

After Dieselgate –An Australian Perspective

7th AIDA Europe Conference

April 12th – 13th 2018

Warsaw Poland

Combined AIDA Motor Liability and Dispute Resolution Working Parties



USA Litigation

- In 2017 Volkswagen pleaded guilty and was fined US \$5.63 Billion by the Department of Justice
- In addition the company has agreed to spend US \$ 19.3 Billion as part of the settlement to compensate its customers in respect of allegations of cheating emissions tests and deceptive conduct – the sum represents compensation payments to affected customers
- The US litigation needs to be seen in the light of very tough US emission controls and the litigation environment generally in the USA



What has happened in Australia ?

- Approximately 100,000 vehicles are affected (VW admit to 84,000)
- Vehicles manufactured from 2009 – 2016
- VW – Golf , Polo , Jetta , Passat , VW CC Eos , Tiguan , Caddy and Amarok
- Skoda – Octavia , Yeti, and Superb
- Audi –A1 , A3 (1.6L) , A3 (2.0L) ,A4 , A5, A6 , Q3 ,TT ,Q5 (CAH and CGL Engines)
- Both companies conducting, product
- recall



Australian Litigation

- 5 Class actions issued by local Australian firms Maurice Blackburn and Co and Bannister law.
- I do not know whether there is a litigation funder involved.
- Proceedings issued in the NSW Federal Court November 2015.
- Listed for a preliminary hearing March 5th 2018.
- In 2016 the Federal Court directed VW Australia and Audi to issue notices on its corporate website and Facebook pages advising customers of the class action proceedings. Allegedly both VW and Audi etc are contacting all the owners of affected vehicles.
- Also on the website is link to a Federal Court Notice outlining the proceedings with a further link for those consumers who wish to opt out of the class action . If a person does not opt out they are deemed to be part of the class action.

Class Actions

- The date in the notice for opting out was 18 October 2017
- VW contests the proceedings arguing that recall notices are being sent to their customers offering to “Fix” vehicles impacted by the problem
- VW argues that the US litigation is markedly different as Australia does not have the same tough USA emission standards .
- Aside from the allegations of misleading and deceptive conduct the Australian class action also pleads that resale value of the diesel vehicles is diminished consist with reduced market demand for affected vehicles .

Class Actions

- Further allegations are that the software fitted to the vehicles was a “defeat device” within the meaning of the expression under the Australian design rules and applicable emission standards ...
- ...and the affected vehicles failed to comply with the requirements of the Australian emission standards which prohibit the use of “defeat devices” to operate an emission control system differently in test to the way it operates under normal road use .
- The MB and Co case also alleges that the companies engaged in ...“unconscionable conduct ,deceit , and general law misrepresentation, and also failed to comply with an express warranty.”

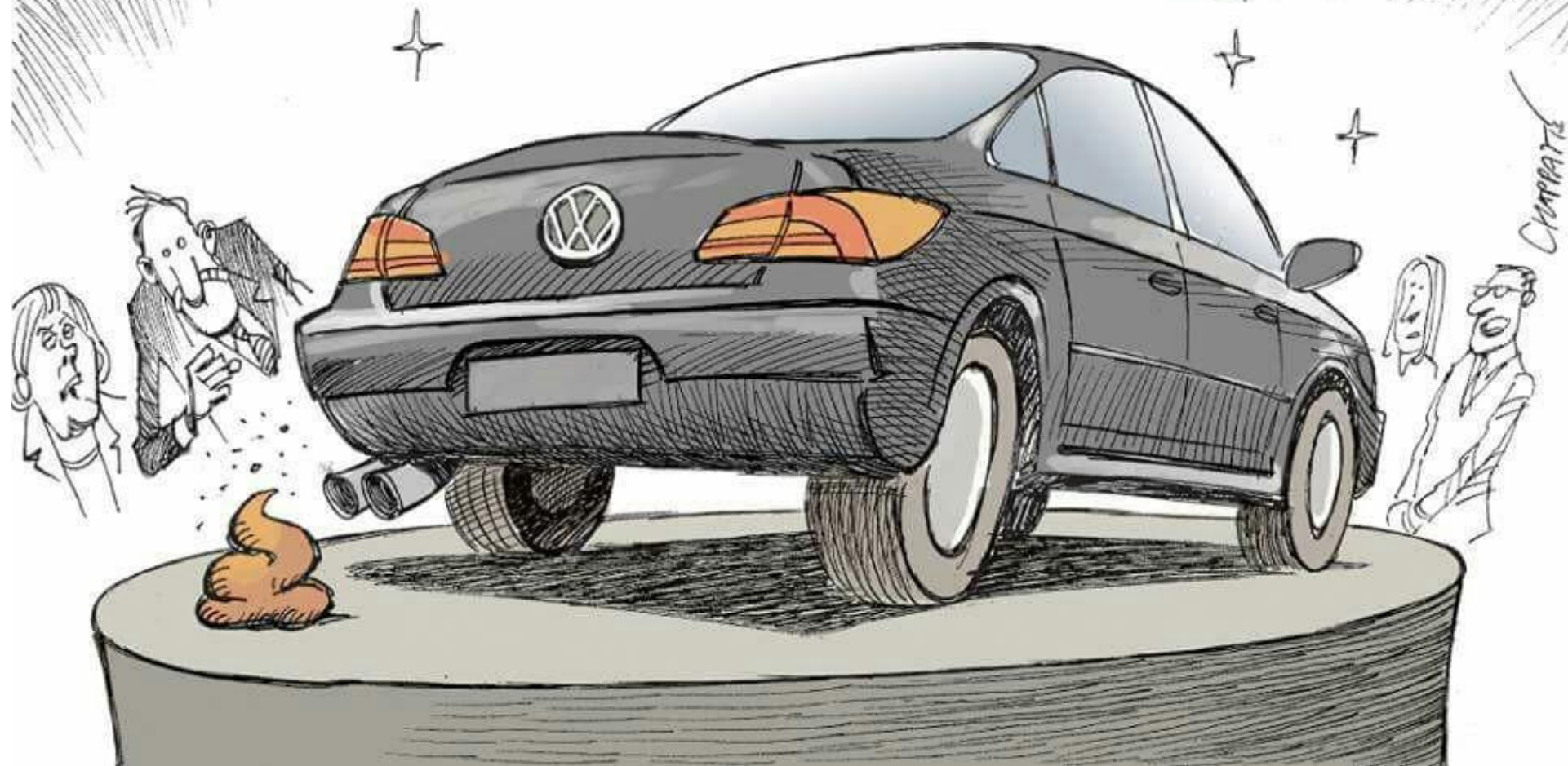
Class Actions

- The defendants deny the allegations and assert that –
- The software in the affected vehicles falls outside the definition of a “defeat device”, because it doesn’t impact upon any part of the vehicles’ emission control system
- The relevant emissions limits of NO_x apply only in laboratory testing and have no application to ordinary driving conditions .
- Even if they contravened the Australian law (which is denied) their conduct did not cause the affected vehicles to decline in value.
- The implementation of the voluntary recall work currently underway ,remedies any loss owners may have suffered and restores any decline in value (which is not admitted)

Class Actions

- The actions by Bannister law are –
- Tolentino v Volkswagen Group Australia Pty Ltd [NSD1308/2015]
- Cantour v Audi Australia Pty Ltd [NSD1307/2015]
- The Bannister law actions do not make any claims against VW, Audi and Skoda parent companies based in Europe.
- The actions by Maurice Blackburn and Co –
- Dalton & Anor v Volkswagen AG and Volkswagen Group Australia Pty Ltd [NSD1459/2015]
- Richardson v Audi AG and Audi Australia Pty Ltd [NSD1472/2015]
- Roe v Skoda Auto a.s, Volkswagen AG and Volkswagen Group Australia Pty Ltd [NSD1473/2015]

MADE IN
GERMANY



Regulator Action

- In September 2017 , the Australian Competition and Consumer Commission (ACCC) issued proceedings in the Federal Court against
- Audi AG , Audi Australia Pty Ltd (the importer) and Volkswagon AG .
- Skoda not added as a defendant on the basis that it comes under the VW umbrella.

The ACCC alleges that between 2011 and 2015:

- VWAG engaged in misleading conduct by installing and not disclosing the existence and operation of 'defeat' software, which controlled the operation of the vehicles' exhaust gas recirculation system. The software caused the vehicles to produce lower nitrogen oxide (NOx) emissions when subject to test conditions in a laboratory, but switched to a different mode under normal on-road driving conditions resulting in significantly higher NOx emissions being produced by the vehicles.
- Both VGA and VWAG engaged in misleading conduct by representing that the vehicles complied with Australian and European standards and all Australian regulatory requirements when, because of the defeat software, that was not the case .

Outcome?

- We will wait and see . The ACCC allegations very much mirror many of the allegations in the class actions
- In the interim VW , Audi etc are in damage control by recalling vehicles and seeking to rectify the problem ...
- So far their endeavours seem to be successful in that the Audi brand s is still very strong in Australia ..!!



"WE THINK THE 'LOW-PERFORMANCE' MODE MAY HAVE KICKED IN HERE, TOO..."

