FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Mercedes-Benz Australia/Pacific Pty Ltd [2022] FCA 1059

File number:	VID 438 of 2021
Judgment of:	**MIDDLETON J**
Date of judgment:	2 September 2022
Date of publication of reasons:	8 September 2022
Catchwords:	**CONSUMER LAW** – Takata airbag recall notice – admitted contraventions of s 127(1) of the Australian Consumer Law concerning compliance with recall notice – where the parties jointly proposed a declaration and agreed pecuniary penalty – declaration made and agreed pecuniary penalty appropriate within the meaning of s 224(1) of the Australian Consumer Law
Legislation:	*Competition and Consumer Act 2010* (Cth) *Federal Court of Australia Act 1976* (Cth) *Consumer Goods (Motor Vehicles with Affected Takata Airbag Inflators and Specified Spare Parts) Recall Notice 2018*
Cases cited:	*Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 399 ALR 599 *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; (2015) 327 ALR 540 *Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73; (2018) 262 FCR 243 *Australian Securities and Investments Commission v Wooldridge* [2019] FCAFC 172 *Trade Practices Commission v CSR Ltd* [1990] FCA 7; [1991] ATPR 41-076 *viagogo AG v Australian Competition and Consumer Commission* [2022] FCAFC 87 *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49; (2021) 284 FCR 24

Division:	General Division
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Solicitor for the Respondent:	Baker McKenzie

ORDERS

VID 438 of 2021

BETWEEN:	**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION** Applicant
AND:	**MERCEDES-BENZ AUSTRALIA/PACIFIC PTY LTD** Respondent

ORDER MADE BY: **MIDDLETON J**

DATE OF ORDER: **2 SEPTEMBER 2022**

THE COURT DECLARES THAT:

1. Mercedes-Benz Australia/Pacific Pty Ltd ('**Mercedes-Benz Australia/Pacific**'), in respect of the compulsory Takata recall ('**Takata Recall**') imposed on suppliers of motor vehicles in Australia by the *Consumer Goods (Motor Vehicles with Affected Takata Airbag Inflators and Specified Spare Parts) Recall Notice 2018* ('**Takata Recall Notice**') failed to use attention-capturing high-impact language in communications to consumers in relation to the Affected Takata Airbag Inflators:

   (a) on 23 occasions between 16 July 2018 and 17 March 2020, by making statements to consumers to the effect that Mercedes was undertaking the Takata Recall as a precaution; and

   (b) on 4 occasions between 18 February 2020 and 17 March 2020, by making statements to consumers to the effect that Beta inflators in other manufacturers' vehicles had not had any faults or caused any accidents, injuries or deaths,

   and in doing so failed to implement its Communication and Engagement Plan for contacting consumers as required by s 7(1)(a) of the Takata Recall Notice, in contravention of s 127(1) of the Australian Consumer Law ('**ACL**'), being Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

THE COURT ORDERS THAT:

2. Mercedes-Benz Australia/Pacific pay to the Commonwealth of Australia pecuniary penalties under s 224(1) of the ACL, totalling $12.5 million, in respect of the contraventions of s 127(1) of the ACL referred to in Declaration 1 above, with such penalties to be paid within 30 days of the date of this order.

3. Mercedes-Benz Australia/Pacific pay a contribution to the Australian Competition and Consumer Commission's costs in the amount of $100,000, to be paid within 30 days of this order.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MIDDLETON J:

INTRODUCTION

1 In this proceeding the Applicant, the Australian Competition and Consumer Commission ('**ACCC**') alleges contraventions of s 127(1) of the Australian Consumer Law ('**ACL**'), being Sch 2 to the *Competition and Consumer Act 2010* (Cth) ('**CCA**'), and seeks declarations, pecuniary penalties and costs. The Respondent, Mercedes-Benz Australia/Pacific Pty Ltd ('**Mercedes**') has admitted facts that constitute the contraventions alleged against it and does not oppose the relief sought.

2 The purpose of these reasons is to set out the factual basis upon which the relief is based and to explain why the Court has formed its own view that the relief sought and the pecuniary penalties in the amounts agreed by the parties are appropriate.

3 The proper approach to civil regulatory orders which are sought on an agreed basis is now well settled.

4 In *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49; (2021) 284 FCR 24, Wigney, Beach and O'Bryan JJ noted the desirability of the Court accepting an agreed penalty and, while reinforcing the notion that it is ultimately a matter of discretion for the Court, stated at [127] (citations omitted):

> [I]n considering whether the agreed and jointly proposed penalty is an appropriate penalty, it is necessary to bear in mind that there is no single appropriate penalty. Rather, there is a permissible range of penalties within which no particular figure can necessarily be said to be more appropriate than another. The permissible range is determined by all the relevant facts and consequences of the contravention and the contravener's circumstances. An agreed and jointly proposed penalty may be considered to be "an" appropriate penalty if it falls within that permissible range… It is unlikely to be considered an appropriate penalty if it falls outside that range.

RELEVANT LEGAL PRINCIPLES AS TO PENALTIES

5 Pursuant to s 224(1)(a)(viii) of the ACL, if the Court is satisfied that a person has contravened s 127(1) of the ACL, the Court may order the person to pay such pecuniary penalty, in respect of each act or omission by the person to which it applies, as the Court determines to be appropriate.

6 The scope of the power to impose civil pecuniary penalties was recently considered by the High Court of Australia in *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 399 ALR 599 ('***Pattinson***') and the Full Court of the Federal Court of Australia in *viagogo AG v Australian Competition and Consumer Commission* [2022] FCAFC 87 (Yates, Abraham and Cheeseman JJ).

7 Certain principles (derived from the reasons of the plurality in *Pattinson*) are apposite to the approach required to be taken to the imposition of the pecuniary penalties in this proceeding:

- the purpose of a civil penalty in this statutory scheme is primarily, if not solely, the promotion of the public interest in compliance with the provisions of the ACL by the deterrence of further contraventions of the ACL;
- there is no place for a "notion of proportionality" in a civil penalty regime, being a notion drawn from the criminal law, but what is required is that there be some reasonable relationship between the theoretical maximum and the final penalty imposed which will be established where the penalty does not exceed what is reasonably necessary to deter future contraventions of a like kind by the contravenor and others;
- civil penalties must be fixed with a view to ensuring that the penalty is not such as to be regarded by the offender or others as an acceptable cost of doing business;
- the factors identified by French J (as his Honour then was) in *Trade Practices Commission v CSR Ltd* [1990] FCA 521 are possible relevant considerations which inform the assessment of a penalty's appropriate deterrent value, although these should not be considered as a "legal checklist" and the court's task remains to determine what is an "appropriate" penalty in the circumstances of the particular case. (However, s 224(2) of the ACL lists considerations which *must* be taken into account);
- another relevant factor is the maximum penalty which might be imposed, albeit it must be balanced with all other relevant factors;
- the power to impose a penalty is to be exercised judicially, that is, fairly and reasonably having regard to the subject matter, scope and purpose of the ACL;
- concepts such as totality, parity and course of conduct may still assist in the assessment of what may be considered reasonably necessary to deter further contraventions of the ACL.

8 As to the course of conduct concept, separate contraventions arising from separate acts ordinarily attract separate penalties. However, where separate acts, giving rise to separate contraventions, are inextricably interrelated, they should be viewed as a single 'course of conduct': *Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73; (2018) 262 FCR 243 at [234] (Allsop CJ, Middleton and Robertson JJ).

9 Considerations of whether the acts of the contravenor should be viewed as a single 'course of conduct' may assist in the assessment of what may be considered reasonably necessary to deter further contraventions of the ACL: see *Pattinson* at [45]. It is a useful tool of analysis that can help avoid double punishment: see *Australian Securities and Investments Commission v Wooldridge* [2019] FCAFC 172 ('***Wooldridge***') at [25] (Greenwood, Middleton and Foster JJ).

10 As to the totality principle, where multiple separate penalties are to be imposed upon a particular wrongdoer, the totality principle is applied as a "final check" to ensure that, overall, the penalty is appropriate and that the sum of the penalties imposed for several contraventions does not result in the total of the penalties exceeding what is proper having regard to the totality of the contravening conduct involved: *Wooldridge* at [26].

11 It has been described as an analytical tool which is applied as to ensure that the overall penalty is not oppressive or disproportionate in the sense that it is greater than necessary to achieve the object of deterrence: *Pattinson* at [41].

BACKGROUND

A summary of the facts and contraventions

12 Section 122 of the ACL empowers the Minister to issue a recall notice in respect of consumer goods in certain circumstances. By the *Consumer Goods (Motor Vehicles with Affected Takata Airbag Inflators and Specified Spare Parts Recall Notice 2018* ('**Recall Notice**'), the Minister recalled ('**Recall**') vehicles fitted with two types of airbag inflators produced by the Takata group of companies: Alpha inflators and non-Alpha (or Beta) inflators (together, 'Affected Takata Airbag Inflators' or '**ATAIs**'). Only Beta inflators were installed in Mercedes' vehicles.

13 The terms of the Recall Notice were drafted on the basis that Alpha inflators posed a more significant safety risk than Beta inflators. Beta inflators were included in the Recall because they also posed a safety risk. However, the Recall provided that cars fitted with Beta inflators could be driven during the period of the Recall until they were repaired. There were three

Priority Factors in the Recall Notice to assist in the sequencing of the recall of vehicles, being (1) exposure to heat and humidity, (2) vehicles more than six years old and (3) vehicles with driver side inflators.

14 The Recall Notice sets out how suppliers (including Mercedes) are to undertake the Recall. Section 7(1) relevantly provides as follows:

> (1) A Supplier must develop and implement a Communication and Engagement Plan for contacting, communicating with, and engaging with Consumers, and for maximising rates of replacement of Affected Takata Airbag Inflators under this Recall Notice. In particular:
>
> (a) a Supplier … must develop and implement a Communication and Engagement Plan which, at a minimum, addresses the requirements in Schedule 2 …

15 Mercedes developed a Communication and Engagement Plan ('**CEP**') for cars ('**MBC CEP**') which the ACCC approved on 26 June 2018.

16 Mercedes-Benz Vans Australia Pacific Pty Ltd developed a CEP for vans ('**MBV CEP**'), which was relevantly approved by the ACCC on 10 August 2018. Mercedes was responsible for dealing with issues relating to the Recall insofar as it concerned vans.

17 The Mercedes Car CEP and Mercedes Van CEP are in substantially identical terms.

18 Paragraphs 4.1 and 4.2 of the MBC CEP and MBV CEP provided as follows:

> **4.1 Information and Phrases**
>
> ***Q: Do you plan to avoid including information or phrases that are likely to minimise or mitigate the perception of the risk? Examples of such language include: "No ruptures have been observed in [the Supplier's] vehicles to date" and "we are only conducting this recall as a precaution".***
>
> MBC acknowledges the safety concern with the Recall and understands the importance of achieving the highest possible recall completion rates. Accordingly, it will use attention-capturing, high-impact language in all general and direct communications to consumers in order to try and avoid consumers ignoring notices. Please refer to the consumer letter included in this document for reference of such language used to create urgency and highlight the importance of this Recall.
>
> **4.2 Impactful Language**
>
> ***Q: Do you plan to use language designed to capture attention and be impactful, including by use of bold text to highlight particularly impactful words (e.g. "urgent" and "kill")?***
>
> MBC acknowledges the safety concern with the Recall and understands the importance of achieving the highest possible recall completion rates. Accordingly, it will use attention-capturing, high-impact language in all general and direct communications to consumers in order to try and avoid consumers ignoring notices. Please refer to the

> letter included in this document for reference of such language used to create urgency and highlight the importance of this Recall.
>
> (emphasis added)

19 On:

(1) 23 occasions, Mercedes call centre staff members made statements to consumers to the effect that Mercedes was undertaking the Recall as a precaution (the '**Precaution Statements**'); and

(2) four occasions, Mercedes call centre staff members made statements to consumers to the effect that Beta inflators in other manufacturers' vehicles had not had any faults or caused any accidents, injuries or deaths (the '**No Incidents Statements**'),

(together, the '**Contravening Statements**').

20 In total, five call centre staff were involved in the Contravening Statements.

21 The Contravening Statements did not amount to "attention-capturing, high-impact language", as required by paragraphs 4.1 and 4.2 of the Mercedes CEPs. By failing to comply with the MBC CEP and MBV CEP in that way, Mercedes failed to comply with s 7(1)(a) of the Recall Notice, and therefore contravened s 127(1) (the '**Admitted Contravening Conduct**').

The nature of the contraventions

22 The context of the Admitted Contravening Conduct is as follows as agreed by the parties.

23 First, the Admitted Contravening Conduct relates to the implementation of the MBC CEP and MBV CEP, which were made pursuant to the Recall Notice. The Explanatory Statement for the Recall Notice states that the purpose of the Recall Notice is to protect Australian vehicle occupants from the serious risk of injury or death if an ATAI in their vehicle ruptures when the airbag system deploys following a vehicle collision.

24 Second, as a general proposition, to the extent any consumer delayed having the ATAIs in their vehicles replaced, this could have increased the risk of rupture. There is no evidence indicating whether or not the Admitted Contravening Statements caused any consumer to delay the replacement of an ATAI. The ATAIs fitted in each vehicle the subject of the Admitted Contravening Conduct were in fact replaced in compliance with the Recall.

25 Third, the MBC CEP and MBV CEP included statements which call centre staff were permitted to say to consumers. The MBC CEP and MBV CEP contained the following permitted language in a script, FAQs and an e-book:

(1) "Mercedes-Benz vehicles in Australia ARE NOT fitted with the "Alpha" Takata airbags."

(2) "Mercedes-Benz vehicles in Australia ARE NOT fitted with "Alpha" Takata airbags, which are the high-risk inflators you may have heard about in the media."

(3) "We would like to reassure you, the 'Alpha' airbag, which is the high risk airbag you may have heard about in the media, is not fitted in our Mercedes-Benz vehicles. However we are recalling specific types of Takata airbags because there is an associated safety risk which may increase over time."

(4) "Can I continue to drive my vehicle?", the answer "Yes, there are no 'Alpha airbags' in any Mercedes-Benz vehicles in Australia however, if and when you receive a letter asking you to have this Recall performed by an authorised Mercedes-Benz retailer, please contact the retailer as soon as possible to book your vehicle in for the airbag to be replaced. If you are not the only driver of this vehicle, please inform all other drivers of this important information."

(5) "Can I continue to drive my vehicle? Yes. There are no 'Alpha airbags' in any Mercedes-Benz vehicles and we are not aware of a ruptured inflator in any Mercedes-Benz vehicle worldwide".

26 Fourth, paragraphs 4.1 and 4.2 of the Mercedes CEPs required Mercedes to use "attention-capturing" or "high-impact language" when communicating with consumers about the Recall.

27 Statements to the effect that there had been no incidents, accidents, injuries or deaths caused by Beta inflators in other manufacturer's vehicles (ie vehicles other than Mercedes-Benz vehicles) (the No Incidents Statements) and that the Recall and replacement of ATAIs was being undertaken as a precaution (the Precaution Statements), did not comply with the requirement in paragraphs 4.1 and 4.2 of the Mercedes CEPs to use "attention-capturing" or "high-impact language" when communicating with consumers about the Recall.

28 The contraventions constituting the Admitted Contravening Conduct are comprised of failures to comply with the MBC CEP and MBV CEP in the manner described above.

PROVISIONS OF THE ACL RELATING TO A RECALL NOTICE

29 Section 122 of the ACL empowers the responsible Minister to publish a recall notice. Section 123 of the ACL regulates the content of a recall notice.

30 The Recall Notice was published by legislative instrument on 27 February 2018.

31 Publication of a recall notice by legislative instrument ensures that, where the notice is concerned with the recall of goods of a particular type, even suppliers who have not been identified are bound to comply with it.

32 Section 123(1) of the ACL provides that a recall notice may require one or more suppliers of the goods to take one or more of the following actions:

> (a) recall the goods;
>
> (b) disclose to the public, or to a class of persons specified in the notice, one or more of the following:
>
> > (i) the nature of a defect in, or a dangerous characteristic of, the goods as identified in the notice;
> >
> > (ii) the circumstances as identified in the notice in which a reasonably foreseeable use or misuse of the goods is dangerous;
> >
> > (iii) procedures as specified in the notice for disposing of the goods;
>
> (c) if the identities of any of those suppliers are known to the responsible Minister—inform the public, or a class of persons specified in the notice, that the supplier undertakes to do whichever of the following the supplier thinks is appropriate:
>
> > (i) unless the notice identifies a dangerous characteristic of the goods—repair the goods;
> >
> > (ii) replace the goods;
> >
> > (iii) refund to a person to whom the goods were supplied (whether by the supplier or by another person) the price of the goods.

33 Section 123(2) of the ACL provides that the recall notice may specify:

> (a) the manner in which the action required to be taken by the notice must be taken; and
>
> (b) the period within which the action must be taken.

34 Section 127(1) of the ACL provides:

> If:
>
> (a) a recall notice for consumer goods is in force; and
>
> (b) the notice requires a person (other than the regulator) to do one or more things;

the person must comply with the notice.

35 A contravention of s 127(1) attracts a pecuniary penalty, pursuant to s 224(1)(a)(viii) of the ACL.

36 The Recall Notice, by way of s 7(1)(a), required suppliers such as Mercedes to:

> develop and implement a Communication and Engagement Plan for contacting, communicating with, and engaging with Consumers, and for maximising rates of replacement of Affected Takata Airbag Inflators under this Recall Notice … which, at a minimum, addresses the requirements in Schedule 2.

37 Schedule 2 provided that:

> This Schedule sets out the requirements for a Communication and Engagement Plan under section 7 of this Recall Notice.
>
> **General**
>
> 1. A Communication and Engagement Plan is a plan for contacting, communicating with, and engaging with Consumers, and for maximising rates of replacement of Affected Takata Airbag Inflators.
>
> 2. A Supplier's Communication and Engagement Plan must address each of the components set out in this Schedule.
>
> …
>
> **Content of Consumer communications**
>
> 4. Where this Recall Notice requires specified language for specified communications, that language must be used.
>
> 5. In all communications with Consumers pursuant to this Recall Notice, a Supplier must use clear, simple language. In particular, a Supplier must identify the risk presented by airbag inflator ruptures in clear, simple language that emphasises the risk of injury or death from shrapnel in the event of a rupture and avoid unnecessarily technical or scientific terminology. Supplier communications with Consumers must also use appropriately urgent terms. The assessment of urgency must take into account the age of the Vehicle, the type of inflator involved, the location of the Vehicle in an area of high absolute humidity, and the location of the relevant inflator inside the Vehicle. …
>
> …
>
> 6. A Supplier must not include information or phrases that are likely to minimise or mitigate the perception of the risk, as these may discourage Consumer action to have the Affected Takata Airbag Inflator replaced. Examples of such language include: "No ruptures have been observed in [the Supplier's] vehicles to date", and "we are only conducting this recall as a precaution".
>
> 7. A Supplier must use language designed to capture attention and be impactful. A Supplier must use bold text to highlight particularly impactful words (e.g., "urgent", "kill").
>
> 8. A Supplier must avoid using generic or low-impact imagery (e.g., scenic pictures).

38 Section 7 of the Recall Notice relevantly requires that a supplier develop and implement a CEP which addresses the requirements in Schedule 2. It is the CEP, as approved by the ACCC, which then imposes the substantive relevant communication obligations.

39 In this proceeding, there was previously a dispute as to the validity of the Recall Notice. I am satisfied that the Recall Notice was valid. Section 123 of the ACL provides that a recall notice may specify the manner in which action required to be taken must be taken. A question may arise as to whether the requirement for specificity is satisfied by s 7(1)(a) of the Recall Notice, which relevantly provides that a supplier must develop and implement a CEP "which, at a minimum, addresses the requirements in Schedule 2".

40 I consider that the Recall Notice does relevantly specify the manner in which action required to be taken by the notice must be taken. The text of s 123(2) of the ACL is not prescriptive or restrictive as to the manner in which action required to be taken by a recall notice may be specified. The purpose of s 122 of the ACL is to permit a responsible Minister to respond to circumstances where public safety is at risk, and as such the relevant provisions of the ACL should receive a broad reading to assist that purpose.

DISCUSSION

Specific deterrence considerations in the present proceeding

41 This consideration arises in the context of a need to deter Mercedes from engaging in conduct like the Admitted Contravening Conduct in the future.

42 The parties rely on the following matters.

43 First, it is not in dispute that the purpose of the Recall Notice was to protect Australian vehicle occupants from the serious risk of injury or death if an ATAI in their vehicle ruptures when the airbag system deploys following a vehicle collision.

44 Second, Mercedes did not have formal monitoring and quality assurance in place at its Takata Call Centre in relation to the content of calls with consumers.

45 Third, on 18 February 2020, Mercedes offered and the ACCC accepted a court enforceable undertaking pursuant to s 87B of the CCA, in relation to Mercedes' failure to initiate the recall of affected C Class and E Class vehicles in accordance with the dates in its approved Recall Initiation Schedule to the Recall Notice. As part of this process, Mercedes also sought to amend

its Recall Initiation Schedule under its CEP. Mercedes has complied with this undertaking, as well as the amended Recall Initiation Schedule.

46 Fourth, the Admitted Contravening Conduct occurred on 27 occasions between July 2018 and March 2020. The 27 interactions that constitute the Admitted Contravening Conduct were amongst in excess of 52,000 total interactions between the Takata Call Centre and consumers, under the terms of the MBC CEP and MBV CEP. Mercedes had tens of thousands of further interactions with consumers in executing the Recall (such as letters, emails, SMSs).

47 Fifth, all Consumers to whom the Contravening Statements were made had their vehicles recalled and the Beta inflators in those vehicles were replaced (and in all instances that occurred before the deadline to meet the obligations in the Recall Notice). No consumer suffered loss or harm as a result of Admitted Contravening Conduct.

48 Sixth, Mercedes cooperated with the ACCC when it first raised its concerns about Mercedes' compliance with its CEPs, and has cooperated with the ACCC by making the admissions in this proceeding.

General deterrence considerations in the present case

49 Further to the specific deterrence considerations above, several matters point to the need for a penalty which will deter other businesses from contravening the ACL in a manner similar to the Admitted Contravening Conduct.

50 First, compulsory recalls concern public safety, and so a deterrence against non-compliance is important to give effect to the public safety purpose of recalls.

51 Second, the motor vehicle industry is very large. Recalls relating to motor vehicles have the potential to impact a large proportion of the Australian population. As such, the potential impact of failure to comply with compulsory recalls in that industry is very large. It is important that communication by suppliers of motor vehicles adheres to the standards of communication required of them by, for example, CEPs.

52 Third, contraventions of mandatory recalls must attract appropriate penalties in order to maintain consumer confidence in the recall process and product safety measures.

53 Fourth, corporations should be left in no doubt that a strong internal compliance program, including proper training and supervision of management and staff, is not optional. If the burden of the penalty is seen to be less than the costs of such a program, corporations may be

tempted to absorb the risk of being caught, in preference to ensuring careful compliance with the CCA. Such an approach would give contravening corporations an advantage over those that do take on the proper costs of compliance.

Imposing penalties for multiple contraventions

54 Each of the Contravening Statements identified in Schedule 1 and Schedule 2 to the Amended Statement of Agreed Facts and Admissions (which has been filed in Court and is available for inspection on the Court file) involves a separate contravention of s 127(1) of the ACL. Accordingly, the conduct for which penalties are sought gave rise to 27 distinct contraventions. Those contraventions were nonetheless closely factually interrelated.

Contraventions grouped as a 'course of conduct' for penalty purposes

55 Separate contraventions arising from separate acts ordinarily attract separate penalties. However, where separate acts, giving rise to separate contraventions, are inextricably interrelated, they should be viewed as a single 'course of conduct'. This provides one way of avoiding double-punishment for those parts of the legally distinct contraventions which involve overlap in wrongdoing.

56 In the present proceeding, it is appropriate to group the contraventions into two courses of conduct: those involving the Precaution Statements and those involving the No Incidents Statements. The grouping takes into account the overlapping nature of the contraventions, which involved the repetition of two categories of statements to consumers.

The 'totality' principle

57 As I have already indicated, where multiple separate penalties are to be imposed upon a particular wrongdoer, the totality principle is applied as a 'final check' to ensure that, overall, the penalty is appropriate and that the sum of the penalties imposed for several contraventions does not result in the total of the penalties exceeding what is proper having regard to the totality of the contravening conduct involved. In cases where the court believes that the cumulative total of the penalties to be imposed would be too low or too high, the court should alter the final penalties to ensure that they are 'just and appropriate'.

58 In this proceeding, grouping the penalties into two courses of conduct means that any relevant overlap is appropriately addressed, and the sum of the penalties involved does not exceed what is proper having regard to the totality of the contravening conduct. No totality reduction is

required beyond that reflected in the penalty agreed by the parties and as imposed by the Court in this proceeding.

Principles to be applied in setting a penalty of 'appropriate deterrent value'

59 A number of principles guide the determination of an appropriate penalty amount. These are explained briefly, followed by a consideration of the proposed penalty amounts having regard to all the circumstances of the contravening conduct.

Maximum penalties

60 The maximum penalty acts as a limit on the power conferred by s 224 of the ACL. However, the High Court confirmed in *Pattinson* that maximum penalties, or penalties approaching the maximum, are not limited exclusively to the worst categories of conduct as distinct from being balanced with all other relevant factors. The statutory maximum is but one matter which should be taken into account when ascertaining what penalty is appropriate in the circumstances.

61 Prior to 1 September 2018, the maximum penalty for a contravention by a company of s 127(1) of the ACL was $1.1 million. A total of six of the Contravening Statements occurred prior to 1 September 2018. This $1.1 million maximum applies to each of those contraventions.

62 This amounts to a statutory maximum penalty of $6.6 million.

63 From 1 September 2018, the maximum penalty for a contravention by a company of s 127(1) of the ACL is the greater of $10 million, three times the value of the benefit obtained by way of the conduct or, if the Court cannot determine the value of that benefit, 10% of the annual turnover of the body corporate in the 12-month period preceding the contravention. A total of 21 of the Contravening Statements occurred after 1 September 2018.

64 Mercedes made no gain from the Admitted Contravening Conduct.

65 Therefore, the measure of maximum penalty for the Admitted Contravening Conduct occurring after 1 September 2018 is $10 million per contravention. As such, the total maximum penalty for the Admitted Contravening Conduct, excluding the six which occurred before 1 September 2018, is $210 million.

66 The total maximum penalty for the Admitted Contravening Conduct is $216.6 million. Such a penalty of that amount would be oppressive, and well outside the appropriate range.

Identifying the various factors

67 Section 224(2) of the ACL requires the Court to have regard to 'all relevant matters' in determining the appropriate penalty. It specifies a number of (non-exhaustive) statutory factors to which the Court *must* have regard:

(a) the nature and extent of the wrongdoing and of any loss or damages suffered as a result of the act or omission;

(b) the circumstances in which the act or omission took place; and

(c) whether the respondent has previously been found by a court in proceedings under Ch 4 or Pt 5-2 of the ACL to have engaged in any similar conduct.

68 Numerous other relevant factors have been identified and applied, including:

(1) the size of the contravenor;

(2) the deliberateness of the contravention and the period over which it extended;

(3) whether the contravention arose out of the conduct of senior management of the contravenor or at some lower level;

(4) whether the contravenor has a corporate culture conducive to compliance with the regulatory regime applicable to it, as evidenced by educational programmes and disciplinary or other corrective measures in response to an acknowledged contravention;

(5) whether the contravenor has shown a disposition to co-operate with the ACCC in relation to the contravention;

(6) whether the contravenor has engaged in similar conduct in the past;

(7) the financial position of the contravenor;

(8) whether the contravening conduct was systematic, deliberate or covert; and

(9) in the context of considering the weight to be given to general and specific deterrence:

    (a) the extent of contrition;

    (b) whether the contravening company made a profit from the contraventions;

    (c) the extent of the profit made by the contravening company; and

    (d) whether the contravening company engaged in the conduct with an intention to profit from it.

Synthesising the factors

69 The reasoning process in deriving a penalty figure having regard to the various relevant factors is conventionally described as one of 'instinctive synthesis': *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; (2015) 327 ALR 540 at 543 [6] per Allsop CJ.. The Court undertakes a single evaluative task in which all considerations that rationally touch on or inform deterrence are taken into account and balanced. The process requires a weighing together of all relevant factors, rather than a sequential and mathematical process.

70 I agree with the parties that the following penalties for each course of conduct are appropriate:

(1) In respect of the Admitted Contravening Conduct comprising the Precaution Statements, a total penalty of $10.1 million with the Court imposing a penalty of $300,000 for the six Precaution Statements made prior to 1 September 2018 and $9,800,000 for the 17 Precaution Statements which occurred after 1 September 2018.

(2) In respect of the Admitted Contravening Conduct comprising the No Incident Statements, which all occurred after 1 September 2018, the Court imposes a total penalty of $2,400,000.

71 I agree with the parties on the following matters as submitted by them as to the reasons why those penalties are appropriate for the purposes of s 224(1) of the ACL:

- The maximum penalty in this case is $216.6 million. That is a matter to be taken into account when determining the appropriate penalty, but as I have said, is well outside the appropriate range.
- The penalty could not be seen as the acceptable cost of doing business and is an appropriate penalty to deter future contraventions.
- The Admitted Contravening Conduct was not deliberate, reckless, systematic, or covert and was a result of the conduct of five contractors engaged by Mercedes. Senior management of Mercedes were not involved in the Admitted Contravening Conduct.
- The contravenor's size and financial position is a relevant consideration in determining whether a civil penalty will achieve deterrence. In my view, the proposed penalties are appropriate having regard to the financial position of Mercedes as reflected in the evidence before the Court.

- Mercedes' conduct did not result in any financial or other loss to consumers. Mercedes completed the Recall. The consumers to which the Contravening Statements were made had the ATAIs in their vehicles replaced. The absence of any loss or damage also is a matter in mitigation. Nevertheless, even where there is no evidence of actual injury or harm to any affected person as the result of a contravention of the ACL, an appropriate penalty is warranted in order to deter suppliers from undermining the purpose and efficacy of recall notices.
- Mercedes has not previously been found to have relevantly (for the purposes of s 224 of the ACL) contravened the ACL or to have engaged in conduct similar to the contraventions of the ACL the subject of this proceeding.
- The Admitted Contravening Conduct resulted in no financial or other form of gain to Mercedes. There is no suggestion that Mercedes made a profit from the Admitted Contravening Conduct, or that it intended to make a profit via its contraventions. Mercedes spent in excess of $100 million in executing the Recall over a period of more than three years. In addition to the Takata Call Centre contractors, over a dozen staff members were involved in executing the Recall.
- Mercedes has fully cooperated with authorities which can properly reduce the penalty that would otherwise be imposed.

72 Mercedes has provided, in agreed terms, a court-enforceable undertaking to the ACCC to implement targeted compliance steps in relation to recall obligations, pursuant to s 87B of the CCA. The undertaking relevantly provides as follows:

(1) Within two weeks of judgment being received in the Federal Court proceedings, Mercedes-Benz must communicate the outcome of the Federal Court proceeding commenced by the ACCC against Mercedes-Benz and this Undertaking, to all relevant executives and staff, including call centre staff, and reinforce the importance of Mercedes-Benz's obligations in respect of product safety and in particular product safety recalls.

(2) Mercedes-Benz must communicate with all relevant executives and staff at least every 12 months to reinforce the content of, and importance of compliance with, Mercedes-Benz's obligations in respect of product safety, and in particular mandatory and voluntary product safety recalls.

(3) Where a product supplied by Mercedes-Benz is subject to a mandatory recall in Australia, Mercedes-Benz must ensure that:

(a) all relevant executives and staff including call centre staff of Mercedes-Benz are briefed on the content and requirements of the recall notice;

(b) all call centre materials, including any templates for phone and written communications with consumers, in relation to the recall are reviewed and approved by a senior Mercedes corporate counsel;

(c) a sample of actual phone and written communications with consumers (by call centre staff or other Mercedes staff or agents) about the recall are reviewed by a senior Mercedes corporate counsel; and

(d) regular updates are provided to relevant senior managers and senior Mercedes corporate counsel about the recall, including about compliance with the recall notice.

73 This compliance program will help to ensure Mercedes' ongoing compliance with the mandatory recall provisions in the ACL. Undertakings of this kind are a most important matter to take into account on penalty, because they mitigate the penalty which would otherwise be imposed to give effect to specific deterrence and ensuring compliance in the future.

DECLARATIONS

74 The Court has a wide discretionary power to make declarations under s 21 of the *Federal Court of Australia Act 1976* (Cth). The preconditions for declaratory relief are established in this proceeding. There is a real and not a hypothetical question, the ACCC has a real interest in raising it and there is a proper contradictor and real consequences.

75 Declaratory relief is appropriate in cases such as the present, where the parties seek to quell the real controversy between them and, in the case of the ACCC, to obtain a declaration from the Court expressing public disapproval of a breach of the law. Declaratory relief in this case also vindicates the ACCC's claim that Mercedes contravened the ACL, assists the ACCC in carrying out the duties conferred on it by the CCA in the future, assists in clarifying the law, and deters others from contravening the ACL.

COSTS

76 Mercedes has agreed to make a contribution of $100,000 towards the ACCC's costs of the proceeding, to be paid within 30 days of the date of the Court's order.

DISPOSITION

77 On 2 September 2022, for the above reasons I made the declaration and orders as follows:

THE COURT DECLARES THAT:

(1) Mercedes-Benz Australia/Pacific Pty Ltd ('**Mercedes-Benz Australia/Pacific**'), in respect of the compulsory Takata recall ('**Takata Recall**') imposed on suppliers of motor vehicles in Australia by the *Consumer Goods (Motor Vehicles with Affected Takata Airbag Inflators and Specified Spare Parts) Recall Notice 2018* ('**Takata Recall Notice**') failed to use attention-capturing high-impact language in communications to consumers in relation to the Affected Takata Airbag Inflators:

(a) on 23 occasions between 16 July 2018 and 17 March 2020, by making statements to consumers to the effect that Mercedes was undertaking the Takata Recall as a precaution; and

(b) on 4 occasions between 18 February 2020 and 17 March 2020, by making statements to consumers to the effect that Beta inflators in other manufacturers' vehicles had not had any faults or caused any accidents, injuries or deaths,

and in doing so failed to implement its Communication and Engagement Plan for contacting consumers as required by s 7(1)(a) of the Takata Recall Notice, in contravention of s 127(1) of the Australian Consumer Law ('**ACL**'), being Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

THE COURT ORDERS THAT:

(2) Mercedes-Benz Australia/Pacific pay to the Commonwealth of Australia pecuniary penalties under s 224(1) of the ACL, totalling $12.5 million, in respect of the contraventions of s 127(1) of the ACL referred to in Declaration 1 above, with such penalties to be paid within 30 days of the date of this order.

(3) Mercedes-Benz Australia/Pacific pay a contribution to the Australian Competition and Consumer Commission's costs in the amount of $100,000, to be paid within 30 days of this order.

I certify that the preceding seventy-seven (77) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Middleton.

Associate: 

Dated: 8 September 2022