



Equity Division Supreme Court New South Wales

Case Name: **Dwyer v Volkswagen Group Australia Pty Ltd t/as Volkswagen Australia (No 2)**

Medium Neutral Citation: [2021] NSWSC 1137

Hearing Date: 31 August 2021

Date of Decision: 7 September 2021

Jurisdiction: Equity - Commercial List

Before: Stevenson J

Decision: Proceedings to be dismissed with costs; funder to be jointly and severally liable for those costs; costs to be paid on indemnity basis in relation to the Structural Break Analysis issue; common questions answered

Catchwords: COSTS – representative proceedings – proceedings dismissed – whether funder to be jointly and severally liable for defendant’s costs – whether defendant should have certain costs on an indemnity basis – whether plaintiff should have appreciated his case on loss and damage would fail following service of defendant’s expert report – Calderbank letter – whether plaintiff unreasonably failed to accept offer

CIVIL PROCEDURE – representative proceedings – common questions – how questions should be answered

Cases Cited: Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd (No 5) [2021] FCA 246
Bakers Investment Group (Australia) Pty Ltd v Caason Investments Pty Ltd [2015] VSC 644
Carter v Caason Investments Pty Ltd [2016] VSCA 236
Dwyer v Volkswagen Group Australia Pty Ltd t/as Volkswagen Australia [2021] NSWSC 715
FPM Constructions Pty Ltd v Council of the City of Blue Mountains [2005] NSWCA 340
Gore v Justice Corp Pty Ltd (2002) 119 FCR 429; [2002] FCA 354

Yu v Cao (2016) 91 NSWLR 190; [2015] NSWCA 276

Category: Consequential orders

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): 2018/322648

JUDGMENT

- 1 I published my principal judgment in this matter on 18 June 2021.¹ These reasons assume familiarity with that judgment. I will use the same abbreviations.
- 2 I concluded that Professor Dwyer's claim against VW, as representative of the Group Members, failed.
- 3 It is common ground that the proceedings must now be dismissed with costs.
- 4 Three issues remain:
 - (1) whether the funder of the proceedings, Regency Funding Pty Ltd, should be jointly and severally liable with Professor Dwyer for VW's costs;
 - (2) whether VW should have certain of its costs on an indemnity basis; and

¹ *Dwyer v Volkswagen Group Australia Pty Ltd t/as Volkswagen Australia* [2021] NSWSC 715.

(3) what answers should now be given to the common questions.

Should Regency Funding be jointly and severally liable for VW's costs?

5 Regency Funding is on notice of VW's application that it be liable for costs and has been given an opportunity to make submissions.

6 On 23 August 2021, through its solicitor, Regency Funding informed VW's solicitors that it did not seek to be heard on the application.

7 I am satisfied that this is an appropriate case to make an order against the funder.

8 The Court has power to order that a non-party pay costs.²

9 Matters relevant in determining whether it is appropriate to make such an order include whether the non-party:

- (a) has provided the funds for the litigation;³
- (b) has a direct interest in, and entitlement to, a substantial part of the fruits of the litigation;⁴
- (c) was involved in the litigation purely for commercial gain;⁵
- (d) had a right to information and involvement in decision making in relation to the litigation;⁶ and
- (e) agreed to provide an indemnity to the unsuccessful party for any adverse costs order.⁷

² For example, *Yu v Cao* (2016) 91 NSWLR 190; [2015] NSWCA 276 at [137] (McColl JA with whom Sackville AJA and Adamson J agreed).

³ *FPM Constructions Pty Ltd v Council of the City of Blue Mountains* [2005] NSWCA 340 at [210] (Beazley, Giles and Basten JJA).

⁴ *Carter v Caason Investments Pty Ltd* [2016] VSCA 236 at [38] (Weinberg, Ferguson and Kaye JJA); *FPM Constructions* at [210].

⁵ *Carter v Caason* at [38].

⁶ *Carter v Caason* at [38].

- 10 Each of those factors is present in this case.
- 11 Regency Funding provided the funds for this litigation, including security for costs of \$2.15 million. I accept VW’s submission that Regency Funding did this purely for commercial gain, particularly having regard to the terms of the relevant litigation funding agreement which provided for a significant proportion of any “Proceeds of the Claim” to be paid to Regency Funding.
- 12 As VW submitted, Regency Funding “by its involvement, may properly and fairly be described as a real party to the litigation” and “is, in effect, the opposing party”.⁸
- 13 For those reasons, I propose to make the orders sought by VW against Regency Funding.

Indemnity costs

- 14 VW seeks an order that Professor Dwyer and Regency Funding be jointly and severally liable for VW’s costs on an indemnity basis:
- (a) “[f]or all costs attributable to the loss and damage aspect of the proceedings” from 29 January 2021, on which date Dr Pleatsikas’s report was served; and
 - (b) generally, from 6 April 2021, on which date a Calderbank offer was served.

Costs from 29 January 2021 attributable to loss and damage

- 15 It is common ground that in order to obtain an order for indemnity costs in relation to this aspect of the matter, it is necessary for VW to show that:

⁷ *Gore v Justice Corp Pty Ltd* (2002) 119 FCR 429; [2002] FCA 354 (O’Loughlin, Whitlam and Marshall JJ).

⁸ *Bakers Investment Group (Australia) Pty Ltd v Caason Investments Pty Ltd* [2015] VSC 644 at [15] (Elliott J).

- (a) there was, from the time that Dr Pleatsikas’s report was served, a “high degree of certainty concerning the deficiencies in [Professor Dwyer’s] case”; and
- (b) the deficiencies were “sufficiently manifest and clear such that it can be inferred that [Professor Dwyer] would or should have appreciated them when the action was...continued [beyond 29 January 2021], at least if [he] had given proper consideration to, or been properly advised about, the merits of [his] case”.⁹

16 Professor Dwyer sought to establish that he, and the Group Members, suffered damage because the “true value” of the VW vehicles he and they purchased was less than the amount paid for those vehicles.

17 In this regard, Professor Dwyer relied upon the evidence of Professor Baddeley.

18 I did not accept Professor Baddeley’s evidence for the reasons I gave at [J224] to [J252].

19 Professor Baddeley relied upon two bases to identify and calculate “negative price differentials” between “defective vehicles” and “non-defective vehicles”.

20 Those two bases were:

- (a) “Discrete Choice Experiments”, consisting of the survey evidence that I described at [J212] to [J220]; and
- (b) a “Structural Break Analysis”, being an analysis of auction dates of used vehicles that I described at [J233] and on which Professor Dwyer abandoned reliance prior to closing submissions.

⁹ To adopt the language of Wigney J in *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd (No 5)* [2021] FCA 246 at [11], to which both parties referred as stating the relevant test.

- 21 In his report, Dr Pleatsikas identified what he called “fundamental flaws” in both the Discrete Choice Experiments and the Structural Break Analysis.
- 22 Dr Pleatsikas identified all the difficulties with the Discrete Choice Experiments that led to me concluding that no weight should be given to them.¹⁰
- 23 Those criticisms led to Professor Baddeley conducting a further, revised, Discrete Choice Experiment and to producing a further report which purported to answer some of those criticisms.
- 24 In opening submissions, counsel for Professor Dwyer acknowledged that both Discrete Choice Experiments undertaken by Professor Baddeley had “weaknesses, which the Professor acknowledges”. In final submissions, and following Professor Baddeley’s evidence, counsel acknowledged the “undoubted limitations and problems” with the Discrete Choice Experiments.¹¹
- 25 All of these matters were clear to me following Professor Baddeley’s evidence for the reasons I set out in the principal judgment.
- 26 The opinions expressed in Dr Pleatsikas’s report can thus now be seen to bespeak a “high degree of certainty concerning the deficiencies in [Professor’s Dwyer’s case]”.
- 27 However, I find it less certain that those deficiencies were so “manifestly clear” that Professor Dwyer, and those advising him, would have appreciated it was, in effect, pointless continuing with the case.
- 28 I see substance in the submissions made on behalf of Professor Dwyer that I should be slow to reach such a conclusion where, as here, Professor

¹⁰ They were based on an unrealistic premise: [J238]; only measured willingness to pay rather than the vehicle’s market value: [J240]-[J241]; contained an “Opening Statement” which asked participants to assume a false level of risk: [J245]; were confusing: [J248]; did not contain quantifiable information about the probability that the airbag’s safety risk might eventuate: [J250]; and were not answered by participants at a speed or in a manner that suggested they gave thoughtful attention to the survey: [J251].

¹¹ See [J222].

Baddeley prepared a report in reply to Dr Pleatsikas's report, took issue with his criticisms of her reasoning, and adhered to her opinions.

29 Despite the fact that I ultimately did not accept the validity of the opinions Professor Baddeley expressed, I am not able to conclude that this result was so obviously likely that Professor Dwyer and Regency Funding should be visited with indemnity costs in relation to this issue.

30 The matter is clearer in relation to the Structural Break Analysis.

31 The Structural Break Analysis was beset with the fundamental error that I described in my principal judgment as to the recall dates of sale of the vehicles analysed.¹² The Structural Break Analysis was also directed to the likely impact of the installation of allegedly defective airbags on the resale of the vehicles in question, and thus not relevant to their true value at time of purchase. Counsel for Professor Dwyer abandoned reliance on the Structural Break Analysis during the hearing and accepted that "Professor Baddeley was unable to appreciate that the exercise suffered from fundamental flaws and was and is of no utility to the Court".

32 The deficiencies concerning this aspect of Professor Dwyer's case were "manifestly clear" and should have been, and ultimately were, appreciated by those advising him.

33 For those reasons, I propose to make an order to the effect that VW have its costs attributable to the loss and damage aspect of the proceedings, so far as they concern the Structural Break Analysis, on an indemnity basis from 29 January 2021.

34 Otherwise, I decline to make the order sought by VW.

¹² At [J232]-[J234].

The Calderbank letter

35 On 25 March 2021, VW's solicitors sent Professor Dwyer's solicitors a *Calderbank* letter proposing that proceedings be discontinued on the basis that:

- “(a) there be no order as to costs and the security for costs presently lodged with the Court would be released upon Court approval;
- (b) the Plaintiff release and discharge the Defendant from any and all claims (known or unknown) of any nature which the Plaintiff now has, at any time had or may have against the Defendant; and
- (c) the funder and the solicitors for the plaintiff agree not to fund, promote or otherwise have any involvement in any matter concerning the same or similar subject matter against the Defendant or any related body corporate of the Defendant”.

36 This was, in effect, a “walk-away” offer. However, in circumstances where VW had by that point incurred very substantial costs in defending the proceedings and had security for costs in the sum of \$2.15 million, it can be seen as a genuine offer of compromise for the purposes of the *Calderbank* principles.

37 The question, however, is whether it was unreasonable of Professor Dwyer not to accept it.

38 I am not able to come to that conclusion.

39 First, the release that VW proposed in par (b) of the offer was extremely broad. It extended to any future claim that Professor Dwyer might have against VW for any reason, including any claim he might have were he to purchase another Volkswagen having quite different problems from those for which he contended in these proceedings.

40 More significantly, par (c) of the offer imposed a term that was not within Professor Dwyer's power to accept. Professor Dwyer could not accept the offer without the cooperation of Regency Funding and his solicitors.

41 It may be that Professor Dwyer would have needed consent and cooperation of Regency Funding in any decision to settle the proceedings, but the involvement of Professor Dwyer’s solicitors was not something over which he could control.

42 Further, Professor Dwyer was obliged to consider the interests of Group Members. As was submitted on his behalf:

“31. The second fundamental problem is that if the *Calderbank* offer had been accepted, group members would have been unable to continue pursuit of the existing representative proceeding (or institute a new representative proceeding) unless they could identify and secure the services of an alternative funder and solicitors. Individual group members could continue their own individual claims – or bring new proceedings – but only via a different solicitor.

32. Whilst the prospect of continuing representative proceedings via a new funder and solicitor, or bringing or continuing individual claims on a self-funded basis via new solicitors, was theoretically open, the practical reality was that both options were unlikely; hence the commercial reason for including condition (c) in the *Calderbank* offer.”

43 In these circumstances, I am not satisfied that it was unreasonable of Professor Dwyer not to accept the *Calderbank* offer.

44 Accordingly, I am not prepared to make an order for indemnity costs based on that offer.

Common questions

45 It is now agreed that I should answer the common questions in the manner set out in the document attached to these reasons.

46 Questions 17 and 19 assume an affirmative answer to an earlier question. As an affirmative answer is not to be given to those earlier questions, it is not, strictly speaking, necessary to answer questions 17 and 19. Nonetheless, it is agreed that I should answer those questions as set out in the schedule.

Conclusion

- 47 The parties should now confer and agree on the orders necessary to finalise the proceedings.

Answers to common questions

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

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

	Question	Answer
	<i>(b) sections 54, 271, 272 and 273 of the ACL do not apply to Recalled Vehicles that were supplied by the Defendant to another person for re-supply before 1 January 2011, regardless of whether the Recalled Vehicle was supplied to a Group Member after 1 January 2011?</i>	
10	<i>Was any Recalled Vehicle acquired by a Group Member not of merchantable quality within the meaning of section 74D of the TPA at the time of supply to the Group Member by reason of the answers to Questions 3 to 5?</i>	No. By reason of the answers to questions 3 to 4, the Recalled Vehicles acquired by Group Members were of merchantable quality within the meaning of section 74D of the TPA at the time of supply to each Group Member.
11	<p><i>Whether a reasonable consumer fully acquainted with the state and condition of the Recalled Vehicles at the time of supply would not regard the Recalled Vehicles as:</i></p> <p><i>(a) acceptably fit for all the purposes for which goods of that kind are commonly supplied?</i></p> <p><i>(b) free from defects?</i></p> <p><i>(c) safe?</i></p> <p><i>for the purposes of section 54 of the ACL.</i></p>	<p>No. Given the answers to Questions 3 and 4, a reasonable consumer fully acquainted with the state and condition of the Recalled Vehicles at the time of supply would regard the Recalled Vehicles as:</p> <p>(a) acceptably fit for all the purposes for which goods of that kind are commonly supplied;</p> <p>(b) free from defects; and</p> <p>(c) safe.</p> <p>for the purposes of section 54 of the ACL.</p>
12	<p><i>Whether, by the conduct in paragraph 20 of the Amended Statement of Claim, the Defendant made any of the following representations (Representations) in respect of each of the Recalled Vehicles:</i></p> <p><i>(a) the Recalled Vehicles were safe to drive;</i></p> <p><i>(b) it was safe to transport passengers in the Recalled Vehicles;</i></p> <p><i>(c) the airbag(s) in the Recalled Vehicles did not contain any defect that made the airbag(s) or the vehicle unsafe;</i></p> <p><i>(d) the construction of the Recalled Vehicles would not expose the driver or passengers to unnecessary harm;</i></p> <p><i>(e) the Recalled Vehicles airbag(s) would deploy properly in the event of an accident or collision;</i></p> <p><i>(f) the Defendant would notify any purchaser (past or prospective) of any issue with the Recalled Vehicle's construction that had</i></p>	As the plaintiff did not press any allegations in respect of these matters put in issue by the plaintiff, and the plaintiff led no evidence to support those allegations, the claims that the Defendant made such Representations fail.

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

	Question	Answer
	<i>(b) is the cause of action under section 271 of some or any Group Members who received a recall notice from the Defendant, or were otherwise notified or ought reasonably to have become aware that vehicles of the same model as their Recalled Vehicle were the subject of a recall, time-barred by operation of section 273 of the ACL?</i>	
17	<p><i>If the answer to Question 10 is “Yes”, can the Group Members have suffered any loss or damage, in the form of a reduction in the “true value” of that Recalled Vehicle as at the date of purchase, attributable to the Recalled Vehicle not being of merchantable quality, in circumstances in which:</i></p> <p><i>(a) the Group Member has had the Recalled Takata Airbag in their Recalled Vehicle replaced at no cost for the replacement; or</i></p> <p><i>(b) the Group Member is able to have the Recalled Takata Airbag in their Recalled Vehicle replaced at no cost for the replacement?</i></p>	Given the answer to question 10, it is not necessary to answer this question. But given the answer to Questions 3, 4 and 10, Group Members have not suffered any loss or damage. In circumstances where the Takata Airbag in a Recalled Vehicle has been replaced at no cost, there is no difference between the purchase price of the Recalled Vehicle and the “true value” of that Recalled Vehicle at the time of purchase.
18	<i>If the answer to Question 11 is “Yes”, was any non-compliance with section 54(1) of the ACL only because of any act, default or omission of Takata Corporation (or its related entities, including TK Holdings Inc) and not because of any act, default or omission of the Defendant?</i>	Given the answers to Questions 3, 4 and 11, it is not necessary to answer this question.
19	<p><i>If the answer to Question 11 is “Yes”, can the Group Members have suffered any loss or damage, in the form of a reduction in the “true value” of that Recalled Vehicle as at the date of purchase, attributable to the Recalled Vehicle not being of acceptable quality, in circumstances in which:</i></p> <p><i>(a) the Group Member has had the Recalled Takata Airbag in their Recalled Vehicle replaced at no cost for the replacement; or</i></p> <p><i>(b) the Group Member is able to have the Recalled Takata Airbag in their Recalled Vehicle replaced at no cost for the replacement?</i></p>	Given the answer to question 11 it is not necessary to answer this question. But given the answers to Questions 3, 4 and 11, Group Members have not suffered any loss or damage. In circumstances where the Takata Airbag in a Recalled Vehicle has been replaced at no cost, there is no difference between the purchase price of the Recalled Vehicle and the “true value” of that Recalled Vehicle at the time of purchase.
20	<i>If the answer to Question 15 is “Yes”, can the Group Members have suffered any loss or damage, in the form of a reduction in the “true value” of that Recalled Vehicle as at the date of purchase, attributable</i>	Given the answers to Questions 3, 4, 14 and 15, it is not necessary to answer this question.

	Question	Answer
	<p><i>to alleged misleading or deceptive conduct, in circumstances in which:</i></p> <p>(a) <i>the Group Member has had the Recalled Takata Airbag in their Recalled Vehicle replaced at no cost for the replacement; or</i></p> <p>(b) <i>the Group Member is able to have the Recalled Takata Airbag in their Recalled Vehicle replaced at no cost for the replacement?</i></p>	
20A	<p><i>Can the Group Members have suffered any loss or damage, in the form of disappointment, distress and / or anxiety, attributable:</i></p> <p>(a) <i>If the answer to question 10 is yes, to the Recalled Vehicle not being of merchantable quality;</i></p> <p>(b) <i>If the answer to question 11 is yes, to their Recalled Vehicle not being of acceptable quality;</i></p> <p>(c) <i>If the answer to question 15 is yes, to the misleading or deceptive conduct of the defendant;</i></p> <p><i>in circumstances in which:</i></p> <p>(d) <i>the Group Member has had the Recalled Takata Airbag in their Recalled Vehicle replaced at no cost for the replacement; or</i></p> <p>(e) <i>the Group Member is able to have the Recalled Takata Airbag in their Recalled Vehicle replaced at no cost for the replacement?</i></p>	No. Given the answers to Questions 3, 4, 10, 11, 14 and 15, it is not possible for any Group Members to have suffered any loss or damage of the kind described in this question.
21	<i>Is the cause of action under section 74D(1) of the TPA of any Group Member time-barred by operation of section 74J(1)?</i>	Given the answers to Questions 10 and 11, it is not necessary to answer this question.
22	<i>Is the cause of action under section 74D(1) of the TPA of any Group Member time-barred by operation of section 74J(3)?</i>	Given the answers to Questions 10 and 11, no Group Member has a cause of action available under section 74D(1) of the TPA. However, were any such action available, any Group Member who acquired their Recalled Vehicle before 22 October 2008 would be time-barred by operation of section 74J(3).

	Question	Answer
23	<i>Are the claims of misleading or deceptive conduct of some or any Group Members time-barred by operation of sections 82(2) and 87(1CA) of the TPA and/or sections 236(2) and 237(3) of the ACL?</i>	Given that the plaintiff did not press his claims in respect of misleading or deceptive conduct and the plaintiff led no evidence to support those allegations, as indicated in response to Questions 14 and 15, it is not necessary to answer this question.
24	<i>Is any cause of action based on unconscionable conduct under the TPA or ACL of some or any Group Members time-barred by operation of sections 82(2) and 87(1CA) of the TPA or sections 236(2) and 237(3) of the ACL (as applicable)?</i>	Given that the plaintiff did not press his claims in respect of unconscionability, and the plaintiff led no evidence to support those allegations, it is not necessary to answer this question.
25	<p><i>Whether:</i></p> <p><i>(a) Takata Corporation or its related entities (as specified in each defence) was a concurrent wrongdoer for the purposes of section 87CB of the TPA or CCA?</i></p> <p><i>(b) if so, whether and in what proportion the defendant's liability should be reduced in respect of the causes of action under sections 52 and 53(a) of the TPA and/or sections 18 and 29(1)(a) of the ACL?</i></p>	Given that the plaintiff did not press his claims in respect of the causes of action relevant to these provisions and the plaintiff led no evidence to support those allegations, and given the answers to Questions 14 and 15, it is not necessary to answer this question.
26	<i>Is the answer to any of the questions above not common to the claims of the Group Members?</i>	The answer to Question 1(a) is not common to the claims of the purported Group Members. The effect of the answer to Question 1(a) is that those purported Group Members that were not supplied a Recalled Vehicle by an authorised distributor of the Defendant or by a commercial supplier of second-hand vehicles are not, in fact, Group Members.