that there was an Isuzu Defeat Device when he purchased the vehicle.
- (6) In the circumstances above, the respondent contumeliously disregarded the rights of the Group Members:
  - (a) to purchase and drive cars that complied with emissions regulations;
  - (b) to drive cars that were not excessively productive of exhaust gas emissions; and
  - (c) to not have a vehicle supplied or caused to be supplied to them:
    - (i) which was illegal to drive on roads in Australia;
    - (ii) which was not capable of being legally registered in each State and Territory;
    - (iii) which was liable to be recalled;
    - (iv) the use of which could be prohibited; and
    - (v) the registration of which could be suspended or cancelled.

## SCHEDULE 2: EXPRESS WARRANTY PARTICULARS

### Particulars to paragraph 122 of the Statement of Claim

<b>1.</b>	<b>D-MAX</b>
<b>1A</b>	<b>MY 2017 D-MAX</b>
(i)	"Emission level Euro 5"
(ii)	"advanced Euro5-compliant unit."
(iii)	"Isuzu is fully committed to lowering emissions over the course of a vehicle's life cycle - from materials procurement to disposal and recycling. This philosophy is no better illustrated than in our Isuzu D-MAX."
(iv)	"The "pursuit of people's trust" is the underlying trait of product development at Isuzu. As a matter of principle, the vehicles we manufacture must be worthy of the trust of our drivers. This philosophy guides us in perfecting our technology and creating vehicles with a conscience."
<b>1B</b>	<b>MY 2018 D-MAX</b>
(i)	"Emission level Euro 5"
(ii)	"advanced Euro5-compliant unit."
(iii)	"Isuzu is fully committed to lowering emissions over the course of a vehicle's life cycle - from materials procurement to disposal and recycling. This philosophy is no better illustrated than in our Isuzu D-MAX."
(iv)	The "pursuit of people's trust" is the underlying trait of product development at Isuzu. As a matter of principle, the vehicles we manufacture must be worthy of the trust of our drivers. This philosophy guides us in perfecting our technology and creating vehicles with a conscience."
<b>1C</b>	<b>MY 2019 D-MAX</b>
(i)	"Emission level Euro 5"
(ii)	"advanced Euro5-compliant unit."
(iii)	"Isuzu is fully committed to lowering emissions over the course of a vehicle's life cycle - from materials procurement to disposal and recycling. This philosophy is no better illustrated than in our Isuzu D-MAX."
(iv)	The "pursuit of people's trust" is the underlying trait of product development at Isuzu. As a matter of principle, the vehicles we manufacture must be worthy of the trust of our drivers. This philosophy guides us in perfecting our technology and creating vehicles with a conscience."
<b>1D</b>	<b>MY 2020 D-MAX</b>
	<i>To be completed following discovery.</i>



**1E MY 2021 D-MAX**

- (i) "Emission level Euro 5"
- (ii) "Being Euro 5 compliant, the D-MAX also delivers efficient fuel economy across the range"

**1F MY 2022 D-MAX**

- (i) "Emission level: Euro 5"
- (ii) "Both the 3-litre and 1.9-litre turbo-diesel engines are Euro 5 compliant, helping every D-MAX deliver efficient fuel economy across the range."
- (iii) "The whole range is powered by Isuzu's robust 3-litre turbo-diesel engine, while the 4x2 SX Single Cab Chassis range gains exclusive access to a 1.9-litre engine option which provides lower emissions and better fuel efficiency"

**1G MY 2023 D-MAX**

- (i) "Emission level Euro 5"
- (ii) "Both the 3-litre and 1.9-litre turbo-diesel engines are Euro 5 compliant, helping every D-MAX deliver efficient fuel economy across the range"
- (iii) "The whole range is powered by Isuzu's robust 3-litre turbo-diesel engine, while the 4x2 SX Single Cab Chassis range gains exclusive access to a 1.9-litre engine option which provides lower emissions and better fuel efficiency."

**1H MY 2024 D-MAX**

- (i) "Emission level Euro 5"

**2. MU-X****2A 2016.5 MU-X (Mid-2016 model MU-X)**

- (i) "Emission level Euro5"
- (ii) "Euro5-compliant Isuzu diesel engine"

**2B MY 2018 MU-X**

- (i) "Emission level Euro5"
- (ii) "each component of the Euro5-compliant Isuzu diesel engine has been crafted to reduce maintenance costs and increase durability to ensure years of trouble-free motoring."

**2C MY 2019 MU-X**

- (i) "Emission level Euro5"
- (ii) "Euro5-compliant Isuzu diesel engine"

**2D MY 2020 MU-X**

*To be completed following discovery*

**2E MY 2021 MU-X**

- (i) "Emission level Euro 5"
- (ii) "And with its Euro 5 compliance, the MU-X demonstrates efficient fuel economy across the range"

**2F MY 2022 MU-X**

- (i) "Emission level Euro 5"

**2G MY 2023 MU-X**

- (i) "Emission level Euro 5"
- (ii) "And with its Euro 5 compliance, the MU-X demonstrates efficient fuel economy across the range"

**2H MY 2024 MU-X**

- (i) "Emission level Euro 5"

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