

OUTCOME DETAILS

**Supreme Court - Civil
at Supreme Court Sydney
on 16 September 2021**

**2018/00322648-001 / Statement of Claim: Philip Dwyer v VOLKSWAGEN GROUP
AUSTRALIA PTY LTD trading as VOLKSWAGEN AUSTRALIA**

1. The proceedings are dismissed.
2. The plaintiff and Regency Funding Pty Ltd be jointly and severally liable for the defendant's costs of and incidental to the proceedings, on the following bases:
 - (a) For all costs attributable to the loss and damage aspect of the proceedings, so far as they concern the Structural Break Analysis described at [J233] of the principal judgment in this matter published on 18 June 2021, on a party / party basis up to and including 29 January 2021 and on an indemnity basis thereafter; and
 - (b) For all costs other than those described in (a) above (and excluding costs relating to the defendant's notice of motion filed 12 July 2019, which are the subject of orders made on 8 April 2021), on a party / party basis.
3. The common questions be answered in the manner set out in the Schedule to these orders.

Justice J Stevenson

Signed

Date

Answers to common questions

	Question	Answer
1(a)	<i>Whether the Recalled Vehicles were supplied to Group Members in trade or commerce?</i>	Recalled Vehicles that were supplied to Group Members by an authorised distributor of the Defendant or by a commercial supplier of second-hand vehicles were supplied in trade or commerce. Recalled Vehicles were not otherwise supplied to Group Members in trade or commerce.
1(b)	<i>Whether the Recalled Vehicles are goods within the meaning of the TPA and/or ACL?</i>	Yes. The Recalled Vehicles are goods within the meaning of the TPA and ACL.
2	<i>Not used.</i>	N/A
3	<p><i>Whether the Takata Airbags in each of the Recalled Vehicles have either or both:</i></p> <p><i>(a) a propensity to explode and/or a risk of exploding, thereby propelling metal shrapnel towards the occupants of the Defective Vehicle;</i></p> <p><i>(b) a propensity to malfunction and/or a risk of malfunctioning on deployment of the Takata Airbag, by deploying too rapidly and/or with excessive force;</i></p> <p><i>as a consequence of the use of ammonium nitrate in the propellant?</i></p>	<p>No. The Takata Airbags in each of the Recalled Vehicles do not, as a consequence of the use of ammonium nitrate in the propellant:</p> <p>(a) have a propensity to explode or a risk of exploding;</p> <p>(b) have a propensity to malfunction or a risk of malfunctioning on deployment of the Takata Airbag, by deploying too rapidly or with excessive force.</p>
4	<p><i>As a result of the answer to Question 3 above, in respect of each model of the Recalled Vehicles:</i></p> <p><i>(a) are or were they not safe to drive; and/or</i></p> <p><i>(b) if driven, do or did they expose the driver or any passengers to unnecessary danger and harm,</i></p> <p><i>attributable to their construction with at least one Takata Airbag?</i></p>	<p>No. The fact that each model of the Recalled Vehicles was constructed with at least one Takata Airbag:</p> <p>(a) does not make any of those Recalled Vehicles not safe to drive and does not expose the driver or any passengers to any unnecessary danger or harm;</p> <p>(b) did not in the past make any of those Recalled Vehicles not safe to drive and did not expose the driver or any passengers to any unnecessary danger or harm.</p>
5	<i>If the answer to either of the sub-paragraphs in Question 4 is "Yes", when did each model of Recalled Vehicle become unsafe to drive or</i>	Given the answers to Questions 3 and 4, it is not necessary to answer this

	Question	Answer
	<i>expose the driver or passenger (as relevant) to unnecessary danger or harm?</i>	question.
6	<i>Not used.</i>	N/A
7	<p><i>If the answer to either of the sub-paragraphs in Question 4 is “Yes”, whether the defendant took any or adequate steps to:</i></p> <p><i>(a) warn members of the public that the Recalled Vehicles were not safe to drive; or</i></p> <p><i>(b) prevent the Recalled Vehicles being driven; or</i></p> <p><i>(c) ensure that Recalled Vehicles were not sold as second-hand vehicles; or</i></p> <p><i>(d) warn members of the public that the Recalled Vehicles were not safe for passengers,</i></p> <p><i>and if so, when?</i></p>	As the plaintiff did not press any allegations in respect of these matters put in issue by the plaintiff, and the plaintiff led no evidence to support those allegations, and given the answers to Questions 3 and 4, it is not necessary to answer this question.
8	<i>If the answers to Questions 3 and 4 are “Yes”, whether the defendant knew, or ought to have known, of those matters, in respect of each of the Recalled Vehicles, as at: (a) November 2008; (b) April 2013; (c) June 2014; (d) October 2017; or (e) July 2018?</i>	Given the answers to Questions 3 and 4, it is not necessary to answer this question.
9	<p><i>Do the transitional provisions in item 6 of Schedule 7 of the Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010 (Cth) have the effect that:</i></p> <p><i>(a) sections 74D and 74J of the TPA apply to all Recalled Vehicles supplied by the Defendant to another person for re-supply before 1 January 2011, regardless of whether the Recalled Vehicle was supplied to a Group Member after 1 January 2011; and</i></p> <p><i>(b) sections 54, 271, 272 and 273 of the ACL do not apply to Recalled Vehicles that were supplied by the Defendant to another person for re-supply before 1 January 2011, regardless of</i></p>	Given the answers to Questions 3 to 5, it is not necessary to answer this question.

	Question	Answer
	<i>whether the Recalled Vehicle was supplied to a Group Member after 1 January 2011?</i>	
10	<i>Was any Recalled Vehicle acquired by a Group Member not of merchantable quality within the meaning of section 74D of the TPA at the time of supply to the Group Member by reason of the answers to Questions 3 to 5?</i>	No. By reason of the answers to questions 3 to 4, the Recalled Vehicles acquired by Group Members were of merchantable quality within the meaning of section 74D of the TPA at the time of supply to each Group Member.
11	<p><i>Whether a reasonable consumer fully acquainted with the state and condition of the Recalled Vehicles at the time of supply would not regard the Recalled Vehicles as:</i></p> <p><i>(a) acceptably fit for all the purposes for which goods of that kind are commonly supplied?</i></p> <p><i>(b) free from defects?</i></p> <p><i>(c) safe?</i></p> <p><i>for the purposes of section 54 of the ACL.</i></p>	<p>No. Given the answers to Questions 3 and 4, a reasonable consumer fully acquainted with the state and condition of the Recalled Vehicles at the time of supply would regard the Recalled Vehicles as:</p> <p>(a) acceptably fit for all the purposes for which goods of that kind are commonly supplied;</p> <p>(b) free from defects; and</p> <p>(c) safe.</p> <p>for the purposes of section 54 of the ACL.</p>
12	<p><i>Whether, by the conduct in paragraph 20 of the Amended Statement of Claim, the Defendant made any of the following representations (Representations) in respect of each of the Recalled Vehicles:</i></p> <p><i>(a) the Recalled Vehicles were safe to drive;</i></p> <p><i>(b) it was safe to transport passengers in the Recalled Vehicles;</i></p> <p><i>(c) the airbag(s) in the Recalled Vehicles did not contain any defect that made the airbag(s) or the vehicle unsafe;</i></p> <p><i>(d) the construction of the Recalled Vehicles would not expose the driver or passengers to unnecessary harm;</i></p> <p><i>(e) the Recalled Vehicles airbag(s) would deploy properly in the event of an accident or collision;</i></p> <p><i>(f) the Defendant would notify any purchaser (past or prospective) of any issue with the Recalled Vehicle's construction that had the potential to affect the vehicle's safety at the time of purchase, or as soon as the defendant became aware of it?</i></p>	As the plaintiff did not press any allegations in respect of these matters put in issue by the plaintiff, and the plaintiff led no evidence to support those allegations, the claims that the Defendant made such Representations fail.

	Question	Answer
	<i>If so, when and to what extent were those Representations qualified?</i>	
13	<i>Whether, if any of the Representations (as set out in Question 12) was a representation of opinion, the defendant had a reasonable basis for making that Representation?</i>	Given the answer to Question 3 and 12, it is not necessary to answer this question.
14	<i>Whether the Defendant:</i> <i>(a) engaged in Misleading Conduct?</i> <i>(b) engaged in Misleading Conduct by Silence by virtue of the matters alleged in paragraph 22 of the Amended Statement of Claim?</i>	As the plaintiff did not press any allegations in respect of these matters put in issue by the plaintiff, and the plaintiff led no evidence to support those allegations, the claims that the Defendant engaged in any Misleading Conduct fail.
15	<i>If the answer to Question 14 is “Yes”, were the Misleading Conduct or the Representations (as applicable), in respect of each of the Recalled Vehicles:</i> <i>(a) false or misleading in contravention of section 53(a) of the TPA and/or section 29(1)(a) of the ACL;</i> <i>(b) misleading or deceptive, or likely to mislead or deceive, in contravention of section 52 of the TPA and/or section 18 of the ACL; and/or</i> <i>(c) misleading as to the nature, characteristics and/or the suitability of each of the Recalled Vehicles in contravention of section 55 of the TPA and/or section 33 of the ACL?</i>	Given the answer to Question 14, it is not necessary to answer this question.
16	<i>For the purposes of section 273 of the ACL:</i> <i>(a) did some or any Group Members become aware, or ought they reasonably to have become aware, that the guarantee had not been complied with (assuming that the answer to Question 11 is “Yes”) if and when they received a recall notice from the Defendant or were otherwise notified that vehicles of the same model as their Recalled Vehicle were the subject of a recall; and</i> <i>(b) is the cause of action under section 271 of some or any Group Members who received a recall notice from the Defendant, or were otherwise notified or ought reasonably to have become</i>	Given the answers to Questions 3, 4 and 11, it is not necessary to answer this question.

	Question	Answer
	<i>aware that vehicles of the same model as their Recalled Vehicle were the subject of a recall, time-barred by operation of section 273 of the ACL?</i>	
17	<p><i>If the answer to Question 10 is “Yes”, can the Group Members have suffered any loss or damage, in the form of a reduction in the “true value” of that Recalled Vehicle as at the date of purchase, attributable to the Recalled Vehicle not being of merchantable quality, in circumstances in which:</i></p> <p><i>(a) the Group Member has had the Recalled Takata Airbag in their Recalled Vehicle replaced at no cost for the replacement; or</i></p> <p><i>(b) the Group Member is able to have the Recalled Takata Airbag in their Recalled Vehicle replaced at no cost for the replacement?</i></p>	<p>Given the answer to question 10, it is not necessary to answer this question. But given the answer to Questions 3, 4 and 10, Group Members have not suffered any loss or damage. In circumstances where the Takata Airbag in a Recalled Vehicle has been replaced at no cost, there is no difference between the purchase price of the Recalled Vehicle and the “true value” of that Recalled Vehicle at the time of purchase.</p>
18	<i>If the answer to Question 11 is “Yes”, was any non-compliance with section 54(1) of the ACL only because of any act, default or omission of Takata Corporation (or its related entities, including TK Holdings Inc) and not because of any act, default or omission of the Defendant?</i>	<p>Given the answers to Questions 3, 4 and 11, it is not necessary to answer this question.</p>
19	<p><i>If the answer to Question 11 is “Yes”, can the Group Members have suffered any loss or damage, in the form of a reduction in the “true value” of that Recalled Vehicle as at the date of purchase, attributable to the Recalled Vehicle not being of acceptable quality, in circumstances in which:</i></p> <p><i>(a) the Group Member has had the Recalled Takata Airbag in their Recalled Vehicle replaced at no cost for the replacement; or</i></p> <p><i>(b) the Group Member is able to have the Recalled Takata Airbag in their Recalled Vehicle replaced at no cost for the replacement?</i></p>	<p>Given the answer to question 11 it is not necessary to answer this question. But given the answers to Questions 3, 4 and 11, Group Members have not suffered any loss or damage. In circumstances where the Takata Airbag in a Recalled Vehicle has been replaced at no cost, there is no difference between the purchase price of the Recalled Vehicle and the “true value” of that Recalled Vehicle at the time of purchase.</p>
20	<p><i>If the answer to Question 15 is “Yes”, can the Group Members have suffered any loss or damage, in the form of a reduction in the “true value” of that Recalled Vehicle as at the date of purchase, attributable to alleged misleading or deceptive conduct, in circumstances in which:</i></p> <p><i>(a) the Group Member has had the Recalled Takata Airbag in their Recalled Vehicle replaced at no cost for the replacement; or</i></p>	<p>Given the answers to Questions 3, 4, 14 and 15, it is not necessary to answer this question.</p>

	Question	Answer
	<i>(b) the Group Member is able to have the Recalled Takata Airbag in their Recalled Vehicle replaced at no cost for the replacement?</i>	
20A	<p><i>Can the Group Members have suffered any loss or damage, in the form of disappointment, distress and / or anxiety, attributable:</i></p> <p><i>(a) If the answer to question 10 is yes, to the Recalled Vehicle not being of merchantable quality;</i></p> <p><i>(b) If the answer to question 11 is yes, to their Recalled Vehicle not being of acceptable quality;</i></p> <p><i>(c) If the answer to question 15 is yes, to the misleading or deceptive conduct of the defendant;</i></p> <p><i>in circumstances in which:</i></p> <p><i>(d) the Group Member has had the Recalled Takata Airbag in their Recalled Vehicle replaced at no cost for the replacement; or</i></p> <p><i>(e) the Group Member is able to have the Recalled Takata Airbag in their Recalled Vehicle replaced at no cost for the replacement?</i></p>	No. Given the answers to Questions 3, 4, 10, 11, 14 and 15, it is not possible for any Group Members to have suffered any loss or damage of the kind described in this question.
21	<i>Is the cause of action under section 74D(1) of the TPA of any Group Member time-barred by operation of section 74J(1)?</i>	Given the answers to Questions 10 and 11, it is not necessary to answer this question.
22	<i>Is the cause of action under section 74D(1) of the TPA of any Group Member time-barred by operation of section 74J(3)?</i>	Given the answers to Questions 10 and 11, no Group Member has a cause of action available under section 74D(1) of the TPA. However, were any such action available, any Group Member who acquired their Recalled Vehicle before 22 October 2008 would be time-barred by operation of section 74J(3).
23	<i>Are the claims of misleading or deceptive conduct of some or any Group Members time-barred by operation of sections 82(2) and 87(1CA) of the TPA and/or sections 236(2) and 237(3) of the ACL?</i>	Given that the plaintiff did not press his claims in respect of misleading or deceptive conduct and the plaintiff led no evidence to support those allegations, as indicated in response to Questions 14 and 15, it is not necessary to answer this question.
24	<i>Is any cause of action based on unconscionable conduct under the TPA or ACL of some or any Group Members time-barred by operation of sections 82(2) and 87(1CA) of the TPA or sections 236(2) and</i>	Given that the plaintiff did not press his claims in respect of unconscionability, and the plaintiff led no evidence to support those allegations, it is not

	Question	Answer
	<i>237(3) of the ACL (as applicable)?</i>	necessary to answer this question.
25	<p><i>Whether:</i></p> <p><i>(a) Takata Corporation or its related entities (as specified in each defence) was a concurrent wrongdoer for the purposes of section 87CB of the TPA or CCA?</i></p> <p><i>(b) if so, whether and in what proportion the defendant's liability should be reduced in respect of the causes of action under sections 52 and 53(a) of the TPA and/or sections 18 and 29(1)(a) of the ACL?</i></p>	Given that the plaintiff did not press his claims in respect of the causes of action relevant to these provisions and the plaintiff led no evidence to support those allegations, and given the answers to Questions 14 and 15, it is not necessary to answer this question.
26	<i>Is the answer to any of the questions above not common to the claims of the Group Members?</i>	The answer to Question 1(a) is not common to the claims of the purported Group Members. The effect of the answer to Question 1(a) is that those purported Group Members that were not supplied a Recalled Vehicle by an authorised distributor of the Defendant or by a commercial supplier of second-hand vehicles are not, in fact, Group Members.