



**Equity Division
Supreme Court
New South Wales**

Case Name: **Dwyer v Volkswagen Group Australia Pty Ltd t/as Volkswagen Australia**

Medium Neutral Citation: [2021] NSWSC 715

Hearing Date(s): 18-20, 24-25, 31 May and 1 June 2021

Date of Decision: 18 June 2021

Jurisdiction: Equity - Commercial List

Before: Stevenson J

Decision: The plaintiff's case fails

Catchwords: CIVIL PROCEDURE – Representative proceedings – Sale of goods – claim that Volkswagen vehicles were not of acceptable quality for the purposes of s 54 of the Australian Consumer Law by reason of being fitted with driver side Takata airbags – where airbags contained a propellant (“PSAN”) that had propensity to degrade when exposed to moisture and temperature fluctuations – whether plaintiff established any functionally significant propensity of the PSAN to degrade in the airbag in his vehicle such as to cause it to explode or malfunction – whether the airbag in the defendant’s vehicle did not malfunction – where defendant replaced the airbag in the plaintiff’s vehicle without cost – whether the plaintiff established any loss by reason of any want of acceptable quality in his vehicle

Legislation Cited: Civil Procedure Act 2005 (NSW)
Competition and Consumer Act 2010 (Cth), Sch 2 – Australian Consumer Law
Consumer Goods (Motor Vehicles With Affected Takata Airbag Inflators and Specified Spare Parts) Recall Notice 2018 (Cth)
Trade Practices Act 1974 (Cth)

Cases Cited: Australian Competition and Consumer Commission v Jayco Corp Pty Ltd [2020] FCA 1672

Australian Competition and Consumer Commission v Top Snack Foods Pty Ltd [1999] FCA 752
Courtney v Medtel Pty Ltd (2003) 126 FCR 219; [2003] FCA 36
Farley v Skinner [2002] 2 AC 732
Gill v Ethicon Sarl (No 5) [2019] FCA 1905
Graham Barclay Oysters Pty Ltd v Ryan (2000) 102 FCR 307; [2000] FCA 1099
HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd (2004) 217 CLR 640; [2004] HCA 54
Kizbeau Pty Ltd v WG & B Pty Ltd (1995) 184 CLR 281; [1995] HCA 4
Medtel Pty Ltd v Courtney (2003) 130 FCR 182; [2003] FCAFC 151
New South Wales Lotteries Corporation Pty Ltd v Kuzmanovski (2011) 195 FCR 234; [2011] FCAFC 106
Potts v Miller (1940) 64 CLR 282
Prestige Auto Traders Australia Pty Ltd v Bonnefin [2017] NSWSC 149
Steiner v Magic Carpet Tours Pty Ltd (1984) ASC 55-366; (1984) ATPR 40-490
Wyzenbeek v Australasian Marine Imports Pty Ltd (In Liq) (2019) 272 FCR 373; [2019] FCAFC 167
Zoneff v Elcom Credit Union Ltd (1990) 94 ALR 445

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Explanatory Memorandum, Competition and Consumer Act 2010 (Cth), Sch 2 – Australian Consumer Law
P Herzfeld and T Prince, Interpretation, (2nd ed, 2020, Thomson Reuters)

Category:

Principal judgment

Parties:

Philip Dwyer as representative plaintiff (Plaintiff)
Volkswagen Group Australia Pty Ltd trading as Volkswagen Australia (Defendant)

Representation:

Counsel:
C R C Newlinds SC with D Barnett (Plaintiff)
S J Free SC with I Ahmed and C Winnett (Defendant)

Solicitors:

Quinn Emanuel Urquhart & Sullivan (Plaintiff)
Clayton Utz (Defendant)

File Number(s):

SC 2018/322648

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JUDGMENT

Introduction

- 1 The plaintiff, Professor Phillip Dwyer, brings these proceedings under Pt 10 of the *Civil Procedure Act 2005* (NSW) as representative of some 83,000 persons (the “Group Members”) who between 2007 and 2018 purchased Volkswagen vehicles in which a Takata driver side airbag was installed.

- 2 The plaintiff purchased his vehicle, a Volkswagen Passat, in 2013 for some \$40,000.

- 3 By reason of s 54 of the Australian Consumer Law¹ (the “ACL”) the defendant, Volkswagen Group Australia Pty Ltd (“VW”), is taken to have guaranteed to the plaintiff and those Group Members who purchased their Volkswagens prior to 1 January 2011², that their vehicles were of “acceptable quality”; that is, relevantly, free from defects and safe.

- 4 The plaintiff contends that his vehicle was not of acceptable quality because, by reason of the installation of the Takata airbag, the vehicle was not free from defects and was not safe.

- 5 That is because, the plaintiff contends:
 - (a) the airbag contained a propellant known as Phase Stabilised Ammonium Nitrate (“PSAN”) that had a propensity to degrade

¹ *Competition and Consumer Act 2010* (Cth), Sch 2 – Australian Consumer Law.

² Group Members who purchased their vehicles prior to 1 January 2011 were instead entitled to the warranty under s 74D of the *Trade Practices Act 1974* (Cwth): see [20] below

over time when exposed to moisture and temperature fluctuations; and

- (b) if the PSAN degraded sufficiently, the PSAN could burn so aggressively that the inflator housing could rupture in a life-threatening way.

6 Although put more widely in his pleadings, the plaintiff's case advanced in final submissions was in essence that it was this risk of mis-deployment that meant that the vehicle was of unacceptable quality and that the defect in the vehicle for the purposes of s 54 of the ACL was the use of a propellant in the airbag that was vulnerable to temperature fluctuations or presence of moisture.

7 The plaintiff accepts that the risk of mis-deployment of these airbags is unquantifiable in that it cannot be predicted when and in what circumstances the PSAN in the airbags might degrade to a functionally significant degree.

8 Indeed, it is the plaintiff's case that this is what makes the vehicles of unacceptable quality for the purpose of s 54 of the ACL.

9 The plaintiff has had no problem with the airbag in his vehicle. The vehicle has not been involved in an incident that would have caused the airbag to deploy. There is thus no evidence that, in fact, the airbag in his car would not have deployed as intended.

10 VW replaced the Takata airbag in the plaintiff's car in 2019 at no cost to the plaintiff. This occurred during the vehicle's 60,000 km service. It is common ground that the new airbag is sound and will deploy as intended. The plaintiff incurred no out of pocket expenses while the airbag in his car was being replaced.

11 Each of the Group Members is in the same position as the plaintiff in that there was no mis-deployment of the Takata airbag in their vehicles, and that VW have now replaced the airbags at no cost with a non-Takata airbag.

- 12 It is agreed that I should decide this case, at least at the outset, by reference to the plaintiff's position and leave the position of the Group Members for later consideration, if appropriate.
- 13 I have been greatly assisted by the submissions of Mr Newlinds SC, who appeared with Mr Barnett for the plaintiff, and Mr Free SC, who appeared with Mr Ahmed and Ms Winnett for VW. Much of what follows, especially as to uncontroversial background matters, is drawn with gratitude from those submissions. The case was conducted with great skill by both sides and with great economy, bearing mind its complexities. The case occupied only 9 of the 15 days allocated for hearing. That is a tribute to those conducting the case. Much of the time saved was a result of Mr Newlinds and Mr Barnett electing not to press aspects of the plaintiff's case that would otherwise have lengthened the hearing. The quality of the parties' closing written submissions was particularly fine.

Decision

- 14 The plaintiff has not established any link between the propensity of PSAN to degrade and any relevant, functionally significant, propensity of the PSAN to degrade in the particular airbag installed in his vehicle so as to cause it to explode or malfunction. He has therefore not established that the vehicle was not of acceptable quality when he purchased it.
- 15 In any event, the plaintiff has not established that he has suffered any damage by reason of the installation of a Takata airbag in his vehicle, not least because VW has, without charge, replaced the Takata airbag with an airbag that is undoubtedly sound.

The provisions in the ACL

- 16 Section 54 of the ACL provides that if a person supplies, in trade or commerce, goods to a consumer and the supply is not by auction, then there is a guarantee that the goods are of "acceptable quality".

17 If the guarantee is not complied with, an affected person may recover damages from the manufacturer of the goods under s 271(1) of the ACL subject to the exception in, relevantly, s 271(2)(a), to which I will return.

18 By reason of s 272 of the ACL, such an affected person is entitled to recover:

(a) any reduction in the value of the goods below, relevantly, the price paid for the goods resulting from the failure to comply with the guarantee; and

(b) any reasonably foreseeable loss or damage suffered by the affected person because of the failure to comply with the guarantee.

19 Goods are of “acceptable quality” if they are, relevantly:

(a) free from defects; and

(b) safe,³

as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard as acceptable⁴ having regard to, relevantly:

(a) the nature of the goods; and

(b) any other relevant circumstances relating to the supply of the goods.⁵

20 The concept of “acceptable” quality is similar to that of “merchantable” quantity contained in s 74D of the *Trade Practices Act 1974* (Cth), the test relevant to Group Members who purchased Volkswagens with Takata airbags prior to 1

³ Section 54(2)(c) and (d).

⁴ Section 54(2).

⁵ Section 54(3).

January 2011. It is common ground that such distinction as there may be between goods being of “acceptable” as opposed to “merchantable” quality⁶ is not a determinative distinction for the purpose of these proceedings.

- 21 The question as to whether goods are of acceptable quality is an objective one, to be determined on the basis of relevant information known at the time of the trial.⁷
- 22 The test posed by s 54 is not absolute, nor is it a standard of perfection. Rather, it is a test of what a reasonable consumer would regard as acceptable having regard to, relevantly here, any relevant circumstances relating to supply of the goods.⁸
- 23 The relevant expectation is that of a reasonable consumer in the position of the actual consumer.⁹ The question is to be answered on the basis of what was objectively reasonable to expect at the time of supply.¹⁰
- 24 The answer will always depend on the circumstances.

The plaintiff’s pleaded case

- 25 In his Amended Statement of Claim, the plaintiff pleads that:

“Takata Airbags:

- a. use ammonium nitrate in the propellant with the consequence that the inflators within the Takata Airbags:
 - i. have a propensity to explode and/or a risk of exploding, thereby propelling metal shrapnel towards the occupants of the Defective Vehicle;

⁶ See *Gill v Ethicon Sarl (No 5)* [2019] FCA 1905 at [3529] in which Katzmann J opined that the words were “not materially different”.

⁷ *Prestige Auto Traders Australia Pty Ltd v Bonnefin* [2017] NSWSC 149 at [132] (N Adams J).

⁸ *Australian Competition and Consumer Commission v Jayco Corp Pty Ltd* [2020] FCA 1672 at [27] (Wheeler J).

⁹ *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307; [2000] FCA 1099 at [533]-[534] (Lindgren J, Lee J agreeing; Kiefel J at [611]); *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219; [2003] FCA 36 at [216] (Sackville J).

¹⁰ *Medtel Pty Ltd v Courtney* (2003) 130 FCR 182; [2003] FCAFC 151 at [64] (Branson J, Jacobson J agreeing).

- ii. have 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.”¹¹

26 The plaintiff alleges that as his vehicle was fitted with a Takata Airbag it was not safe to drive and if driven would “expose the driver and any passengers to unnecessary danger and harm”.¹²

27 And that, by reason of these matters:¹³

“...a reasonable consumer fully acquainted with the state and condition of the Defective Vehicles would not regard the Defective Vehicles as:

- a. acceptably fit for all the purposes for which goods of that kind are commonly supplied;
- b. free from defects;
- c. safe.”

28 The plaintiff contends he is entitled to recover damages, being the difference between the price he paid for his Volkswagen Passat and the “true value” of the vehicle.¹⁴

Takata airbags in Volkswagen vehicles

29 The Takata airbags in question were fitted to the front driver side of the vehicles, within the steering wheel boss.

30 Airbags are comprised of several different components. Those components include the inflator which, in this case, was a particular type of frontal single stage driver airbag inflator known as a “Smokeless Driver Inflator” (“SDI”).

31 The purpose of an airbag inflator is to cause gas to be generated rapidly when there is a collision.

¹¹ At par 7.

¹² At par 9(c).

¹³ At par 16.

¹⁴ At par 18(A).

- 32 In the event of a collision, an ignitor within the airbag produces hot gasses. These gasses ignite propellant tablets that cause the propellant, here the PSAN, to ignite and produce gas for inflating the airbag cushion.
- 33 These steps need to occur within milliseconds of the initiation of the process by the airbag control unit.
- 34 The plaintiff's vehicle, and each of the vehicles of the Group Members, was manufactured by VW's German parent Volkswagen Aktiengesellschaft ("VW AG").
- 35 VW AG did not manufacture the airbags. Airbag systems are complex and require specialist expertise to design, develop, manufacture and test. Indeed, VW AG does not hold the German legal approvals necessary to produce airbag systems.
- 36 VW AG gave Takata specifications in respect of the airbags in a "Book of Requirements". The Book of Requirements contained specification drawings, under cover of a "nomination letter", setting out certain requirements that Takata was required to meet when designing the airbag system.
- 37 The specifications that VW AG gave Takata included performance specifications for the inflators, including that, at room temperature, inflation should occur within the range of 24 to 33 milliseconds.
- 38 However, and critically, VW AG did not specify what propellant should be used in the airbags. Takata chose to use PSAN as the propellant.
- 39 VW AG became aware from publicly available sources that from in or around 2007 Takata was conducting internal investigations in relation to airbags supplied to manufacturers other than VW AG.
- 40 In 2013 and 2014, Takata told VW AG on a number of occasions that these investigations did not relate to airbags installed in Volkswagen vehicles.

- 41 Evidently it was known, at around this time, that certain types of Takata airbag inflators, not of the kind used in Volkswagen vehicles, had manufacturing defects.
- 42 On 25 January 2016, the US National Highway Traffic Safety Administration (the “US Regulator”) published a “Takata Defect Information Report” which was said to “address concerns with non-desiccated SDI airbag inflators installed in frontal driver airbag modules in the United States”.
- 43 Mr Andreas Schade, a Technical Expert employed within VW AG’s Technical Development Department, gave evidence in cross-examination that, prior to this point, VW AG “didn’t know that there is a rupture risk in our cars, we didn’t see anything, we didn’t hear anything up to that stage [of] rupture or mis-deployment”.
- 44 Mr Schade said that, based on discussions he had with the US Regulator, it became clear to him that the US Regulator required certain Volkswagen vehicles in the United States to be recalled.
- 45 On 9 February 2016, Volkswagen Group of America provided a formal response to the US Regulator in which it stated that:
- (a) Volkswagen was not aware of any incidents, accidents or injuries worldwide relating to ruptured inflators or of any ruptured inflators from Takata’s production plant in Freiberg, Germany;¹⁵
 - (b) the ruptures that had been reported to have occurred were in vehicles other than Volkswagens; and
 - (c) the root causes of those ruptures had not been determined.
- 46 This led to VW AG deciding, in 2016, to conduct its own analysis (“the Empirical Analysis Program”) for the purpose of investigating whether PSAN gas

¹⁵ Where the airbags installed in Volkswagens were manufactured.

generators used in Volkswagen vehicles constituted a safety risk. I return to the Empirical Analysis Program below.

The real-world experience in Volkswagen vehicles

47 VW AG installed frontal Takata airbag inflators using PSAN in some 20 million Volkswagen vehicles worldwide. The plaintiff has not adduced evidence that any Takata airbag in any of these vehicles has mis-deployed.

48 Mr Schade estimated that some 440,000 of those 20 million Volkswagen vehicles have been involved in a collision that resulted in deployment of the vehicle's airbag.

49 Mr Schade said that:

“This estimate was calculated by applying the rate of incidents that involved a collision that resulted in the deployment of a vehicle's airbag (obtained from publicly available government sources, such as the accident rates published by [the US Regulator]) to the number of vehicles manufactured each year, the period for which the vehicle may be expected to remain in the national fleet (published by [the US Regulator]) over the period of manufacture from 2005 to 2015 of the affected vehicles containing Takata frontal airbags equipped with PSAN propellant (obtained from VWAG's production records)”.

50 Mr Schade said:

“I am not aware, nor to my knowledge is any of my colleagues at VWAG aware, of any confirmed field incident globally that has resulted in the mis-deployment of a PSAN based driver side airbag in any Volkswagen vehicle, whether or not such a rupture caused harm to a vehicle occupant.”

51 Mr Schade's analysis made clear that some of the 440,000 vehicles were relatively new. It is common ground that PSAN will only degrade after many years' exposure to temperature fluctuations and moisture. For that reason, a lack of airbag mis-deployment in new vehicles is not presently significant. However, 50,000 of the 440,000 Volkswagen vehicles involved in accidents were nine years old or older, and thus of an age where any problem with the airbags would likely materialise.

52 Overall, there is no evidence of any mis-deployment of a Takata airbag in any Volkswagen.

53 That fact is, of course, not determinative of the issues in these proceedings. But it raises a serious question as to whether there is any link between PSAN's propensity to degrade when considered as a matter of generality, and the likelihood of any functionally significant propensity of PSAN degradation in the airbags fitted to Volkswagen vehicles, including that purchased by the plaintiff.

The recall notices

54 In February 2018, the Assistant Minister to the Treasurer issued the *Consumer Goods (Motor Vehicles With Affected Takata Airbag Inflators and Specified Spare Parts) Recall Notice 2018* (Cth) (the "Recall Notice"), which came into effect in March 2018.

55 The Recall Notice applied to a wide class of motor vehicles and required the recall of "Affected Takata Airbag Inflators" including driver side airbags that used PSAN as a propellant.

56 The Recall Notice stated that it had been issued after a detailed investigation by the Australian Competition and Consumer Commission (ACCC) into possible risks involved in using vehicles containing Takata airbags.

57 The Recall Notice differentiated between "Alpha" airbags which were manufactured between 2000 and 2002 and were affected by known manufacturing problems, and other inflators. Alpha inflators were stated in the Recall Notice to pose an "extreme safety risk". The Recall Notice required suppliers to initiate recall action of Alpha inflators immediately. No Volkswagen vehicle was fitted with an Alpha inflator.

58 The Recall Notice stated:

"Degradation of the propellant can reach an unsafe point between six and twenty-five years post manufacture of the vehicle depending on the climate that the vehicle is exposed to over time. In the most severe hot and humid climatic

conditions, the defect can manifest as early as between six and nine years post-manufacture.”

59 Schedule 2 of the Recall Notice contained a “Communication and Engagement Plan” and set out “examples of best practice communications to Consumers to adequately convey the serious safety risk posed by Affected Takata Airbag Inflators and the need for replacement”.

60 In March 2018, when the Recall Notice came into effect, the plaintiff’s vehicle was less than five years’ old.

61 For vehicles up to six years from manufacture, the suggested communication to consumers was:

“Your vehicle’s airbag is faulty and it could **kill or seriously injure** you and other people in your vehicle from when it reaches six years after its year of manufacture. **There is no immediate known risk with the airbag, but there will be in the future**...it is important that you...arrange to have the airbag replaced before it reaches 6 years old”. (Emphasis in original.)

62 Thus, the regulatory regime underpinned by the Recall Notice did not contemplate an immediate safety risk for cars less than six years old.

63 In relation to cars older than six years, the suggested communication was different and read:

“Your vehicle’s airbag is faulty and it could **kill or seriously injure** you and other people in your vehicle. You should immediately...arrange for the airbag to be replaced”. (Emphasis in original.)

64 As required by the Recall Notice, VW initiated a recall program under which Volkswagen vehicles were recalled and the airbag inflators in them progressively replaced.

65 The airbag in the plaintiff’s vehicle was replaced on 2 May 2019 in the course of its 60,000 km service.

66 VW has now replaced the airbag inflators in each of the affected Volkswagen vehicles, or applied to the ACCC for an allowable exemption (for example

where the vehicle has been stolen, scrapped or where the owner has not been able to be contacted).

VW AG's Empirical Testing Program

67 In February 2016, VW AG commenced its Empirical Analysis Program of the Takata airbag inflators.

68 The program involved the collection of approximately 20,000 SDI airbag inflators from the field. The airbags were retrieved from vehicles manufactured from 2005 onwards and from various geographical areas around the world with a range of climactic conditions.

69 The geographical and age spread of the inflators used in the Empirical Analysis Program was important because PSAN degradation observed in other brands of vehicles and in other airbags (such as passenger side frontal airbags) was thought to be more likely to occur in hot and humid conditions and in aging vehicles.

70 The plaintiff's liability expert, Mr Robert Renz,¹⁶ agreed that the Empirical Analysis Program had involved ample testing across different climate zones and of inflators of different ages.

71 Mr Renz gave this evidence in cross-examination:

"Q. Now, the Volkswagen empirical analysis program that is described in Mr Schade's affidavit, you've agreed with Professor Klapötke,¹⁷ is a suitable program to understand the ballistic performance of these Takata airbags in Volkswagen vehicles.

A. Yes.

Q. And you've agreed that the scientific methodology that was applied by Volkswagen was sound and consistent with accepted scientific practise.

A. Correct.

¹⁶ A chemist with Mechanical Engineering Technology expertise and many years' experience working on automatic airbag ignitors, inflators and micro gas generators.

¹⁷ VW's liability expert, a Professor of Chemistry at Ludwig Maximilian University in Munich.

Q. And it's produced meaningful conclusions about the performance of the parts and substances which were tested.

A. I believe it did create meaningful conclusions, though I would say that my conclusions and [VW's]¹⁸ conclusions aren't necessarily in agreement.

Q. But they are both operating off the same data, aren't they?

A. Yes, they are."

72 VW AG concluded from the Empirical Analysis Program that SDI inflators installed in Volkswagen vehicles "did not show any functionally relevant anomalies and no material manufacturing faults...that would lead to rupture".

73 VW AG considered that the result of the Empirical Analysis Program was that the airbag inflators fitted to Volkswagen vehicles exhibited performance in accordance with the specifications for them, and did not exhibit any deviation from those specifications that would indicate that they were at systemic risk of rupture or mis-deployment.

74 The Empirical Analysis Program revealed that airbag inflators for Volkswagens were different from the inflators in other vehicles in ways that might meaningfully affect their performance. I return to this below.

75 As a result of this testing program, VW AG's Product Safety Committee determined that there was no systemic risk associated with airbag inflators installed in Volkswagen vehicles that would warrant their recall. Indeed, I was informed that no European regulator has required a recall of Volkswagens fitted with Takata airbags.

76 By the Empirical Analysis Program, VW AG sought to test the very airbags that are said by the plaintiff to be at risk of failure. This is the only empirical evidence before me concerning how these airbags are or were likely to perform.

¹⁸ The transcript records Mr Renz referring to "Takata's conclusions" but this was clearly an accidental slip.

77 It is not, of course, for VW to show that the airbags are safe. It is for the plaintiff to show that they are unsafe. The results of the Empirical Analysis Program suggest that the airbags are safe.

78 I do not accept the submission made on behalf of the plaintiff that “the tests that Volkswagen carried out where undertaken to support, not truly to test” whether the airbag inflators were unsafe. There is nothing in the evidence to suggest that the Empirical Analysis Program was not a genuine attempt by VW AG to ascertain whether there was any problem with Takata airbags installed in Volkswagens.

Physical examinations and CT scans

79 VW AG subjected the retrieved airbags to physical examinations and CT scans.

80 These showed differences between airbag inflators fitted to Volkswagen vehicles and those fitted to other vehicles.

81 Such differences included:

- (a) the number of outflow openings;
- (b) the size of the propellant tablets;
- (c) the use of a ceramic, rather than a wired, propellant cushion;
- (d) the use of a thicker base plate;
- (e) a design to deploy with larger output pressure;
- (f) absence of what Mr Schade described as “anomalies” in the base of the generators that in other brands indicated excessive moisture over time; and

(g) use of 60 gm filter compared to a 70 gm filter in SDI inflators installed in other vehicles.

82 Mr Schade gave unchallenged evidence that the results of the CT scans showed that the SDI inflators installed in Volkswagen branded vehicles did not show any functionally relevant anomalies and no material manufacturing faults that would lead to rupture.

83 This provides support for the submission made on behalf of VW before me that airbag inflators for Volkswagen vehicles are different from the inflators in other vehicles in ways that meaningfully affect their performance.

Closed Vessel Analysis

84 VW AG subjected PSAN, drawn from the airbag inflators recovered from the field, to pressure in a reinforced closed vessel in order to determine whether its “Integrated Burn Rate”, measured in megapascals per millimetre per second (MPa*mm/s), exceeded the “normal” or “expected” rate of between 1,700 and 1,850 MPa*mm/s.

85 Takata derived the “normal” or “expected” Integrated Burn Rates from new PSAN, that is PSAN that had not previously been deployed in an airbag inflator. There was no challenge before me about these normal or expected Integrated Burn rates, notwithstanding that they were derived from information from Takata. Indeed, the plaintiff’s purported challenge to the results of the Closed Vessel Analysis assumed their correctness.

86 Mr Schade explained that:

“Closed vessel tests are performed to determine the pressure generated by the burning of the propellant and subsequently calculate the burn rate of the propellant and the pressure generated by the burning of the propellant (which produces the gas which inflates the airbag cushion). This is done by igniting a sample...of propellant extracted from the Field Inflators within a specially designed and reinforced closed vessel which ensures that the volume during the ignition remains constant”.

87 Mr Schade gave this evidence in cross-examination:

“Q. And because you had read in the literature about these alleged incidents that were happening around the world with airbags rupturing and the like that there was a suggestion that the PSAN was degrading over time, you wanted to check if the PSAN that Takata had used in the airbags might have been degraded. Correct?

A. WITNESS: In our vehicles, in our set ups, yes.

Q. That was the point in part of the experiment you were carrying out.

A. WITNESS: Exactly.”

88 Mr Renz agreed that the closed vessel analysis was a good test for correlating the burn performance of the propellant, PSAN. Mr Renz added that it was not possible to draw a direct correlation between this and the performance of the PSAN inside an inflator. However, the plaintiff points to no other testing than that carried out during the Empirical Analysis Program.

89 The results of the Closed Vessel Tests were recorded in Mr Schade’s attached Figure 21.

90 As Figure 21 shows, in the Closed Vessel Tests the PSAN was subjected to pressures up to 90 MPa. This was much higher than would normally be experienced in the field as the airbags are designed so that when pressure reaches 40 to 50 MPa ventholes open and the airbag inflates.

91 The normal or expected Integrated Burn Rate for PSAN of between 1,700 to 1,850 MPa*mm/s are depicted by the vertical green bars within the blackened shading in Figure 21.

92 Figure 21 shows that some PSAN exhibited an Integrated Burn Rate at times exceeding these normal or expected rates.

93 Thus, Professor Klapötke gave this evidence in cross-examination:

“Q. Professor, you agree that the experiments conducted by Volkswagen do show a progressive deterioration in the PSAN, that exceeds the normal or expected parameters set by Volkswagen by about 8%, don't you?

A. Yes, I do agree. For the older inflators, not for the new ones.

Q. Of course. And it's a progressive phenomenon, and therefore the older the inflator, the more marked the result will be?

A. In general, yes, but it depends on environmental conditions and other factors...

Q. You accept that an 8% deviation from normal or expected is statistically significant?

A. 8% is statistically relevant, though it's not dangerous.”

94 The highest Integrated Burn Rate recorded in the experiment was 2,051 MPa*mm/s.

95 In his Figure 23 (attached), Mr Schade plotted the Integrated Burn Rates detected in the Closed Vessel Analysis against the age of the vehicles from which the airbags had been retrieved in relation to three climates zones: Zone 1 being warm; Zone 2 being temperate; and Zone 3 being cold.

96 The horizontal green lines on Figure 23 represent the normal or expected Integrated Burn Rates of 1,700 to 1,850 MPa*mm/s.

97 The red line at 3,000 MPa*mm/s represents what Takata had determined to be the “critical rupture point” beyond which rupture might occur. As can be seen from Figure 23, the Integrated Burn Rates revealed by the Closed Vessel Analysis from PSAN retrieved from vehicles in all three climate zones was well below that critical rupture point.

98 I admitted the evidence of Takata’s critical rupture point as evidence only that this was the rate adopted by Takata as being critical and not as evidence that this was in fact so.

99 As the plaintiff pointed out, neither Professor Klapötke nor Mr Schade have sought to prove or check that 3,000 MPa*mm/s was a critical rate beyond which rupture was likely, nor short of which rupture was unlikely.

100 However, as I have said, the plaintiff’s criticism of the conclusions VW AG drew from the Closed Vessel Analysis were based on the extent that the tests

showed a deviation from Takata's normal or expected Integrated Burn Rate and thus assumed the correctness of those rates. In the context of testing the likely veracity of conclusions VW AG drew from the Closed Vessel Analysis, and in order to compare like with like, that criticism can only be measured against Takata's other metric, its critical rupture rate.

101 Therefore, the implications of the Integrated Burn Rates being shown to be above Takata's normal or expected range must be considered in the context of Takata's critical rupture point.

102 As I have said, while the Closed Vessel Analysis did show that the PSAN from some retrieved airbags exceeded Takata's normal or expected range, none came anywhere near Takata's critical rupture point.

103 Further, the evidence before me established that airbags are designed with a 150% safety factor as far as concerns the Integrated Burn Rate. If that factor is applied to the highest Integrated Burn Rate detected in the Closed Vessel Analysis, 2,150 MPa*mm/s, the result is still well below the Takata critical rupture point.

Tank Tests

104 VW AG also subjected some of the inflators retrieved from the field to "Tank Tests" in which the inflator, as a unit, was placed in a tank and internal and external measurements taken.

105 Little attention was paid to these tests in final submissions, save that it was emphasised on behalf of the plaintiff that during one of these tests, one inflator ruptured.

106 This was the only rupture that occurred in the entire Empirical Analysis Program in which some 20,000 airbags were tested.

107 In that regard Mr Renz gave this evidence:

“Q. Given the comprehensive data you've seen from the Volkswagen testing of inflators from around the world, including inflators of equivalent age, you would actually conclude that the incident with the [one airbag that ruptured] is anomalous, wouldn't you?

A. I'm not sure that I would characterise that as anomalous. The parts reaching that rupture point, there's a spectrum even at a specific age and a specific environment, so I would - again, not knowing the specifics here - I've seen this happen where - in other expert reports, where they had a number of deployments with a number of them performing without rupturing and having one or two ruptures out of a large number of samples.

Q. But in this particular setting, you've got the benefit of a large body of data, including a large number of airbags from 2007 that have been tested and have shown burn rates nowhere near the rupture level. Do you accept that?

A. I do accept that.

Q. Viewed in that light, this single incident you would view as an anomaly as compared with the rest of the data.

A. Yes.”

Mis-deployment short of rupture

108 On behalf of the plaintiff it was suggested that the Empirical Analysis Program as a whole was directed to ascertaining whether airbags might rupture and not as to whether there might be some kind of mis-deployment short of rupture.

109 I do not think this is a fair criticism. This is revealed by the evidence that Mr Schade gave in cross-examination:

“Q. Your report, almost exclusively, and the experiments you conducted were aimed to determine whether there was a rupture risk. Correct?

A. WITNESS: Yes.

Q. They were not aimed or directed to determining whether there was a misdeployment risk below the level of rupture, were they?

A. WITNESS: But that's what you see if you do a tank test, or you do a closed vessel test. You - you don't get only on and off. You get on and off --

Q. Are you even trying --

A. WITNESS: I'm sorry.

Q. -- to answer my question?

A. WITNESS: I understand that your question is if we looked at misdeployments below a rupture, so to speak, and my answer to this is that a tank test and closed vessel test but not a deployment test, a simple deployment test. A tank test and a closed vessel test will show if you have a - a directed or an inflator that might lead to a misdeployment as you just depicted it.”

Conclusion as to the Empirical Analysis Program

110 I am not persuaded that the results of the Empirical Analysis Program could lead to a conclusion that the tested airbags were unsafe.

111 On the contrary, the results of the Empirical testing program suggest, as VW AG concluded, that the airbag inflators installed in Volkswagens were safe and that increased Integrated Burn Rates revealed by the tests were unlikely to translate to aggressive or unsafe deployment of the airbags.

112 In any event, had I been persuaded that there was some defect or flaw in the manner in which VW AG conducted the Empirical Analysis Program such as would warrant its results being set to one side, it would not follow that a conclusion opposite to that drawn by VW AG should be adopted. It would mean no more than that the results of the Empirical Analysis Program cast no light on the question.

113 As I have mentioned, it was not for VW to show that the airbags were safe, but for the plaintiff to show that they were not.

What is the “consequence” of the use of PSAN as an inflator?

114 The plaintiff’s closing submissions made repeated reference to PSAN having a “propensity” to degrade.

115 As I have said, as articulated in closing submissions, the plaintiff’s case is that the defect in the vehicles for the purpose of s 54 of the ACL was the use in the airbag inflators of a propellant, PSAN, that was vulnerable to degradation when subjected to temperature fluctuations or the presence of moisture.

116 But that is not the plaintiff's pleaded case.

117 The plaintiff's pleaded case is that the use of PSAN in the airbag inflators had the consequence that the inflators within the airbags would themselves have the propensity to explode or malfunction by deploying too rapidly or with excessive force.¹⁹

118 To make out this case, the plaintiff must do more than show that PSAN had a propensity to degrade.

119 The plaintiff must show a link, that the pleadings recognise, that the airbags themselves, and in particular those installed in Volkswagens, had a propensity to explode or aggressively deploy.

PSAN's propensity to degrade

120 PSAN is hydroscopic, that is, it absorbs moisture from the air.

121 Mr Renz and Professor Klapötke agreed that generally speaking:

- (a) the root cause of the degradation of PSAN in the Takata airbag inflators was thermal fluctuation with moisture being present;
- (b) the rate of such degradation increases as the moisture level increases; and
- (c) the degradation of the PSAN will lead to an increase in surface area of the PSAN which leads to faster burning of the propellant tablets. This then causes increased pressure inside the inflator, which in turn causes the airbag inflation to occur faster and at a higher peak pressure than would otherwise be the case.

¹⁹ See [25] above.

122 Mr Renz opined that such degradation was progressive, irreversible and inevitable.

123 Professor Klapötke expressed a more nuanced view:

“Q. Professor, you agree that the experiments conducted by Volkswagen do show a progressive deterioration in the PSAN, that exceeds the normal or expected parameters set by Volkswagen by about 8%, don't you?”

A. Yes, I do agree. For the older inflators, not for the new ones.

Q. Of course. And it's a progressive phenomenon, and therefore the older the inflator, the more marked the result will be?

A. In general, yes, but it depends on environmental conditions and other factors.

Q. Of course. And you accept the scientific theory that that degradation will be an inevitable thing that happens to PSAN if it is exposed to temperature fluctuations and some form of humidity or moisture?

A. Yes, I do. If humidity and moisture, you mean ingress by external humidity and moisture, not by the amount of moisture that was in the propellant from the time of manufacture on.

Q. Yes, so some external moisture that comes into the system either at the time of manufacture or after?

A. I would say, at the time of manufacture, if everything goes according to the standards, would be no problem. It has to be additional moisture.

Q. But if everything at the factory doesn't go to standards, well, the moisture might get in there, but otherwise, it's going to have got in by some process after the car is manufactured?

A. Yes.

Q. And that could be a myriad of things. It could be leaking seals, it could be valves not working, it could be adhesive tape not sticking properly. But, whatever, if moisture gets in, and you combine it with temperature fluctuations, the science is that this process will commence, and it will then inevitably progress?

A. Yes, that's correct.”

124 What this establishes is that PSAN *can* degrade *if* exposed to moisture and temperature fluctuation.

125 If this occurs, the consequences described by Mr Renz and Professor Klapötke follow.

126 But there is a further complication. The rate at which the PSAN within an airbag inflator will degrade varies significantly according to a variety of factors which differ from manufacturer to manufacturer. It is not possible to make generalisations between airbags fitted to different manufacturers' vehicles or even between different models of vehicles made by the same manufacturer.

127 Mr Renz agreed that the factors which will affect the rate of PSAN degradation include:

- (a) the dashboard components and interior upholstery of the vehicles;
- (b) the physical integrity of the propellant;
- (c) the integrity of the seals on the inflator;
- (d) the type of aluminium used as a sealant in the inflator;
- (e) the number of physical openings within each inflator and their circumference;
- (f) the amount of moisture present at the time of manufacture;
- (g) the size and shape of the propellant that is used;
- (h) the arrangement of the tablets of propellant within the inflator; and
- (i) the position of the airbag within the vehicle.

128 As I have set out above, the physical examinations and CT scans conducted as a part of the Empirical Analysis Program showed that the airbag inflators installed in Volkswagen vehicles differed from the airbag inflators in other vehicles in many of these respects.²⁰

²⁰ See [79] to [83] above.

129 Mr Renz and Professor Klapötke agreed that the differences between inflator design and vehicles, as well as other variables, impacted upon the level of moisture ingress into an inflator, being the critical factor associated with degradation of PSAN.

130 Thus, Mr Renz gave this evidence in cross-examination:

“Q. Putting those various factors together, you've agreed with Professor Klapötke in the joint report that the level of moisture ingress into an inflator is dependent on several factors, including environmental, design, and vehicle details. That's correct?

A. That is correct.

Q. So you accept now, then, Mr Renz, that it's not scientifically valid to assess PSAN degradation independently of the particular type of inflator and the particular vehicle model into which it's installed?

A. I would accept that.”

131 Thus, Mr Renz agreed that the enquiry as to the safety of the airbag inflators in question must be vehicle and airbag inflator type specific.

132 It was put on behalf of the plaintiff in final submissions that:

“No time frame can be given for when the risk of mis-deployment and/or rupture arises for any given car and the risk for any given car at any given point in time cannot be quantified, other than to say that the risk increases over time.”

133 That may be correct at a very high level of generality. But it overstates matters for present purposes, where the question is whether there was a risk of rupture and mis-deployment of the airbags in Volkswagen vehicles.

134 In that regard, Professor Klapötke gave this evidence in cross-examination:

“Q. You also agree with Mr Renz, I think, that because there are so many variables as to what could impact on this process, that the timing and speed over which it will occur is unknowable?

A. It is unknowable on the basis of theoretic model of prediction. If you do testing, fierce testing on many, many examples returned from the field, you can create a model to be able in a position to predict the time when it becomes critical or dangerous.”

135 As I have set out above, by engaging in the Empirical Analysis Program, VW AG has engaged in “fierce testing” of “many examples returned from the field” so as to be “in a position to predict the time when the airbags become critically dangerous”.

136 That testing suggests, very strongly in my opinion, that there is no reason to predict that the airbag inflators actually installed in Volkswagen will become critical or dangerous.

Propensity or risk of explosion

137 As I have said, the normal or expected operating pressure in the Takata airbag inflators was between 1,700 and 1,850 MPa*mm/s. Mr Renz agreed that the inflator housing for an airbag is designed to have a rupture pressure which is “very significantly higher than the designed internal operating pressure” and that there is a margin between the normal burn rate for the propellant in the inflator and the “critical burn rate at which rupture could occur”. Mr Renz agreed that “the industry standard” for this safety margin was “around 150% of normal operating pressure”.

138 Applying the industry standard safety margin of at least 150% to the highest of the normal or expected operating pressure of 1,850 MPa*mm/s yields a rupture pressure of 2,775 MPa*mm/s. As was pointed out on behalf of VW, this figure is broadly consistent with Takata’s calculation of the peak pressure at which inflator housing might rupture, being 3,000 MPa*mm/s.²¹

139 As I have set out, the Empirical Analysis Program conducted by VW AG showed that airbag inflators in Volkswagen vehicles did not reach anything like this level of pressure.

140 As was submitted for VW:

“The unchallenged evidence was that the [Empirical Analysis Program] showed that in closed vessel testing, there were no critical anomalies identified in the

²¹ See [97] to [101] above.

burn rate of inflators in Volkswagen vehicles. Moreover, out of the thousands of inflators of various ages and from various climates around the world that were tested, the analysis showed the *highest* burn rate that was observed was 2051 MPa*mm/s. This is nowhere near the level of increased pressure that could involve a risk of rupture, whether that is the figure of approximately 2775 MPa*mm/s suggested by Mr Renz's industry standard or the rupture pressure of 3000 MPa*mm/s calculated by Takata". (Emphasis in original.)

- 141 The plaintiff's case is that there is a risk of an explosion occurring because PSAN by its nature may or will degrade in the presence of moisture and temperature fluctuation, and that the bare fact that PSAN has this propensity is sufficient to create the risk.
- 142 As VW submitted, a critical integer is missing here. That critical integer is of there being any connection between possible degradation in the PSAN and airbag performance in Volkswagens.
- 143 The plaintiff has not established that, on the balance of probabilities, the alleged propensity or risk has been present in any Volkswagen vehicle. Nor that, on the balance of probabilities, the alleged propensity or risk would have materialised in any Volkswagen material at any identifiable point in time.
- 144 As VW submitted, the most that the plaintiff can say, relying on the evidence of Mr Renz, is that there is a *theoretical possibility* that at some *identified point* in the future, *if* a vehicle were to be left in the right environment for long enough, the alleged propensity or risk *might* materialise.
- 145 The plaintiff has not sought to demonstrate that this risk could eventuate within any meaningful timeframe.
- 146 I think that VW is correct to submit that the risk that the plaintiff asserts remains no more than a speculative possibility.

Propensity or risk of aggressive malfunction

- 147 The plaintiff's second alleged propensity or risk relates to a malfunction of an airbag by reason of aggressive deployment short of rupture.

148 There is no evidence before me that this has actually occurred in any airbag in any car, let alone in a Volkswagen.

149 Mr Renz accepted that whether some deviation from the designed burn rates in an airbag inflatable material would affect the ability of the airbag to inflate within a specified time would depend upon the extent of the deviation. Mr Renz agreed that he had not carried out any analysis to ascertain what the burn rate of the propellant in airbags fitted to Volkswagen vehicles would need to be in order to meet Volkswagen's specification. He also agreed that he did not know what deviation would be required from either the internal operating pressure or internal burn rates of the propellant, before the airbag failed to meet those specifications.

150 Mr Renz opined that there was a "continuum of risk" in relation to the performance of an airbag inflator and that the higher the burn rate within an airbag inflator the more quickly the airbag would inflate. Mr Renz agreed that he could not say where, along that "continuum", a particular burn rate equated to a particular kind of deployment. Nor could Mr Renz say the extent to which an increased burn rate increased the risk of mis-deployment or risk to an occupant of a vehicle, let alone in a Volkswagen vehicle.

151 In these circumstances, I think VW was correct to submit:

"The effect of this evidence is that there is nothing that could support a finding that there was any real propensity or risk that the airbag inflators installed in Volkswagen vehicles would malfunction in a manner that involved deploying too rapidly or with excessive force, let alone in a manner that would cause harm to a vehicle occupant or otherwise impede their efficacy. The plaintiff boldly suggests in his closing submissions...that the Court can simply infer without evidence that if an airbag deploys 'too quickly and therefore is deflating when it is meant to be creating a cushion, there is a greater risk of some injury to the driver than if the airbag deployed at its deigned and intended speed'. These are highly technical propositions depending on things which occur over the course of a handful of milliseconds. The expert witness called for the plaintiff was unable to assist in proving how these interacting factors would in fact play out in different circumstances. The Court has no sound basis to draw the inferences invited by the plaintiff".

Conclusion

152 In substance, the plaintiff's case is that there is a theoretical possibility that at some unidentified time in the future there may be a risk of mis-deployment in an airbag inflator fitted to a Volkswagen vehicle.

153 I am not satisfied that there is any evidence that any such possibility was real or would develop in a way that was meaningful to a consumer.

Was the plaintiff's vehicle not of acceptable quality?

154 The question under s 54 of the ACL is whether a reasonable consumer, fully acquainted with the state and condition of the plaintiff's vehicle, including any hidden defects, would have regarded the vehicle as being acceptable.

155 The plaintiff's case is that the state and condition of the goods for this purpose must be assessed in light of the facts that:

- a. The PSAN propellant used in the affected airbags has a propensity to degrade over time given the presence of moisture and changes in temperature;
- b. Volkswagen's own testing shows that propensity is manifesting in the field. That indicates, that by whatever means, sufficient moisture is entering the system in the real world to cause measurable degradation of the PSAN;
- c. As PSAN degrades, the risk of the airbag mis-deploying (ie deploying too quickly) or rupturing increases. This process is inevitable and progressive;
- d. If the airbag deploys too quickly, the risk is that it will not protect the occupant in an accident either at all or to the extent designed, leading to an increased risk of injury. If the airbag ruptures, the risk is that metal fragments are sprayed inside the cabin and cause injury or death;
- e. That process of degradation, culminating in the risk of mis-deployment and rupture, is inevitable in the sense that given temperature fluctuations and moisture, *those outcomes will happen at some stage*;
- f. No time frame can be given for when the risk of mis-deployment and/or rupture arises for any given car and the risk for any given car at any given point in time cannot be quantified, other than to say that the risk increases over time." (Emphasis added.)

- 156 But, for the reasons I have set out, a reasonable consumer in this hypothetical circumstance would also be acquainted with the fact that there was no reason to think that, probably, “those outcomes will happen at some stage”²² in any Volkswagen and thus in the plaintiff’s vehicle.
- 157 This reflects the link or integer that is missing from the plaintiff’s case, namely between the propensity of PSAN to degrade and any relevant, functionally significant propensity of PSAN to degrade in Volkswagens.
- 158 Further, the reasonable consumer in the hypothetical circumstance posed by s 54 would also be acquainted with the fact that motor vehicles are complicated pieces of machinery that may develop problems, even problems going to the safety of the vehicle, that may require rectification by the manufacturer during the vehicle’s lifetime.
- 159 In these circumstances, I am not persuaded that the plaintiff’s vehicle was not of acceptable quality and thus not persuaded that VW has failed to comply with the guarantee in s 54(1) of the ACL.

Section 271(2) of the ACL

- 160 Assuming that this conclusion is not correct, and that the plaintiff’s vehicle was not of acceptable quality, and that VW thereby did not comply with the guarantee in s 54 of the ACL, the question that arises under s 271(2) of the ACL is whether VW did not so comply “only because of” the act, default or omission of Takata.
- 161 Section 271(2) provides, relevantly:

“(2) Subsection (1) does not apply if the guarantee under section 54 is not complied with only because of:

(a) an act, default or omission of, or any representation made by, any person other than the manufacturer or an employee or agent of the manufacturer; or

²² See the passage I have emphasised at [155e].

(b) a cause independent of human control that occurred after the goods left the control of the manufacturer...”.

- 162 In this hypothetical circumstance, the reason that VW did not comply with the s 54 guarantee is because the airbag in the plaintiff’s vehicle used PSAN as the propellant and because PSAN has a propensity to degrade.
- 163 VW AG did not design the airbag and did not specify what propellant should be used, let alone specify that PSAN should be used. Only Takata was responsible for the design and manufacture of the airbag and for the decision to use PSAN as the propellant.
- 164 But for Takata’s decision to use PSAN as the propellant, there would have been no breach by VW of the s 54 guarantee of the kind contended for by the plaintiff. There is no other circumstance that, in this hypothetical scenario, has led to VW being in breach of the guarantee.
- 165 It is true that VW AG installed the airbag, but there is no suggestion here that the manner of airbag installations was causative of the plaintiff’s vehicle not being of acceptable quality.
- 166 It is also true that VW “supplied” the vehicle to the plaintiff for the purpose of s 54.
- 167 But the guarantee under s 54 only arises when there has been such a supply. The exemption in s 271(2) can only arise if there has been such a supply. Otherwise, there could be no guarantee “not complied with”. The exemption in s 271(2) presupposes that the manufacturer in question has “supplied” the goods and then posits a circumstance where the breach of the guarantee thereby arising occurs “only because” of the conduct of another.
- 168 The fact that, on this hypothesis, the plaintiff’s vehicle was not “acceptable” from the time of its manufacture takes matters no further. Subsection 271(2)(b) deals expressly, and alternatively, with causes “after the goods left the control

of the manufacturer”. This makes clear that the legislature did not intend that the exception in s 271(2) be so confined.

169 The plaintiff also submitted that VW’s non-compliance with s 54 in this hypothetical circumstance was not “only” because of Takata’s acts, defaults or omissions but also because of VW’s own selection of Takata as its subcontractor and VW’s “selection and policing of specifications and quality standards” even if it “exercised reasonable care and skill”.

170 In effect, the submission was that the mere fact that VW chose Takata as its airbag supplier was itself a reason for its failure to comply with the s 54 guarantee. But that reading of s 271(2)(a) would leave it having no work to do. That subsection is clearly directed to acts, faults and omissions of parties other than the manufacturer itself. If the mere engagement by the manufacturer of such a third party was sufficient to exclude the subsection’s operation, I find it hard to see what operation the subsection could have.

171 The plaintiff also drew attention to the Explanatory Memorandum leading to the introduction of s 271(2)(a) into the ACL. The Explanatory Memorandum read:

“A manufacturer is not required to pay damages to a consumer if an act, default or omission or representation made by some other person, not being an employee or agent of the manufacturer, resulted in caused goods to be of less than acceptable quality. This ensures that manufacturers are not held liable for issues with goods that are beyond their control.”

172 I do not see that this takes matters any further. In this case, the circumstances that, on this hypothesis, led to VW being in breach of the s 54 guarantee were beyond its, and VW AG’s control.

173 For these reasons, even if the plaintiff could establish his vehicle was not of acceptable quality for the purpose of s 54 of the ACL when he purchased it, the guarantee that would have arisen under s 54 does not apply by reason of s 271(2).

Damages

174 As I have determined that the plaintiff has failed to establish that his vehicle was not of acceptable quality when he purchased it, it is not necessary to consider the question of whether or not the plaintiff has suffered damage.

175 However, in deference to the detailed submissions advanced by the parties, I will consider that question upon the assumption, contrary to my conclusions, that the plaintiff has established that his vehicle was not of acceptable quality.

Section 272(1) of the ACL

176 The plaintiff's damages are to be assessed in accordance with s 272(1) of the ACL which is in the following terms:

"272 Damages that may be recovered by action against manufacturers of goods

- (1) In an action for damages under this Division, an affected person in relation to goods is entitled to recover damages for:
 - (a) any reduction in the value of the goods, resulting from the failure to comply with the guarantee to which the action relates, below whichever of the following prices is lower:
 - (i) the price paid or payable by the consumer for the goods;
 - (ii) the average retail price of the goods at the time of supply; and
 - (b) any loss or damage suffered by the affected person because of the failure to comply with the guarantee to which the action relates if it was reasonably foreseeable that the affected person would suffer such loss or damage as a result of such a failure.
- (2) Without limiting subsection (1)(b), the cost of inspecting and returning the goods to the manufacturer is taken to be a reasonably foreseeable loss suffered by the affected person as a result of the failure to comply with the guarantee.
- (3) Subsection (1)(b) does not apply to loss or damage suffered through a reduction in the value of the goods."

177 On behalf of the plaintiff it was submitted that the plaintiff's claim for damages is not confined by s 272(1)(a) to "any reduction in the value of the goods" as set out in that subsection.

178 This was said to be so because of the use in the chapeau to s 272(1) of the word "for" rather than words such as "measured solely by" or "assessed only as".

179 But, as a matter of language, "for" is used here to specify and confine what damages are recoverable for breach of the s 54 guarantee.

180 Thus, "for" is used here in the sense of "having as a reason or cause" or "representing".²³

181 My attention was drawn to the Explanatory Memorandum relevant to s 272(1)(a) which states:

"The damages that are recoverable from a manufacturer of goods *include* the reduction in value of goods below the lower of the price paid or the average retail price of the goods at the time of the supply. This approach ensures that manufacturers are not required to provide excessive compensation to consumers if suppliers charge high prices for goods". (Emphasis added.)

182 This passage does state that damages recoverable "include" the reduction in value of the goods but the word "include" is here used merely to describe the content of s 272(1)(a), not to suggest that some other species of damage is also available.

183 In my opinion, the plaintiff's damages can only be assessed by reference to the test in s 272. The question is what damage the plaintiff has suffered by reason of the value of his vehicle being reduced below its purchase price as a result of it being of unacceptable quality.

²³ *Concise Oxford English Dictionary*, online ed, accessed 15 June 2021; and accepting the well-known caveats about using dictionary definitions to construe statutes and contracts: P Herzfeld and T Prince, *Interpretation*, (2nd ed, 2020, Thomson Reuters) at [20.40].

How the plaintiff put his claim for damages

184 As developed in final submissions, the plaintiff put his claim for damages in three ways.

185 First, he contended that there had been a reduction in value of his vehicle, at the time of purchase, of \$15,000 from the purchase price. This reduction was calculated by reference to two “Discrete Choice Experiments” conducted by an econometrician, Professor Michelle Baddeley. The result of those Discrete Choice Experiments was said to reveal that the “true value” of the plaintiff’s vehicle when he purchased it was \$25,000: \$40,000 less \$15,000.

186 Second, and alternatively, the plaintiff contended that his loss should be calculated on a “left in hand” basis by comparing what he paid for the vehicle and what he has now “left in hand”.

187 Third, and assuming that damages could not be calculated on either of the first two bases, the plaintiff contended that as he “undoubtedly suffered a loss on the day he bought” the vehicle and had “undoubtedly paid too much given the then unknown defect” in the vehicle that I should “do the best I can” to arrive at a damages figure.

The plaintiff has suffered no damage

188 For the reasons that follow, I am not able to accept any of the bases on which the plaintiff put his damages claim.

189 There is a fundamental problem with the plaintiff’s case that can be resolved without resort to the numerous authorities to which I was taken.

190 The plaintiff is only entitled to damages for the loss that he has actually suffered. This is an obvious proposition for which there is ample authority.²⁴

²⁴ For example, see *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281 at 296; [1995] HCA 4 at [29] (Brennan, Deane, Dawson, Gaudron and McHugh JJ).

- 191 This must involve consideration of the events that have happened since the plaintiff purchased his vehicle and thus at how “risks evolved into certainties”.²⁵
- 192 The plaintiff’s case concerning “reduction in the value” directs attention only to events at the time that the plaintiff purchased the vehicle.
- 193 But the question for the purpose of s 272 of the ACL is what damage the plaintiff has now suffered “for”, that is, as a result of or by reason of, any reduction in the value of the vehicle below the purchase price “resulting from” any failure by VW to comply with the s 54 guarantee.
- 194 The question is, what effect has any such failure had on the plaintiff’s financial position?
- 195 The answer is obvious. It has had no effect on the plaintiff’s financial position.
- 196 The plaintiff has had the full use of his vehicle since he acquired it.
- 197 There has never been any issue with the performance of the vehicle associated with the alleged defect, being the use of PSAN as the propellant in the airbag inflator.
- 198 The plaintiff was not involved in an accident which resulted in the deployment of the airbag in his vehicle. But had he been involved in such an accident, whether before or after his original airbag was replaced, I see no basis to conclude that the airbag would have operated in anything other than in the way it was designed to operate.
- 199 The revelation to the plaintiff that the airbag in his car would need to be replaced did not affect the performance or utility of the vehicle, nor the way that the plaintiff continued to use it.

²⁵ *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at 661; [2004] HCA 54 at [45] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ).

200 The airbag inflator has now been replaced with a new airbag inflator as part of the regular servicing of the car, and at no cost to the plaintiff.

201 The plaintiff continues to own a car that is as valuable as any ordinary eight-year-old Volkswagen Passat would be.

202 In closing submissions, this was accepted on behalf of the plaintiff when it was stated:

“It is accepted that common sense would suggest that once the defective airbags are replaced with safe airbags, the plaintiff’s car has the same value as a now eight-year old second hand car as it would have had had the plaintiff bought the same vehicle but with non-defective airbags at the outset”.

203 The plaintiff’s argument is that, nonetheless, he “overpaid for his new vehicle”. But that argument ignores what has happened since then.

204 The plaintiff, now, has precisely what he thought he was acquiring.

205 It is not to the point only to enquire what the “true value” of the plaintiff’s vehicle was at the date of purchase and thus whether that “true value” was less than the purchase price. What matters is the plaintiff’s position now that the airbag has been replaced. The effect of such replacement is that such defect, as may hitherto have affected the vehicle’s value, has been removed.

206 In my opinion, this is a sufficient basis on which to dismiss the plaintiff’s claim.

207 Nonetheless, I will consider how the plaintiff did put his claim.

Reduction in value

208 The plaintiff’s case was that s 272(1)(a), in effect, provides for a *Potts v Miller*²⁶ “approach” and entitles the plaintiff to recover the difference between what he paid for his vehicle and its “true value”.

²⁶ (1940) 64 CLR 282.

- 209 But s 272 makes no reference to “true value”. Rather, it speaks of a reduction in value resulting from, relevantly, a failure to comply with the s 54 guarantee.
- 210 The airbag in the plaintiff’s car has now been replaced by VW at no charge and the plaintiff has accepted that as a matter of “common sense” his car is now of the same value as if it had never been fitted with a Takata airbag.
- 211 The plaintiff nonetheless contends that he “overpaid for his new vehicle” because its value was reduced below its purchase price by reason of the potential for the airbags to mis-deploy. That proposition depends upon the results of the Discrete Choice Experiments.

Discrete Choice Experiments

- 212 Professor Baddeley conducted two Discrete Choice Experiments which the parties referred to as “DCE-1” and “DCE-2”. DCE-1 was conducted in May 2020 and DCE-2 in April 2021.
- 213 The main differences between DCE-1 and DCE-2 were that DCE-1 was directed to airbags in seven makes of vehicles²⁷ whereas DCE-2 was directed only to Volkswagen vehicles, and that DCE-2 included information concerning risk that was absent from DCE-1.
- 214 In each DCE, Professor Baddeley engaged a professional survey company to conduct an online survey for which respondents were rewarded, premised on the assumption that the respondent was buying a new vehicle and had then been offered two options for the purchase. The first option was a car with a “defective driver’s side airbag”. The second option was a car with “non-defective airbags”.
- 215 Each DCE asked the respondents to review a detailed and lengthy “opening statement”.

²⁷ Toyota, Honda, Nissan, BMW, Mazda and Subaru, in addition to VW.

216 The respondents were then asked to answer ten “choice questions”. Each of these set out five types of information for two different options. The five types of information and options were randomly changed for each survey participant.

217 To illustrate the point, an example of “Task 1 of 10” for DCE-1 was:

	Option A	Option B
The car is fitted with one or more defective airbag(s)	No	Yes
The car will be recalled for replacement of the defective airbag(s)	No	Yes
Recall status	No recall necessary	Your airbag is replaced with an airbag, but the replacement airbag may be unsafe
Malfunction	No malfunction	If the airbag inflates too aggressively in the event of a crash, it may not protect the driver and passengers from injury in an accident and/or may itself injure the driver and passengers
Price	\$109,500	\$65,700
I would purchase:		

218 Each respondent was given different combinations of replacement, recall, malfunction and price scenarios, randomly selected.

- 219 Respondents were then asked to complete a further set of concluding questions. In the case of DCE-1, this included 30 questions on the respondents' appreciation of risk.
- 220 Professor Baddeley estimated that it would take respondents 10 minutes to complete the survey.
- 221 In opening submissions, the plaintiff argued that Professor Baddeley's Discrete Choice Experiments were an "appropriate basis for quantification" of his alleged loss and that her model "applie[d] accepted economic methodology and produce[d] plausible results".
- 222 However, following Professor Baddeley's evidence, the plaintiff accepted in closing submissions that there were "undoubted limitations and problems" with the Discrete Choice Experiments. Nonetheless, it was submitted for the plaintiff that I could use the results of the exercise to form an estimate of the "true value" of the plaintiff's vehicle at the time he purchased it.
- 223 I do not agree. In my opinion, for the reasons that follow, no weight can be given to the experiments. They certainly do not show that, as the plaintiff contends, his vehicle was worth \$15,000 less than he paid for it.

Professor Baddeley

- 224 Professor Baddeley is a highly qualified and, academically, deeply experienced economist and econometrician.
- 225 But she did not present well as a witness.
- 226 In closing submissions, the plaintiff accepted that Professor Baddeley "presented as a somewhat naïve and inexperienced court expert".
- 227 That is true, but I would go further. Professor Baddeley, consciously or unconsciously, has become too closely aligned with the interests of the plaintiff

and the Group Members that she represents and has allowed herself to become something of an advocate for them.

228 To answer and critique Professor Baddeley's work, VW called Dr Christopher Pleatsikas. Dr Pleatsikas is also an economist and a specialist in statistical and econometric analysis, including analysis of survey data.

229 It is true, as the plaintiff submitted, that Dr Pleatsikas expressed his criticisms of Professor Baddeley's work in robust and perhaps unnecessarily combative language.

230 But Dr Pleatsikas identified a number of fundamental flaws in Professor Baddeley's work and impressed me as a well informed and reliable expert.

231 I am not prepared to accept Professor Baddeley's opinions to the extent that they were contested by Dr Pleatsikas.

232 An example of a fundamental error that Professor Baddeley made was in relation to her "Structural Break Analysis".

233 By this analysis, Professor Baddeley sought to analysis vehicle auction data in an attempt to identify and quantify any diminution in the resale price of vehicles that correlated with the announcement of the recalls in respect of the affected vehicle. Prior to closing submissions the plaintiff abandoned reliance on Professor Baddeley's Structural Break Analysis and in closing submissions accepted that it suffered from "fundamental flaws" and was "of no utility to the Court". One obvious problem with the Structural Break Analysis is that it was untethered to the plaintiff's pleaded case, which relied only on diminution in the value of the plaintiff's vehicle at the time he acquired it, and not at the time of any resale. But the Structural Break Analysis remains relevant insofar as it sheds light on the reliability of Professor Baddeley's opinions.

234 For the purpose of her Structural Break Analysis, Professor Baddeley erroneously assigned recall dates for Volkswagen vehicles approximately four

years prior to the time that they were recalled. Professor Baddeley assumed that the recall dates were in 2014, when they were in fact in 2018. When this was pointed out by Dr Pleatsikas in his reply report, Professor Baddeley's response was not to accept the implications this had for her methodology but to attempt to justify that methodology through the supposed effect of what the parties referred to as "Dieselgate"²⁸ on the price of Volkswagen vehicles from May 2014. Professor Baddeley relied on an academic article to justify this position but in cross-examination accepted that the article did not mention Volkswagen specifically. More troublingly, Professor Baddeley accepted that another article she cited was inconsistent with the opinion she expressed in her report, and that she was aware of that at the time that she cited it.

235 Further, in July 2019, Professor Baddeley presented a draft document for discussion with the plaintiff's solicitors entitled "Discrete Choice Methodology". That document contained a note from Professor Baddeley to the plaintiff's solicitors:

"We will need some guidance from the legal team on how narrow or broad this range ought to be, based on their expectations around how much the average consumer needs to be compensated".

236 Professor Baddeley was speaking of the "range" of discounts that survey respondents should be offered in the event that they elected for a car with defective airbags. In closing submissions, the plaintiff pointed out there was no criticism made of the discounts ultimately adopted by Professor Baddeley. But that is not the point. As VW submitted, Professor Baddeley's note represented a request from her for information so as to design an experiment that best fitted the answers the plaintiff's solicitors hoped to derive. I can envisage no good explanation for an exchange of this kind between a supposedly independent expert and the solicitors for the plaintiff. None was given. Indeed, as Professor Baddeley said, when this was pointed out to her:

"I agree that that was not an appropriate thing for me to say".

²⁸ An issue, unrelated to that in this case, that arose in relation to diesel emissions.

237 Professor Baddeley was also provided with a “Literature Review” prepared by the plaintiff’s solicitors. Professor Baddeley said she used the Literature Review as a resource in preparing her reply report. The Literature Review contained material inappropriate to be provided to an independent expert, including purported views as to the effect of various articles on the prospects of the case as a whole and whether they assisted or detracted from the parties’ cases.²⁹

Not a real-world premise

238 In any event, a fundamental difficulty with the Discrete Choice Experiments is that they were based upon a highly unrealistic premise, namely, that a rational person would buy, at a discount, a car known to have a defective airbag. I think VW was correct to submit that the scenario the participants were thus asked to assume was so artificial, and so implausible and removed from reality, that any views thereby expressed about Volkswagen vehicles could not be treated as an insight into value.

239 There were three further problems with the Discrete Choice Experiments.

Only measured willingness to pay

240 The first is that, as Professor Baddeley accepted, the Discrete Choice Experiments were not directed to ascertaining the market value of the vehicles in question. Rather they were directed to ascertaining a purchaser’s willingness to pay for the vehicle; or the “value to the consumer” of the vehicle. Thus, the Discrete Choice Experiments were directed only to the demand side of a transaction that, in the real world, would have a supply side as well.

241 It is no doubt true that in the real world there would not be a market for vehicles known to have a defective airbag, not least because no rational and responsible vehicle manufacturer would offer such vehicles for sale.

²⁹ VW referred to numerous examples in fn 157 of its closing submissions.

242 But it does not follow that, assuming it can be ascertained, a purchaser's willingness to pay for a vehicle can be a proxy for the vehicle's market value.

243 The test posited by s 272 of the ACL is expressed in terms of "price payable" or "average retail price" and thus in terms of value in a market of buyers and sellers.

244 The Discrete Choice Experiments were not directed towards this question and say nothing about market value.

False factual premise

245 A second difficulty with the Discrete Choice Experiments is that they contained an Opening Statement which asked participants to assume a false level of risk.

246 The Opening Statement clearly conveyed that the risk of airbag malfunction existed from the date of manufacture. It is common ground that such risk as existed concerning PSAN degradation did not arise at the date of manufacture, but only after many years and exposure to temperature fluctuations and moisture.

247 The Discrete Choice Experiment also posed as one of the three "recall scenarios", the replacement of existing airbags with another airbag which might also be unsafe. There is no suggestion that VW did this.

Methodological problems

248 Finally, the surveys were confusing.

249 The "Opening Statement" was dense. Professor Baddeley agreed that she was "concerned that it might be confusing".

250 Further, DCE-1 did not include quantifiable information about the probability that the airbag's safety risk might eventuate.

251 Further, a real question arose as to what level of consideration participants gave to the survey. Participants had an incentive, through a points or rewards system, to complete the survey as quickly as possible. Metadata from the survey showed that five out of six participants read the complex Opening Statement at a rate that exceeded that average adult reading speed. The metadata also showed that half the respondents to DCE-1 answered the questions at a median speed of 10 seconds or less and that a high proportion of respondents gave inconsistent answers.

Conclusion

252 The Discrete Choice Experiments were deeply flawed. In my opinion, they were of no value to the task at hand. They cast no light on what the “true value” was for the plaintiff’s vehicle at the time he purchased it, assuming that to be a relevant question.

A “no transaction case”?

253 In closing submissions, the plaintiff characterised his case as a “no transaction case” and submitted that relief should be granted on the basis of “being restored to the position that would have existed if there had not been any transaction”.³⁰

254 But the plaintiff’s damages must be assessed in accordance with s 272 of the ACL which provides for recovery of damages “for...any reduction in value of the goods, resulting from the failure to comply with the guarantee” in, relevantly, s 54.

255 The question posited by s 272 assumes goods have been acquired and then seeks to ask what damage has been suffered by reason of any difference between the price paid and the value of the goods. The section is not directed to what might have happened had the goods not be acquired.

³⁰ For example, *Wyzenbeek v Australasian Marine Imports Pty Ltd (In Liq)* (2019) 272 FCR 373; [2019] FCAFC 167 at [89], [107] (Rares, Burley and Anastassiou JJ).

256 In any event, the plaintiff's evidence does not establish a "no transaction case". His case is that if he had not purchased the Volkswagen Passat, he would have chosen to purchase another vehicle.

The "left in hand" approach

257 Allied to the plaintiff's "no transaction case" submission was the proposition that appropriate compensation in a "no transaction case" might be to award a sum that:

"...together with the value of what the innocent party still holds (or is 'left in hand'), will 'do what is practically just between the parties' so as to, in effect, restore him, her or it to the position that he, she or it would now obtain had the transaction not occurred".³¹

258 The plaintiff contended that what he had "left in the hand" was a second hand Volkswagen Passat worth between \$12,200 and \$25,500.³²

259 Thus, the plaintiff submitted the he should be awarded the difference between what he paid for the car (some \$40,000) and the value of what he has "left in hand", namely a vehicle worth \$25,000³³ = \$15,000. To state the argument is to reveal why it cannot be accepted. It would involve the plaintiff being placed in a position where he had an eight year old car with over 60,000 kms on the odometer, that had been driven without incident throughout that period, and had recently had its airbags replaced at no charge, and yet receive compensation that would put him in the same financial position as he was when his vehicle was a brand new car.

260 There are further difficulties with this argument. It was first raised in closing submissions, was not pleaded, was not opened on and was not the subject of any evidence.

³¹ *Wyzenbeek v Australasian Marine Imports* at [108].

³² Being sale prices for Volkswagen Passats with the same build date as the plaintiff's vehicle between 2015 and 2018.

³³ Adopting, as a "conservative course", the highest of those values.

261 VW submitted that had the matter been raised timeously, it would have been the subject of evidence in the proceedings.

262 In any event, for the same reasons as I have mentioned when referring to the plaintiff's "no transaction case", the framework of s 272 of the ACL is not apt to accommodate damages calculated this way.

"Do my best"

263 As a fallback position, it was submitted for the plaintiff that, in effect, I should "do my best" to arrive at a figure which would provide adequate compensation to the plaintiff.

264 Thus, it was put on behalf of the plaintiff:

"The task for the Court is to determine an appropriate measure which compensates the plaintiff for his loss. That is a difficult task, and any single approach will necessarily have its problems. However, the Court cannot let that inherent difficulty stand in the way of assessing an appropriate sum".

265 Included in the "potential approaches" to such a task, the plaintiff submitted that I could:

- (a) award a proportion of the difference between the price paid by the plaintiff for his vehicle and its "true value", with the proportion being equal to the number of years that the vehicle as "defective" over the total number of years from purchase to judgment; or
- (b) award the plaintiff interest at an appropriate rate on the difference between the price paid and the "true value" over the period during which the vehicle was "defective".

266 The difficulty with each of these approaches is that they do not take account of the fact that such "defect" as may have been in the plaintiff's vehicle has been remedied.

267 And the approaches assume that, somehow, the plaintiff is now in a position where in the events that have happened, he has suffered some financial loss. For the reasons I have explained, in my opinion, he has not.

Loss of use – out of pocket expenses

268 It is common ground that the plaintiff has suffered no relevant out of pocket expenses.

269 The airbag in his vehicle was replaced during the vehicle's 60,000 km service. The plaintiff's wife drove the plaintiff to and from the relevant service centre.

Distress – disappointment and anxiety

270 It has been held that, in cases alleging misleading or deceptive conduct, damages may be awarded for distress, disappointment, inconvenience, vexation or anxiety.³⁴

271 My attention was not brought to any authority in which damages for such matters has been awarded under section 272 of the ACL.

272 However, s 272(1)(b) makes provision for damages for loss or damage suffered by an affected person because of "the failure to comply with [relevantly, a s 54 guarantee]...if it was reasonably foreseeable".

273 Although in final written submissions, VW put that matters such as distress and disappointment would be too remote from a breach of a s 54 guarantee to be recoverable, in closing oral submissions, its senior counsel accepted that such damages might be recoverable, if reasonably foreseeable.

³⁴ For example, *Steiner v Magic Carpet Tours Pty Ltd* (1984) ASC 55-366; (1984) ATPR 40-490 at 45, 642 (Wilcox J); *Zoneff v Elcom Credit Union Ltd* (1990) 94 ALR 445 (Hill J); *Australian Competition and Consumer Commission v Top Snack Foods Pty Ltd* [1999] FCA 752 at [92]-[94] (Tamberlin J); and *New South Wales Lotteries Corporation Pty Ltd v Kuzmanovski* (2011) 195 FCR 234; [2011] FCAFC 106 at [118]-[123].

274 On behalf of the plaintiff, it was accepted in final submissions that any damages awarded to him under this head would be “undoubtedly towards the lower end of the spectrum”.

275 In May 2018, the plaintiff became aware, because of reports in the media, that his vehicle might be affected by the Recall Notice. The airbag in the plaintiff’s vehicle was replaced a year later, in May 2019.

276 The plaintiff described his reaction to knowing that his vehicle was the subject of the Recall Notice in three affidavits, in which an evolving picture emerged.

277 In his first affidavit made on 26 July 2019, the plaintiff did not depose to any anxiety or distress of the kind that he now alleges.

278 In that affidavit he said that:

- (a) since the recall of his vehicle he holds little weight on his previously resolute trust in the Volkswagen brand;
- (b) he was “frustrated” by VW’s handling of the recall, particularly in respect of the lack of information regarding the recall process; and
- (c) “[I]t is my personal belief that [his vehicle’s] potential resale value, as well as its potential trade-in value, has been tarnished by the safety recall”.

279 In an affidavit served on 18 December 2020, the plaintiff said, for the first time, that he was “angry” when he heard of the Recall Notice. He said:

“This was not the first recall my VW had been subject to by the defendant, Volkswagen. My car was also recalled as part of the diesel emissions recall.”³⁵

³⁵ A matter which, as I have said, is not the subject of these proceedings.

280 In this affidavit the plaintiff expressed frustration that “no-one from Volkswagen has bothered to contact me specifically about the recall” and that “[a]t no time did Volkswagen take any proactive steps to engage with me about the recall”.

281 The plaintiff said he found “Volkswagen’s conduct and attitude towards the recall to be incredibly concerning”.

282 He continued:

“To me, the point of a car is to get you from point A to point B, as safely as possible. Volkswagen denied this to me and my wife. Every time either of us drove the car after the recall, I was apprehensive and had the airbag fault in the back of my mind.

Volkswagen has now replaced the airbag in my VW. According to them it is ‘safe’ to drive, but I don’t have any confidence in what VW say, because they are a company that has, in my view, *artfully deceived its customers for a long period of time both in relation to the diesel emissions and in relation to the airbags*”. (Emphasis added.)

283 In cross-examination, the plaintiff was asked why he believed VW had “artfully deceived its customers”. The plaintiff said:

“My understanding was that they knew, in advance, that the airbags were faulty and yet continued to install them in their cars”.

284 Despite the plaintiff professing this belief, it forms no part of the case put on his behalf in these proceedings. There is no suggestion in this case that VW AG installed airbags in Volkswagen vehicles that they knew to be unsafe. No such suggestion was made in submissions to me on the plaintiff’s behalf. The whole point of the Empirical Analysis Program was to ascertain if there was any safety risk involved. For the reasons I have set out, I am satisfied that based on the results of the Empirical Analysis Program, VW AG was entitled to conclude that there was no safety risk involved.

285 The plaintiff continued:

“I will certainly not be buying a VW again. The time and energy I have wasted dealing with Volkswagen’s mistakes and the stress it has put on me and my wife, well it’s not something I would subject myself to again”.

286 In cross-examination, the plaintiff agreed that the “time and energy” that he had “wasted” was because of his involvement in these proceedings.

287 The plaintiff made a third affidavit on 14 May 2021, a short time before the trial.

288 In this affidavit, the plaintiff said that having read the Recall Notice and looked at VW’s website he understood from these sources that “if the faulty Takata airbag in my VW deployed in an accident, shards of metal could shoot out of the airbag and kill me or other passengers in the car”.

289 In cross-examination, the plaintiff accepted that neither Volkswagen’s website nor the Recall Notice suggested that there was any immediate danger with the plaintiff’s vehicle as it was less than six years old. The plaintiff went on to say that although he was “apprehensive and had the airbag fault in the back of my mind”, each time he drove his car:

“The VW was my only means of transport. So to some extent, I often had to push my concerns about it to the back of my mind. As such, this may not have necessarily played on my mind every time I drove the car, but I often felt apprehensive and I was always worried when my wife was driving the car without me”.

290 The plaintiff again expressed “upset” by the lack of communication from VW and said:

“I felt that Volkswagen had not been honest with me and probably other customers about the danger of the airbags in some vehicles, and only took steps when compelled to by law. As I have stated above, VW never contacted me at all about the issue. I only discovered it from the media and then my own research to see if my car was impacted”.

291 The plaintiff also stated that:

“I also used the VW for domestic travel. For example, my wife and I particularly enjoy trips to Scotts Head, which is about four hours by car from Newcastle”.

292 In cross-examination, the plaintiff accepted that he had continued to drive his vehicle in the normal way from the time he learnt of the Recall Notice to the time the airbag in the car was replaced. He said that he did not feel the need

to adjust his driving habits at all and continued to drive with his wife on multiple trips to Scotts Head, and that his wife also drove the vehicle during this period even though she had a car of her own she could have used.

293 Indeed, the plaintiff stated that he preferred using the vehicle as compared to his wife's car, describing her car as "somewhat older and less comfortable and possibly *less safe* than the Passat".

294 It is thus clear that the plaintiff's alleged frustrations were not merely because of some apprehension about the safety of his vehicle, but also because of his vehicle's earlier recall in relation to the diesel emissions issue, which has no relationship to this case, and because of his frustrations as to what he saw as lack of communication from VW.

295 Overall, I did not find the plaintiff to be a reliable informant.

296 This was due to the evolving nature of his descriptions of his reaction to the state of his vehicle.

297 I also found particularly concerning the different accounts the plaintiff gave of what he was told by VW when the airbag in his vehicle was replaced in May 2019.

298 In his first affidavit, the plaintiff said:

"When I collected my vehicle, I asked the Dealership about what brand of airbag had been used to replace the defective airbag. I was told by a member of the Dealership's customer service team that a non-Takata brand of airbag had been used, however I did not receive a separate service invoice for the replacement".

299 In his third affidavit, served just before the hearing commenced, he added:

"Given the lack of transparency by Volkswagen about the recall and the replacement, my recollection is that I still left the Dealership believing there was a real possibility that another Takata airbag had been used in my VW. I was left in the dark about this".

300 But in cross-examination, the plaintiff gave this evidence:

“Q. you say in your first affidavit that you asked at the dealership about whether - and I take it this was at the end of the day - whether the replacement airbag was a Takata airbag or a non-Takata airbag. Is that right?”

A. That’s my - that’s my - my recollection was, I asked what the - what kind of airbag had been used as the replacement.

Q. And is the reason you asked that because you knew from reading about the issue that some manufacturers were, in fact, using Takata airbags as replacement airbags.

A. That’s right.

Q. But you were told by the staff at the dealership that that wasn’t the case with your car, that the airbag which had been put in was a non-Takata airbag.

A. It’s not my recollection. I believe that the person I was talking to *didn’t really know what kind of airbag had been used to replace it*, and I - my impression was that it was a Takata airbag, because I believe my response was, “What good is that? I’ll only have to come back in 18 months’ time.”

Q. Can I ask you to look at your first affidavit, please, Mr Dwyer.

A. Sure.

Q. If you could turn, please, to paragraph 25 of your first affidavit.

A. Yes.

Q. Do you see there that you’ve said: “I asked the dealership about what brand of airbag had been used to replace the defective airbag. I was told by a member of the dealership’s customer service team that a non-Takata brand of airbag had been used”?

A. That’s right.

Q. That’s the true position, isn’t it?

A. I - I think I’ve modified that statement in a - in the - in the subsequent affidavit.

Q. What’s the true position, Professor Dwyer, about what conversation occurred on the day in May 2019 when you had the car serviced?

A. My recollection is that the person I was talking to *didn’t really know what kind of airbag had been used to replace the Takata airbag*, and I vaguely recall then commenting, “what was the point of that? It’ll only have to be replaced again in 18 months’ time.”

Q. Professor, can you look at your third affidavit, please?

A. Yes.

Q. Turn to the end, to the last paragraph, paragraph 20?

A. Yes.

Q. Have you got paragraph 20, where you refer back to what you said in paragraph 25 of your first affidavit?

A. Yeah.

Q. You say: "where I refer to being told that a non-Takata brand of airbag had been used in my VW, but I was provided with no" - I assume that should be "not" - "I was not provided with any other information and or documentation saying as much, except for a sticker being placed in my VW." So it remains the case, doesn't it, Professor, that you do remember being told by the staff at the dealership that, when you asked that question, they said a non-Takata brand of airbag had been used?

A. My - my recollection is somewhat different, and that's all I can say at this point.

Q. You accept that you wrote--

A. I - I accept that I've written that in the affidavit, yes.

Q. So you accept that the most likely position is you were, in fact, told that?

A. It's quite possible.

Q. So you didn't have cause to say to anyone, "what's the point of that? I'm just going to have to come and get it replaced again"?

A. I remember it somewhat differently.

Q. Professor, the true position is, you asked the question because of the information you knew about what some manufacturers were doing, and you were given a satisfactory answer that the type of airbag that had been installed wasn't a Takata one?

A. I'm not quite sure how I'm supposed to answer that question. I - I just have a slightly different recollection of the short conversation that transpired." (Emphasis added.)

301 I found this evidence to be highly unsatisfactory. Having first deposed that VW told him that the airbag in his vehicle had been replaced with a non-Takata airbag, the plaintiff in his third affidavit then expressed an apprehension that, despite being told that a non-Takata airbag had been used, there was a "real possibility" that this was false and that "another Takata airbag had been used". In cross-examination the plaintiff then resorted to saying that "the person I was

talking to didn't really know what kind of airbag had been used to replace" the Takata airbag.

302 The impression I gained was that, here, the plaintiff was saying whatever he thought would assist his case.

303 In *Courtney v Medtel Pty Ltd*,³⁶ Sackville J said:³⁷

In my view, not every consumer who has experienced anxiety or worry as a consequence of acquiring goods that are not fit for their purpose or not of merchantable quality should receive compensation on that account. In the absence of special or unusual circumstances, I think something more substantial than the worry and anxiety experienced by the applicant in the present case is required before compensation should be awarded under this head. Some restraint is appropriate in cases where compensation is sought for worry and anxiety as such to avoid "the creation of a society bend on litigation": *Farley v Skinner* [2002] 2 AC 732, at 751, per Lord Steyn. Accordingly, no compensation should be awarded to the applicant in respect of anxiety, worry and stress.

304 In my opinion, this is a case where "restraint is appropriate". I am not satisfied that the account the plaintiff gave in his affidavits truly represents any apprehension that he experienced by reason of the alleged defect in his vehicle.

305 To the extent that the plaintiff had been "angry" or "frustrated" by the events following the Recall Notice, this appears to be by reason of his belief that VW has behaved dishonourably, his frustration as what he sees as being poor communication or service from VW and his involvement in these proceedings.

306 In these circumstances, and had I otherwise been satisfied that the plaintiff's case was made out, I would not have awarded the plaintiff any damages under this head.

³⁶ (2003) 126 FCR 219; [2013] FCA 36.

³⁷ At [251].

Limitation

307 It is common ground that no limitation issue arises in relation to the plaintiff's claim.

308 Limitation issues may arise in relation to claims of other Group Members as the time for commencing action for lack of merchantable or acceptable quality is three years from the day when the plaintiff became or ought reasonably to have become aware of the breach.³⁸

Conclusion

309 The plaintiff's claim fails.

310 I will hear submissions as to costs and as to the future conduct of the proceedings.

³⁸ Section 74J of the *Trade Practices Act* and s 273 of the ACL.

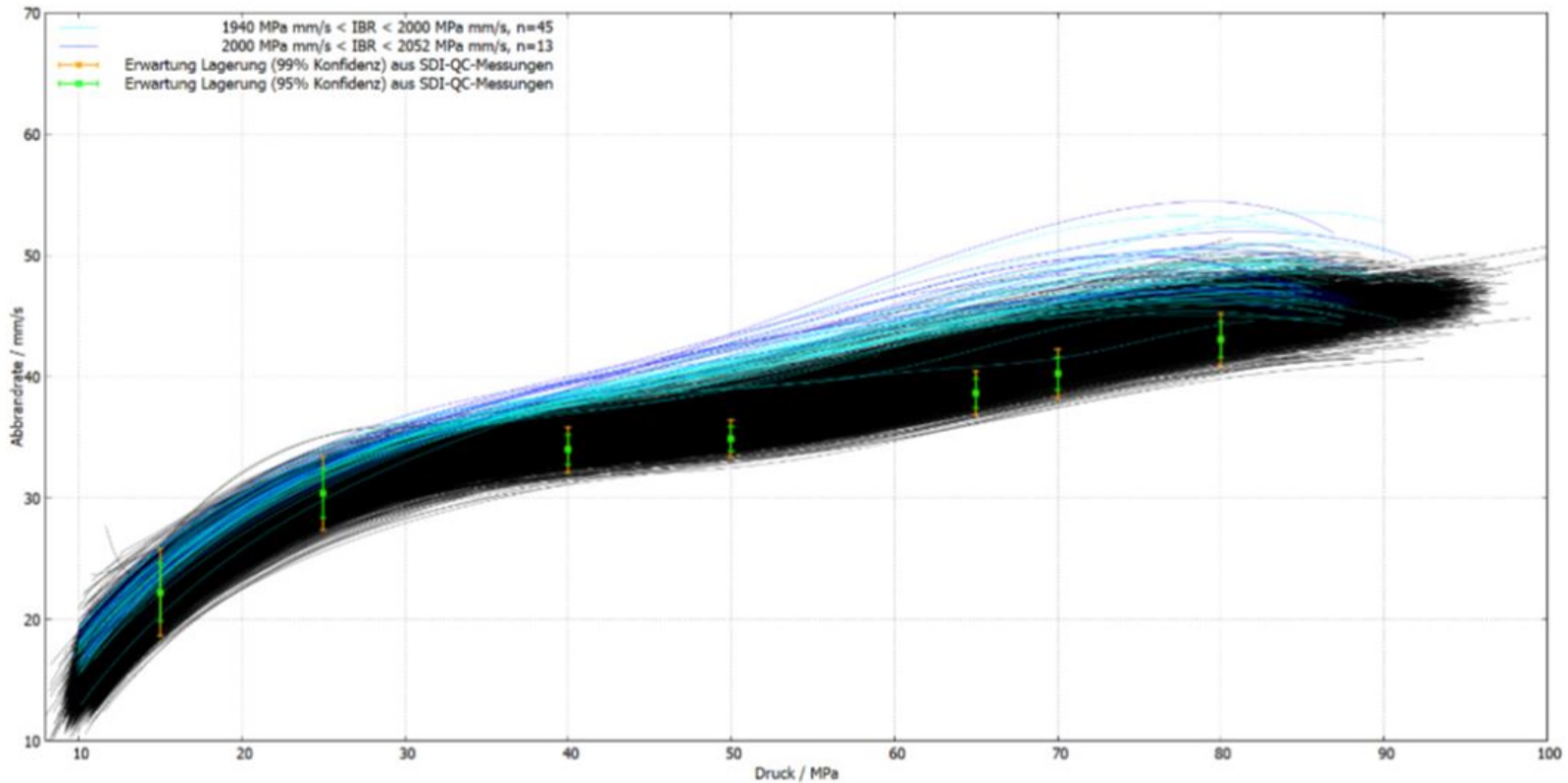


Figure 21: Closed Vessel test results from Field Inflators

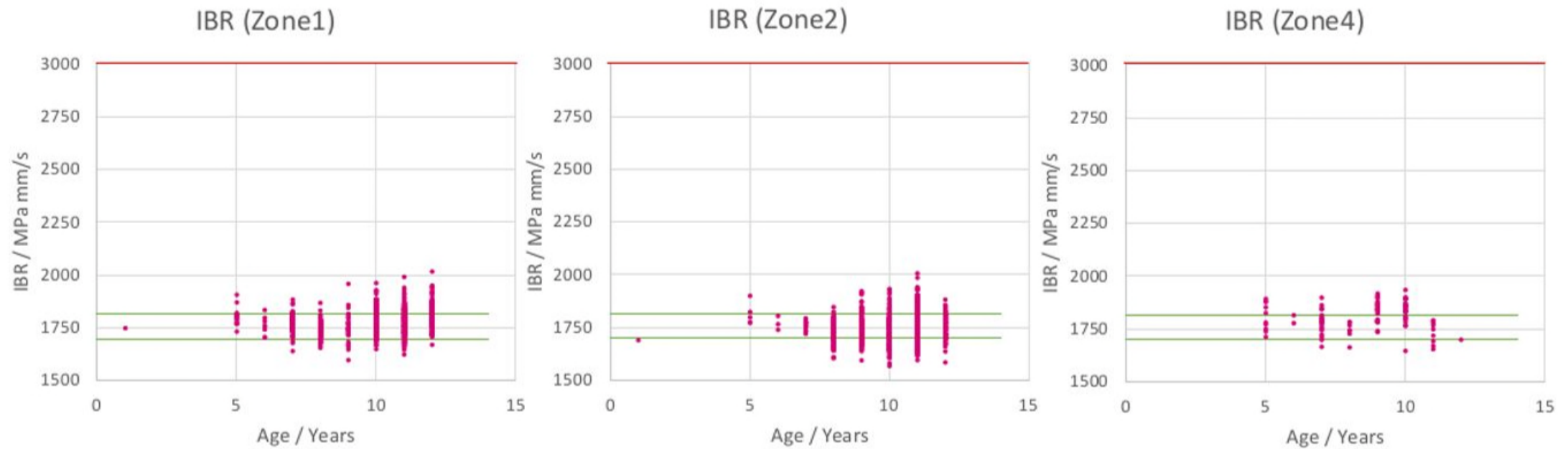


Figure 23: SDI Field Data (IBR) showing time/pressure against age of vehicle