

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL COURT  
GROUP PROCEEDINGS LIST



No. Case: S ECI 2024 00234  
S ECI 2024 00234  
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B E T W E E N:

KRISOULA EL-HELOU

Plaintiff

- and -

MERCEDES-BENZ AUSTRALIA/PACIFIC PTY LTD (ACN 004 411 410)

First Defendant

MERCEDES-BENZ GROUP AG

Second Defendant

MERCEDES-BENZ AG

Third Defendant

DEFENCE

Date of Document: 25 July 2025	Solicitors Code: 420
Filed on behalf of: The Defendants	DX: 240 Melbourne
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In this Defence, unless otherwise indicated, defined terms in the Plaintiff's Further Amended Statement of Claim filed on 16 May 2025 (**FASOC**) have the same meaning, without admission as to their accuracy.

Headings in the FASOC are reproduced in this Defence for ease of reference only and such reproduction is not to be taken as an acceptance of the accuracy of their contents.

Some documents referred to in this Defence include information that is subject to a claim for confidentiality.

As to the allegations in the FASOC, the First Defendant, the Second Defendant and the Third Defendant (together, the **Defendants**) plead as follows:

## 1. INTRODUCTION

1. As to Part 1 of the FASOC headed 'Introduction', containing the first set of numbered paragraphs 1 to 6, the Defendants:

- (a) say that, in response to an objection by the Defendants to Part 1, the Plaintiff stated that Part 1 seeks only to "summarise" the Plaintiff's case and that the "material facts" are pleaded in the body of the Plaintiff's pleading commencing from the second numbered paragraph 1 in Part 2; and

### Particulars

(1) Letter from Herbert Smith Freehills Kramer (**HSF Kramer**) to Piper Alderman (**PA**) dated 20 June 2024, [11].

(2) Letter from PA to HSF Kramer dated 9 August 2024, [12], [14].

(3) Letter from HSF Kramer to PA dated 13 September 2024, [25]-[30].

- (b) accordingly, refer to and repeat their pleas in Parts 2 to 12 below and otherwise deny the allegations in paragraphs 1 to 6 in Part 1 of the FASOC.

## 2. THE PARTIES AND GROUP MEMBERS

1. As to paragraph 1, the Defendants:

- (a) say that the proceeding was not validly commenced as a group proceeding under Part 4A of the *Supreme Court Act 1986* (Vic) until the description of the group members to whom the proceeding relates was amended such that it complied with s 33H(2)(a) and those amendments took effect;
- (b) say further that, in this Defence, vehicles referred to in Annexure A to the FASOC that existed and were imported into Australia are referred to as **Relevant Vehicles**; and
- (c) otherwise do not admit paragraph 1.

2. As to paragraph 2, the Defendants:

- (a) repeat paragraph 1 above; and
- (b) otherwise do not admit paragraph 2.

3. As to paragraph 3, the Defendants:

- (a) admit paragraph 3(a);
- (b) as to paragraph 3(b):
  - (i) admit that on 19 August 2016 the Plaintiff acquired a Mercedes-Benz G-Class GL 350 BlueTEC SUV vehicle with vehicle identification number (VIN) WDC1668242A702701 (**First Vehicle**);
  - (ii) admit that in November 2017 the First Vehicle was replaced with a Mercedes-Benz GLS-Class GLS 350 d 4MATIC vehicle with VIN WDC1668242B020111 (**Second Vehicle**);

- (iii) admit that the First Vehicle and the Second Vehicle fall within the definition of “Affected Vehicles” in paragraph 1(a) of the FASOC; and
    - (iv) do not admit whether the Plaintiff retains ownership of the Second Vehicle;
  - (c) as to paragraph 3(c), admit that the Plaintiff acquired the First Vehicle, as referred to in paragraph 3(b)(i) above, and acquired the Second Vehicle, as referred to in paragraph 3(b)(ii) above, as a consumer pursuant to s 3(1)(b) of the ACL; and
  - (d) otherwise deny paragraph 3.
4. As to paragraph 4, the Defendants:
- (a) as to paragraph 4(a), admit that the First Defendant is and has since 30 November 2007 been a corporation registered in Australia able to be sued in its corporate name and style;
  - (b) as to paragraph 4(b), admit that during the Relevant Period the First Defendant imported, marketed and distributed Relevant Vehicles in Australia;
  - (c) as to paragraph 4(c), admit subject to reference at trial to their full terms and effect, that during the Relevant Period the First Defendant was a manufacturer of Relevant Vehicles within the meaning of s 7(1)(e) of the ACL and s 74A(4) of the TPA, for the reasons pleaded in paragraph 4(c)(ii) of the FASOC insofar as each of those provisions was operative during the Relevant Period;
  - (d) admit paragraph 4(d);
  - (e) admit paragraph 4(e); and
  - (f) otherwise deny paragraph 4.
5. As to paragraph 5, the Defendants:
- (a) admit paragraph 5(a);

- (b) admit paragraph 5(b);
- (c) as to paragraph 5(c), admit that between 1 January 2008 and about 1 November 2019, the Second Defendant was a developer, manufacturer and distributor of vehicles, including Affected Vehicles to the extent that such vehicles existed;
- (d) as to paragraph 5(d), admit that between 1 January 2008 and about 1 November 2019, the Second Defendant was a manufacturer of Affected Vehicles to the extent that such vehicles existed, within the meaning of:

- (i) s 7 of the ACL; or

- (ii) s 74A of the TPA;

insofar as those provisions were operative during the Relevant Period;

- (e) deny paragraph 5(e);
- (f) do not admit paragraph 5(f);
- (g) do not admit paragraph 5(g); and
- (h) otherwise deny paragraph 5.

6. As to paragraph 6, the Defendants:

- (a) admit paragraph 6(a);
- (b) as to paragraph 6(b), admit that since about 1 November 2019 until the end of the Relevant Period, the Third Defendant was a developer, manufacturer and distributor of vehicles, including Affected Vehicles to the extent that such vehicles existed;

(c) as to paragraph 6(c), admit that since about 1 November 2019 until the end of the Relevant Period, the Third Defendant was a manufacturer of Affected Vehicles to the extent that such vehicles existed, within the meaning of s 7 of the ACL;

(d) as to paragraph 6(d):

(i) repeat paragraph 37 below; and

(ii) deny paragraph 6(d);

(e) do not admit paragraph 6(e); and

(f) otherwise deny paragraph 6.

6A. Insofar as the FASOC makes allegations in respect of Group Members and Affected Vehicles other than the Plaintiff and the Plaintiff's Second Vehicle, those allegations are not presently particularised. Among other things, such allegations can only be understood and responded to in connection with particular vehicles, including the particular functionalities and calibrations which are alleged to be defeat devices, the vehicle model and engine type and permutations thereof, including production period, software and hardware, and other physical characteristics of the vehicles. Except where stated otherwise, the material allegations that follow are confined to the case brought in relation to the Plaintiff and the Plaintiff's Second Vehicle. In so pleading, the Defendants are not to be taken to have admitted allegations in relation to any other Group Member or Affected Vehicle. Further pleas by way of defence to allegations in respect of Group Members other than the Plaintiff, or Affected Vehicles other than the Plaintiff's Second Vehicle, cannot be made until those allegations are properly particularised.

### **Particulars**

(1) Letter from HSF Kramer to PA dated 20 June 2024, [10].

(2) Letter from HSF Kramer to PA dated 13 September 2024, [24].

### 3. AUSTRALIAN DESIGN REQUIREMENTS

7. As to paragraph 7, the Defendants:

(a) say that:

(i) from at least the commencement of the Relevant Period to 30 June 2021, the MVS Act was in force;

(ii) on 1 July 2021:

(A) the MVS Act was repealed; and

(B) the RVS Act commenced in full;

(iii) between 11 December 2018 and 1 July 2023, there were transitional arrangements to support the replacement of the MVS Act with the RVS Act;

#### Particulars

*Road Vehicle Standards (Consequential and Transitional Provisions) Act 2018 (Cth) and the RVS Act, s 2.*

(b) admit that:

(i) from at least the commencement of the Relevant Period to 30 June 2021, Australian Design Rule 79 (**ADR 79**) was a ‘national standard’ within the meaning of s 7 of the MVS Act; and

(ii) from 1 July 2021 to at least the end of the Relevant Period, ADR 79 was a ‘national road vehicle standard’ within the meaning of s 12 of the RVS Act;

(c) repeat paragraph 6A above and say further that:

- (i) the version of ADR 79 applicable to the Plaintiff's Second Vehicle was ADR 79/04;

**Particulars**

ADR 79/04, cl 2.2.

- (ii) United Nations – Economic Commission for Europe Regulation No. 83 *Uniform provisions concerning the approval of vehicles with regard to the emissions of pollutants according to engine requirements (Regulation 83)*, Revision 4, incorporating the 06 series of Amendments, was an alternative standard for the purposes of ADR 79/04 in that the technical requirements of Regulation 83 were deemed to be equivalent to the technical requirements of ADR 79/04;

**Particulars**

ADR 79/04, cl 6.1.

- (iii) at all material times, the Plaintiff's Second Vehicle was taken to comply with ADR 79/04 in circumstances where:

- (A) ADR 79/04 specified Regulation 83 as an alternative standard;
- (B) with respect to the Plaintiff's Second Vehicle, a type (of vehicle or component) had been approved in accordance with Article 2 of the *Agreement Concerning the Adoption of Harmonized Technical United Nations Regulations for Wheeled Vehicles, Equipment and Parts which can be Fitted and/or be Used on Wheeled Vehicles and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of these United Nations Regulations (1958 Agreement)* for Regulation 83 and by a Contracting Party to the 1958 Agreement applying Regulation 83 (**International Type Approval**); and



- (C) the International Type Approval corresponded to the same version of Regulation 83 in force from time to time; and

### **Particulars**

- (1) ADR 79/04, cl 6.1.
  - (2) *Vehicle Standard (Australian Design Rule – Harmonisation) 2012*, cl 5.
  - (3) International Type Approval E1 83R-07 6158\*02-W dated 22 November 2016 issued by the Kraftfahrt-Bundesamt in Germany.
  - (4) Summary of Evidence Report – Emission Control for Light Vehicles dated 12 April 2016.
- (d) otherwise deny paragraph 7.
8. As to paragraph 8, the Defendants:
- (a) repeat paragraph 7 above;
  - (b) admit the paragraph insofar as it accurately records the terms and effect of the legislation and standards referred to therein (as in force at the relevant time), to which full reference will be made at trial; and
  - (c) otherwise deny paragraph 8.
9. As to paragraph 9, the Defendants:
- (a) repeat paragraph 7 above;

- (b) admit the paragraph insofar as it accurately records the terms and effect of the legislation and standards referred to and particularised therein (as in force at the relevant time), to which full reference will be made at trial; and
- (c) otherwise deny paragraph 9.

10. As to paragraph 10, the Defendants:

- (a) admit the paragraph insofar as it accurately records the terms and effect of the legislation particularised therein (as in force at the relevant time), to which full reference will be made at trial; and
- (b) otherwise deny paragraph 10.

11. As to paragraph 11, the Defendants:

- (a) repeat paragraph 7 above;
- (b) admit the paragraph insofar as it accurately records the terms and effect of the legislation and standards referred to and particularised therein (as in force at the relevant time), to which full reference will be made at trial; and
- (c) otherwise deny paragraph 11.

12. As to paragraph 12, the Defendants:

- (a) repeat paragraph 7 above;
- (b) admit the paragraph insofar as it accurately records the terms and effect of the legislation and standards referred to and particularised therein (as in force at the relevant time), to which full reference will be made at trial; and
- (c) otherwise deny paragraph 12.

13. As to paragraph 13, the Defendants:

- (a) repeat paragraph 7 above;
- (b) admit the paragraph insofar as it accurately records the terms and effect of the legislation and standards referred to and particularised therein (as in force at the relevant time), to which full reference will be made at trial; and
- (c) otherwise deny paragraph 13.

14. As to paragraph 14, the Defendants:

- (a) repeat paragraph 7 above;
- (b) admit the paragraph insofar as it accurately records the terms and effect of the legislation and standards referred to and particularised therein (as in force at the relevant time), to which full reference will be made at trial; and
- (c) otherwise deny paragraph 14.

15. As to paragraph 15, the Defendants:

- (a) admit the paragraph insofar as it accurately records the terms and effect of the MVS Act (as in force at the relevant time), to which full reference will be made at trial; and
- (b) otherwise deny paragraph 15.

16. As to paragraph 16, the Defendants:

- (a) admit the paragraph insofar as it accurately records the terms and effect of the legislation and rules referred to and particularised therein (as in force at the relevant time), to which full reference will be made at trial; and
- (b) otherwise deny paragraph 16.

17. As to paragraph 17, the Defendants:

- (a) admit the paragraph insofar as it accurately records the terms and effect of the legislation and rules referred to therein (as in force at the relevant time), to which full reference will be made at trial; and
- (b) otherwise deny paragraph 17.

#### **4. ALLEGED DEFEAT DEVICES**

18. As to paragraph 18, the Defendants:

- (a) repeat paragraph 7 above;
- (b) admit that throughout the Relevant Period, ADR 79 applied to the Relevant Vehicles; and
- (c) otherwise deny paragraph 18.

19. As to paragraph 19, the Defendants:

- (a) repeat paragraphs 7, 15, 16 and 18 above;
- (b) say that each Relevant Vehicle was required to be of a type that complied with ADR 79 in order to:
  - (i) under the MVS Act, be given written approval for an identification plate to be placed on it, except as otherwise provided by the MVS Act; or

#### **Particulars**

MVS Act, s 10A.

- (ii) under the RVS Act, be granted a road vehicle type approval and be entered on the RAV, except as otherwise provided by the RVS Act and/or RVS Rules;

**Particulars**

RVS Act, ss 15 and 16; RVS Rules, rr 15 and 19.

(c) say that each Relevant Vehicle:

- (i) under the MVS Act, was required to have an identification plate in order to be lawfully imported except as otherwise provided by the MVS Act; or

**Particulars**

MVS Act, ss 18, 19 and 20.

- (ii) under the RVS Act, was required, *inter alia*, to:

(A) be of a type to which an in force road vehicle type approval applied; or

(B) be specified in an in force import approval,

in order to be lawfully imported except as otherwise provided by the RVS Act and/or RVS Rules;

**Particulars**

RVS Act, s 22.

(d) say that each Relevant Vehicle:

- (i) under the MVS Act, was required to have an identification plate in order to be delivered to a person for use in transport in Australia except as otherwise provided under the MVS Act; or

**Particulars**

MVS Act, ss 5(1), 14 and 14A.

- (ii) under the RVS Act, was required to be entered on the RAV in order to be provided to another person in Australia for the first time, except as otherwise provided in the RVS Act and/or RVS Rules;

**Particulars**

RVS Act, s 24.

- (e) say they will refer at trial to the full terms and effect of the MVS Act, RVS Act and RVS Rules (as in force at the relevant time); and
- (f) otherwise deny paragraph 19.

20. As to paragraph 20:

- (a) repeat paragraphs 7(c) and 18 above;
- (b) admit the paragraph with respect to the Relevant Vehicles insofar as it accurately records the terms and effect of the legislation and standards referred to and particularised in paragraphs 7 to 9 of the FASOC (as in force at the relevant time), to which full reference will be made at trial; and
- (c) otherwise deny paragraph 20.

21. As to paragraph 21:

- (a) repeat paragraphs 7(c) and 18 above;
- (b) admit the paragraph with respect to the Relevant Vehicles insofar as it accurately records the terms and effect of the legislation and standards referred to and particularised in

paragraphs 7, 8 and 11 of the FASOC (as in force at the relevant time), to which full reference will be made at trial; and

- (c) otherwise deny paragraph 21.

22. As to paragraph 22, the Defendants:

- (a) repeat paragraphs 7 above and 23(b) below;
- (b) admit that ADR 79 prohibited the use of a defeat device in vehicles to which ADR 79 applied; and

### **Particulars**

ADR 79, cl 2 and Appendix A paras 2.16 and 5.1.2.1.

- (c) otherwise deny paragraph 22.

23. As to paragraph 23, the Defendants:

- (a) repeat paragraph 22(b) above;
- (b) say that ADR 79 further provided that an element of design may not be considered a defeat device if:
  - (i) the need for the device is justified in terms of:
    - (A) protecting the engine against damage or accident and
    - (B) for safe operation of the vehicle;
  - (ii) the device does not function beyond the requirements of engine starting; or
  - (iii) conditions are substantially included in test procedures specified therein;

### Particulars

ADR 79, Appendix A para 2.16.1, 2.16.2 and 2.16.3.

- (c) otherwise admit paragraph 23;
- (d) say further that:
  - (i) ADR 79 relevantly provided for:
    - (A) a test concerning average exhaust emissions after a cold start, called a Type I test (**Type I Test**);
    - (B) a test cycle for a Type I Test (**Test Cycle**);
    - (C) standardised ambient and operating conditions for a Type I Test (**Test Conditions**); and
    - (D) emissions limits which applied within a Test Cycle, in Test Conditions, for a Type I Test (**Emissions Limits**);

### Particulars

ADR 79, Appendix A, para 5.3.1.4.

- (ii) the Emissions Limits did not apply outside a Test Cycle, or Test Conditions, for a Type I Test; and
- (e) say further that under ADR 79 properly construed:
  - (i) it is an essential characteristic of a defeat device that it causes the emission control system (**ECS**) to operate differently when it senses that the vehicle is being driven, in Test Conditions, on a chassis dynamometer as part of a Test



Cycle, compared to its operation when being driven, in conditions corresponding to Test Conditions, on the road;

- (ii) depending on the vehicle model and functionality involved, the permissible approaches to assessing whether an element of design reduces the effectiveness of the ECS may include the following:
  - (A) functionalities that remain active throughout the operating ranges of a vehicle cannot be defeat devices as they define the effectiveness of the ECS in the vehicle and cannot be said, conceptually, to reduce its effectiveness;
  - (B) there is no reduction in the effectiveness of the ECS if it can be shown that the activation or deactivation (as the case may be) of the functionality in question has no significant impact on tailpipe emissions;
  - (C) alternatively, there is no reduction in the effectiveness of the ECS if Emissions Limits would be observed in Test Conditions even in the counterfactual scenario in which the functionality is deactivated or activated (as the case may be) (referred to as **Testing Out**);
  - (D) further or alternatively, in the case of a selective catalytic reduction (**SCR**) system, there is no reduction in the effectiveness of the ECS if it can be shown that the absolute amount of NO<sub>x</sub> converted by the SCR system per km on average (referred to as the **Absolute NO<sub>x</sub> Conversion**) when a vehicle that uses the functionality in question is driven in conditions which may reasonably be expected to be encountered in normal vehicle operation and use (**Normal Driving Conditions**) outside Test Conditions, is no lower than the Absolute NO<sub>x</sub> Conversion when the vehicle is driven inside Test Conditions in compliance with Emissions Limits;
  - (E) further or alternatively, whether there is a reduction in the effectiveness of the ECS is to be assessed by reference to an extrapolation of the Emissions Limits in Normal Driving Conditions outside Test Conditions; such extrapolation to include consideration of a range of factors

including (I) an appropriate increase in Emissions Limits that is proportionate to the increase (if any) in Normal Driving Conditions in parameters such as load and speed compared to such parameters in Test Conditions, and (II) the ratio between NO<sub>x</sub> emissions on the one hand and the emissions of other pollutants covered by the Emissions Limits on the other;

- (iii) there is no single set of parameters that encompass Normal Driving Conditions in all cases, and Normal Driving Conditions differ depending on the functionality and permutation of vehicle model involved. For example:
  - (A) depending on the functionality, an assessment of Normal Driving Conditions may extend to journey duration;
  - (B) what amounts to Normal Driving Conditions in relation to calibration parameters such as speed and load will differ depending on the type of vehicle; and
- (iv) the provisions referred to in paragraph 23(b)(i) above permitting an element of design which protects against engine damage or accident and/or provides for the safe operation of the vehicle relevantly cover, among other things, elements of design which manage the risks of:
  - (A) unreacted ammonia (NH<sub>3</sub>) being discharged into the atmosphere via the vehicle's tailpipe (**NH<sub>3</sub> Slip**);
  - (B) a reduction in power which could adversely affect the operation of the vehicle (**Loss of Power**);
  - (C) a sudden and unexpected increase in power which could cause the driver to lose control of the vehicle (**Spontaneous Acceleration**);
  - (D) a sudden and unexpected fire onboard the vehicle (**Vehicle Fire**); and/or
  - (E) vehicle components breaking (**Component Breakage**).

24. As to paragraph 24, the Defendants:

- (a) repeat paragraph 23 above; and
- (b) otherwise admit paragraph 24.

25. As to paragraph 25, the Defendants:

- (a) as to paragraph 25(a) and the Plaintiff's Second Vehicle, deny the paragraph, including without limitation that the Plaintiff's Second Vehicle contained 'cycle detection' or an 'Alternative Mode' as alleged;
- (a1) say that:
  - (i) the Plaintiff's Second Vehicle contains an SCR system;
  - (ii) the SCR system operates in accordance with a dual dosing functionality for AdBlue with two complementary modes, namely a fill level (**FL**) mode and feed forward (**FF**) mode (**Dual Dosing**);
  - (iii) Dual Dosing operates in the same way in a Test Cycle as it does outside a Test Cycle in conditions corresponding to Test Conditions;
  - (iv) Dual Dosing does not reduce the effectiveness of the ECS; and
  - (v) the need for Dual Dosing is justified in terms of protecting the engine against damage or accident and/or for safe operation of the vehicle, in that it manages the risk of NH<sub>3</sub> Slip;

### **Particulars**

- (1) The objective of the SCR system is to convert NO<sub>x</sub> into N<sub>2</sub> and H<sub>2</sub>O using NH<sub>3</sub>. SCR operation involves the chemical reaction of NO<sub>x</sub> (which is produced during the combustion process) with

NH<sub>3</sub>. This reaction (**SCR Reaction**) converts NO<sub>x</sub> into N<sub>2</sub> and H<sub>2</sub>O.

- (2) NH<sub>3</sub> is a toxic and highly corrosive substance. It is introduced into the SCR system via a urea-based carrier fluid – commonly sold under the trade name, AdBlue – which is sprayed directly into the exhaust stream and produces NH<sub>3</sub> on board the vehicle via an evaporation process followed by thermolysis and hydrolysis. Thermolysis involves the conversion of urea into NH<sub>3</sub> and isocyanic acid. Hydrolysis involves the breaking down of isocyanic acid and water into NH<sub>3</sub> and CO<sub>2</sub>.
- (3) SCR operation requires determination of the quantity of AdBlue that is injected into the exhaust stream at any given moment (**AdBlue Dosing**) which is highly complex. Inadequate AdBlue Dosing can adversely affect NO<sub>x</sub> conversion rates. Excessive AdBlue Dosing can lead to, *inter alia*, NH<sub>3</sub> Slip (as particularised further below).
- (4) AdBlue Dosing must vary dynamically in response to various factors, which are subject to constant and extreme change during vehicle operation.
- (5) One of the most important factors is the level of raw NO<sub>x</sub> emissions (i.e. the NO<sub>x</sub> that is produced by the combustion process before it has been treated by any exhaust aftertreatment systems). During vehicle operation, these levels fluctuate in response to a wide range of ambient and operating conditions and, to a significant extent, driving style and terrain. Raw NO<sub>x</sub> produced is an important control parameter for determining the level of AdBlue Dosing because the objective of the SCR system is to convert NO<sub>x</sub> into N<sub>2</sub> and H<sub>2</sub>O using NH<sub>3</sub>. Therefore, broadly, the more raw NO<sub>x</sub> that is emitted, the more NH<sub>3</sub> that is required, and *vice versa*.

- (6) Other factors determine the level of AdBlue Dosing (if any) that is required at any given moment. They include:
- a. the temperature of the urea droplets sprayed into the exhaust stream via the AdBlue (**Urea Temperature**);
  - b. the temperature of the molecules involved in the SCR Reaction (**Reaction Temperature**);
  - c. the number of sites available on the SCR catalyst to facilitate the SCR Reaction at any given moment (**Reaction Sites**) which is influenced by, *inter alia*:
    - i. the level of  $\text{NH}_3$  actually stored on the SCR catalyst at any given moment (**Stored  $\text{NH}_3$** );
    - ii. the surface temperature of the SCR catalyst (**Surface Temperature**);
    - iii. deterioration of the SCR catalyst through, *inter alia*, repeat exposure to high temperatures (**Ageing**);
    - iv. the presence of an excessive quantity of hydrocarbon (**HC**) molecules on the SCR catalyst (**Hydrocarbon Poisoning**);
  - d. the amount of time that  $\text{NO}_x$  molecules would be likely to spend in the SCR catalyst at any given moment ( **$\text{NO}_x$  Residence Time**).
- (7) These factors cannot be sensed directly by the Electronic Control Unit (**ECU**) in the vehicle. On board the vehicle, these factors

are calculated using a combination of sensors and models which involve consideration of a number of other calibration parameters which are used as proxies or indicators. For example, the measurement taken by the temperature sensor upstream of the SCR catalyst is a proxy or indicator for, *inter alia*, Urea Temperature, Reaction Temperature and Surface Temperature. Engine oil temperature, ambient air pressure and air intake temperature are proxies or indicators for, *inter alia*:

- a. increased raw HC emissions which is an indicator for, *inter alia*, Hydrocarbon Poisoning and/or a reduction in Reaction Sites;
  - b. increased raw NOx emissions which is an indicator for, *inter alia*, a reduction in Reaction Sites.
- (8) However, these sensors and models are fallible. That gives rise to a further factor that influences the level of AdBlue Dosing (if any), namely, an increased risk of accumulating inaccuracies of relevant sensors, models and actuators, in particular over driving time (**Sensor/Model etc. Inaccuracy**).
- (9) The design of the SCR system takes into account, *inter alia*, these factors in order to manage the risks of:
- a. *NH<sub>3</sub> Slip caused by the injection of AdBlue into the exhaust stream in certain low or high temperatures, and/or when Reaction Sites or NOx Residence Time are low:*
    - i. Once sufficient Urea Temperature has been reached, it is possible to produce significant NH<sub>3</sub> from the urea in AdBlue and the SCR system can, therefore, begin to convert NOx into N<sub>2</sub> and H<sub>2</sub>O at significant rates. However, it cannot do so at full capacity (in terms of

NO<sub>x</sub> conversion) until the optimum Reaction Temperature range has been reached.

- ii. Once a high Surface Temperature has been reached, the number of Reaction Sites reduces. This is due to an increase in desorption rates and a consequent reduction in the ability of the SCR catalyst to store the NH<sub>3</sub> needed for the SCR Reaction.
- iii. Hydrocarbon Poisoning, caused, *inter alia*, by Sub-optimal Combustion can lead to a reduction in Reaction Sites. This is because HC molecules can either temporarily inhibit or permanently deactivate Reaction Sites on the surface of the SCR catalyst.
- iv. Ageing, caused, *inter alia*, by repeated exposure to high temperatures, can also lead to a reduction in the number of Reaction Sites. This is, similarly, because excessive temperature can permanently deactivate Reaction Sites on the surface of the SCR catalyst.
- v. NO<sub>x</sub> Residence Time decreases as exhaust gas mass flow increases. The latter generally increases with engine load and speed. The result is that there is less time available for those NO<sub>x</sub> molecules to react with NH<sub>3</sub> and for the SCR Reaction (which is not instantaneous) to occur.
- vi. The injection of AdBlue into the exhaust stream in any of the situations described in subparagraphs (i) to (v) above could cause NH<sub>3</sub> Slip. In those circumstances, NH<sub>3</sub> molecules unable to either (A) react with NO<sub>x</sub> molecules as part of the SCR Reaction (because the optimum Reaction Temperature range has not been

reached or because NO<sub>x</sub> Residence Time is low) or (B) store on the surface of the SCR catalyst (because of a lack of Reaction Sites) will simply exit the SCR system (and then the vehicle's tailpipe) unreacted and in toxic form.

b. *NH<sub>3</sub> Slip caused by Sensor/Model etc. Inaccuracy:* For example:

- i. NO<sub>x</sub> sensors are in general cross-sensitive to NH<sub>3</sub> (i.e. they are unable to distinguish between NO<sub>x</sub> and NH<sub>3</sub>). High levels detected on those sensors can, therefore, indicate either high levels of NO<sub>x</sub> or high levels of NH<sub>3</sub> exiting the tailpipe. AdBlue Dosing when high levels are detected by those sensors can exacerbate the risk of NH<sub>3</sub> Slip if those high levels were in fact NH<sub>3</sub> exiting the tailpipe.
- ii. The SCR dosing valve injects AdBlue into the exhaust stream at high pressure which causes degradation of the SCR dosing valve over time. A degraded SCR dosing valve injects more AdBlue than it is instructed by the ECU to inject. This can, in certain circumstances, lead to NH<sub>3</sub> Slip.

(10) The risk of NH<sub>3</sub> Slip is relevantly managed by Dual Dosing with two complementary modes: (i) FL mode and (ii) FF mode.

(11) In FL mode, the SCR system is quickly saturated with AdBlue with the primary objective of achieving a target NH<sub>3</sub> storage level. This is achieved by, *inter alia*, injecting more AdBlue than required for the SCR Reaction. The challenges of avoiding NH<sub>3</sub> Slip using only FL include, *inter alia*, constant fluctuations in Reaction Sites (caused by, for example, high Surface



Temperatures, Hydrocarbon Poisoning and Ageing) and Sensor/Model etc. Inaccuracy relating to Stored NH<sub>3</sub>.

- (12) In FF mode the primary objective is to manage the risk of NH<sub>3</sub> Slip. This is achieved by, *inter alia*, injecting marginally less AdBlue than required for the SCR Reaction. This causes the SCR Reaction to draw on Stored NH<sub>3</sub> as well as freshly injected NH<sub>3</sub> and has the effect of increasing Reaction Sites (by depleting Stored NH<sub>3</sub>) thereby reducing the risk of NH<sub>3</sub> Slip.

(b) as to paragraph 25(b) and the Plaintiff's Second Vehicle, deny the paragraph, including without limitation that the Plaintiff's Second Vehicle contained an 'Alternative Mode' as alleged;

(b1) say that:

- (i) the Plaintiff's Second Vehicle contains an exhaust gas recirculation (**EGR**) system;
- (ii) the EGR system operates in accordance with a functionality that modulates the EGR rate depending on the temperature downstream of the charge air cooler (**Charge Air Temperature**);
- (iii) the functionality referred to in subparagraph (ii) above operates in the same way in a Test Cycle as it does outside a Test Cycle in conditions corresponding to Test Conditions;
- (iv) the functionality referred to in subparagraph (ii) above does not reduce the effectiveness of the ECS; and
- (v) the need for the functionality referred to in subparagraph (ii) above is justified in terms of protecting the engine against damage or accident and/or for safe operation of the vehicle, in that it manages the risks of:

(A) Loss of Power;

- (B) Spontaneous Acceleration;
- (C) Vehicle Fire; and
- (D) Component Breakage;

### **Particulars**

- (1) NO<sub>x</sub> is produced during the combustion process. EGR operation involves the reintroduction of a portion of exhaust gas into the combustion chamber. That exhaust gas reduces the concentration of oxygen in the combustion chamber which, together with the dissociation of some of the EGR species (for example, CO<sub>2</sub>) and the heat absorbed by the EGR species (for example, N<sub>2</sub>, CO<sub>2</sub> and H<sub>2</sub>O), serves to reduce peak temperatures during combustion and minimises the formation of NO<sub>x</sub> during combustion.
- (2) The main challenges relevant to the development and design of the EGR system include (as particularised further below):
  - a. the excessive formation of deposits (**Deposits**);
  - b. excessive heat passing through vehicle components unable to tolerate those temperatures (**Overheating**);
  - c. injected fuel failing to burn or to burn completely (**Sub-optimal Combustion**);
  - d. the contamination of the engine oil reservoir with, *inter alia*, engine fuel (**Oil Dilution**);
  - e. the adverse effect of EGR operation on particulate matter (**PM**), CO<sub>2</sub> and HC emissions (**NO<sub>x</sub>/PM etc. Trade-Off**);

and

f. risks arising out of EGR operation (particularised below).

(3) Those challenges give rise to the risk of engine damage, accident and/or threats to the safety of the vehicle, including Loss of Power, Spontaneous Acceleration, Vehicle Fire and Component Breakage. For example:

- a. Deposits (e.g. sooting, varnishing, condensation and icing) caused by the recirculation of exhaust gas can, under certain conditions, build up in the entire airpath through which the recirculated exhaust gas flows, including in the valve which controls the flow of exhaust gas into the combustion chamber (**EGR Valve**). This build-up may cause Component Breakage: for example, it may cause the EGR Valve to stick open, which may in turn lead to, *inter alia*, an excessive flow of recirculated gas into the combustion chamber which may cause Sub-optimal Combustion leading to Loss of Power. Further, it is necessary to manage Deposits in order to comply with the obligation under ADR 79 Appendix A para 5.1.2, that is, to ensure that the ECS (which includes the EGR system) is capable of functioning throughout the normal life of the vehicle under normal conditions of use.
- b. The recirculation of exhaust gas under certain conditions can cause Overheating (and thereby cause Component Breakage, for example deformation of the connection point between the intake manifold and the cylinder head). This in turn may lead to the incorrect calculation of target EGR rates which may cause, *inter alia*, Oil Dilution, Spontaneous Acceleration and Vehicle Fire.

- c. The recirculation of exhaust gas under certain conditions can lead to Sub-optimal Combustion, resulting in a higher concentration of HC (that is, unburnt fuel) in the exhaust stream. Such HC may then lead to Hydrocarbon Poisoning of the SCR catalyst and/or it may be adsorbed by components including the diesel oxidation catalyst (**DOC**), diesel particulate filter (**DPF**) or SCR catalyst where it could ignite, leading to Overheating, which could lead to Component Breakage or Vehicle Fire.
  
  - d. The recirculation of exhaust gas under certain conditions can also lead to Oil Dilution via an increase in, *inter alia*, PM emissions and the resulting increase in the frequency of DPF regenerations (in which PM accumulated on the DPF is burnt off). DPF regenerations require temperatures in excess of 500-600°C. Such temperatures are achieved by, *inter alia*, a change in fuel injection strategy (namely, the injection of fuel late in the injection cycle) which leads to an exothermic reaction in the oxidation catalyst. In such circumstances, some HC (that is, unburnt fuel) and soot will condensate on the (colder) cylinder walls and ultimately reach the oil reservoir. If a critical limit is exceeded, fuel could enter the engine cylinder via the crankcase ventilation system. This could cause the oil to ignite which may lead to Spontaneous Acceleration, Vehicle Fire or Component Breakage. Oil Dilution or soot within the oil may also cause the oil to lose its lubricating quality which could lead to Component Breakage.
- (4) Management of these risks depends on a range of dynamic and interrelated factors, including operating and environmental conditions, which constantly change during vehicle operation. For example, recirculating exhaust gas in lower temperatures increases the risk of Deposits. Recirculating exhaust gas in higher temperatures increases the risk of Overheating. Recirculating exhaust gas when there is Sub-optimal Combustion

or when PM emissions are high increases the risk of Oil Dilution. The NO<sub>x</sub>/PM etc. Trade-Off is a key factor in the management of these risks.

- (5) Management of these risks across the range of possible operating and environmental conditions therefore necessarily involves the use of a combination of sensors and models to determine calibration parameters, such as Charge Air Temperature, which are used as proxies or indicators.
- (c) as to paragraph 25(c) and the Plaintiff's Second Vehicle, deny that the Plaintiff's Second Vehicle contained an 'Alternative Mode' as alleged and say that:
- (i) until 17 July 2020, the SCR system in the Plaintiff's Second Vehicle operated in accordance with a functionality which requested a switch between FL mode and FF mode depending on exhaust gas mass flow;
  - (ii) the functionality referred to in subparagraph (i) above operated in the same way in a Test Cycle as it did outside a Test Cycle in conditions corresponding to Test Conditions;
  - (iii) the functionality referred to in subparagraph (i) above did not reduce the effectiveness of the ECS; and
  - (iv) the need for the functionality referred to in subparagraph (i) above was justified in terms of protecting the engine against damage or accident and/or for safe operation of the vehicle, in that it managed the risk of NH<sub>3</sub> Slip;

### **Particulars**

The particulars to paragraph 25(a1)(v) above are repeated. High rates of exhaust gas mass flow can be used as a proxy for the NO<sub>x</sub> Residence Time, Surface Temperature (in particular, the steadiness of that temperature) and, due to the increased number of inputs, Sensor/Model etc. Inaccuracy, all of which can increase the risk of NH<sub>3</sub> Slip.

- (d) as to paragraph 25(d) and the Plaintiff's Second Vehicle, deny that the Plaintiff's Second Vehicle contained an 'Alternative Mode' as alleged and say that:
- (i) the SCR system in the Plaintiff's Second Vehicle operates in accordance with a functionality which requests a switch between FL mode and FF mode depending on SCR temperature;
  - (ii) the functionality referred to in subparagraph (i) above operates in the same way in a Test Cycle as it does outside a Test Cycle in conditions corresponding to Test Conditions;
  - (iii) the functionality referred to in subparagraph (i) above does not reduce the effectiveness of the ECS; and
  - (iv) the need for the functionality referred to in subparagraph (i) above is justified in terms of protecting the engine against damage or accident and/or for safe operation of the vehicle, in that it manages the risk of NH<sub>3</sub> Slip;

### **Particulars**

The particulars to paragraph 25(a1)(v) above are repeated. Higher Surface Temperatures can reduce Reaction Sites temporarily (via an increase in desorption rates) which can in turn increase the risk of NH<sub>3</sub> Slip.

- (v) further to subparagraphs (i) to (iv) above, until 17 July 2020, the SCR system in the Plaintiff's Second Vehicle operated in accordance with a functionality which requested a switch between FL mode and FF mode depending on SCR temperature, NOx mass flow, and the sum of NOx emissions (**NOx integral**);
- (vi) the functionality referred to in subparagraph (v) above operated in the same way in a Test Cycle as it did outside a Test Cycle in conditions corresponding to Test Conditions;
- (vii) the functionality referred to in subparagraph (v) above did not reduce the

effectiveness of the ECS; and

- (viii) the need for the functionality referred to in subparagraph (v) above was justified in terms of protecting the engine against damage or accident and/or for safe operation of the vehicle, in that it managed the risk of NH<sub>3</sub> Slip;

### **Particulars**

The particulars to paragraph 25(a1)(v) above are repeated. Higher Surface Temperatures can reduce Reaction Sites temporarily (via an increase in desorption rates) which can in turn increase the risk of NH<sub>3</sub> Slip. High rates of NOx mass flow can be an indicator that the SCR system has reached the limits of its capacity and of insufficient Reaction Sites and usually correlate to periods of dynamic driving which, in turn, indicate high exhaust gas temperatures and, therefore, high Surface Temperatures. Further, this all indicates high rates of inputs which in turn is indicative of an increased risk of Sensor/Model etc. Inaccuracy. All of this can increase the risk of NH<sub>3</sub> Slip. The NOx integral is used as a proxy for potential accumulated Sensor/Model etc. Inaccuracy, which indicates an increasing risk of NH<sub>3</sub> Slip.

- (e) as to paragraph 25(e) and the Plaintiff's Second Vehicle, deny that the Plaintiff's Second Vehicle contained an 'Alternative Mode' as alleged and say that:
  - (i) until 17 July 2020, the SCR system in the Plaintiff's Second Vehicle operated in accordance with a functionality which requested a switch between FL mode and FF mode depending on average AdBlue consumption;
  - (ii) the functionality referred to in subparagraph (i) above operated in the same way in a Test Cycle as it did outside a Test Cycle in conditions corresponding to Test Conditions;
  - (iii) the functionality referred to in subparagraph (i) above did not reduce the effectiveness of the ECS; and

- (iv) the need for the functionality referred to in subparagraph (i) above was justified in terms of protecting the engine against damage or accident and/or for safe operation of the vehicle, in that it managed the risk of and NH<sub>3</sub> Slip;

### **Particulars**

The particulars to paragraph 25(a1)(v) above are repeated. High rates of AdBlue consumption usually correlate to high rates of NO<sub>x</sub> mass flow, and high rates of NO<sub>x</sub> mass flow are an indicator of insufficient Reaction Sites and usually correlate to periods of dynamic driving which, in turn, indicate high exhaust temperatures and, therefore, high Surface Temperatures. Further, this all indicates high rates of inputs which in turn is indicative of an increased risk of Sensor/Model etc. Inaccuracy. All of this can increase the risk of NH<sub>3</sub> Slip.

- (f) as to paragraph 25(f) and the Plaintiff's Second Vehicle, deny that the Plaintiff's Second Vehicle contained an 'Alternative Mode' as alleged and say that:
  - (i) until 17 July 2020, the EGR system in the Plaintiff's Second Vehicle operated in accordance with a functionality which modulated the EGR rate when the ECU sensed that the engine was warmed up but idling;
  - (ii) the functionality referred to in subparagraph (i) operated in the same way in a Test Cycle as it did outside a Test Cycle in conditions corresponding to Test Conditions;
  - (iii) the functionality referred to in subparagraph (i) did not reduce the effectiveness of the ECS;
  - (iv) the need for the functionality referred to in subparagraph (i) was justified in terms of protecting the engine against damage or accident and/or for safe operation of the vehicle, in that it managed the risks of:
    - (A) Loss of Power;



- (B) Spontaneous Acceleration;
- (C) Vehicle Fire; and
- (D) Component Breakage; and

### **Particulars**

The particulars to paragraph 25(b1)(v) above are repeated. The EGR rate was modulated when the ECU sensed that the engine was warmed up and idling. This is because of the risk of increased PM emissions leading to Component Breakage, Oil Dilution, Spontaneous Acceleration and Vehicle Fire and the risk of Deposits leading to Loss of Power as well as the risk of Sub-optimal Combustion leading to Component Breakage or Vehicle Fire.

- (g) repeat paragraph 6A above and otherwise deny paragraph 25.

26. [Not used.]

27. As to paragraph 27, the Defendants:

- (a) repeat paragraphs 6A, 7(c), and 23 to 25 above; and
- (b) deny paragraph 27.

27A. As to paragraph 27A, the Defendants:

- (a) repeat paragraphs 6A, 7(c), and 23 to 25 above; and
- (b) deny paragraph 27A.

28. As to paragraph 28, the Defendants:

- (a) repeat paragraphs 5 to 6A, and 23 to 25 above;
- (b) say that the Second Defendant caused the Plaintiff's Second Vehicle to contain the functionalities pleaded in paragraph 25 above; and
- (c) otherwise deny paragraph 28.

## **5. ALLEGED MISLEADING OR DECEPTIVE CONDUCT**

### **A. ALLEGED GENERAL REPRESENTATION**

29. As to paragraph 29, the Defendants:

- (a) as to paragraph 29(a), admit that the First Defendant imported the Relevant Vehicles into Australia;
- (b) as to paragraph 29(b) and the Plaintiff's Second Vehicle, say that the First Defendant:
  - (i) sought and obtained approval for an identification plate; and
  - (ii) caused an identification plate to be affixed to the Plaintiff's Second Vehicle that conformed with the requirements set out in that approval;

### **Particulars**

- (1) Summary of Evidence Report – Emission Control for Light Vehicles dated 12 April 2016.
- (2) Selection of Test Fleet – ADR 79/04 Emissions Control for Light Vehicles dated 12 April 2016.

(3) Road Vehicle Descriptor dated 15 August 2017.

(4) Application for Compliance Approval dated 6 September 2017.

(5) Identification Plate Approval dated 11 September 2017  
(**Identification Plate Approval**).

- (c) as to paragraph 29(c) and the Plaintiff's Second Vehicle, deny the paragraph and say that the Plaintiff's Second Vehicle was imported prior to 1 July 2021;
- (d) as to paragraph 29(d) and the Plaintiff's Second Vehicle, deny the paragraph and say that the Plaintiff's Second Vehicle was imported prior to 1 July 2021;
- (e) as to paragraph 29(e) and the Plaintiff's Second Vehicle, deny the paragraph and say that the Plaintiff's Second Vehicle was imported prior to 1 July 2021;
- (f) as to paragraph 29(f) and the Plaintiff's Second Vehicle, admit that the First Defendant supplied the Plaintiff's Second Vehicle to a dealer in Australia; and
- (g) repeat paragraph 6A above and otherwise do not admit paragraph 29.

30. As to paragraph 30, the Defendants:

- (a) repeat paragraphs 6A, 7, 19 and 29 above;
- (b) insofar as the paragraph refers to the Plaintiff's Second Vehicle, deny the paragraph;
- (c) say that, to the extent that any representation is alleged to have been made by affixing the identification plate to the Plaintiff's Second Vehicle, that identification plate was required to be affixed in a form that conformed with the Identification Plate Approval, and the First Defendant had no right or choice to omit or modify the identification plate or its legally prescribed content, and the First Defendant thereby did not make the representation alleged; and

- (d) otherwise do not admit paragraph 30.

31. As to paragraph 31, the Defendants:

- (a) repeat paragraph 30 above;
- (b) insofar as the paragraph refers to the Plaintiff's Second Vehicle, deny the paragraph; and
- (c) otherwise do not admit paragraph 31.

32. As to paragraph 32, the Defendants:

- (a) repeat paragraphs 23 to 25, 27, 27A and 29 to 31 above; and
- (b) deny paragraph 32.

33. As to paragraph 33, the Defendants:

- (a) repeat paragraphs 29 to 32 above; and
- (b) deny paragraph 33.

34. As to paragraph 34, the Defendants:

- (a) repeat paragraphs 29 to 32 above; and
- (b) deny paragraph 34.

35. As to paragraph 35, the Defendants:

- (a) repeat paragraphs 29 to 32 above; and
- (b) deny paragraph 35.

36. As to paragraph 36, the Defendants:

- (a) repeat paragraph 35 above; and
- (b) deny paragraph 36.

37. As to paragraph 37, the Defendants:

- (a) repeat paragraphs 29 to 35 above; and
- (b) deny paragraph 37.

38. As to paragraph 38, the Defendants:

- (a) repeat paragraphs 29(b), 30 and 37 above; and
- (b) deny paragraph 38.

39. As to paragraph 39, the Defendants:

- (a) repeat paragraph 30 above;
- (b) insofar as the paragraph refers to the Plaintiff's Second Vehicle:
  - (i) say that if the approval received by the First Defendant from the Associate Administrator of Vehicle Standards referred to at paragraph 53(b)(ii) below, or any other such approval, had not been received by the First Defendant, then the Plaintiff's Second Vehicle could not have been acquired in Australia; and
  - (ii) otherwise deny the paragraph; and
- (c) repeat paragraph 6A above and otherwise do not admit paragraph 39.

40. As to paragraph 40, the Defendants:

- (a) repeat paragraph 30 above;
- (b) insofar as the paragraph refers to the Plaintiff's Second Vehicle:
  - (i) say that if the approval received by the First Defendant from the Associate Administrator of Vehicle Standards referred to at paragraph 53(b)(ii) below, or any other such approval, had not been received by the First Defendant, then the Plaintiff's Second Vehicle could not have been made available for sale by a dealer in Australia; and
  - (ii) otherwise deny the paragraph; and
- (c) repeat paragraph 6A above and otherwise do not admit paragraph 40.

41. As to paragraph 41, the Defendants:

- (a) repeat paragraphs 30 to 40 above; and
- (b) deny paragraph 41.

42. As to paragraph 42, the Defendants:

- (a) repeat paragraphs 6A and 33 to 35 above;
- (b) deny paragraph 42;
- (c) insofar as the paragraph refers to the Plaintiff's Second Vehicle, further say that on 17 July 2020, each of the functionalities referred to in, relevantly, paragraphs 25(c), 25(d)(v), 25(e) and 25(f) above was removed from the Plaintiff's Second Vehicle, and the calibration of the functionality referred to in paragraph 25(b1) above was amended, as part of a voluntary service measure, at no additional cost to the Plaintiff, when the Plaintiff's Second Vehicle was serviced;

- (d) further say that if any of the functionalities referred to in paragraphs 25(a1), 25(b1), 25(c), 25(d), 25(e) or 25(f) above was or is present in a Relevant Vehicle, and is held to be a defeat device (which is denied):
  - (i) the functionalities referred to in, relevantly, paragraphs 25(c), 25(d)(v), 25(e) and 25(f) above, if still present, are capable of being removed from a Relevant Vehicle, and the calibration of the functionality referred to in paragraph 25(b1) above is capable of being amended, by a voluntary service measure;
  - (ii) the functionalities referred to in the chapeau to this subparagraph did not and, if still present, do not, prevent or hinder the operation of a Relevant Vehicle in any relevant way; and
  - (iii) the functionalities referred to in the chapeau to this subparagraph did not and, if still present, do not, prevent a Group Member from using their Relevant Vehicle in any relevant way;
- (e) further or alternatively say that Relevant Vehicles acquired by the Plaintiff and Group Members are and were at all material times fitted with an identification plate or registered on the RAV without relevant restriction; and
- (f) further or alternatively say that:
  - (i) the Plaintiff and Group Members, insofar as they acquired an interest in a Relevant Vehicle and have not disposed of that interest, have obtained the use of the Relevant Vehicle from the time that interest was acquired, continue to have the use of that vehicle, and may dispose of it for value in the future;
  - (ii) the Plaintiff and Group Members, insofar as they acquired an interest in a Relevant Vehicle and have already disposed of that interest for value, obtained both the use of the Relevant Vehicle from the time the interest was acquired until its disposal and the valuable consideration received upon its disposal; and
  - (iii) if they had not acquired an interest in a Relevant Vehicle, the Plaintiff and each Group Member who acquired an interest in a Relevant Vehicle would have paid valuable consideration for an interest in or for use of a different vehicle.

43. As to paragraph 43, the Defendants:

- (a) repeat paragraph 42; and
- (b) deny paragraph 43.

B. ALLEGED FEDERAL GOVERNMENT REPRESENTATION

44. As to paragraph 44, the Defendants:

- (a) repeat paragraphs 6A, 7 and 19 above;
- (b) insofar as the paragraph refers to the Plaintiff's Second Vehicle, deny the allegation and say that the First Defendant submitted to the Department of Infrastructure and Regional Development (**DIRD**) the information contained in the:
  - (i) Summary of Evidence Report – Emission Control for Light Vehicles dated 12 April 2016;
  - (ii) Selection of Test Fleet – ADR 79/04 Emissions Control for Light Vehicles dated 12 April 2016;
  - (iii) Road Vehicle Descriptor dated 15 August 2017; and
  - (iv) Application for Compliance Approval dated 6 September 2017; and
- (c) otherwise do not admit paragraph 44.

44A. As to paragraph 44A, the Defendants:

- (a) repeat paragraphs 6A, 7, 19 and 44 above;
- (b) insofar as the paragraph refers to the Plaintiff's Second Vehicle, deny the paragraph; and



(c) otherwise do not admit paragraph 44A.

45. The Defendants deny paragraph 45.

46. As to paragraph 46, the Defendants:

(a) repeat paragraphs 23 to 25, 27, 27A and 44 to 45 above; and

(b) deny paragraph 46.

47. As to paragraph 47, the Defendants:

(a) repeat paragraphs 44 to 46 above; and

(b) deny paragraph 47.

48. As to paragraph 48, the Defendants:

(a) repeat paragraphs 44 to 46 above; and

(b) deny paragraph 48.

49. As to paragraph 49, the Defendants:

(a) repeat paragraph 48 above; and

(b) deny paragraph 49.

50. As to paragraph 50, the Defendants:

(a) repeat paragraphs 44 to 46 above; and

(b) deny paragraph 50.

51. As to paragraph 51, the Defendants:

- (a) repeat paragraphs 47, 48 and 50 above; and
- (b) deny paragraph 51.

52. As to paragraph 52, the Defendants:

- (a) repeat paragraphs 44, 44A and 51 above; and
- (b) deny paragraph 52.

53. As to paragraph 53, the Defendants:

- (a) repeat paragraphs 6A and 44 above;
- (b) insofar as the paragraph refers to the Plaintiff's Second Vehicle:
  - (i) repeat paragraphs 15, 19(c)(i) and 29(b) above and say that the Plaintiff's Second Vehicle was required to have an identification plate in order to be lawfully imported except as otherwise provided by the MVS Act;
  - (ii) say that the First Defendant received approval from the Associate Administrator of Vehicle Standards to affix an identification plate to that vehicle; and

### **Particulars**

Identification Plate Approval.

- (iii) otherwise deny the paragraph; and
- (c) otherwise do not admit paragraph 53.

54. As to paragraph 54, the Defendants:

- (a) insofar as the paragraph refers to the Plaintiff's Second Vehicle, say that if the approval received by the First Defendant from the Associate Administrator of Vehicle Standards referred to at paragraph 53(b)(ii) above, or any other such approval, had not been received by the First Defendant, then the Plaintiff's Second Vehicle could not have been made available for sale by a dealer in Australia;
- (b) insofar as the paragraph refers to other Relevant Vehicles, repeat paragraph 19 above and say that if a Relevant Vehicle could not be lawfully imported into, delivered to a person for use in transport in, or provided to another person for the first time in, Australia in one of the ways described in that paragraph (as applicable to the Relevant Vehicle), it could not have been made available for sale by a dealer in Australia; and
- (c) otherwise deny paragraph 54.

55. As to paragraph 55, the Defendants:

- (a) repeat paragraphs 44 to 53 above; and
- (b) do not admit paragraph 55.

56. As to paragraph 56, the Defendants:

- (a) repeat paragraphs 42, 47, 48, 50, 51 and 52 above; and
- (b) deny paragraph 56.

57. As to paragraph 57, the Defendants:

- (a) repeat paragraph 56 above; and
- (b) deny paragraph 57.

C. ALLEGED FEDERAL GOVERNMENT OMISSION

57A. As to paragraph 57A, the Defendants:

- (a) repeat paragraphs 23 to 25, 27, 27A and 29(a) to 29(e) above;
- (b) deny that the matters alleged at paragraphs 57A(a) to (f) of the FASOC existed;
- (c) admit that at no time when the First Defendant made a submission to DIRD did the Second Defendant or Third Defendant inform or cause the First Defendant to inform DIRD of such matters and deny that they were under any obligation to do so; and
- (d) otherwise deny paragraph 57A.

57B. As to paragraph 57B, the Defendants:

- (a) repeat paragraph 57A above; and
- (b) deny paragraph 57B.

57C. The Defendants deny paragraph 57C.

57D. As to paragraph 57D, the Defendants:

- (a) repeat paragraphs 23 to 25, 27, 27A and 57A above; and
- (b) deny paragraph 57D.

57E. As to paragraph 57E:

- (a) repeat paragraph 57A above; and
- (b) otherwise do not admit paragraph 57E.

57F. As to paragraph 57F, the Defendants:

- (a) repeat paragraphs 57A to 57E above; and
- (b) deny paragraph 57F.

57G. As to paragraph 57G, the Defendants:

- (a) repeat paragraphs 57A to 57E above; and
- (b) deny paragraph 57G.

57H. As to paragraph 57H, the Defendants:

- (a) repeat paragraph 54 above; and
- (b) otherwise deny paragraph 57H.

57I. As to paragraph 57I, the Defendants:

- (a) repeat paragraphs 6A, 55 and 57A above; and
- (b) do not admit paragraph 57I.

57J. As to paragraph 57J, the Defendants:

- (a) repeat paragraphs 42 and 57A to 57I above; and
- (b) deny paragraph 57J.

57K. As to paragraph 57K, the Defendants:

- (a) repeat paragraph 57J above; and

- (b) deny paragraph 57K.

D. ALLEGED FEDERAL GOVERNMENT REPRESENTATION – FAILURE TO CORRECT OR QUALIFY

57L. As to paragraph 57L, the Defendants:

- (a) insofar as the paragraph refers to the Plaintiff's Second Vehicle:
  - (i) repeat paragraphs 44 and 44A above and deny that the Federal Government Representation was made; and
  - (ii) repeat paragraph 57A above and deny that the vehicle had one or more of the qualities referred to in sub-paragraphs (a) to (f) of paragraph 57A of the FASOC; and
- (b) otherwise repeat paragraphs 6A, 44, 44A and 57A above and deny paragraph 57L.

57M. As to paragraph 57M, the Defendants:

- (a) repeat paragraph 57L above; and
- (b) otherwise deny paragraph 57M.

57N. The Defendants deny paragraph 57N.

57O. As to paragraph 57O, the Defendants:

- (a) repeat paragraphs 6A, 57A and 57L above; and
- (b) otherwise do not admit paragraph 57O.

57P. As to paragraph 57P, the Defendants:

- (a) repeat paragraphs 57L to 57O above; and
- (b) deny paragraph 57P.

57Q. As to paragraph 57Q, the Defendants:

- (a) repeat paragraph 54 above; and
- (b) otherwise deny paragraph 57Q.

57R. As to paragraph 57R, the Defendants:

- (a) repeat paragraphs 6A, 55 and 57L above; and
- (b) do not admit paragraph 57R.

57S. As to paragraph 57S, the Defendants:

- (a) repeat paragraphs 42 and 57L to 57R above; and
- (b) deny paragraph 57S.

57T. As to paragraph 57T, the Defendants:

- (a) repeat paragraph 57S above; and
- (b) deny paragraph 57T.

**6. ALLEGED NON-COMPLIANCE WITH GUARANTEE OF ACCEPTABLE QUALITY**

58. As to paragraph 58, the Defendants:

- (a) insofar as the paragraph refers to the Plaintiff, repeat paragraph 3(c) above and admit that the Plaintiff's Second Vehicle was supplied to the Plaintiff as a consumer pursuant to s 3(1)(b) of the ACL; and
- (b) repeat paragraph 6A above and otherwise do not admit paragraph 58.

59. As to paragraph 59, the Defendants:

- (a) insofar as the paragraph refers to the Plaintiff's Second Vehicle;
  - (i) repeat paragraph 29(f) above; and
  - (ii) deny paragraph 59; and
- (b) repeat paragraph 6A above and otherwise do not admit paragraph 59.

60. As to paragraph 60, the Defendants:

- (a) insofar as the paragraph refers to the Plaintiff's Second Vehicle:
  - (i) repeat paragraph 29(f) and 58(a) above;
  - (ii) admit that the supply of the Second Vehicle to the Plaintiff was in trade or commerce; and
- (b) repeat paragraph 6A above and otherwise do not admit paragraph 60.

61. [Not used.]



62. As to paragraph 62, the Defendants:

- (a) repeat paragraphs 58 to 60 above;
- (b) insofar as the paragraph refers to the Plaintiff and the Plaintiff's Second Vehicle repeat paragraph 58(a) above and admit that the supply of that vehicle to the Plaintiff was subject to a guarantee that the vehicle was of acceptable quality pursuant to s 54(1) of the ACL;
- (c) say they will refer at trial to the full terms and effect of the ACL (as in force at the relevant time); and
- (d) repeat paragraph 6A above and otherwise do not admit paragraph 62.

63. As to paragraph 63, the Defendants:

- (a) repeat paragraphs 6A, 23 to 25, 42 and 62 above; and
- (b) deny paragraph 63, including without limitation that, if any of the functionalities referred to in paragraphs 25(a1), 25 (b1), 25(c), 25(d), 25(e) or 25(f) above is held to be a defeat device (which is denied), a reasonable consumer fully acquainted with the state and condition of the Plaintiff's Second Vehicle would regard it as unacceptable.

64. The Defendants deny paragraph 64 and repeat paragraph 42 above.

65. As to paragraph 65, the Defendants:

- (a) repeat paragraphs 6A, 42 and 63 above;
- (b) say further that if any of the functionalities referred to in paragraphs 25(b1), 25(c), 25(d)(v), 25(e) or 25(f) above was or is present in a Relevant Vehicle, and is held to be a defeat device (which is denied):
  - (i) the functionalities referred to in, relevantly, paragraphs 25(c), 25(d)(v), 25(e) and 25(f) above were removed from the Plaintiff's Second Vehicle, and the

calibration of the functionality referred to in paragraph 25(b1) above was amended, as part of a voluntary service measure, and thus have been “remedied” for the purposes of s 259(3) of the ACL; and

- (ii) the functionalities referred to in, relevantly, paragraphs 25(c), 25(d)(v), 25(e) and 25(f) above, if still present, are capable of being removed from a Relevant Vehicle, and the calibration of the functionality referred to in paragraph 25(b1) above is capable of being amended, by a voluntary service measure and thus can be “remedied” for the purposes of s 259(3) of the ACL; and

- (c) deny paragraph 65.

66. As to paragraph 66, the Defendants:

- (a) insofar as the paragraph refers to the Plaintiff’s Second Vehicle, repeat paragraph 29(f) above;
- (b) repeat paragraph 42 above; and
- (c) deny paragraph 66.

67. As to paragraph 67, the Defendants:

- (a) repeat paragraphs 5(d) and 6(c) above;
- (b) admit that the Second Defendant was a manufacturer of the Plaintiff’s Second Vehicle within the meaning of s 7 of the ACL and was, until 31 October 2019, a manufacturer of other Affected Vehicles to the extent that such vehicles existed, within the meaning of s 7 of the ACL and s 74A of the TPA;
- (c) admit that the Third Defendant was, from 1 November 2019, a manufacturer of Affected Vehicles to the extent that such vehicles existed, within the meaning of s 7 of the ACL; and
- (d) otherwise deny paragraph 67.

68. As to paragraph 68, the Defendants:

- (a) repeat paragraph 4(c) above and admit that the First Defendant was a manufacturer of the Plaintiff's Second Vehicle within the meaning of s 7 of the ACL, and of other Relevant Vehicles within the meaning of s 7 of the ACL and s 74A of the TPA; and
- (b) otherwise deny paragraph 68.

69. The Defendants deny paragraph 69 and repeat paragraph 42 above and paragraphs 99 and 100 below.

70. The Defendants deny paragraph 70, repeat paragraph 69 above, and say further that Group Members who have already disposed, or dispose before judgment, of their interest in a Relevant Vehicle, have no legal right to recover damages for any reduction in the value of the Relevant Vehicle (which is denied) under ss 271 or 272 of the ACL.

## **7. ALLEGED NON-COMPLIANCE WITH EXPRESS WARRANTY**

71. As to paragraph 71, the Defendants:

- (a) insofar as the paragraph refers to the Plaintiff's Second Vehicle, repeat paragraph 29 above and:
  - (i) deny that the First Defendant gave the Express Warranty;
  - (ii) further or alternatively, deny that the First Defendant gave the Express Warranty to the Plaintiff;
- (b) say they will refer at trial to the full terms and effect of the ACL (as in force at the relevant time); and
- (c) repeat paragraph 6A above and otherwise deny paragraph 71.

72. As to paragraph 72, the Defendants:

- (a) repeat paragraph 71 above; and
- (b) deny paragraph 72.

73. As to paragraph 73, the Defendants:

- (a) insofar as the paragraph refers to the Plaintiff's Second Vehicle, repeat paragraph 29(f) above;
- (b) repeat paragraphs 58 to 60 and 71 and 72 above; and
- (c) deny paragraph 73.

74. As to paragraph 74, the Defendants:

- (a) repeat paragraphs 23 to 25, 27 and 27A above; and
- (b) deny paragraph 74.

75. As to paragraph 75, the Defendants:

- (a) repeat paragraphs 42, 63, 65, and 74 above; and
- (b) deny paragraph 75.

76. As to paragraph 76, the Defendants:

- (a) repeat paragraphs 42, 74 and 75 above; and
- (b) deny paragraph 76.

77. As to paragraph 77, the Defendants:

- (a) insofar as the paragraph refers to the Plaintiff's Second Vehicle, repeat paragraph 29(f) above;
- (b) repeat paragraphs 42 and 71 to 76; and
- (c) deny paragraph 77 and say further that, on a proper construction of s 259(3) of the ACL, Group Members who have already disposed, or dispose before judgment, of their interest in a Relevant Vehicle, have no legal right to recover damages for any reduction in the value of the Relevant Vehicle (which is denied) under s 259(3)(b) of the ACL.

78. As to paragraph 78, the Defendants:

- (a) repeat paragraphs 71 to 77; and
- (b) deny paragraph 78.

79. As to paragraph 79, the Defendants:

- (a) repeat paragraph 37 above; and
- (b) deny paragraph 79.

80. As to paragraph 80, the Defendants:

- (a) repeat paragraph 79 above; and
- (b) deny paragraph 80.

81. As to paragraph 81, the Defendants:

- (a) repeat paragraphs 23 to 25, 27 and 27A and 80 above; and

- (b) deny paragraph 81.

82. As to paragraph 82, the Defendants:

- (a) repeat paragraphs 42 and 81 above; and
- (b) deny paragraph 82.

83. The Defendants deny paragraph 83 and repeat paragraphs 69 and 70 above.

## **8. ALLEGED CONTRAVENTION OF A SAFETY STANDARD**

84. As to paragraph 84, the Defendants:

- (a) admit the paragraph insofar as it accurately records the terms and effect of the legislation and standards referred to therein (as in force at the relevant time), to which full reference will be made at trial; and
- (b) otherwise deny paragraph 84.

85. As to paragraph 85, the Defendants:

- (a) repeat paragraphs 6A, 23 to 25, 27, 27A and 84 above; and
- (b) deny paragraph 85.

86. As to paragraph 86, the Defendants:

- (a) insofar as the paragraph refers to the Plaintiff's Second Vehicle:
  - (i) repeat paragraph 84 above; and
  - (ii) admit that the Plaintiff's Second Vehicle was a "consumer good" within the meaning of s 2 of the ACL at the time it was supplied to the Plaintiff in

November 2017; and

- (b) repeat paragraph 6A above and otherwise do not admit paragraph 86.

87. As to paragraph 87, the Defendants:

- (a) insofar as the paragraph refers to the Plaintiff's Second Vehicle, repeat paragraph 29(f) above;
- (b) repeat paragraphs 85 and 86 above; and
- (c) deny paragraph 87.

88. As to paragraph 88, the Defendants:

- (a) repeat paragraphs 42 and 87 above; and
- (b) deny paragraph 88.

89. The Defendants deny paragraph 89 and repeat paragraph 42 above.

## **9. ALLEGED UNCONSCIONABLE CONDUCT**

90. As to paragraph 90, the Defendants:

- (a) as to paragraph 90(a), repeat paragraphs 6A and 23 to 28 above and deny the allegation;
- (b) as to paragraph 90(b), repeat paragraphs 6A and 23 to 28 above and deny the allegation;
- (c) as to paragraph 90(c), repeat paragraphs 6A and 23 to 28 above and deny the allegation;
- (c1) as to paragraph 90(c1):
  - (i) admit that increasing NOx emissions can be detrimental to human health and to

the environment; and

- (ii) say further that those effects depend on factors such as the chemical makeup and quantity of the NO<sub>x</sub> emitted and the atmospheric conditions in which it is emitted;
- (d) as to paragraph 90(d), repeat paragraphs 6A and 23 to 28 above and deny the allegation;
- (d1) as to paragraph 90(d1), repeat paragraphs 6A and 23 to 28 above and deny the allegation;
- (e) as to paragraph 90(e), repeat paragraphs 6A and 23 to 28 above and deny the allegation;
- (f) as to paragraph 90(f), repeat paragraphs 30, 37 and 38 above and deny the allegation;
- (g) as to paragraph 90(g), repeat paragraph 32 above and deny the allegation;
- (h) as to paragraph 90(h), repeat paragraphs 44, 44A, 51 and 52 above and deny the allegation;
- (i) as to paragraph 90(i), repeat paragraph 46 above and deny the allegation;
- (i1) as to paragraph 90(i1), repeat paragraphs 57A and 57F above and deny the allegation;
- (i2) as to paragraph 90(i2), repeat paragraphs 57L and 57P above and deny the allegation;
- (j) as to paragraph 90(j), deny the allegation; and
- (k) otherwise deny paragraph 90.

90A. As to paragraph 90A, the Defendants:

- (a) as to paragraph 90A(a), repeat paragraphs 90(a) to 90(i) above;
- (b) as to paragraph 90A(b), repeat paragraphs 6A and 25 above and deny the allegation;



- (c) as to paragraph 90A(c), repeat paragraph 30 above and otherwise deny the allegation;
- (d) as to paragraph 90A(d), repeat paragraph 44 above and otherwise deny the allegation;
- (e) as to paragraph 90A(e), repeat paragraphs 6A, 25, 29(b) and 29(e) above and deny the allegation; and
- (f) otherwise deny paragraph 90A.

91. As to paragraph 91, the Defendants:

- (a) repeat paragraphs 90 and 90A above; and
- (b) deny paragraph 91.

92. As to paragraph 92, the Defendants:

- (a) repeat paragraphs 42, 90 and 91 above; and
- (b) deny paragraph 92.

93. The Defendants deny paragraph 93 and repeat paragraph 42 above.

## **10. AGGRAVATED AND EXEMPLARY DAMAGES**

94. The Defendants deny paragraph 94.

## **11. LIMITATION DEFENCES**

95. If the Plaintiff has a cause of action under ss 271 and 272 of the ACL or the ACL (Vic) or cognate State or Territory legislation (which is denied), she ought reasonably to have become aware of non-compliance with the guarantee more than three years prior to the commencement of this proceeding and as such the cause of action is barred by s 273 of the ACL or the ACL (Vic) or cognate State or Territory legislation.

### Particulars

If, which is denied, there was non-compliance with the guarantee as alleged in the FASOC, then the Plaintiff ought reasonably to have become aware of that non-compliance on or before 21 January 2021.

From in or around 2016, there was extensive media reporting, such as that listed in Annexure A to this Defence, regarding regulatory action and litigation concerning alleged defeat devices and Mercedes-Benz diesel vehicles. The Second Defendant also reported on such regulatory action and litigation in its interim and annual reports from 2016, also listed in Annexure A. Whatever further investigation or testing was desired to be undertaken by or on behalf of the Plaintiff before alleging non-compliance with the guarantee, ought reasonably to have been undertaken before 21 January 2021.

Further particulars, including of any characteristics, attributes and circumstances of the Plaintiff relevant to these matters, may be provided following discovery and evidence.

96. If the Plaintiff has a cause of action under s 259 of the ACL or the ACL (Vic) or cognate State or Territory legislation (which is denied), the cause of action accrued more than six years prior to the commencement of this proceeding, and as such is barred by s 5(1) of the *Limitation of Actions Act 1958* (Vic).
97. Insofar as the Plaintiff has any other cause of action (which is denied), it accrued more than six years prior to the commencement of this proceeding, and as such is barred by:
  - (a) s 236(2) of the ACL or the ACL (Vic) or cognate State or Territory legislation;
  - (b) s 237(3) of the ACL or the ACL (Vic) or cognate State or Territory legislation; or
  - (c) s 239(4) of the ACL or the ACL (Vic) or cognate State or Territory legislation.

98. At the individual trial of each Group Member, further or alternatively insofar as the Court determines that any Group Member limitation periods can be determined at the trial of the common issues, the Defendants will allege, further or alternatively, that:

- (a) if a Group Member has a cause of action under ss 271 and 272 of the ACL or cognate State or Territory legislation (which is denied), the cause of action is barred by s 273 of the ACL or cognate State or Territory legislation insofar as they ought reasonably to have become aware of non-compliance with the guarantee more than three years prior to the date on which the amendment referred to at paragraph 1(a) above took effect;

### **Particulars**

If, which is denied, there was non-compliance with the guarantee as alleged in the FASOC, then a Group Member ought reasonably to have become aware of that non-compliance more than three years prior to the date on which the amendment referred to at paragraph 1(a) above took effect.

The Defendants will rely on the particulars to paragraph 95 above. Further, from 2021, there continued to be extensive media reporting, such as that listed in Annexure B to this Defence, regarding regulatory action and litigation concerning alleged defeat devices and Mercedes-Benz diesel vehicles. The Second Defendant also continued to report on such regulatory action and litigation in its interim and annual reports, also listed in Annexure B. Whatever further investigation or testing was desired to be undertaken by or on behalf of a Group Member before alleging non-compliance with the guarantee, ought reasonably to have been undertaken more than three years prior to the date on which the amendment referred to at paragraph 1(a) above took effect.

Further particulars, including of any characteristics, attributes and circumstances of Group Members relevant to these matters, may be provided following discovery and evidence.

- (b) if a Group Member has a cause of action under s 259 of the ACL or the ACL (Vic) or cognate State or Territory legislation (which is denied) which accrued more than:

- (i) three years prior to the date on which the amendment referred to at paragraph 1(a) above took effect, it is barred by operation of s 12(1) of the *Limitation Act 1981* (NT);
  - (ii) six years prior to the date on which the amendment referred to at paragraph 1(a) above took effect, it is barred by operation of s 5(1) of the *Limitation of Actions Act 1958* (Vic), s 14 of the *Limitation Act 1969* (NSW), s 10(1) of the *Limitations of Actions Act 1974* (Qld), s 4(1) of the *Limitation Act 1974* (Tas), s 13 of the *Limitation Act 2005* (WA), and/or s 11 of the *Limitation Act 1985* (ACT);
  - (iii) in Queensland and Tasmania, alternatively to subparagraph (ii) above, twelve years prior to the date on which the amendment referred to at paragraph 1(a) above took effect, it is barred by operation of s 10(3) of the *Limitations of Actions Act 1974* (Qld) and/or s 4(3) of the *Limitation Act 1974* (Tas);
- (c) if a Group Member has a cause of action under s 74D of the TPA (which is denied), the cause of action is barred by s 74J(1) and s 74J(2)(a)(iii) of the TPA where the consumer or a person who acquired the goods from, or derived title to the goods through or under, the consumer first became aware, or ought reasonably to have become aware that the goods were not of merchantable quality more than three years prior to the date on which the amendment referred to at paragraph 1(a) above took effect;

### **Particulars**

The particulars to paragraph 98(a) above are repeated.

- (d) if a Group Member has a cause of action under s 74G of the TPA (which is denied), the cause of action is barred by s 74J(1) and s 74J(2)(a)(vi) of the TPA where the consumer or a person who acquired the goods from, or derived title to the goods through or under, the consumer first became aware, or ought reasonably to have become aware of the failure of the First, Second and/or Third Defendant (as applicable) to comply with the express warranty referred to in that section more than three years prior to the date on which the amendment referred to at paragraph 1(a) above took effect;

### Particulars

The particulars to paragraph 98(a) above are repeated.

- (e) if a Group Member has a cause of action under s 74D and/or 74G of the TPA (which is denied), the cause of action is barred by s 74J(3) of the TPA where the time of the first supply to a consumer of the goods to which the action relates occurred more than ten years prior to the date on which the amendment referred to at paragraph 1(a) above took effect; and
- (f) if a Group Member has any other cause of action (which is denied), insofar as that cause of action accrued more than six years prior to the commencement of this proceeding, it is barred by:
  - (i) s 236(2) of the ACL or the ACL (Vic) or cognate State or Territory legislation;
  - (ii) s 237(3) of the ACL or the ACL (Vic) or cognate State or Territory legislation;
  - (iii) s 239(4) of the ACL or the ACL (Vic) or cognate State or Territory legislation; or
  - (iv) s 82(2) of the TPA.

## 12. ACL SECTION 271(6) DEFENCE

99. In relation to each of the functionalities in the Plaintiff's Second Vehicle referred to in, relevantly, paragraphs 25(b1), 25(c), 25(d)(v), 25(e) and 25(f) above, if the Plaintiff has a cause of action under ss 271 and 272 of the ACL or the ACL (Vic) or cognate State or Territory legislation (which is denied), the cause of action is barred by operation of s 271(6) by reason of the following matters:

- (a) on 17 July 2020, the Plaintiff requested that LSH Auto (Melbourne) Pty Ltd (the **Dealer**) undertake the works referred to in paragraph 42(c) above;

### Particulars

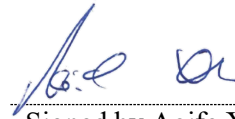
Clause 1 of the “Service Repair Order – Terms and Conditions” (**Terms**), which the Plaintiff agreed to by signing a Service Repair Order on 17 July 2020, provided that the Plaintiff requests the Dealer to carry out Works. Works were defined in clause 2 to be the repairs, procedures and services described in the Service Repair Order annexed to the Terms. The Service Repair Order included the works referred to in paragraph 42(c) above (job 3).

- (b) the request was made in accordance with an express warranty given by the First Defendant;
- (c) on the same day as the request was made, the Dealer undertook the works referred to in paragraph 42(c) above; and
- (d) in both receiving the request referred to in sub-paragraph (a) and carrying out the works referred to in sub-paragraph (c), the Dealer was acting on behalf of the First Defendant.

100. At the individual trial of each Group Member, the Defendants will allege that:

- (a) if any of the functionalities referred to in, relevantly, paragraphs 25(b1), 25(c), 25(d)(v), 25(e) or 25(f) above was present in a Group Member’s Relevant Vehicle and is held to be a defeat device (which is denied), then by operation of s 271(6) of the ACL or the ACL (Vic) or cognate State or Territory legislation, a Group Member does not have a cause of action under ss 271 and 272 in relation to any such functionality in circumstances where:
  - (i) in accordance with an express warranty made by the First Defendant the Group Member required the First Defendant to remedy the non-compliance with the guarantee by undertaking works of the kind referred to in paragraph 42(c) above on the Group Member’s Relevant Vehicle; and
  - (ii) the First Defendant remedied the non-compliance with the guarantee and did so within a reasonable time by undertaking those works.

Date: 25 July 2025

A handwritten signature in blue ink, appearing to read 'Aoife Xuereb', is positioned above a horizontal dotted line.

Signed by Aoife Xuereb  
Lawyer for the Defendants

This pleading was prepared by Jonathan Kirkwood, Geoffrey Kozminsky and Alison Martyn of counsel.

## ANNEXURE A

No	Publication	Title	Date
<b>Australian Media</b>			
1.	AAP Newswire, Australian Associated Press	AAP Broadcast Bulletin for Apr 23 at 0900	23 April 2016
2.	Australian Financial Review	Scandal-hit car industry feels heat as regulators dig deep	29 April 2016
3.	The Australian	Pursed lips over lemons	7 May 2016
4.	The Australian	We won't get fooled again on fuel economy claims... or rose-coloured speedo glass	4 June 2016
5.	The Australian	Daimler to tweak engine software of 3 million diesel cars	20 July 2017
6.	Sunday Age	Mercedes, Audi move on diesel emission concerns	23 July 2017
7.	Sydney Morning Herald	Mercedes, Audi address emissions	24 July 2017
8.	Canberra Times	Porsche SUV caught up in scandal	29 July 2017
9.	Sydney Morning Herald	Mercedes caught with emission cheat device	16 June 2018
<b>International Media</b>			
10.	The Guardian	Four more carmakers join diesel emissions row	9 October 2015
11.	The Guardian	Mercedes owner files US suit over diesel emissions	19 February 2016
12.	Wall Street Journal	Volkswagen posts loss on charge; Germany recalls other cars	22 April 2016
13.	Wall Street Journal	German car makers to recall 630,000 cars as Volkswagen scandal widens	22 April 2016
14.	Daily Telegraph	New emissions scandal as VW takes €16bn hit for 'dieselgate'	23 April 2016



15.	Telegraph Online	All diesel drivers ‘deserve payout’ in emissions crisis	23 April 2016
16.	Financial Times	Brussels probes diesel car software for emissions breaches	28 April 2016
17.	Financial Times	German prosecutors to search Daimler offices in emissions probe	23 May 2017
18.	Wall Street Journal	Daimler plans emissions modifications on more than three million vehicles	18 July 2017
19.	Wall Street Journal	Daimler earnings hit as diesel scandal lingers	20 October 2017
20.	Reuters	Software may have helped Daimler pass U.S. emissions tests - report	18 February 2018
21.	Financial Times	Daimler to recall and refit 238,000 vehicles over software concerns	12 June 2018
22.	Los Angeles Times	As Europe orders a recall, EPA’s inquiry into Mercedes emissions drags on	1 July 2019
23.	Wall Street Journal	Daimler issues another profit warning as legal woes, recalls hit	12 July 2019
24.	Automotive News	Will the diesel mess ever end?	12 August 2019
25.	Dominion Post	How dirty is diesel?	31 August 2019
26.	Bloomberg	Daimler fined \$960 million to settle rigged diesel-car probe	24 September 2019
27.	City AM	Car giants facing criminal charges over diesel gate	25 September 2019
28.	Automotive Forecast	Daimler fined US\$960m for misreporting diesel emissions	26 September 2019
29.	Agence France Presse English Wire	Daimler says to cut jobs to save 1 bn euros by end-2022	14 November 2019
30.	The Guardian	Profits at Mercedes-Benz owner Daimler slump by €5bn	12 February 2020
31.	The Herald	Scots pursue landmark multiple-million-pound claim over Mercedes dieselgate ‘scandal’	29 July 2020
32.	The Washington Post	Daimler to settle U.S diesel emissions cases	14 August 2020

33.	CNN	Daimler to pay \$1.5 billion in emissions cheating settlement with the US	14 September 2020
34.	Mail Online UK	Volkswagen loses European Court of Justice case in diesel emissions scandal after arguing 'defeat devices' were installed to protect engines	17 December 2020

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**Interim and Annual Reports**

35.	Daimler	Interim Report Q1 2016	April 2016
36.	Daimler	Interim Report Q2 2016	July 2016
37.	Daimler	Interim Report Q3 2016	October 2016
38.	Daimler	Annual Report 2016	February 2017
39.	Daimler	Interim Report Q1 2017	April 2017
40.	Daimler	Interim Report Q2 2017	July 2017
41.	Daimler	Interim Report Q3 2017	October 2017
42.	Daimler	Annual Report 2017	February 2018
43.	Daimler	Interim Report Q1 2018	April 2018
44.	Daimler	Interim Report Q2 2018	July 2018
45.	Daimler	Interim Report Q3 2018	October 2018
46.	Daimler	Annual Report 2018	February 2019
47.	Daimler	Interim Report Q1 2019	April 2019
48.	Daimler	Interim Report Q2 2019	July 2019
49.	Daimler	Interim Report Q3 2019	October 2019
50.	Daimler	Annual Report 2019	February 2020
51.	Daimler	Interim Report Q1 2020	April 2020
52.	Daimler	Interim Report Q2 2020	July 2020
53.	Daimler	Interim Report Q3 2020	October 2020

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## ANNEXURE B

No	Publication	Description	Date
<b>Australian Media</b>			
1.	The Australian	German carmakers and soap dodgers drown sorrows while Lambo gets pole	16 July 2021
2.	AAP Newsfeed	EUR: Daimler staff charged in diesel scandal	23 July 2021
<b>International Media</b>			
3.	The Guardian	UK Mercedes-Benz car owners seek damages over alleged emissions cheating	25 March 2021
4.	Daily Mirror Online	9.6 million diesel drivers could be owed compensation for mis-sold cars, lawyers warn	19 April 2021
5.	The Guardian	EU fines VW and BMW £750m for colluding with Daimler on fumes	8 July 2021
6.	The New York Times	E.U. fines Volkswagen and BMW more than \$1 billion for emissions collusion	9 July 2021
7.	Mail Online UK	A million UK Mercedes owners could get £10,000 each as lawyers sue car firm over emissions-cheating devices on diesel vehicles	12 October 2021
8.	Dow Jones Institutional News	Daimler settles in Canada for \$197 million over diesel emissions claims	13 December 2021
9.	Reuters	South Korea fines Mercedes \$16.9 million over emissions rules breach	7 February 2022
<b>Interim and Annual Reports</b>			
10.	Daimler	Annual Report 2020	February 2021
11.	Daimler	Interim Report Q1 2021	April 2021
12.	Daimler	Interim Report Q2 2021	July 2021
13.	Daimler	Interim Report Q3 2021	October 2021