

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 19/12/2019 4:21:50 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged: Concise Statement  
File Number: NSD2105/2019  
File Title: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



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A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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**Concise Statement**

No. \_\_\_\_\_ of 2019



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

**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**

Applicant

**VOLKSWAGEN FINANCIAL SERVICES AUSTRALIA PTY LTD (ACN 097 071 460)**

Respondent

**A. THE IMPORTANT FACTS GIVING RISE TO THE CLAIM**

1. The Defendant, Volkswagen Financial Services Australia Pty Ltd (**Volkswagen**) is the holder of an Australian credit licence under the *National Consumer Credit Protection Act 2009* (Cth) (the **Act**). Volkswagen enters into credit contracts with consumers, to provide credit for the purchase of vehicles. These proceedings relate to credit contracts entered into between Volkswagen and consumers during the period from 20 December 2013 and 15 December 2016 (the **Relevant Period**).
2. During the Relevant Period, Volkswagen authorised persons, including employees of dealerships, to engage in credit activities on its behalf under its Australian credit licence, in accordance with the exemption at regulation 23 of the *National Consumer Credit Protection Regulations 2010* (Cth) (known as the 'point of sale' exemption) (**Accredited Users**). The Accredited Users were each issued with individual credentials for Volkswagen's point of sale computer system (**POS system**).
3. During the Relevant Period, if a consumer indicated they were interested in obtaining finance from Volkswagen, the usual process was that they were introduced to a dealer representative who was an Accredited User. Where the consumer proceeded with an application, the Accredited User made inquiries of the consumer, including about their financial situation, and recorded the information in the POS system.

Filed on behalf of (name & role of party)	Australian Securities and Investments Commission, Plaintiff		
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4. There were fields in the POS system for, inter alia, the recording of income, assets, home loans, credit card liabilities, other vehicle finance, other loans, and rent. The POS system also contained fields where the Accredited User could record the following consumer expenses:
  - a. in the period from 20 December 2013 to 22 November 2015, Other Living, School Fees, Child Support/Maintenance and Special Living Requirements; and
  - b. in the period from 23 November 2015 to 15 December 2016, Living Expenses (i.e. Electricity, Food), Insurance Payments, Telephone and Internet, Holidays and Sports, Entertainment/Alcohol/Tobacco/Gambling, Child Support, Specialist Living/Childcare Requirements, Any Additional Remote Living Expenses and Other Foreseeable Expenses,together (**Living Expenses**).
5. The information recorded in the POS system in respect of each application for credit was automatically entered into a computerised credit decision system, known as “Inteflow”, for assessment. The credit decision system then either automatically approved the application or referred it for further assessment. As part of the assessment, the credit decision system engaged in a capacity calculation, which purported to assess whether the consumer would be able to afford to meet their financial obligations under the credit contract, by assessing the consumer’s cash flow – i.e. income minus expenses.
6. In performing this capacity calculation, for certain Living Expenses, the credit decision system, Inteflow, used the *higher* of the amount recorded in the system, and an amount derived from a weighted benchmark (the Melbourne Institute’s Henderson Poverty Index to 22 November 2015, and the ABS’s Household Expenditure Measure from 23 November 2015). For other Living Expenses, Inteflow only used amounts recorded in the POS system (without reference to any weighted benchmark).
7. In the period from 20 December 2013 to 22 November 2015, approximately 97.4% of loan applications (29,372 applications) submitted by Accredited Users in the POS system had \$0 recorded in all Living Expenses fields. In the period from 23 November 2015 to 15 December 2016, approximately 69.3% of loan applications (19,571 applications) submitted by Accredited Users in the POS system had \$0 recorded in all Living Expenses fields.
8. ASIC contends that, during the Relevant Period:

- a. Volkswagen did not have a policy which required Accredited Users to make any inquiries about a consumer's Living Expenses;
  - b. Volkswagen did not state to Accredited Users that they must obtain details as to a consumer's Living Expenses;
  - c. Volkswagen did not provide any training to Accredited Users to the effect that they were required to make any inquiries about a consumer's Living Expenses;
  - d. the Accredited Users were not required to complete the Living Expenses fields before a loan application could be submitted in the POS system;
  - e. to the extent that an Accredited User left the Living Expenses fields blank in the POS system in respect of an application, \$0 was automatically recorded in those fields when the application was submitted; and
  - f. Volkswagen expected that any estimate of Living Expenses obtained from the consumer during questioning about the consumer's financial situation would be recorded in these fields.
9. ASIC further contends that, during the Relevant Period, Volkswagen also:
- a. did not have any policy which required Accredited Users to conduct any verification of a consumer's Living Expenses;
  - b. did not state to Accredited Users that they must conduct any verification of a consumer's Living Expenses;
  - c. did not provide any training to Accredited Users to the effect that they were required to conduct any verification of a consumer's Living Expenses; and
  - d. was not aware of any instances where Accredited Users verified a consumer's Living Expenses where those Living Expenses were recorded as \$0 in the consumer's loan application.
10. ASIC brings these proceedings in relation to two categories of credit contracts (Schedules A and B), where \$0 was recorded in all Living Expenses fields in the loan application submitted by the Accredited User. Those Schedules will be provided separately from this Concise Statement.
11. For the credit contacts in Schedule A, the files of both Volkswagen and the relevant dealership for each relevant consumer have been obtained by ASIC. There is no

document on those files recording an inquiry into any of the consumer loan applicant's Living Expenses, or any steps being taken to verify any Living Expenses. Schedule B lists all credit contracts entered into during the Relevant Period, where \$0 was recorded in all Living Expenses fields in the loan application (including the Schedule A contracts).

**B. THE RELIEF SOUGHT FROM THE COURT**

12. The relief sought is set out in the accompanying application, summarised as (a) declarations; (b) pecuniary penalties; (c) costs; and (d) such further or other orders as the Court considers appropriate.

**C. THE PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT**

13. Under s 128 of the Act, Volkswagen was prohibited from entering into a credit contract with a consumer who would be the debtor under the contract on a day (the credit day) unless it had, within 90 days before the credit day:
- a. made an assessment that was in accordance with s 129 of the Act (see s 128(c));
  - b. made inquiries in accordance with s 130 of the Act (see s 128(d)); and
  - c. conducted verification in accordance with s 130 of the Act (see s 128(d)).
14. Under s 129 of the Act, Volkswagen was required, *inter alia*, to assess whether the credit contract would be unsuitable for the consumer if it was entered into.
15. Under s 130(1)(b) of the Act, Volkswagen was required to make reasonable inquiries about the consumer's financial situation, before making the assessment for the purposes of s 129 of the Act. Under s 130(1)(c) of the Act, Volkswagen was required to take reasonable steps to verify the consumer's financial situation, before making the assessment for the purposes of s 129 of the Act.
16. ASIC contends that in respect of each consumer, making reasonable inquiries about a particular consumer's financial situation included making reasonable inquiries about the Living Expenses of that consumer, and taking reasonable steps to verify that consumer's financial situation included taking reasonable steps to verify that consumer's Living Expenses.
17. In all of the circumstances, ASIC contends that, where \$0 was recorded in all Living Expenses fields in the POS system for a consumer, Volkswagen did not make inquiries or did not make reasonable inquiries about the consumer's Living Expenses (except for

limited instances where estimates of the consumer's Living Expenses were recorded on a handwritten document, but contrary to Volkswagen's expectations, were not then recorded by the Accredited User in the POS system for the purposes of the application and assessment).

18. ASIC contends that in respect of each of the Schedule A credit contracts, Volkswagen did not make inquiries or reasonable inquiries about the Living Expenses of the consumer. For the Schedule B credit contracts (being all of the credit contracts entered into between 20 December 2013 and 15 December 2016 where \$0 was recorded for Living Expenses), other than the Schedule A credit contracts, ASIC is not in a position to identify the specific credit contracts where Volkswagen did not make inquiries or reasonable inquiries about Living Expenses, but it intends to rely on the likely number of contraventions on the question of penalty.
19. As to verification, ASIC contends that Volkswagen did not take steps to verify or did not take reasonable steps to verify the consumer's Living Expenses, and therefore their financial situation, before the assessment, for each of the Schedule B credit contracts, or alternatively each of the Schedule A credit contracts.
20. ASIC also contends that for each of the Schedule B credit contracts, or alternatively each of the Schedule A credit contracts, Volkswagen did not make the assessment required by the Act because it has not assessed the consumer's financial situation as part of an assessment as to whether the credit contract was unsuitable for that consumer.
21. Further, under s 47(1)(a) of the Act, Volkswagen, as a licensee under the Act, must do all things necessary to ensure that the credit activities authorised by its licence are engaged in efficiently, honestly and fairly. ASIC contends that by Volkswagen's absence of policies and training during the Relevant Period regarding making reasonable inquiries about and taking reasonable steps to verify Living Expenses, Volkswagen contravened the obligation at s 47(1)(a) of the Act. ASIC also contends that Volkswagen contravened s 47(1)(d) of the Act through each of its failures to comply with the Act.

**D. THE ALLEGED HARM**

22. The provisions of the Act which ASIC alleges have been contravened relate to Volkswagen's responsible lending obligations. The provisions are directed to protecting Australian consumers from entering into credit contracts where the credit licensee has not made the mandatory reasonable inquiries about and taken reasonable steps to verify

a consumer's financial situation prior to assessing the unsuitability of a credit contract for that consumer.

**Certificate of lawyer**

I Susan Donnelly certify to the Court that, in relation to this Concise Statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation set out above.

Date: 19 December 2019

  
\_\_\_\_\_  
Signed by Susan Donnelly

Lawyer for the Applicant

This Concise Statement was prepared by Jeremy Clarke SC, Yaseen Shariff and Tim Kane.