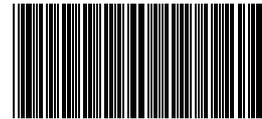




Filed: 17 September 2018 11:02 AM



D00011JC9L

Defence to Amended Statement of Claim

COURT DETAILS

Court	Supreme Court of NSW
Division	Equity
List	Equity General
Registry	Supreme Court Sydney
Case number	2017/00340824

TITLE OF PROCEEDINGS

First Plaintiff	Louise Haselhurst
First Defendant	Toyota Motor Corporation Australia Limited trading as Toyota Australia ABN 64009686097

FILING DETAILS

Filed for	Toyota Motor Corporation Australia Limited trading as Toyota Australia , Defendant 1
Legal representative	JASON LAWRENCE BETTS
Legal representative reference	
Telephone	02 9225 5000

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Defence to Amended Statement of Claim (FINAL Defence to SFASOC - 17 September 2018.pdf)

[attach.]

Form 7A (version 5)
UCPR 14.3

DEFENCE TO SECOND FURTHER AMENDED STATEMENT OF CLAIM

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
List	General
Registry	Sydney
Case number	2017/340824

TITLE OF PROCEEDINGS

Plaintiff	Louise Haselhurst
Defendant	Toyota Motor Corporation Australia Limited (ACN 009 686 097)

FILING DETAILS

Filed for	Toyota Motor Corporation Australia Limited, defendant
Filed in relation to	Plaintiff's <u>Second</u> Further Amended Statement of Claim
Legal representative	Jason Betts, Herbert Smith Freehills
Legal representative reference	82657805
Contact name and telephone	Jason Betts, 02 9225 5323
Contact email	Jason.Betts@hsf.com

PLEADINGS AND PARTICULARS

PRELIMINARY MATTERS

- A. Headings are used in this Defence for convenience only. They do not form part of the Defendant's response to the Second Further Amended Statement of Claim filed on 7 May 4 September 2018 (**Claim**).
- B. The Defendant adopts the defined terms used in the Claim for convenience only, and by doing so does not admit any factual assertions contained in, or in any way implied by, any defined term used in the Claim and repeated in this Defence.
- C. In this Defence, the Defendant uses 'TMCA' to refer to Toyota Motor Corporation Australia Limited (ACN 009 686 097).

In answer to the allegations within the Claim, TMCA says as follows:

1 In answer to paragraph 1, TMCA:

- a. admits that the Plaintiff brings this proceeding as a representative proceeding in her own right and on behalf of the Group Members;
- b. says that to the extent the Plaintiff uses the defined term 'Takata Airbag' in this paragraph and otherwise in her Claim:
 - i. TMCA does not admit any factual assertions contained in, or in any way implied by, that defined term by responding to it or repeating it in this Defence;
 - ii. adopts the defined term 'Takata Airbag Inflator' rather than 'Takata Airbag' to describe the airbag inflators manufactured by Takata Corporation or TK Holdings, Inc. or their related entities (together, 'Takata') which formed part of Takata airbag modules and ultimately Takata airbags, which were installed in those Toyota or Lexus motor vehicles that have been the subject of an airbag-related product safety recall listed in paragraphs 11 and 11A of the Claim;
- c. says that to the extent the Plaintiff uses the defined term 'Defective Vehicle' in this paragraph and otherwise in her Claim:
 - i. TMCA does not admit any factual assertions contained in, or in any way implied by, that defined term by responding to it or repeating it in this Defence;
 - ii. adopts the defined term 'Recalled Vehicle' rather than 'Defective Vehicle' in this Defence to describe those Toyota or Lexus motor vehicles fitted with a Takata Airbag Inflator within some of their respective airbag(s), which have been the subject of an airbag-related product safety recall listed in paragraphs 11 and 11A of the Claim; and
- d. says that the 'future recalls' pleaded at paragraph 1(b)(ii)(II) of the Claim form part of the Compulsory Recall pleaded at paragraph 11A of the Claim;
- e. otherwise does not admit paragraph 1.

2 In answer to paragraph 2, TMCA:

- a. ~~denies~~ admits sub-paragraph 2(a) and:

- i. says that on or about 13 January 2012, the Plaintiff purchased a Toyota Corolla Ascent 1.8L Auto Sedan, model number ZRE152R – AEPDKQ;
 - ii. says that where it responds to the defined term 'Plaintiff's Vehicle' in this Defence, it does so on the basis that the 'Plaintiff's Vehicle' is the vehicle described in (i) above; and
 - iii. says that the Plaintiff's Vehicle had a production date of 10 November 2011;
- b. in answer to sub-paragraph (b):
- ~~i. says that the Plaintiff purchased the Plaintiff's Vehicle from Gillen Motors Pty Ltd trading as 'Truscotts' at 151 Parramatta Road, Five Dock, New South Wales; and~~
 - ii. ~~otherwise denies~~ admits the allegations in sub-paragraph (b);
- c. says that the Plaintiff paid \$24,600 including accessories, fees and taxes for the Plaintiff's Vehicle, and on that basis admits the allegations in sub-paragraph (c);
- d. does not admit the allegations in sub-paragraph (d);
- e. admits the allegations in sub-paragraph (e);
- f. ~~does not admit~~ denies the allegations in sub-paragraph (e1);
- g. does not admit the allegations in sub-paragraph (e2); and
- h. does not plead to sub-paragraph (f) as it contains no allegations against it.

3 TMCA does not admit the allegations in paragraph 3.

4 In answer to paragraph 4, TMCA:

- a. admits the allegations in sub-paragraphs (a), (b), (e), (f) and (g);
- b. in answer to sub-paragraph (c):
 - i. says that the Defendant did not manufacture any of the Recalled Vehicles; and
 - ii. otherwise admits the allegations in the sub-paragraph;
- c. denies the allegations in sub-paragraph (d);
- d. in answer to sub-paragraph (h):

- i. says that it did supply some Recalled Vehicles in the manner alleged;
and
- ii. otherwise does not admit the allegations in the sub-paragraph.

5 TMCA admits the allegations in paragraph 5 that insofar as TMCA supplied the Recalled Vehicles, it did so in trade or commerce, but TMCA otherwise does not admit paragraph 5.

6 TMCA admits the allegations in paragraph 6.

The Recalled Vehicles

7 In answer to paragraph 7, TMCA:

- a. says, in general answer to the paragraph, that:
 - i. not all Toyota or Lexus motor vehicles fitted with a front driver or passenger airbag manufactured and supplied by Takata are subject to airbag-related product safety recalls;
 - ii. it denies the allegations in the paragraph to the extent they apply to Toyota or Lexus motor vehicles which are not subject to any of the airbag-related safety recalls pleaded in paragraphs 11 and 11A of the Claim;
- b. in answer to sub-paragraph 7(a):
 - i. says that the Takata Airbag Inflators which are the subject of the airbag-related product safety recalls pleaded in paragraphs 11 and 11A of the Claim use non-desiccated 'phase stabilised' ammonium nitrate (**PSAN**) as a propellant in the airbag inflator;
 - ii. denies that the use of PSAN as a propellant in the Takata Airbag Inflator, in and of itself, has the consequences alleged in the sub-paragraph;
 - iii. says that certain of the Takata Airbag Inflators may not operate as intended if the propellant within the inflator has degraded as a result of long term exposure to persistent high absolute humidity and high temperatures as a result of the following factors:
 - 1. moisture exposure to the propellant which may have occurred during the assembly or manufacture at the Takata plant in

Monclova, Mexico in the period between 4 October 2001 and 31 October 2002;

2. moisture intrusion as a result of a compromise of the integrity of the sealing subsystem around the airbag inflator;
3. improper propellant density during the manufacturing process due to improper use of machinery and lack of quality controls;
4. missing propellant wafers, or missing or misplaced components, of the inflator leading to cracking or other degradation of propellant;

Particulars

Particulars will be provided following expert evidence.

- iv. says that the Takata Airbag Inflators which are affected by the factors mentioned in sub-paragraph (b)(iii) may have the potential to rupture during airbag deployment and propel metallic fragments into contact with an occupant, resulting in possible injury or death;
- v. says that the Takata Airbag Inflators manufactured by Takata at the plant in Monclova, Mexico in the period between 4 October 2001 and 31 October 2002 which formed part of the following airbags installed within the following models of motor vehicles sold by TMCA in Australia:
 1. the front driver airbag fitted in the Echo NCP10 and NCP13 models which were produced in the period from 19 December 2002 to 18 December 2003;
 2. the front driver airbag fitted in the RAV4 ACA 22 and ACA 23 models which were produced in the period from 29 July 2003 to 19 August 2003;
 3. the front passenger airbag fitted in the Corolla ZZE122 model which were produced in the period from July 2001 to November 2003;
 4. the front passenger airbag fitted in the Avensis Verso ACM20 model which were produced in the period from October 2001 to May 2003; and

5. the front passenger airbag fitted in the SC430 UZZ40 and FN48Y models which were produced in the period from January 2001 to May 2003;
- vi. says that the airbag inflators identified in sub-paragraph (b)(v) have all been the subject of a product safety recall and these inflators are referred to as the "**Alpha Inflators**";
- vii. says that all other Takata airbag inflators which are the subject of the airbag inflator related product safety recalls pleaded in paragraphs 11 and 11A are referred to as the "**Beta Inflators**";
- viii. otherwise does not admit the allegations in sub-paragraph 7(a);
- c. admits the allegations in sub-paragraph 7(b);
- d. admits that the Takata Airbag Inflators designed, developed and manufactured by Takata and distributed to auto manufacturers throughout the world have:
 - i. caused approximately 100 million vehicles to be the subject of product safety recalls worldwide, with more than 4 million vehicles being the subject of product safety recalls in Australia;
 - ii. caused injuries and deaths as a result of field ruptures which have caused metallic fragments to come into contact with vehicle occupants, but no deaths have occurred in connection with ruptures of passenger airbags; and
- e. otherwise does not admit the allegations in sub-paragraphs 7(c) to (f).

8 In answer to paragraph 8, TMCA:

- a. admits the allegations in paragraph 8;
- b. says that as at ~~7 May 2018~~, ~~approximately 76% of Alpha Inflators and approximately 74% of Beta Inflators within the Recalled Vehicles have been replaced~~ 14 September 2018, approximately 81% of Alpha Inflators and approximately 86% of Beta Inflators that were originally installed within the Recalled Vehicles have been replaced;
- c. says that it is continuing to recall Recalled Vehicles and will complete the recall of all Recalled Vehicles as soon as practicable and in any event by 31 December 2020 in accordance with the *Consumer Goods (Motor Vehicles*

with Affected Takata Airbag Inflators and Specified Spare Parts) Recall Notice 2018;

- d. says that additional product recall campaigns are planned to commence in 2019 in accordance with the *Consumer Goods (Motor Vehicles with Affected Takata Airbag Inflators and Specified Spare Parts) Recall Notice 2018*.

9 [Intentionally left blank] In answer to paragraph 9, TMCA:

- a. ~~says that Lexus SC430 vehicles manufactured after May 2003 are not the subject of a safety recall pleaded in the Claim; and~~
- b. ~~otherwise admits the allegations in paragraph 9.~~

10 In answer to paragraph 10, TMCA:

- a. admits the allegations in sub-paragraphs 10(a), (b) and (d);
- b. in answer to sub-paragraph 10(c):
- i. repeats its answer to paragraphs 7 and 8;
 - ii. denies that the Recalled Vehicles with the Takata Airbag Inflators which have been replaced as pleaded in paragraph 8 above are not safe to drive or expose the driver and any passengers to danger or harm;
 - iii. insofar as the Recalled Vehicles which contain Beta Inflators are less than 6 years old and have not been exposed to long term persistent high absolute humidity and high temperatures, TMCA denies that those vehicles are not safe to drive or expose the driver and any passengers to unnecessary danger or harm; and
 - iv. otherwise does not admit the allegations in the sub-paragraph.

11 In answer to paragraph 11, TMCA:

- a. says that it notified the Commonwealth Minister pursuant to section 128 of the ACL that it was voluntarily taking action to recall the vehicles subject to the product safety recalls described in the paragraph;
- b. says that the ACCC gave the product safety recalls the Product Safety Recall Numbers described in the paragraph;
- c. says that the dates on which the Plaintiff pleads that each product safety recall was issued are the dates when those product safety recalls were

originally published by the ACCC, not the dates when TMCA originally made a notification pursuant to section 128 of the ACL;

- d. says that to the extent that the text of a product safety recall on the Product Safety Australia website was amended, those amendments were not made by TMCA and TMCA does not presently know when those amendments were made; and
- e. ~~says that there have been amendments to some of the product safety recalls which have not been pleaded by the Plaintiff;~~

Particulars

~~TMCA will provide further particulars to the Plaintiff by way of letter.~~

- f. ~~says that in answer to sub-paragraph (m)(iii), Product Recall Australia Number 2018/16536 as originally issued did not include the language pleaded by the Plaintiff, and that language was included in a subsequent version of that product safety recall; and~~
- g. otherwise admits the allegations in the paragraph.

11A. TMCA admits the allegations in paragraph 11A.

12 In answer to paragraph 12, TMCA:

- a. admits the allegations in sub-paragraph 12(a);
- b. in answer to sub-paragraph 12(b):
 - i. admits that it held each of the Recalled Vehicles out as being safe to drive and safe for passengers, until such time as it issued the product safety recalls pleaded in paragraphs 11 and 11A of the Claim;
 - ii. says that, since it issued the product safety recalls pleaded in paragraphs 11 and 11A of the Claim, TMCA has held the Recalled Vehicles out as being subject to the product conditions identified in the product safety recalls;
 - iii. says that in addition to publishing the product safety recalls, TMCA has taken a number of other steps to communicate issues identified in product safety recalls to customers, including but not limited to:

1. customer contact campaigns, including extensive letter campaigns and initiatives to source additional customer contact details;
2. outbound telephone calls to owners of vehicles fitted with Alpha Inflators;
3. dealer engagement campaigns, including through correspondence issued to dealer principals, meetings, mandatory video messages for dealer personnel, and instructions to dealers to contact customers within a dealer's geographical area;
4. the issuing of media statements, and responding to media enquiries;
5. issuing press advertisements in national and local media;
6. issuing service bulletins to State and Territory based motor trade associations and significant fleet operators;
7. the establishment of a dedicated recall campaign helpline;
8. the establishment of a dedicated recall website.

Particulars

Further particulars will be provided following evidence.

- iv. otherwise denies the allegations in the sub-paragraph; and
- c. denies the allegations in sub-paragraph (c).

- 13 [intentionally left blank]
- 14 [intentionally left blank]
- 15 [intentionally left blank]
- 16 [intentionally left blank]
- 17 [intentionally left blank]
- 18 [intentionally left blank]
- 19 [intentionally left blank]
- 20 [intentionally left blank]
- 21 [intentionally left blank]

22 [intentionally left blank]

Failure to supply goods of merchantable quality – TPA s74D

23 In answer to paragraph 23, TMCA:

- a. repeats its answer to paragraphs 7, 8, 10(b) and 10(c);
- b. denies that all Recalled Vehicles were not of merchantable quality;
- c. says that insofar as the Claim brings an action that a Recalled Vehicle was not of merchantable quality within the meaning of section 74D of the TPA, and that action has not been commenced within 10 years after the time of the first supply to a consumer of the Recalled Vehicle within the meaning of s 74J(3) of the TPA, s 74J(3) of the TPA operates as a defence to the action;
- d. says that insofar as an action relates to vehicles fitted with Alpha Inflators, specifically, as far as TMCA is presently aware, and that action has been commenced more than 10 years after the time of the first supply of each of the relevant vehicles to a consumer, and s 74J(3) of the TPA operates as a defence to the action; and
- e. otherwise does not admit the allegations in the paragraph.

24 In answer to paragraph 24, TMCA:

- a. denies the allegations in the paragraph;
- b. repeats its answer to paragraph 8;
- c. says that:
 - i. TMCA has recalled or intends to recall the Recalled Vehicles in order to replace the relevant driver or passenger airbag equipped with a Takata Airbag Inflator;
 - ii. it would be unreasonable if a Group Member did not respond to the recall within a reasonable period of time in order to have any such Takata Airbag Inflator in the Recalled Vehicles replaced;
 - iii. to the extent a Group Member has not (or does not) ~~reasonably~~ respond to such a recall, within a reasonable time, any loss they suffer in the meantime will not have been caused by TMCA and they have (or will have) failed to mitigate any loss or damage they have suffered;
 - iv. to the extent a Group Member has not (or does not) reasonably respond to a recall, TMCA remains (or will remain) ready and willing to

replace the airbag in their vehicle as and when that Group Member responds to the recall, subject to the availability of replacement inflators at the time of a response;

and

- d. says that insofar as any action pursuant to section 74D of the TPA has not been commenced within 3 years after the day on which the cause of action first accrued for the purposes of s 74J(1) of the TPA, then any claim for relief is barred; and
- e. repeats paragraph 23(c) and (d) and says that insofar as any action pursuant to section 74D has not been commenced within 10 years after the time of the first supply of a consumer of the Recalled Vehicle for the purposes of s 74J(3) of the TPA, then any claim for relief is barred.

25 TMCA denies the allegations in paragraph 25.

26 [intentionally left blank]

27 [intentionally left blank]

28 [intentionally left blank]

29 [intentionally left blank]

Failure to supply goods of acceptable quality – ACL s 54

30 In answer to paragraph 30, TMCA:

- a. repeats its response to paragraphs 3(e), 4(h) and 5 of the Claim; and
- b. admits that if, on or after 1 January 2011, a person supplies, in trade or commerce, goods to a consumer and the supply does not occur by way of auction, there is a guarantee that the goods are of acceptable quality pursuant to section 54 of the ACL; and
- c. otherwise does not admit the allegations in the paragraph.

31 In answer to paragraph 31, TMCA:

- a. repeats its answer to paragraphs 7, 8, 10(b), 10(c), 11 and 11A of the Claim;
- b. denies that all Recalled Vehicles were not of acceptable quality;
- c. otherwise does not admit the allegations in the paragraph.

32 In answer to paragraph 32, TMCA:

- a. repeats its answer to paragraph 31 of the Claim;
- b. otherwise does not admit the allegations in the paragraph.

33 In answer to paragraph 33, TMCA:

- a. denies the allegations in the paragraph;
- b. repeats its answer to paragraph 8;
- c. says that:
 - i. TMCA has recalled or intends to recall the Recalled Vehicles in order to replace the relevant driver or passenger airbag equipped with a Takata Airbag Inflator;
 - ii. it would be unreasonable if a Group Member did not respond to the recall within a reasonable period of time in order to have any such Takata Airbag Inflator in the Recalled Vehicles replaced;
 - iii. to the extent a Group Member has not (or does not) reasonably respond to such a recall, within a reasonable time, any loss they suffer in the meantime will not have been caused by TMCA and they have (or will have) failed to mitigate any loss or damage they have suffered;
 - iv. to the extent a Group Member has not (or does not) reasonably respond to a recall, TMCA remains (or will remain) ready and willing to replace the Takata Airbag Inflator in their vehicle as and when that Group Member responds to the recall, subject to the availability of replacement airbag inflators at the time of a response;
- d. says that the Plaintiff has been notified by letter of the recall of the Plaintiff's Vehicle, and on about 10 May 2018 the Takata Airbag Inflator was replaced in the Plaintiff's Vehicle ~~but as at the date of this pleading TMCA has no record of the Plaintiff having taken steps to enable TMCA to cause the Takata Airbag Inflator within the Plaintiff's Vehicle to be replaced;~~

Particulars

The correspondence with the Plaintiff included:

On 31 May 2017, TMCA sent the Plaintiff a letter advising her that a safety recall campaign had been launched regarding the Takata Airbag Inflator in the front passenger airbag in her vehicle and that replacement parts for the front passenger

airbag inflator in her vehicle were being prepared and that she would be contacted once the relevant parts became available.

On 11 December 2017, TMCA sent the Plaintiff a letter advising her that the relevant parts for her vehicle had become available and urged her to contact a Toyota Dealer without delay.

In or around May 2018, TMCA has recently issued a subsequent letter to the Plaintiff advising that it is important she immediately contact her closest/preferred Toyota Dealer or the Toyota Recall Campaign Hotline to arrange to have her Takata Airbag Inflator replaced.

On 10 May 2018, the passenger side airbag in the Plaintiff's vehicle was replaced at the Phil Gilbert Motor Group dealership in Croydon, NSW.

- e. says that to the extent that the Plaintiff did not take steps in a timely manner to have her Takata Airbag Inflator replaced by TMCA, any loss suffered in the meantime was not caused by TMCA and the Plaintiff's conduct in failing to take any steps to enable TMCA to cause the Takata Airbag Inflator within the Plaintiff's Vehicle to be replaced is an unreasonable failure to mitigate any loss or damage she may have suffered;
- ~~f. says that TMCA is ready and willing to replace the Takata Airbag Inflator in the Plaintiff's Vehicle as and when she responds to the notifications which have been sent to her regarding the recall;~~
- g. says that insofar as any action pursuant to s 54 of the ACL has not been commenced within 3 years after the day on which the affected person first became aware, or ought reasonably to have become aware, that the guarantee to which the action relates has not been complied with for the purposes of s 273 of the ACL, then any claim for relief is time barred;
- h. says that the Group Members including the Plaintiff may not recover damages by action against TMCA for any non-compliance with the Acceptable Quality Guarantee (which is not admitted) because any such non-compliance was only because of an act, default or omission of, or representation made by, Takata, for the purposes of section 271(2)(a) of the ACL.

Particulars

The particulars include but are not limited to Takata's conduct in being the person with responsibility for designing, developing, producing and selling the Takata airbag inflators and falsifying reports on design and production testing, as well as omitting to disclose safety issues with Takata Airbag Inflators which had been identified by Takata. Further particulars will be provided following evidence.

34 [intentionally left blank]

35 [intentionally left blank]

36 [intentionally left blank]

37 [intentionally left blank]

38 [intentionally left blank]

39 [intentionally left blank]

40 [intentionally left blank]

41 [intentionally left blank]

Misleading or deceptive conduct

42 In answer to paragraph 42, TMCA:

- a. denies the allegations in paragraph 42;
- b. repeats its answer to paragraphs 4(d), 4(g), 4(h), 7, 8, 10(b), 10(c), 11, 11A and 12;
- c. says that:
 - i. to the extent that the Plaintiff pleads contraventions of section 53(a) of the TPA and/or section 29(1)(a) of the ACL, those provisions require the identification of a false or misleading representation that goods are, relevantly, of a particular standard, quality or grade;
 - ii. by letter dated 13 April 2018, TMCA requested further and better particulars of the allegedly false or misleading representation(s) that goods are of a particular standard, quality or grade, and the particular standard, quality or grade which TMCA allegedly represented the vehicles to have;
 - iii. by letter dated 20 April 2018, the Plaintiff did not respond to that request for further and better particulars, but identified that the conduct

alleged to be false or misleading was *'(t)he fact that the Defendant marketed, distributed and promoted Defective Vehicles that were fitted with one or more Takata airbags in the Australian market, therefore representing they were safe and free from defects'* (**Alleged Representation**);

- iv. the Alleged Representation does not identify any false or misleading representation(s) that goods are of a particular standard, quality or grade, nor the particular standard, quality or grade relied upon for the purposes of section 53(a) of the TPA and/or section 29(1)(a) of the ACL; and
 - v. no reasonable cause of action for contravention of s 53 of the TPA or s 29 of the ACL is disclosed in the Claim; and
- d. says that TMCA's conduct in holding the vehicles out as being safe to drive was a representation or statement of opinion for which TMCA had a reasonable basis.

Particulars

The particulars include but are not limited to TMCA directly or indirectly relying on reports and other information provided by Takata involving the testing and performance of the relevant airbag inflators, including but not limited to:

- (i) design testing, including of the relevant inflators, which is undertaken in order to ensure the relevant inflators meet Takata's specifications and quality control procedures and standards, as well as vehicle manufacturer's technical specifications, including performance, safety and durability specifications, with the information from that testing then being set out in Design Validation reports or 'DV Reports';
- (ii) production testing, including of the relevant inflators, where components assembled on a mass production line are tested to ensure that the production process established and utilised by Takata results in inflators that meet Takata's specifications and quality control procedures and standards, as well as vehicle manufacturer's technical specifications, including performance,

safety and durability specifications, with the information from that testing set out in Product Validation reports or 'PV reports';

(iii) additional testing when design changes, or problems arose, during design testing and production testing, with the information generated from such testing set out in 'delta DV reports' and 'delta PV reports';

(iv) ongoing, regular testing following mass production of certain inflators to confirm that relevant inflators were manufactured in accordance with Takata specifications and quality control procedures and standards, and vehicle manufacturer technical specifications, known as lot acceptance testing or 'LAT data'.

TMCA will provide further particulars following evidence in these proceedings.

42A In answer to paragraph 42A, TMCA:

- a. repeats its answer to paragraph 42; and
- b. otherwise denies the allegations in the paragraph.

42B In answer to paragraph 42B, TMCA:

- a. repeats its answer to paragraphs 42 and 42A; and
- b. otherwise denies the allegations in the paragraph;
- a. says that:
 - i. to the extent that the Plaintiff pleads contraventions of section 53(a) of the TPA and/or section 29(1)(a) of the ACL, those provisions require the identification of a false or misleading representation that goods are, relevantly, of a particular standard, quality or grade;
 - ii. paragraph 42A does not identify any false or misleading representation(s) that goods are of a particular standard, quality or grade, nor the particular standard, quality or grade relied upon for the purposes of section 53(a) of the TPA and/or section 29(1)(a) of the ACL; and
 - iii. no reasonable cause of action for contravention of s 53 of the TPA or s 29 of the ACL is disclosed in the Claim; and

- b. says that to the extent TMCA made the representation(s) alleged, that was a representation or statement of opinion for which TMCA had a reasonable basis.

Particulars

TMCA repeats the particulars to sub-paragraph 42(d) above.

42C In answer to paragraph 42C, TMCA:

- a. repeats its answer to paragraphs 42 and 42A; and
 b. otherwise denies the allegations in the paragraph.

43 In answer to paragraph 43, TMCA:

- a. repeats its answer to paragraph 42; and
 b. denies it engaged in misleading conduct; and
 c. admits its conduct was in trade or commerce.

44 In answer to paragraph 44, TMCA:

- a. repeats its answer to paragraphs 42 and 43; and
 b. denies the allegations in the paragraph.

45 TMCA denies the allegations in paragraph 45.

46 In answer to paragraph 46, TMCA:

- a. denies the allegations in the paragraph;
 b. repeats its answer to paragraph 8;
 c. says that:
- i. TMCA has recalled or intends to recall the Recalled Vehicles in order to replace the relevant driver or passenger equipped with a Takata Airbag Inflator;
 - ii. it would be unreasonable if a Group Member did not respond to the recall within a reasonable period of time in order to have any such Takata Airbag Inflator in the Recalled Vehicles replaced;
 - iii. to the extent a Group Member has not (or does not) reasonably respond to such a recall; within a reasonable time, any loss they suffer in the meantime will not have been caused by TMCA and they have (or will have) failed to mitigate any loss or damage they have suffered;

- iv. to the extent a Group Member has not (or does not) reasonably respond to a recall, TMCA remains (or will remain) ready and willing to replace the Takata Airbag Inflator in their vehicle as and when that Group Member responds to the recall, subject to the availability of replacement airbags at the time of a response;
- d. says that the Plaintiff has been notified by letter of the recall of the Plaintiff's Vehicle, and on about 10 May 2018 the Takata Airbag Inflator was replaced in the Plaintiff's Vehicle ~~but as at the date of this pleading, TMCA has no record of the Plaintiff having taken steps to enable TMCA to cause the passenger airbag equipped with a Takata Airbag Inflator within the Plaintiff's Vehicle to be replaced;~~

Particulars

The correspondence with the Plaintiff included:

On 31 May 2017, TMCA sent the Plaintiff a letter advising her that a safety recall campaign had been launched regarding the Takata Airbag Inflator in the front passenger airbag in her vehicle and that replacement parts for the front passenger airbag inflator in her vehicle were being prepared and that she would be contacted once the relevant parts became available.

On 11 December 2017, TMCA sent the Plaintiff a letter advising her that the relevant parts for her vehicle had become available and urged her to contact a Toyota Dealer without delay.

In or around May 2018, TMCA has recently issued a subsequent letter to the Plaintiff advising that it is important she immediately contact her closest/preferred Toyota Dealer or the Toyota Recall Campaign Hotline to arrange to have her Takata Airbag Inflator replaced.

On 10 May 2018, the passenger side airbag in the Plaintiff's vehicle was replaced at the Phil Gilbert Motor Group dealership in Croydon, NSW.

- e. says that to the extent that the Plaintiff did not take steps in a timely manner to have her Takata Airbag Inflator replaced by TMCA, any loss suffered in the meantime was not caused by TMCA and the Plaintiff's conduct in failing to

~~take any steps to enable TMCA to cause the Takata Airbag Inflator within the Plaintiff's Vehicle to be replaced is an unreasonable failure to mitigate any loss or damage she may have suffered;~~

~~f. says that TMCA is ready and willing to replace the Takata Airbag Inflator in the Plaintiff's Vehicle as and when she responds to the notifications which have been sent to her regarding the recall.~~

47 In answer to paragraph 47, TMCA:

- a. denies the allegations in the paragraph;
- b. repeats its answer to paragraph 46;
- c. says that insofar as a Group Member makes an application under section 87(1A) of the TPA for compensation:
 - i. if that application is not made within 3 years after the day on which the cause of action that relates to the conduct accrued for the purposes of section 87(1CA) of the TPA, where the cause of action accrued prior to 26 July 2001, that application is time barred;
 - ii. if that application is not made within 6 years after the day on which the cause of action that relates to the conduct accrued for the purposes of section 87(1CA) of the TPA, where that cause of action accrued from 26 July 2001, that application is time barred;
- d. says that insofar as a Group Member seeks to recover loss or damage under section 82 of the TPA:
 - i. if the action is not commenced within 3 years after the day on which the cause of action that relates to the conduct accrued for the purposes of section 82(2) of the TPA, where the cause of action accrued prior to 26 July 2001, that action is time barred;
 - ii. if the action is not commenced within 6 years after the day on which the cause of action that relates to the conduct accrued for the purposes of section 82(2) of the TPA, where that cause of action accrued from 26 July 2001, that action is time barred;
- e. says that insofar as a Group Member makes an application for compensation under section 237(1) of the ACL, if that application is not made within 6 years from the day on which the cause of action that relates to the conduct accrued

for the purposes of section 237(3) of the ACL, that application is time barred;
and

- f. says that insofar as a Group Member seeks to recover loss or damage under section 236(1) of the ACL, if the action is not commenced within 6 years after the day on which the cause of action that relates to the conduct accrued for the purposes of section 236(2) of the ACL, that action is time barred; and
- g. says further in answer to the allegations in paragraph 47(b) of the Claim that if any loss or damage has been suffered, then:
 - i. insofar as Group Members have been offered a replacement airbag inflator, but have not taken up that offer of replacement within a reasonable time, then any loss or damage suffered by such Group Members after being notified of the offer to replace their Takata Airbag Inflator has been suffered partly as a result of their failure to take reasonable care by having the Takata Airbag Inflator in their Recalled Vehicle replaced (or replaced within a reasonable time);
 - ii. in those premises, the amount of the loss or damage Group Members may recover under section 82(1) of the TPA and 236(1) of the ACL is to be reduced to the extent that the Court considers just and equitable having regard to the Group Members' share in the responsibility for their loss or damage, pursuant to sections 82(1B) of the TPA and 137B of the CCA.

Apportionment Defence – Takata Corporation

47A Paragraphs 42 to 47 of the Claim plead claims for damages made under section 82 of the TPA or section 236 of the ACL for economic loss caused by conduct alleged to have been done in contravention of section 52 of the TPA or section 18 of the ACL respectively, being apportionable claims within the meaning of section 87CB of the TPA and 87CB of the *Competition and Consumer Act 2010 (Cth)* (**CCA**)(**Apportionable Claims**).

47B If, which is denied, any of the Plaintiff or Group Members have suffered loss or damage with respect to an Apportionable Claim, TMCA makes the allegations in paragraphs 47C to 47M:

- a. without derogating from TMCA's response to the Plaintiff's allegations in the remainder of this Claim;

- b. without admission of any liability to any Plaintiff or Group Member by TMCA or any other persons or entities; and
- c. only for the purposes of TMCA's defence insofar as it relates to the reduction of any liability TMCA may be found to have to the Plaintiff or Group Member for any loss so as to reflect the proportion of loss the Court considers just having regard to the responsibility of any other persons or entities for that loss.

47C Takata Corporation:

- a. is and was at all material times a Japanese company with its principal place of business in Tokyo, Japan;
- b. is and was at all material times a corporation within the meaning of that term as defined in section 4 of the TPA and section 4 of the CCA;
- c. either directly or through its related entities, designed, developed and manufactured the Takata Airbag Inflators that were used as a component part in the Recalled Vehicles, including the PSAN propellant in those inflators;
- d. either directly or through its related entities, assembled those Takata Airbag Inflators into Takata airbag modules and supplied the Takata airbags to Toyota Motor Corporation or its related entities, for use as a component part in the Recalled Vehicles;
- e. either directly or through its related entities, supplied, in trade or commerce, Takata Airbag Inflators to consumers in Australia, by virtue of the Takata Airbag Inflators being a component of the Recalled Vehicles.

47D At all material times, Takata:

- a. is and was a specialised supplier of automotive safety systems that designs, manufactures, tests, markets, distributes and sells airbag systems (including those with the Takata Airbag Inflators) for use in vehicles;
- b. is and was one of the largest suppliers of airbag systems in the world (of which, there are only a small number of suppliers of airbag systems in the world);
- c. either directly or through its other Takata entities designed, manufactured, tested, marketed, distributed and sold the airbag systems (including the Takata Airbag Inflators) to car manufacturers, including Toyota Motor Corporation and/or to a related entity to Toyota Motor Corporation; and

- d. either directly or through its related entities manufactured airbag systems, including inflators and inflator propellant, in manufacturing plants that it owned or controlled.

47E At all material times:

- a. airbag inflators were and are complex in nature and therefore require specialist expertise to design, develop, manufacture and test;
- b. Toyota Motor Corporation, either directly or through its related entities, relied upon its supplier, Takata, to design, develop, manufacture and test airbag inflators for use in airbag systems in vehicles manufactured by Toyota Motor Corporation for distribution or sale, including for distribution or sale to Australian consumers;
- c. Takata knew or ought to have known that Toyota Motor Corporation, either directly or through its related entities, would use the Takata Airbag Inflators in vehicles manufactured by Toyota Motor Corporation for distribution or sale to Australian consumers;
- d. Toyota Motor Corporation provided Takata with certain technical specifications, including relating to durability, safety and performance specifications that the airbag inflators and airbag modules must meet and satisfy, which included specific durability, safety and performance specifications for airbag inflators (**Inflator Specifications**); and
- e. Takata's airbag systems would only be purchased by Toyota Motor Corporation, either directly or through its related entities, and installed in Toyota and Lexus vehicles by Toyota Motor Corporation and / or its related entities if Takata verified that those Inflator Specifications were met.

Particulars

Further particulars will be provided following evidence.

- 47F From time to time, Takata made representations to Toyota Motor Corporation, TMCA and / or their related entities that its design and manufacture of the Takata Airbag Inflators met the Inflator Specifications, including through investigation and testing conducted by Takata of the Takata Airbag Inflators and the PSAN propellant used in them.

Particulars

Rule 11 Plea Agreement entered into by Takata Corporation on 13 January 2017.

Further particulars will be provided following evidence.

- 47G From time to time, Takata made representations to Toyota Motor Corporation, TMCA and/or their related entities that Takata Airbag Inflators were safe for use in motor vehicles.

Particulars

Further particulars will be provided following evidence.

- 47H At a point in time which TMCA is presently not aware, Takata had knowledge that the design and production of certain of the Takata Airbag Inflators did not meet the Inflator Specifications or otherwise were unsafe or prone to rupture and there were safety issues with the continued use or function of certain of the Takata Airbag Inflators.

Particulars

Rule 11 Plea Agreement entered into by Takata Corporation on 13 January 2017.

- 47I At all material times up to 13 January 2017 (or in the alternative, at some other date which TMCA is presently not aware), Takata did not modify or correct its representations referred to in paragraphs 47F and 47G above.

47J By:

- a. making the representations referred to in paragraphs 47F and 47G above; and / or
- b. failing to take steps to notify TMCA and/or its related entities and/or the public regarding the safety or function of the Takata Airbag Inflators (including by failing to notify that the Takata Airbag Inflators did not meet the Inflator Specifications and by affirmatively omitting critical information and falsifying the information presented to TMCA and/or its related entities),

Takata engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of section 52 of the TPA and/or section 18 of the ACL.

47JA Further or alternatively:

- a. Takata was a "manufacturer" of the Takata Airbag Inflators as defined by section 7 of the ACL and/or section 74A of the TPA;

- b. the Takata Airbag Inflators were "goods" as defined by section 2(1) of the ACL and for the purposes of section 74D of the TPA;
- c. if and insofar as the Takata Airbag Inflators were:
 - i. not of acceptable quality and the guarantee under section 54 of the ACL has not been complied with, then Group Members are affected persons in relation to the Takata Airbag Inflators who may recover damages from Takata by action under section 271(1) of the ACL; and/or
 - ii. not of merchantable quality for the purposes of section 74D of the TPA, then Group Members may recover compensation by action against Takata under section 74D of the TPA.

47K Further or alternatively, at all material times, Takata:

- a. owed a duty of care to consumers in Australia to exercise due care and skill in designing, manufacturing, testing, marketing, distributing and selling the Takata Airbag Inflators and Takata airbags, by reason of the matters pleaded in paragraphs 47C(c)-(e), 47D and 47E;
- b. was aware, or ought to have been aware, that the Takata Airbag Inflators could be fitted in vehicles to be purchased by consumers in Australia, such as the Recalled Vehicles;
- c. was aware, or ought to have been aware, that consumers in Australia were reliant on it in designing, manufacturing, testing, marketing, distributing and selling Takata airbags, including the Takata Airbag Inflators and PSAN propellant, with due care and skill;
- d. could reasonably foresee that the Plaintiff and Group Members may suffer loss or damage if Takata did not exercise due care and skill in designing, manufacturing, testing, marketing, distributing and selling the Takata airbags, including the Takata Airbag Inflators and PSAN propellant;
- e. breached its duty of care to the Plaintiff and Group Members by not exercising due care and skill in designing, manufacturing, testing, marketing, distributing and selling the Takata airbags.

Particulars

Further particulars will be provided following evidence.

- 47L By reason of the matters pleaded in paragraphs 47C to 47K, if TMCA has any liability to the Plaintiff or Group Members, then Takata is also liable to the Plaintiff and Group Members for that loss and damage by reason of Takata's conduct acts or omissions and is a concurrent wrongdoer for the purposes of section 87CB(3) of the TPA and/or section 87CB(3) of the CCA.
- 47M If the Plaintiff or Group Members have suffered any loss as alleged or at all and if that loss was caused by the conduct of TMCA and TMCA is liable for that loss as alleged (which is also denied), then the liability of TMCA (if any) in relation to that loss should be reduced to reflect that proportion of the loss the Court considers just having regard to the extent of Takata's responsibility for the loss, pursuant to section 87CD(1) of the TPA and/or section 87CD(1) of the CCA.

Unconscionable conduct

- 48 In answer to paragraph 48, TMCA:
- a. denies the allegations in the paragraph; and
 - b. repeats its response to paragraphs 7(a)(i), 8 and 10(c).
- 49 TMCA denies the allegations in paragraph 49.
- 49A TMCA denies the allegations in paragraph 49A.
- 50 In answer to paragraph 50, TMCA:
- a. denies the allegations in the paragraph;
 - b. repeats its answer to paragraph 8;
 - c. says that:
 - i. TMCA has recalled or intends to recall the Recalled Vehicles in order to replace the relevant Takata Airbag Inflator;
 - ii. it would be unreasonable if a Group Member did not respond to the recall within a reasonable period of time in order to have any such Takata Airbag Inflator in the Recalled Vehicles replaced;
 - iii. to the extent a Group Member has not (or does not) reasonably respond to such a recall, within a reasonable time, any loss they suffer in the meantime will not have been caused by TMCA and they have (or will have) failed to mitigate any loss or damage they have suffered;
 - iv. to the extent a Group Member has not (or does not) reasonably respond to a recall, TMCA remains (or will remain) ready and willing to

replace the Takata Airbag Inflator in their vehicle as and when that Group Member responds to the recall, subject to the availability of replacement airbag inflators at the time of a response;

- d. says that the Plaintiff has been notified by letter of the recall of the Plaintiff's Vehicle, and on about 10 May 2018 the Takata Airbag Inflator was replaced in the Plaintiff's Vehicle but ~~as at the date of this pleading, TMCA has no record of the Plaintiff having taken steps to enable TMCA to cause the Takata Airbag Inflator within the Plaintiff's Vehicle to be replaced;~~

Particulars

The correspondence with the Plaintiff included:

On 31 May 2017, TMCA sent the Plaintiff a letter advising her that a safety recall campaign had been launched regarding the Takata Airbag Inflator in the front passenger airbag in her vehicle and that replacement parts for the front passenger airbag inflator in her vehicle were being prepared and that she would be contacted once the relevant parts became available.

On 11 December 2017, TMCA sent the Plaintiff a letter advising her that the relevant parts for her vehicle had become available and urged her to contact a Toyota Dealer without delay.

In or around May 2018, TMCA has recently issued a subsequent letter to the Plaintiff advising that it is important she immediately contact her closest/preferred Toyota Dealer or the Toyota Recall Campaign Hotline to arrange to have her Takata Airbag Inflator replaced.

On 10 May 2018, the passenger side airbag in the Plaintiff's vehicle was replaced at the Phil Gilbert Motor Group dealership in Croydon, NSW.

- e. says that to the extent that the Plaintiff did not take steps in a timely manner to have her Takata Airbag Inflator replaced by TMCA, any loss suffered in the meantime was not caused by TMCA and the Plaintiff's conduct ~~in failing to take any steps to enable TMCA to cause the Takata Airbag Inflator within the Plaintiff's Vehicle to be replaced~~ is an unreasonable failure to mitigate any loss or damage she may have suffered;

~~f. says that TMCA is ready and willing to replace the Takata Airbag Inflator in the Plaintiff's Vehicle as and when she responds to the notifications which have been sent to her regarding the recall.~~

51 In answer to paragraph 51, TMCA:

- a. repeats its answer to paragraph 50;
- b. otherwise denies the allegations in paragraph 51;
- c. says that insofar as a Group Member makes an application under section 87(1A) of the TPA for compensation:
 - i. if that application is not made within 3 years after the day on which the cause of action that relates to the conduct accrued for the purposes of section 87(1CA) of the TPA, where the cause of action accrued prior to 26 July 2001, that application is time barred;
 - ii. if that application is not made within 6 years after the day on which the cause of action that relates to the conduct accrued for the purposes of section 87(1CA) of the TPA, where that cause of action accrued from 26 July 2001, that application is time barred;
- d. says that insofar as a Group Member seeks to recover loss or damage under section 82 of the TPA:
 - i. if the action is not commenced within 3 years after the day on which the cause of action that relates to the conduct accrued for the purposes of section 82(2) of the TPA, where the cause of action accrued prior to 26 July 2001, that action is time barred;
 - ii. if the action is not commenced within 6 years after the day on which the cause of action that relates to the conduct accrued for the purposes of section 82(2) of the TPA, where that cause of action accrued from 26 July 2001, that action is time barred;
- e. says that insofar as a Group Member makes an application for compensation under section 237(1) of the ACL, if that application is not made within 6 years from the day on which the cause of action that relates to the conduct accrued for the purposes of section 237(3) of the ACL, that application is time barred; and
- f. says that insofar as a Group Member seeks to recover loss or damage under section 236(1) of the ACL, if the action is not commenced within 6 years after

the day on which the cause of action that relates to the conduct accrued for the purposes of section 236(2) of the ACL, that action is time barred.

Relief claimed

52 TMCA denies that the Plaintiff is entitled to the relief claimed.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the Legal Profession Uniform Law Application Act 2014 that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature



Capacity

Solicitor

Date of signature

~~18 May 2018~~ 17 September 2018

AFFIDAVIT VERIFYING

Name Simone Zerial
 Address 155 Bertie St, Port Melbourne VIC 3207
 Occupation Lawyer
 Date 17 September 2018

I say on oath:

- 1 I am the Manager, Legal Projects in the Corporate Affairs Division of the Toyota Motor Corporation Australia Limited.
- 2 I believe that the allegations of fact contained in the defence are true.
- 3 I believe that the allegations of fact that are denied in the defence are untrue.
- 4 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

SWORN at

Melbourne

CARLA KRIEK
 155 Bertie Street Port Melbourne Vic 3207
 An Australian legal practitioner
 within the meaning of the
 Legal Profession Uniform Law (Victoria)

Signature of deponent



Name of witness

CARLA KRIEK

Address of witness

155 BERTIE STREET, PORT MELBOURNE VIC 3207

Capacity of witness

Solicitor

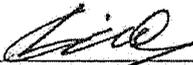
And as a witness, I certify the following matters concerning the person who made this affidavit (the deponent):

- 1 #I saw the face of the deponent. [OR, delete whichever option is inapplicable]
~~#I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.*~~
- 2 ~~#I have known the deponent for at least 12 months.~~ [OR, delete whichever option is inapplicable]
 #I have confirmed the deponent's identity using the following identification document:

DRIVER'S LICENCE

Identification document relied on (may be original or certified copy)†

Signature of witness



Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

[* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]

[† "Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]