

## SHORT MINUTES OF ORDER

### COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
List	General (Class Action)
Registry	Sydney
Case number	2017/353017

### TITLE OF PROCEEDINGS

Plaintiff	<b>Kimley Lloyd Whisson</b>
Defendant	<b>Subaru (Aust) Pty Ltd</b>

### PREPARATION DETAILS

Prepared for	<b>Kimley Lloyd Whisson, Plaintiff</b>
Legal representative	Damian Scattini
Legal representative reference	07435-00001
Contact name and telephone	Damian Scattini, 02 9146 3888
Contact email	Damianscattini@quinnemanuel.com

### TERMS OF ORDER MADE BY THE COURT BY CONSENT

**THE COURT NOTES** the ruling made by it on 7 May 2020 to sever the opt out notice (**Opt Out Notice**) and registration notice (**Registration Notice**), such that the Opt Out Notice is issued to group members in the manner and form set out in these orders below and the Registration Notice is issued to group members in a manner and form to be determined by the Court.

#### THE COURT ORDERS BY CONSENT THAT:

##### Opt Out

- 1 The orders entered 4 February 2020 as varied on 25 February 2020 are vacated.
- 2 Pursuant to s 162 the *Civil Procedure Act 2005* (NSW):
  - (a) 4.00 pm AEST on 31 August 2020 be fixed as the date by which a Group Member may opt out of the proceeding (**Opt-Out Deadline**);
  - (b) any Group Member who wishes to opt out of this proceeding must, on or before the Opt-Out Deadline, deliver to the Sydney Registry of the Supreme Court of New

South Wales, an Opt Out Notice in the form of Schedule A to the Notice (defined in order 5 below).

- 3 If, on or before the Opt-Out Deadline, the solicitors for any party receive a notice purporting to be an Opt Out Notice referable to this proceeding, the solicitors must file that notice with the Court, within three (3) days of receipt of the notice by the solicitors and the notice shall be treated as an Opt Out Notice received by the Court at the time it was received by the solicitors.
- 4 The solicitors for the parties have leave to inspect the Court file and to copy any Opt Out Notices filed.
- 5 Pursuant to sections 175 and 176(1) of the *Civil Procedure Act 2005* (NSW), the form and content of the notices to Group Members advising of the commencement of the proceedings and their right to opt out of the proceedings before the Out-Out Deadline annexed hereto and marked "Annexure A" (**Notice**) and "Annexure B" (**Abridged Notice**) are approved.
- 6 Pursuant to section 176(2) of the *Civil Procedure Act 2005* (NSW), the Notice and Abridged Notice be given to Group Members according to the following procedure:
  - (a) on or before 29 May 2020, the Sydney Registry of the Supreme Court of New South Wales will cause the Notice to be posted on the class action page of the website of the Supreme Court of New South Wales and will cause the Notice to be available for inspection at the Sydney Registry;
  - (b) on or before 29 May 2020, the Plaintiff will email a copy of the Notice to those Group Members who, at the date of these orders had provided their email address to Regency Funding Pty Ltd or Quinn Emanuel. The email shall comprise only the following text:

**Takata airbags class action**

Class Actions have been commenced in the Supreme Court of New South Wales against Nissan, Toyota, Subaru, Volkswagen, Mazda, Honda and BMW in relation to recalled Takata airbag/s (**Takata Class Actions**). You have previously provided your details to Quinn Emanuel and/or Regency (the Funder of the Takata Class Actions) and have requested to be kept informed of important updates regarding the Takata Class Actions. Important information about your right to opt out of the Takata Class Action(s) is available by clicking on the following link [a large file link with all notices will be inserted]. The content of this email has been approved by the Supreme Court of New South Wales;

- (c) on or before 29 May 2020, the Defendant will cause a link to the relevant webpage referred to in order 6(a) above to be placed on its website at [www.subaru.com.au/](http://www.subaru.com.au/), and to remain so displayed until the Opt-Out Deadline with the following text:

**Takata airbags class action**

A class action has been commenced in the Supreme Court of New South Wales against Subaru in relation to recalled Takata airbag/s. If, as at 27 February 2018, you owned or leased a Subaru vehicle affected by the recall, you may be a group member. Important information about your right to opt out of the class action is available here [insert link to relevant webpage referred to in order 6(a) above];

- (d) The Plaintiff will, acting in conjunction and cooperation with the Plaintiffs to proceedings (2018/00009565); (2017/00378526), (2017/340824); (2018/00009555); (2018/00042244) and (2018/00322648), cause a copy of the Abridged Notice to be published on or before 29 May 2020 in the following newspapers:

- i. The Sydney Morning Herald, New South Wales;
- ii. The Age, Victoria;
- iii. The Advertiser, South Australia;
- iv. The Courier Mail, Queensland;
- v. The Mercury, Tasmania;
- vi. Canberra Times, Australian Capital Territory;
- vii. The West Australian, Western Australia; and
- viii. NT News, Northern Territory.

- 7 The costs of and incidental to the procedure set out in order 6 above be initially borne by the Plaintiff but on the basis that those costs will subsequently fall to be dealt with by the Court as part of the costs of the proceeding.

**Amended Pleadings**

- 8 The Plaintiff has leave to file and serve his Third Further Amended Statement of Claim (**3FASOC**), in the form provided to the Defendant on 7 May 2020, on or before 22 May 2020.

- 9 Annexure A to the orders made 29 January 2019 be varied to include the following additional question common to the claims of group members in this proceeding:

**[21A]** *Can the Group Members have suffered any loss or damage, in the form of disappointment, distress and / or anxiety, attributable:*

- (a) *If the answer to question 10 is yes, to the Recalled Vehicle not being of merchantable quality;*
- (b) *If the answer to question 11 is yes, to their Recalled Vehicle not being of acceptable quality;*
- (c) *If the answer to question 15 is yes, to the misleading or deceptive conduct of the defendant;*

*in circumstances in which:*

- (d) *the Group Member has had the Recalled Takata Airbag in their Recalled Vehicle replaced at no cost for the replacement; or*
- (e) *the Group Member is able to have the Recalled Takata Airbag in their Recalled Vehicle replaced at no cost for the replacement?*

- 10 The Plaintiff to provide further particulars in relation to paragraph 7 of the 3FASOC, on or before 22 May 2020.
- 11 The Defendant to file and serve any Defence to the 3FASOC by 3 July 2020.

#### **Costs in respect of the Class Closure Application**

- 12 The Defendant is to serve any written submissions in relation to the costs of its Notice of Motion filed 8 August 2018, by 3 July 2020.
- 13 The Plaintiff is to serve any written submissions in response to the Defendant's submissions referred to in order 12 above by 17 July 2020.

#### **Other**

- 14 The parties have liberty to apply on 24 hours' notice, and generally.

#### **Case Management**

- 15 The matter be listed for further directions on 17 July 2020.

### **SIGNATURES**

#### **Plaintiff**

Kimley Lloyd Whisson, plaintiff consents.

Signature of legal representative  
Capacity  
Date of signature 21/05/2020

Solicitor



**Defendant**

Subaru (Aust) Pty Ltd, defendant consents.

Signature of legal representative  
Capacity  
Date of signature 21 May 2020

Solicitor



**SEAL AND SIGNATURE**

Court seal  
Signature  
Capacity  
Date made or given  
Date entered

**NOTICE**

Subject to limited exceptions, no variation of a judgment or order can occur except on application made within 14 days after entry of the judgment or order.

## ANNEXURE A

**Important Legal Notice  
Takata Airbag Class Action against Subaru**

**What is this Notice?**

This notice contains important information about the class action brought against Subaru on behalf of consumers affected by the Takata airbag recall (**Subaru Class Action**).

Please read this notice carefully. If you do not understand the notice you should contact the lawyers for the plaintiff in the class action, Quinn Emanuel, or seek independent legal advice.

**Why am I receiving this notice?**

On 22 November 2017, a class action was commenced in the Supreme Court of New South Wales (the **Court**) against Subaru (Aust) Pty Ltd (**Subaru**). On [date], the Court made orders requiring this Notice be published for the information of persons who may be members of the class on whose behalf the action is brought (the **Court Orders**).

If, as at **27 February 2018**, you owned or leased a Subaru vehicle, which has been subject to a safety recall arising from it being fitted with certain Takata airbag/s, you may be a Group Member in the Subaru Class Action (**Group Member**).

**Am I a Group Member of the Subaru Class Action?**

You are a Group Member in the Subaru Class Action if you meet both of the following criteria:

1. At any time during the period 1 January 2004 to 27 February 2018 you acquired a Subaru vehicle in Australia (either by purchasing a new or second-hand Subaru vehicle or by leasing a Subaru vehicle on hire or on hire-purchase):
  - (a) that was fitted with a front driver or passenger airbag manufactured or supplied by Takata Corporation (**Takata Airbag**); and
  - (b) which has been the subject of an airbag-related product safety recall; and
2. you did not sell or otherwise dispose of your Subaru vehicle prior to or on 27 February 2018.

You are not a Group Member of the Subaru Class Action, if:

- (a) you do not meet the criteria outlined above; or
- (b) you sold your Subaru vehicle at any time prior to (or on) 27 February 2018.

**What is a class action?**

A class action is an action that is brought by one person (the **Plaintiff** – in this case **Mr Kimley Lloyd Whisson**) on his or her behalf and on behalf of a group of people (**Group Members** – this may include you) against another person (the **Defendant** - in this case

**Subaru**), in circumstances where the Plaintiff and Group Members have similar claims against the Defendant.

Group members in a class action are not individually responsible for the legal costs associated with bringing the class action. In a class action, only the Plaintiff is responsible for the costs.

Group Members in a class action will be bound by any judgment or settlement entered into in that class action, unless they have **opted out** of the proceeding. This means that:

1. if the class action is successful, Group Members may be eligible for a share of any settlement monies or Court-awarded damages;
2. if the class action is unsuccessful, Group Members will be bound by that result; and
3. regardless of the outcome of the class action, Group Members will not be able to pursue their claim against the Defendant in separate legal proceedings unless they have opted out.

### **What is this Subaru Class Action about?**

In summary, the Plaintiff alleges that, in importing, marketing and supplying Subaru vehicles fitted with certain Takata airbag/s in Australia, Subaru:

1. failed to comply with the merchantable quality guarantee in the Trade Practices Act 1974 (Cth) or acceptable quality guarantee in the Australian Consumer Law;
2. engaged in misleading or deceptive conduct; and
3. engaged in unconscionable conduct.

Subaru denies those allegations and is defending the Subaru Class Action.

The Plaintiff seeks orders that Subaru be required to compensate Group Members for the impact that the alleged contraventions have had on Group Members. This includes compensation for:

1. the difference between the price paid for your Subaru vehicle and the 'true value' of that vehicle (to the extent that difference is attributable to the presence of a Takata airbag);
2. costs associated with the loss of use of your Subaru vehicle, if you elected not to drive your Subaru vehicle for a period due to the presence of a Takata airbag; and
3. expenditure incurred (or to be incurred in the future) as a result of the presence of a Takata airbag in your Subaru vehicle, including the time, cost and inconvenience of attending a Subaru service centre to have the airbags replaced (e.g. taxi or public transport fares or lost wages etc);
4. distress, disappointment and/or anxiety caused to you as a result of the alleged defect, urgent recall, and eventual replacement of a Takata airbag in your Subaru vehicle.

The Subaru Class Action is currently set down for trial commencing on 1 March 2021. The parties have been ordered by the Court to commence mediation discussions before 7 December 2020. You will shortly receive a separate notice inviting you to voluntarily provide information to the defendants in advance of the court-ordered mediation. That separate notice is not related to this opt out notice. It is foreshadowed here by way of update only.

You can access copies of key documents filed in connection with the Subaru Class Action on the website of the Supreme Court of New South Wales at [http://www.supremecourt.justice.nsw.gov.au/Pages/sco2\\_classaction/Toyota-Australia-Class-Action.aspx](http://www.supremecourt.justice.nsw.gov.au/Pages/sco2_classaction/Toyota-Australia-Class-Action.aspx) or visiting the Sydney Registry of the Supreme Court of New South Wales.

### **What is Opt Out?**

In a class action, the Plaintiff does not need to seek the consent of Group Members to commence a claim on their behalf. Group Members can cease to be a member, however, by **opting out** of the class action. The deadline to opt out of the Subaru Class Action is **4:00pm AEST, on 31 August 2020** (the **Opt-Out Deadline**). Unless you opt out before this deadline, you will be bound by any outcome reached in the Subaru Class Action

### **What should I do if I WANT to be a group member in the Subaru Class Action?**

You do not need to do anything in response to this notice if you are already a Group Member and meet the criteria outlined above.

### **What should I do if I DO NOT WANT to be a group member in the Subaru Class Action?**

If you do not wish to remain as a Group Member in the Subaru Class Action (and therefore preserve your right to pursue a separate claim against Subaru), you must opt out of the class action by completing and submitting an “**Opt Out Notice**” (set out at **Schedule A** to this Notice) to the Sydney Registry of the NSW Supreme Court before the Opt-Out Deadline.

If you opt out of the Subaru Class Action:

- (a) you will not be affected by any orders made in the Subaru Class Action;
- (b) you will not be permitted to participate in the distribution of any damages awarded or settlement outcome in the Subaru Class Action;
- (c) you will be able to commence separate legal proceedings in relation to the matters the subject of the Subaru Class Action on your own behalf if you so wish.

Opt Out Notices **must** be submitted directly to the Sydney Registry of the NSW Supreme Court in hard copy (at the address appearing on the Opt Out Notice) before the **Opt-Out Deadline, 4:00 pm AEST on 31 August 2020**.

Opt Out Notices received after this time will not be accepted, and you will remain as a Group Member in the Subaru Class Action.



**What happens if I do nothing?**

As explained above, if you do nothing you will remain a Group Member, provided you meet the criteria outlined above. As a Group Member, you will be bound by any judgment or settlement entered into in that class action.

**IMPORTANT REMINDER REGARDING THE TAKATA AIRBAG RECALL**

The Subaru Class Action is **not** a means for Group Members to get their recalled Takata airbags replaced. If you have a vehicle that has been recalled because it is fitted with a Takata Airbag(s) and you have not had the airbag(s) replaced, please urgently contact your vehicle dealer.

Getting your airbag replaced in accordance with the recall will not affect your ability to participate in the Subaru Class Action.

More details about the Takata airbag recall and how you can contact your nearest Subaru dealer can be found at: [www.subaru.com.au/takata-recall](http://www.subaru.com.au/takata-recall). If you are unsure whether your vehicle is affected, you can check at: [www.ismyairbagsafe.com.au](http://www.ismyairbagsafe.com.au).

**SCHEDULE A**

Form 115 (version 2)  
UCPR 58.2

**OPT OUT NOTICE****COURT DETAILS**

Court	Supreme Court of New South Wales
Division	Equity
List	General (Class Action)
Registry	Sydney Registry
Case number	2017/353017

**TITLE OF PROCEEDINGS**

Plaintiff	<b>Kimley Lloyd Whisson</b>
Defendant	<b>Subaru (Aust) Pty Ltd</b>

**FILING DETAILS**

Filed for	<b>[name]</b> , person opting out of representative proceedings
Legal representative (if any)	[solicitor] [firm]
Legal representative reference	[reference number]
Contact name and telephone	[name] [telephone]
Contact email	[email address]

**OPT OUT NOTICE**

Name of person opting out

Address of person opting out

I, a group member in these representative proceedings, opt out of the proceedings.

I understand that in opting out:

- 1 I forego the right to share in any relief obtained by the representative party in the representative proceedings;
- 2 I am not entitled to receive any further notification about the conduct or disposition of the proceedings; and
- 3 To the extent that I have a claim against the defendant(s), any limitation period suspended by the commencement of the representative proceedings has recommenced to run.

**SIGNATURE**

Signature of legal representative

Signature of or on behalf of  
person opting out if not legally  
represented

Capacity

[eg solicitor, authorised officer of person opting out,  
person opting out]

Date of signature

**NOTICE TO PERSON OPTING OUT**

You must, within the time specified in the notice to group members file this form in the registry of the court at the address below.

**REGISTRY ADDRESS**

Street address	Supreme Court of NSW Law Courts Building, Queen's Square 184 Phillip Street Sydney NSW 2000
Postal address	Supreme Court of NSW GPO Box 3 Sydney NSW 2001
Telephone	1300 679 272

## ANNEXURE B

**IMPORTANT LEGAL NOTICE**  
**TAKATA AIRBAG CLASS ACTIONS**  
**VEHICLES RECALLED BY BMW, HONDA, MAZDA, NISSAN, SUBARU, TOYOTA,**  
**LEXUS & VOLKSWAGEN**

**What is this Notice?**

The Supreme Court of New South Wales has ordered that this notice be published to persons who may be group members in one (or more) of the respective class actions commenced against the manufacturers and/or suppliers of **BMW, Honda, Mazda, Nissan, Subaru, Toyota, Lexus and Volkswagen (the Defendants)** branded vehicles that are, or will be, the subject of a Takata airbag safety recall (**Takata Airbag Class Actions**). The purpose of this notice is to inform group members of the Takata Airbag Class Actions of their right to opt out of the class action and cease to be a group member of the Takata Airbag Class Actions. If you own, owned, or lease a recalled vehicle fitted with a Takata airbag/s, you should read this notice carefully as it contains important information that may affect your legal rights.

**What are the Takata Airbag Class Actions?**

The Plaintiffs in the respective Takata Airbag Class Actions allege that, in marketing and/or supplying consumers with vehicles fitted with certain Takata airbag/s in Australia, the Defendants failed to comply with certain sections of the *Trade Practices Act 1974* (Cth) or the *Australian Consumer Law* and engaged in misleading or deceptive conduct and unconscionable conduct. The Plaintiffs allege that, as a result of the Defendants' conduct, group members have suffered loss. The Defendants deny those allegations and are defending the class actions.

**Are you a Group Member?**

You are a group member of one (or more) of the Takata Airbag Class Actions if you satisfy the following requirements:

1. at any time during the Relevant Period (set out below for each vehicle make), you acquired a **BMW, Honda, Lexus, Mazda, Nissan, Subaru, Toyota or Volkswagen** vehicle in Australia that was fitted with a front driver or passenger airbag manufactured or supplied by Takata Corporation, and which has been the subject of a safety recall;  
and
2. you still owned (or leased) that vehicle on 27 February 2018 (or 31 May 2018 for Volkswagen vehicles).

The Relevant Period for the respective class actions are as follows:

<b>Make</b>	<b>Relevant Period</b>
<b>1. BMW</b>	1 January 1999 to 27 February 2018
<b>2. Honda</b>	1 January 2001 to 27 February 2018
<b>3. Lexus</b>	1 November 2000 to 27 February 2018
<b>4. Mazda</b>	1 January 2002 to 27 February 2018
<b>5. Nissan</b>	1 January 2000 to 27 February 2018
<b>6. Subaru</b>	1 January 2004 to 27 February 2018
<b>7. Toyota</b>	1 November 2000 to 27 February 2018
<b>8. Volkswagen</b>	1 November 2000 to 31 May 2018

### **Can I opt out of the class actions?**

Yes. If you do not wish to remain a Group Member (and therefore preserve your right to pursue a separate claim against the manufacturer or supplier), then you **must** opt out by completing and submitting an “Opt Out Notice” by **4pm AEST on 31 August 2020**. Copies of the Opt Out Notice are available on the NSW Supreme Court website. If you opt out, you will not be entitled to participate in any settlement approved or judgment awarded by the Court in the proceedings.

If you wish to remain a Group Member, you do not need to take any action at this time.

### **More information**

Please go to <http://www.supremecourt.justice.nsw.gov.au> under the banner “Class Actions” for more information about the Takata Airbags Class Actions.

#### **Important reminder regarding Takata Airbag Recall**

If you have a vehicle that has been recalled because it is fitted with a Takata Airbag(s) and you have not had the airbag(s) replaced, please urgently contact your vehicle dealer.

More information about the recall is available at [www.ismyairbagsafe.com.au](http://www.ismyairbagsafe.com.au)