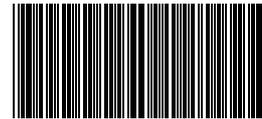




Filed: 17 September 2018 5:05 PM



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Amended Defence

COURT DETAILS

Court	Supreme Court of NSW
Division	Equity
List	Equity General
Registry	Supreme Court Sydney
Case number	2018/00009565

TITLE OF PROCEEDINGS

First Plaintiff	Jaydan Bond
First Defendant	NISSAN MOTOR CO. (AUSTRALIA) PTY. LTD. ABN 54004663156

FILING DETAILS

Filed for	NISSAN MOTOR CO. (AUSTRALIA) PTY. LTD., Defendant 1
Legal representative	JENNIFER ANNE CAMPBELL
Legal representative reference	
Telephone	02 9230 4000

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.

Amended Defence (Defence to FASOC - 17 September 2018.pdf)

[attach.]

Form 7A (version 5)
UCPR 14.3

DEFENCE TO THE FURTHER AMENDED STATEMENT OF CLAIM

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity Division
List	General (Class Action)
Registry	Sydney
Case number	2018/9565

TITLE OF PROCEEDINGS

Plaintiff	Jaydan Bond
Defendant	Nissan Motor Co. (Australia) Pty Ltd (ABN 54 004 663 156)

FILING DETAILS

Filed for	Nissan Motor Co. (Australia) Pty Ltd , defendant
Legal representative	Jennifer Anne Campbell Allens, Solicitors
Legal representative reference	31441
Contact name and telephone	Jennifer Anne Campbell (02) 9230 4868
Contact email:	Jenny.Campbell@allens.com.au

HEARING DETAILS

PLEADING AND PARTICULARS

PRELIMINARIES

- A Headings are used in this Defence for convenience only. They do not form part of the defendant's response to the Further Amended Statement of Claim filed by the plaintiff on 3 September 2018 (the **Statement of Claim**).
- B The terms defined by the plaintiff in the Statement of Claim have the same meaning in this pleading, unless otherwise defined or stated. The defendant does not admit any factual assertions contained in, or in any way implied by, any defined term used in the Statement of Claim and repeated in this Defence.

In answer to the Statement of Claim, the defendant says as follows:

THE PROCEEDING AND THE PARTIES

1. As to paragraph 1, the defendant:

- (a) does not plead to the paragraph as it does not contain any allegation against it;
- (b) says that:
 - (i) vehicles fitted with airbags manufactured or supplied by Takata Corporation and/or its related entities or subsidiaries, including TK Holdings Inc, that use a propellant other than Phase Stabilised Ammonium Nitrate (**PSAN**) or contain a desiccant (other than a calcium sulphate desiccant) are not affected by the issues referred to in paragraph 7(a) herein and have not been the subject of any of the recalls alleged in paragraphs 11 and 11A of the Statement of Claim;
 - (ii) by reason of the matters alleged in sub-paragraph (i) herein, in this Defence:
 - (A) an airbag manufactured or supplied by Takata Corporation or its related entities or subsidiaries, including TK Holdings Inc, that uses PSAN as the propellant technology to inflate the airbag cushion and does not contain a desiccant, or contains a calcium sulphate desiccant, is defined as an **Affected Takata Airbag**;
 - (B) a Nissan motor vehicle that is or was fitted with an Affected Takata Airbag and that:
 - (I) is or was the subject of any of the recalls referred to in paragraphs 11 and 11A of the Statement of Claim; or
 - (II) is the subject of any of the future recalls referred to in sub-paragraph 1(b)(ii)(II) of the Statement of Claim;is defined as an **Affected Vehicle**;
 - (C) the defined term within the Statement of Claim, "Defective Vehicles" is not used.

2. As to paragraph 2, the defendant:

(a) as to sub-paragraph (a):

(i) admits that the 2005 model year Y61 Patrol was the subject of Product Recall Australia Number 2015/14752 and later the Compulsory Recall;

(ii) otherwise does not know and therefore does not admit the sub-paragraph;

(b) does not know and therefore does not admit sub-paragraph (b);

(c) does not know and therefore does not admit sub-paragraph (c);

(d) does not know and therefore does not admit sub-paragraph (d);

(e) as to sub-paragraph (e):

(i) does not know and therefore does not admit sub-paragraphs (i) to (iii);

(ii) otherwise:

(A) denies the sub-paragraph;

(B) says that the allegation that the defendant expressly knew the matters alleged in that sub-paragraph is embarrassing;

(e1) denies sub-paragraph (e1);

(e2) does not know and therefore does not admit the sub-paragraph (e2);

(f) does not plead to sub-paragraph (f) as it does not contain any allegation against it.

3. As to paragraph 3, the defendant:

(a) does not know and therefore does not admit sub-paragraph (a);

(b) does not know and therefore does not admit sub-paragraph (b);

(c) does not know and therefore does not admit sub-paragraph (c);

(d) as to sub-paragraph (d):

(i) does not know and therefore does not admit sub-paragraphs (i) to (iii);

(ii) otherwise:

(A) denies the sub-paragraph;

(B) says that the allegation that the defendant expressly knew the matters alleged in that sub-paragraph is embarrassing;

- (e) as to sub-paragraph (e):
 - (i) repeats paragraphs 2(c) and 3(b) herein;
 - (ii) does not know and therefore does not admit the sub-paragraph;
- (f) does not know and therefore does not admit sub-paragraph (f).

4. As to paragraph 4, the defendant:

- (a) admits sub-paragraph (a);
- (b) admits sub-paragraph (b);
- (c) as to sub-paragraph (c):
 - (i) admits sub-paragraphs (i) and (ii);
 - (ii) says that all of the Affected Vehicles were manufactured outside of Australia by Nissan Motor Co., LTD (**NML**) or its subsidiaries or associated companies (not including the defendant);
 - (iii) otherwise denies the sub-paragraph;
- (d) [not used]
- (e) as to sub-paragraph (e):
 - (i) says that it imported the Affected Vehicles into Australia;
 - (ii) otherwise denies the paragraph;
- (f) as to sub-paragraph (f):
 - (i) says that, by reason of the matters pleaded in sub-paragraphs (c) and (e) herein, the defendant is a manufacturer of the Affected Vehicles within the meaning of sections 74A of the TPA or section 7 of the ACL;
 - (ii) otherwise denies the sub-paragraph;
- (g) as to sub-paragraph (g):
 - (i) as to sub-paragraph (i):
 - (A) admits that it supplied Affected Vehicles to independent dealers authorised to sell, lease and service those vehicles and to rental fleet businesses;
 - (B) otherwise denies the sub-paragraph;

- (ii) as to sub-paragraph (ii):
 - (A) admits that it supplied a limited number of used Affected Vehicles directly to consumers;
 - (B) otherwise denies the sub-paragraph.
- 5. As to paragraph 5, the defendant:
 - (a) admits that any Affected Vehicle supplied by the defendant, its authorised dealers or other motor vehicle dealers to a Group Member was supplied to that Group Member in trade or commerce;
 - (b) otherwise does know and therefore does not admit whether any other Affected Vehicles were supplied to Group Members in trade or commerce.
- 6. The defendant does not plead to paragraph 6 as it does not make any allegation against it.

THE AFFECTED VEHICLES

- 7. As to paragraph 7, the defendant:
 - (a) as to sub-paragraph (a):
 - (i) says that:
 - (A) where the Affected Vehicle in which the Affected Takata Airbag is fitted is subject to sustained exposure to high absolute humidity and fluctuating high temperatures, the design and (in relation to the Alpha Airbags defined in sub-paragraph (IV) herein) manufacture of the Affected Takata Airbags by Takata Corporation or its subsidiaries create a risk that there may be an ingress of moisture into the inflator and absorption of that moisture by the propellant, which may cause the PSAN propellant in Affected Takata Airbags to degrade over time;
 - (B) in the event that the absorption of moisture by the propellant referred to in sub-paragraph (I) herein occurs, there is a risk that the inflator may deploy in an accident with greater force than it is designed to, and potentially rupture the inflator housing, which may cause metal fragments to be projected into the passenger compartment;

- (C) certain of the Affected Takata Airbags fitted in Affected Vehicles manufactured between 2000 to 2004 may be affected by manufacturing control problems at Takata de Mexico, S.A. de C.V.'s Mexico plant and, as a result, these airbags have a higher risk of the rupture to the inflator housing referred to in sub-paragraph (II) than for other Affected Takata Airbags;

Particulars

Further particulars as to manufacturing problems at Takata Corporation or its subsidiaries' plants may be provided following the filing of the defendant's expert evidence.

- (D) Affected Takata Airbags affected by the issues referred to in sub-paragraph (III) herein are described as **Alpha Airbags** and all other Affected Takata Airbags are described as **Beta Airbags** in this Defence;
- (E) as degradation of the propellant referred to in sub-paragraph (I) herein can only occur after a period of sustained exposure to high absolute humidity and fluctuating high temperatures, the issues identified in sub-paragraph (II) herein take a period of time to occur with the length of that period of time depending on the climate that the Affected Vehicle is exposed to over time;

Particulars

The service life expectancy of Beta Airbags ranges from 6 years to 25 years depending on environmental exposure among other factors.

Further particulars as to when the issues identified in sub-paragraphs (I) and (II) herein arise in relation to Alpha Airbags and Beta Airbags may be provided following the filing of the defendant's expert evidence.

- (F) Takata Airbags that do not use PSAN as the propellant, or that use PSAN as the propellant and include a desiccant (other than a calcium sulphate desiccant) to avoid moisture degrading the inflator components, are not affected by the issues identified in paragraph (I), (II) or (III) herein and are not the subject of any of

the recalls alleged in paragraphs 11 or 11A of the Statement of Claim;

- (ii) otherwise denies the sub-paragraph;
- (b) as to sub-paragraph (b):
 - (i1) says that the Commonwealth Minister for Small Business issued a safety warning notice to the public on 5 August 2017 pursuant to sections 129(1)(a) and 129(1)(b) of the ACL;
 - (i) admits that the warning notice contained the words reproduced in sub-paragraph 7(b)(i) of the Statement of Claim and says further that the warning notice also stated that:
 - (A) *"motor vehicles containing Takata airbags are under investigation to determine whether those goods will or may cause injury to any person, or a reasonably foreseeable use (including a misuse) of those goods, will or may cause injury to any person"*;
 - (B) consumers were strongly urged to check whether their vehicles were included in a recall;
 - (C) if their vehicle was included as part of a recall, advised consumers to, as a matter of urgency, contact a dealership to arrange remediation;
 - (ii) as to sub-paragraphs (ii) and (iii), says that the safety warning notice only applied to Affected Vehicles that were the subject of a recall at the time the notice was issued;
 - (iii) otherwise denies the paragraph and relies on the safety warning notice for its full force and effect, as if set out in full herein;
- (c) as to sub-paragraphs (c) to (f):
 - (i) admits that the statistics referred to in those paragraphs have been stated in various sources;
 - (ii) says that there have been no injuries or deaths resulting from the explosion of an Affected Takata Airbag in an Affected Vehicle supplied by the defendant;
 - (iii) otherwise does not admit the sub-paragraphs.

8. As to paragraph 8, the defendant:

(a) says that:

- (i) each of the Affected Vehicles was fitted with at least one Affected Takata Airbag at the time it was first supplied by the defendant to a person for re-supply or to a consumer;
- (ii) pursuant to the Voluntarily Initiated Recalls and the Compulsory Recall referred to in paragraphs 11 and 11A herein, it has caused Affected Takata Airbags in Affected Vehicles to be replaced with airbags other than Affected Takata Airbags or with new Affected Takata Airbags (which have been or will be the subject of a later recall to replace those airbags with airbags other than Affected Takata Airbags);
- (iii) where Affected Vehicles have been in an accident that has involved the deployment of an Affected Takata Airbag or an Affected Takata Airbag has been replaced otherwise than pursuant to the Voluntarily Initiated Recalls or the Compulsory Recalls, it does not know whether the Affected Takata Airbag has been replaced with an airbag other than an Affected Takata Airbag;

(b) otherwise denies the paragraph.

9. [Not used]

10. As to paragraph 10, the defendant:

(a) as to sub-paragraph (a):

- (i) admits that the Affected Vehicles are goods of a kind ordinarily acquired for personal, domestic or household use or consumption;
- (ii) admits that some of the Affected Vehicles were acquired for an amount that did not exceed \$40,000;
- (iii) otherwise denies the sub-paragraph;

(b) admits that the Affected Vehicles are goods of a kind that are commonly bought and commonly supplied for the purposes referred to in sub-paragraph (b) of the Statement of Claim;

- (c) as to sub-paragraph (c):
 - (i) repeats paragraph 7(a) herein;
 - (ii) says that a vehicle fitted with a Takata Airbag that is not an Affected Takata Airbag is safe to drive and does not expose the driver and/or any passenger to danger or harm by reason of the matters referred to in sub-paragraph 7(a)(i)(A) herein;
 - (iii) says further that:
 - (A) at the time of the first supply by the defendant to another person for re-supply, the Affected Vehicles were safe to drive and did not expose the driver and any passenger to danger or harm;
 - (B) the Affected Vehicles only potentially exposed the driver or any passenger to any danger or harm after a period of time in the circumstances referred to in sub-paragraph 7(a)(i)(A) herein and only if the Affected Takata Airbag fitted in the Affected Vehicle had not been replaced by that time;
 - (C) an Affected Vehicle that has:
 - (I) had all Affected Takata Airbags replaced with airbags other than Affected Takata Airbags, is not unsafe to drive and does not expose the driver and any passenger to danger or harm by reason of the matters referred to in sub-paragraph 7(a)(i)(A) herein;
 - (II) had all Affected Takata Airbags replaced with new Affected Takata Airbags, only potentially exposed the driver or any passenger to any danger or harm after a period of time in the circumstances referred to in sub-paragraph 7(a)(i)(A) herein and only if the Affected Takata Airbag fitted in the Affected Vehicle had not been replaced by that time;
 - (iv) otherwise denies the sub-paragraph;
- (d) admits that the Affected Vehicles are goods within the meaning of the provisions of the TPA and ACL referred to in sub-paragraph 10(d) of the Statement of Claim;
- (e) otherwise denies the paragraph.

11. As to paragraph 11, the defendant:

(a1) admits that, in compliance with section 128 of the ACL, it notified the responsible Commonwealth Minister that it was voluntarily taking action to recall certain Affected Vehicles fitted with Affected Takata Airbags as referred to in paragraph 11 of the Statement of Claim (the ***Voluntarily Initiated Recalls***);

(a) as to sub-paragraph (a):

(i) admits that:

(A) on 29 June 2010, it notified the responsible Commonwealth Minister that it was voluntarily taking action to recall certain vehicles (recall campaign R1020);

(B) the Australian Competition and Consumer Commission (**ACCC**) subsequently gave that recall campaign the reference Product Recall Australia Number 2010/11761;

Particulars

Letter from the defendant to the Produce Safety Policy Section, ACCC and Vehicle Safety Standards, Department of Transport & Regional Services sent on 29 June 2010.

(ii) says that:

(A) the recall applied to two vehicles, being one N16 Pulsar and one Y61 Patrol vehicle, each built in 2001 with specific VINs;

(B) the recall action was taken on the grounds that: *'The propellant wafer for the deployment of the air bag in the front passenger air bag inflator may be partially broken up into powder. This can cause the combustion rate of the propellant to rise, and excessive internal pressure may be produced in the inflator during the air bag deployment. In an extreme case, the inflator may rupture, and the metal fragments may scatter.'*;

(iii) admits that words broadly to the effect pleaded in paragraphs 11(a)(iii), (iv) and (v) of the Statement of Claim appeared on the Product Safety Australia website and says further that any later updates to the text of the recall on the Product Safety Australia website were not made by the

defendant and the defendant does not know when, or by whom, those updates were made;

- (iv) otherwise denies the sub-paragraph;
- (b) as to sub-paragraph (b):
 - (i) admits that:
 - (A) on 12 April 2013, it notified the responsible Commonwealth Minister that it was voluntarily taking action to recall certain vehicles (recall campaign R1302);
 - (B) the ACCC subsequently gave that recall campaign the reference Product Recall Australia Number 2013/13542;

Particulars

Letter from the defendant to the Parliamentary Secretary to the Treasurer (c/o ACCC, Product Safety Policy Section) and Administrator of Vehicle Standards, Department of Infrastructure and Transport dated 12 April 2013.

- (C) on 18 June 2013, it further notified the responsible Commonwealth Minister that it had amended the recall to give separate campaign reference numbers (R2302, R4302, R3302 and R1302) for each car model referred to in subparagraph (ii)(A) herein;

Particulars

Letter from the defendant to the Parliamentary Secretary to the Treasurer (c/o ACCC, Product Safety Policy Section) and Vehicle Safety Standards Branch, Department of Infrastructure and Transport dated 18 June 2013.

- (ii) says that:
 - (A) the recall was with respect to N16 Pulsar, D22 Navara, Y61 Patrol and T30 X-Trail vehicles built between 2000 and 2004 with specific VINs;
 - (B) the recall action was taken on the grounds that: *'The passenger airbag supplier (Takata) has reported to NHTSA a potential safety defect in the Front Passenger Air Bag Inflators on certain 2000-*

2004 Nissan vehicles, and also vehicles of our competitors.

According to Takata, some air bag inflators were manufactured out of specification, which can create excessive pressure within the inflator during air bag deployment and may result in abnormal deployment.';

- (iii) admits that words broadly to the effect pleaded in paragraphs 11(b)(iii), (iv) and (v) of the Statement of Claim appeared on the Product Safety Australia website and says further that any later updates to the text of the recall on the Product Safety Australia website were not made by the defendant and the defendant does not know when, or by whom, those updates were made;
- (iv) otherwise denies the sub-paragraph;
- (c) as to sub-paragraph (c):
 - (i) admits that:
 - (A) on 27 June 2014, it notified the responsible Commonwealth Minister that it was voluntarily taking action to recall certain vehicles (recall campaign R1407);
 - (B) the ACCC subsequently gave that recall campaign the reference Product Recall Australia Number 2014/14182;

Particulars

Letter from the defendant to the Product Safety Hazard Response Branch, ACCC and General Manager of Vehicle Safety Standards, Department of Infrastructure and Regional Development dated 27 June 2014.

- (C) on 23 September 2014, it further notified the responsible Commonwealth Minister that it had amended the recall campaign to give separate reference numbers (R2407, PG3B7, R4407, R5407, R3407 and R1407) for each car model referred to in subparagraph (ii)(A) herein;

Particulars

Letter from the defendant to the Product Safety Hazard Response Branch, ACCC and General Manager of Vehicle

*Safety Standards, Department of Infrastructure and
Regional Development dated 23 September 2014.*

- (ii) says that:
 - (A) the recall was with respect to N16 Pulsar, Y61 Patrol, D22 Navara, A33 Maxima and T30 X-Trail vehicles built between April 2001 and June 2003 with specific VINs;
 - (B) the recall action was being taken on the grounds that: *'The front passenger air bag inflator contains propellant wafers that are required to properly deploy the air bag. Some incorrect propellant wafers with insufficient density might be installed in certain inflators. This may cause the combustion rate of the propellant to increase inside the inflator, which can lead to internal pressure rising suddenly during air bag deployment and may result in abnormal deployment. In certain cases, the inflator housing may rupture and the metal fragments may scatter. The unlikely event of abnormal passenger airbag deployment or metal fragment scatter may pose a hazard to the occupants of the vehicle.'*;
- (iii) admits that words broadly to the effect pleaded in paragraphs 11(c)(iii) and (iv) of the Statement of Claim appeared on the Product Safety Australia website and says further that any later updates to the text of the recall on the Product Safety Australia website were not made by the defendant and the defendant does not know when, or by whom, those updates were made;
- (iv) otherwise denies the sub-paragraph;
- (d) as to sub-paragraph (d):
 - (i) admits that:
 - (A) on 4 June 2015, it notified the responsible Commonwealth Minister that it was voluntarily taking action to recall certain vehicles (recall campaign R1420);

- (B) the ACCC subsequently gave that recall campaign the reference Product Recall Australia Number 2015/14751;

Particulars

Letter from the defendant to the Product Safety Hazard Response Branch, ACCC and General Manager of Vehicle Safety Standards, Department of Infrastructure and Regional Development dated 4 June 2015.

- (ii) says that:
- (A) the recall was with respect to N16 Pulsar, Y61 Patrol, D22 Navara, J31 Maxima and T30 X-Trail vehicles built between April and December 2003 with specific VINs;
- (B) the recall action was being taken on the grounds that: *'The front passenger air bag inflator contains propellant wafers that are required to properly deploy the air bag. Some incorrect propellant wafers with insufficient density might be installed in certain inflators. This may cause the combustion rate of the propellant to increase inside the inflator, which can lead to internal pressure rising suddenly during air bag deployment and may result in abnormal deployment. In certain cases, the inflator housing may rupture and the metal fragments may scatter. The unlikely event of abnormal passenger airbag deployment or metal fragment scatter may pose a hazard to the occupants of the vehicle.'*;
- (iii) admits that words broadly to the effect pleaded in paragraphs 11(d)(iii), (iv), (v) and (vi) of the Statement of Claim appeared on the Product Safety Australia website and says further that any later updates to the text of the recall on the Product Safety Australia website were not made by the defendant and the defendant does not know when, or by whom, those updates were made;
- (iv) otherwise denies the sub-paragraph;

(e) as to sub-paragraph (e):

(i) admits that:

- (A) on 4 June 2015, it notified the responsible Commonwealth Minister that it was voluntarily taking action to recall certain vehicles (recall campaign R1508);
- (B) the ACCC subsequently gave that recall campaign the reference Product Recall Australia Number 2015/14752;

Particulars

Letter from the defendant to the Product Safety Hazard Response Branch, ACCC and General Manager of Vehicle Safety Standards, Department of Infrastructure and Regional Development dated 4 June 2015.

(ii) says that:

- (A) the recall was with respect to N16 Pulsar, Y61 Patrol, D22 Navara, J31 Maxima and T30 X-Trail vehicles built between January 2004 and March 2007 with specific VINs;
- (B) the recall action was being taken on the grounds that: *'Nissan has identified that a potential air leak on some passenger airbag inflators may allow moisture to enter the airbag inflator causing the propellant in the inflator units to deteriorate. Deterioration of the propellant may, under certain usage conditions, lead to abnormal deployment of the passenger airbag. The unlikely event of abnormal passenger airbag deployment or metal fragment scatter may pose a hazard to the occupants of the vehicle.'*;

(iii) admits that words broadly to the effect pleaded in paragraphs 11(e)(iii), (iv), (v) and (vi) of the Statement of Claim appeared on the Product Safety Australia website and says further that any later updates to the text of the recall on the Product Safety Australia website were not made by the defendant and the defendant does not know when, or by whom, those updates were made;

(iv) otherwise denies the sub-paragraph;

(f) as to paragraph (f):

(i) admits that:

- (A) on 6 July 2015, it notified the responsible Commonwealth Minister that it was voluntarily taking action to recall certain vehicles (recall campaign R1512);
- (B) the ACCC subsequently gave that recall campaign the reference Product Recall Australia Number 2015/14821;

Particulars

Letter from the defendant to the Product Safety Hazard Response Branch, ACCC and General Manager of Vehicle Safety Standards, Department of Infrastructure and Regional Development dated 6 July 2015.

(ii) says that:

- (A) the recall was with respect to Y61 Patrol, D22 Navara, J31 Maxima and T30 X-Trail vehicles built between April 2007 and December 2008 with specific VINs;
- (B) the recall action was being taken on the grounds that: *'Nissan has identified that a potential air leak on some passenger airbag inflators may allow moisture to enter the airbag inflator causing the propellant in the inflator units to deteriorate. Deterioration of the propellant may, under certain usage conditions, lead to abnormal deployment of the passenger airbag. The unlikely event of abnormal passenger airbag deployment or metal fragment scatter may pose a hazard to the occupants of the vehicle.'*;

(iii) admits that words broadly to the effect pleaded in paragraphs 11(f)(iii), (iv) and (v) of the Statement of Claim appeared on the Product Safety Australia website and says further that any later updates to the text of the recall on the Product Safety Australia website were not made by the defendant and the defendant does not know when, or by whom, those updates were made;

(iv) otherwise denies the sub-paragraph;

(g) as to sub-paragraph (g):

(i) admits that:

- (A) on 29 February 2016, it notified the responsible Commonwealth Minister that it was voluntarily taking action to recall certain vehicles (recall campaign R1515);
- (B) the ACCC subsequently gave that recall campaign the reference Product Recall Australia Number 2016/15228;

Particulars

Letter from the defendant to the Product Safety Hazard Response Branch, ACCC and General Manager of Vehicle Safety Standards, Department of Infrastructure and Regional Development dated 29 February 2016.

- (C) on 10 March 2016, it notified the responsible Commonwealth Minister that it had amended its recall campaign reference number to RT201;

Particulars

Letter from the defendant to the Product Safety Hazard Response Branch, ACCC and General Manager of Vehicle Safety Standards, Department of Infrastructure and Regional Development dated 10 March 2016.

(ii) says that:

- (A) the recall was with respect to D40 Navara vehicles built in Thailand between 2008 and 2014 with specific VINs;
- (B) the recall action was being taken on the grounds that: *'The propellant tablets in some of the subject inflators may experience an alteration over time, which could potentially lead to over-aggressive combustion in the event of an air bag deployment. Depending on the circumstances, this potential condition could create excessive internal pressure when the air bag is deployed, which could result in the body of the inflator rupturing upon deployment. The unlikely event of abnormal driver's airbag*

deployment or metal fragment scatter may pose a hazard to the driver of the vehicle.';

- (iii) admits that words broadly to the effect pleaded in paragraphs 11(g)(iii), (iv) and (v) of the Statement of Claim appeared on the Product Safety Australia website and says further that any later updates to the text of the recall on the Product Safety Australia website were not made by the defendant and the defendant does not know when, or by whom, those updates were made;
- (iv) otherwise denies the sub-paragraph;
- (h) as to sub-paragraph (h):
 - (i) admits that:
 - (A) on 12 May 2016, it notified the responsible Commonwealth Minister that it was voluntarily taking action to recall certain vehicles (recall campaign RT022);
 - (B) the ACCC subsequently gave that recall campaign the reference Product Recall Australia Number 2016/15383;

Particulars

Letter from the defendant to the Product Safety Hazard Response Branch, ACCC and General Manager of Vehicle Safety Standards, Department of Infrastructure and Regional Development dated 12 May 2016.

- (ii) says that:
 - (A) the recall was with respect to C11 Tiida vehicles built between October 2006 and December 2012 with specific VINs;
 - (B) the recall action was being taken on the grounds that: *'The propellant tablets in some of the subject inflators may experience an alteration over time, which could potentially lead to over-aggressive combustion in the event of an air bag deployment. Depending on the circumstances, this potential condition could create excessive internal pressure when the air bag is deployed, which could result in the body of the inflator rupturing upon deployment. The unlikely event of abnormal driver's airbag*

deployment or metal fragment scatter may pose a hazard to the driver of the vehicle.';

- (iii) admits that words broadly to the effect pleaded in paragraphs 11(h)(iii), (iv) and (v) of the Statement of Claim appeared on the Product Safety Australia website and says further that any later updates to the text of the recall on the Product Safety Australia website were not made by the defendant and the defendant does not know when, or by whom, those updates were made;
- (iv) otherwise denies the sub-paragraph;
- (i) as to sub-paragraph (i):
 - (i) admits that:
 - (A) on 28 November 2016, it notified the responsible Commonwealth Minister that it was voluntarily taking action to recall certain vehicles (recall campaign R1627);
 - (B) the ACCC subsequently gave that recall campaign the reference Product Recall Australia Number 2016/15769;

Particulars

Letter from the defendant to the Product Safety Hazard Response Branch, ACCC and General Manager of Vehicle Safety Standards, Department of Infrastructure and Regional Development dated 28 November 2016.

- (ii) says that:
 - (A) the recall was with respect to D22 Navara and Y61 Patrol vehicles built between June 2009 and December 2012 with specific VINs;
 - (B) the recall action was being taken on the grounds that: *'Nissan has identified that a potential air leak on some passenger airbag inflators may allow moisture to enter the airbag inflator causing the propellant in the inflator units to deteriorate. Deterioration of the propellant may, under certain usage conditions, lead to abnormal deployment of the passenger airbag. The unlikely event of an abnormal passenger airbag deployment or metal fragment scatter may pose a hazard to the occupants of the vehicle.';*

- (iii) admits that words broadly to the effect pleaded in paragraphs 11(i)(iii), (iv) and (v) of the Statement of Claim appeared on the Product Safety Australia website and says further that any later updates to the text of the recall on the Product Safety Australia website were not made by the defendant and the defendant does not know when, or by whom, those updates were made;
- (iv) otherwise denies the sub-paragraph;
- (j) as to sub-paragraph (j):
 - (i) admits that:
 - (A) on 8 February 2017, it notified the responsible Commonwealth Minister that it was voluntarily taking action to recall certain vehicles (recall campaign R1703);
 - (B) the ACCC subsequently gave that recall campaign the reference Product Recall Australia Number 2017/15940;

Particulars

Letter from the defendant to the Product Safety Hazard Response Branch, ACCC and General Manager of Vehicle Safety Standards, Department of Infrastructure and Regional Development dated 8 February 2017.

- (ii) says that:
 - (A) the recall was with respect to two vehicles, one N16 Pulsar and one Y61 Patrol, each built in September 2001 with specific VINs;
 - (B) the recall action was being taken on the grounds that: *'Based on NHTSA's amended consent order, NHTSA and the Ministry of Land, Infrastructure, Transport and Tourism (MLIT) requested affected manufacturers to conduct second recall for past Takata passenger airbag inflator recalls where non-desiccated Takata passenger airbag inflators were used. The two vehicles involved in this action were fitted with non-desiccated inflators in 2010.'*;
- (iii) admits that words broadly to the effect pleaded in paragraphs 11(j)(iii), (iv) and (v) of the Statement of Claim appeared on the Product Safety Australia website and says further that any later updates to the text of the

recall on the Product Safety Australia website were not made by the defendant and the defendant does not know when, or by whom, those updates were made;

- (iv) otherwise denies the sub-paragraph;
- (k) as to sub-paragraph (k):
 - (i) admits that:
 - (A) on 6 October 2017, it notified the responsible Commonwealth Minister that it was voluntarily taking action to recall certain vehicles (recall campaign RT030);
 - (B) the ACCC subsequently gave that recall campaign the reference Product Recall Australia Number 2017/16363;

Particulars

Letter from the defendant to the Product Safety Hazard Response Branch, ACCC and General Manager of Vehicle Safety Standards, Department of Infrastructure and Regional Development dated 6 October 2017.

- (ii) says that:
 - (A) the recall was with initially respect to C11 Tiida and D40 Navara vehicles built between 2006 and 2015 with specific VINs, and was later refined to C11 Tiida vehicles built between 2006 to 2012 and D40 Navara vehicles built between 2006 to 2015 with specific VINs;
 - (B) the recall action was being taken on the grounds that: *'Nissan has identified that a potential air leak on some passenger airbag inflators may allow moisture to enter the airbag inflator causing the propellant in the inflator units to deteriorate. Deterioration of the propellant may, under certain usage conditions, lead to abnormal deployment of the passenger airbag. The unlikely event of an abnormal passenger airbag deployment or metal fragment scatter may pose a hazard to the occupants of the vehicle.'*;
- (iii) admits that words broadly to the effect pleaded in paragraphs 11(k)(iii), (iv) and (v) of the Statement of Claim appeared on the Product Safety

Australia website and says further that any later updates to the text of the recall on the Product Safety Australia website were not made by the defendant and the defendant does not know when, or by whom, those updates were made;

(iv) otherwise denies the paragraph;

(l) otherwise denies the sub-paragraph.

11A. As to paragraph 11A, the defendant:

(a) admits that a compulsory safety recall was issued by Michael Sukkar, Assistant Minister to the Treasurer pursuant to section 122 of the ACL on 27 February 2018 (**Compulsory Recall**);

(b) says that the Compulsory Recall was with respect to the Affected Vehicles;

(c) relies on the Compulsory Recall for its full force and effect, as if set out in full herein;

(d) otherwise denies the paragraph.

12. As to paragraph 12, the defendant:

(a) as to sub-paragraph (a):

(i) admits that it marketed, distributed and promoted the Affected Vehicles within Australia during the periods in which those Affected Vehicles were offered for sale as new vehicles;

(ii) otherwise denies the sub-paragraph;

(b) as to sub-paragraph (b):

(i) repeats sub-paragraph (a) herein;

(ii) says that it:

(A) subject to sub-paragraph (C) herein, held out new Affected Vehicles as being safe to drive and safe for passengers in its promotional and marketing material by making statements as to the safety features of the Affected Vehicles, including that the Affected Vehicles were fitted with (or could be fitted with as an optional extra) certain airbags;

- (B) relies on the content of those statements made by it for their full force and effect, as if set out in full herein;
- (C) at and from the time the Voluntarily Initiated Recalls were published, held out the Affected Vehicles as being subject to the issues identified in the Voluntarily Initiated Recalls;
- (iii) otherwise denies the sub-paragraph;
- (c) as to sub-paragraph (c), denies the sub-paragraph and says that it:
 - (i) implemented the Voluntarily Initiated Recalls;
 - (ii) brought the Voluntarily Initiated Recalls and Compulsory Recall to the attention of owners of Affected Vehicles the subject of those recalls;

Particulars

*In compliance with the FCAI Code of Practice for the Conduct of an Automotive Safety Recall (**Code of Practice**), it brought the Voluntarily Initiated Recalls and Compulsory Recall to the attention of owners of Affected Vehicles by:*

- (I) preparing recall notices that complied with the formal requirements of the Code of Practice so as to bring the recall to the attention of the owners of Affected Vehicles;*
- (II) sending the VINs of the Affected Vehicles the subject of the relevant recall to National Exchange of Vehicle & Driver Information System (**NEVDIS**) to obtain the name and address of the registered owners;*
- (III) organising for a mailing house to send letters containing the recall notice to the registered owners of the Affected Vehicles using the NEVDIS information;*
- (IV) where the owner did not present their Affected Vehicle to an authorised dealership for repair, sending reminder letters using refreshed NEVDIS name and address data;*
- (V) from December 2015 to December 2016, sending 'pre-letters' to owners of Affected Vehicles subject to a relevant recall where the owner may experience delay due to parts*

availability with the replacement of the Affected Takata Airbag;

- (VI) *from August 2017, in addition to the steps referred to above, obtaining further contact information from the State Registration Authorities for Affected Vehicles fitted with Alpha Airbags and:*
- *sending the recall notice to the email address of the owner of the Affected Vehicle where that was available; and*
 - *calling owners of Affected Vehicles fitted with Alpha Airbags where the owner's telephone number was available; and*
- (VII) *from December 2017, in addition to the steps referred to above, utilising the defendant's dealer service data to obtain email addresses for Affected Vehicles and sending the recall notice to the email address of the owner of the Affected Vehicle where that was available;*
- (VIII) *on 12 December 2017, publishing a video on Youtube.com that 'strongly urged' owners of the Nissan vehicles to 'check whether their vehicle has been recalled';*
- (IX) *from 12 December 2017 utilising Nissan's social media platforms to urge customers to check whether their vehicle is part of the recall and to promote the video referred to in paragraph (VIII);*
- (X) *from March 2018, in addition to the steps referred to above, obtaining further contact information from the State Registration Authorities for Affected Vehicles in line with the guidelines provided by the ACCC for the Compulsory Recall;*
- (XI) *in March 2018, taking steps to further enhance existing contact information for the owners of Affected Vehicles by using a third party data provider in line with the guidelines provided by the ACCC for the Compulsory Recall;*

- (XII) *using the enhanced contact information to provide details of recalls to owners of Affected Vehicles who had not had their airbags finally replaced in line with the guidelines and timetable provided by the ACCC for the Compulsory Recall, including by:*
- (A) *from May 2018, organising for a mailing house to commence sending letters containing recall notices by post;*
 - (B) *from June 2018, sending recall notices by email (where the enhanced contact information included an email address);*
 - (C) *from June 2018, sending an alert by text message (where the enhanced contact information included a mobile telephone number);*
 - (D) *from June 2018, making telephone calls (where the enhanced contact information included a telephone number); and*
 - (E) *from July 2018, sending letters containing recall notices by registered post;*
- (XIII) *in July 2018, launching an improved Nissan Australia website to support Nissan owners to identify if their vehicles were affected, and if so, whether a recall is currently active or scheduled for the future, including recall information in multiple languages;*
- (XIV) *in July 2018, participating in a FCAI Joint Industry Advertising campaign across TV, radio, newspapers and on-line; and*
- (XV) *in September 2018, commencing in-person visits for Alpha vehicles;*
- (iii) organised for the replacement of the Affected Takata Airbags fitted in the Affected Vehicles the subject of the Voluntarily Initiated Recalls and Compulsory Recall at no cost to the owner of the Affected Vehicle for the replacement of the airbag;

- (iv) worked and continues to work with the ACCC and the Commonwealth Department of Infrastructure and Regional Development (*DIRD*) to coordinate the implementation of the Voluntarily Initiated Recalls and Compulsory Recall.

13. [not used]

14. [not used]

15. [not used]

16. [not used]

17. [not used]

18. [not used]

19. [not used]

20. [not used]

21. [not used]

22. [not used]

MERCHANTABLE QUALITY CLAIM – TPA s74D

23. As to paragraph 23, the defendant:

(a) repeats paragraph 7(a) herein;

(b) says that a vehicle fitted with a Takata Airbag that is not an Affected Takata Airbag does not fail to be of merchantable quality with the meaning of section 74D(3) of the TPA due to the presence of that Takata Airbag;

(c) says further that:

(i) at the time of the first supply by the defendant to another person for re-supply the Affected Vehicles were of merchantable quality within the meaning of section 74D(3) of the TPA;

(ii) Affected Vehicles may only cease to be of merchantable quality within the meaning of section 74D(3) of the TPA due to the presence of an Affected Takata Airbag that has not been replaced with an airbag other than an Affected Takata Airbag after a period of time in the circumstances referred to in sub-paragraph 7(a)(i)(A) herein and only if the Affected Takata Airbag fitted in the Affected Vehicle had not been replaced by that time;

- (iii) Affected Vehicles that have:
 - (A) had all Affected Takata Airbags replaced with airbags other than Affected Takata Airbags, do not fail to be of merchantable quality within the meaning of section 74D(3) of the TPA due to the presence of an Affected Takata Airbag from the time of the replacement;
 - (B) had all Affected Takata Airbags replaced with new Affected Takata Airbags, may only cease to be of merchantable quality within the meaning of section 74D(3) of the TPA due to the presence of an Affected Takata Airbag after a period of time in the circumstances referred to in sub-paragraph 7(a)(i)(A) herein and only if the Affected Takata Airbag fitted in the Affected Vehicle had not been replaced by that time;
 - (d) otherwise denies the paragraph.
24. As to paragraph 24, the defendant:
- (a) denies the paragraph;
 - (b) says that:
 - (i) any Group Member with an Affected Vehicle is able to have their Affected Takata Airbag replaced by an authorised dealer of the defendant at no cost for the replacement of the airbag;
 - (ii) where an Affected Vehicle (including the Plaintiff's vehicle) has had all Affected Takata Airbags replaced with airbags other than Affected Takata Airbags any loss of value is not by reason of the matters alleged in the Statement of Claim.
25. The defendant denies paragraph 25 and says that sub-section 74D(1) of the TPA does not apply to Group Members who acquired their Affected Vehicle by way of sale by auction.

25A. In further response to the causes of action alleged in paragraphs 23 to 24 of the Statement of Claim, the defendant:

- (a) says that:
 - (i) to the extent that any Group Member's cause of action under section 74D(1) accrued on or before 9 January 2015, the claim is not actionable and is time-barred by operation of section 74J(1) of the TPA;
 - (ii) each Group Member's cause of action accrued on the date on which they acquired their Affected Vehicle;
- (b) says further that, to the extent that any Group Member's claim under section 74D(1) is in respect of loss or damage suffered in relation to the supply of an Affected Vehicle that was first supplied to a consumer before 9 January 2008, it relies on the defence in sub-section 74J(3) of the TPA;
- (c) says that sub-paragraph 25A(b) herein applies to the plaintiff, as his Affected Vehicle was manufactured in around 2005 and first supplied to a consumer before 9 January 2008;
- (d) otherwise relies on section 74J of the TPA for its full force and effect.

26. [not used]

27. [not used]

28. [not used]

29. [not used]

ACCEPTABLE QUALITY CLAIM – ACL s54

30. As to paragraph 30, the defendant:

- (a) says that sub-section 54(1) of the ACL creates a statutory guarantee that goods are of acceptable quality (as defined in sub-section 54(2)) only if:
 - (i) a person supplies, in trade or commerce, goods to a consumer; and
 - (ii) the supply does not occur by way of sale by auction;
- (b) says further that, by reason of the matters alleged at paragraph (a) herein:
 - (i) the guarantee only applies to the quality of the Affected Vehicle at the time of supply to Group Members;

- (ii) the guarantee does not apply to any Affected Vehicles supplied to Group Members:
 - (A) otherwise than in trade or commerce; or
 - (B) by way of sale by auction;
 - (c) otherwise denies the paragraph.
- 31. As to paragraph 31, the defendant:
 - (a) repeats paragraph 7(a) herein;
 - (b) says that a vehicle fitted with a Takata Airbag that is not an Affected Takata Airbag does not fail to be of acceptable quality within the meaning of section 54 of the ACL due to the presence of that Takata Airbag;
 - (c) says further that:
 - (i) at the time of the first supply by the defendant to another person for re-supply, the Affected Vehicles were of acceptable quality within the meaning of section 54 of the ACL;
 - (ii) Affected Vehicles may only cease to be of acceptable quality within the meaning of section 54 of the ACL due to the presence of an Affected Takata Airbag that has not been replaced with an airbag other than an Affected Takata Airbag after a period of time in the circumstances referred to in sub-paragraph 7(a)(i)(A) herein and only if the Affected Takata Airbag fitted in the Affected Vehicle had not been replaced by that time;
 - (iii) Affected Vehicles that have had:
 - (A) all Affected Takata Airbags replaced with airbags other than an Affected Takata Airbags, do not fail to be of acceptable quality within the meaning of section 54 of the ACL due to the presence of an Affected Takata Airbag from the time of that replacement;
 - (B) all Affected Takata Airbags replaced with new Affected Takata Airbags, may only cease to be of acceptable quality within the meaning of section 54 of the ACL due to the presence of an Affected Takata Airbag after a period of time in the circumstances referred to in sub-paragraph 7(a)(i)(A) herein and only if the Affected Takata Airbag fitted in the Affected Vehicle had not been replaced by that time;

- (d) otherwise denies the paragraph.
32. As to paragraph 32, the defendant:
- (a) repeats paragraph 31 herein;
- (b) otherwise denies the paragraph.
33. The defendant denies paragraph 33 and:
- (a) says that:
- (i) sections 271 and 272 of the ACL only apply to conduct by the defendant that occurred on or after 1 January 2011;

Particulars

1. *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010 (Cth), section 2.*
2. *Competition and Consumer Act 2010 (Cth) (CCA), section 131.*

- (ii) the TPA continues to apply to acts or omissions by the defendant that occurred before 1 January 2011;

Particulars

- Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010 (Cth), item 6 of Schedule 7.*

- (iii) it repeats paragraphs 23 to 25A herein with respect to the claim by the plaintiff and any other Group Member that acquired an Affected Vehicle after 1 January 2011 that was supplied by the defendant to a consumer or a person who acquired the Affected Vehicle for re-supply before 1 January 2011;

- (b) says further that:
- (i) sub-section 271(2)(a) of the ACL provides that sub-section 271(1) does not apply if the guarantee under section 54 is not complied with only because of an act, default or omission of, or any representation made by, any person other than the manufacturer or an employee or agent of the manufacturer; and

- (ii) to the extent that the Affected Vehicles did not, at any time, comply with the guarantee under section 54, this non-compliance was only because of the act, default or omission of Takata Corporation, TK Holdings Inc. or Takata de Mexico, S.A. de C.V., or their respective employees or agents, and was not because of the act, default or omission of the defendant or its employees or agents;

Particulars

The relevant acts, defaults or omissions of Takata Corporation, TK Holdings Inc. and Takata de Mexico, S.A. de C.V., or their employees or agents, that resulted in any non-compliance with the guarantee were:

- *the design and/or manufacture of the Affected Takata Airbags resulting in the issues referred to in paragraph 7(a)(i)(A) above;*
- *the implementation of the scheme of inducing vehicle manufacturers (including the Nissan Group) to purchase the Affected Takata Airbags by creating falsified testing data and reports as detailed in the plea agreement between Takata Corporation and the United States Department of Justice signed in January 2017.*

- (c) repeats sub-paragraph 24(b) herein.

33A. In further response to the causes of action pleaded in paragraphs 30 to 33 of the Statement of Claim, the defendant says that:

- (a) section 273 of the ACL provides that an action under section 271 must be commenced within 3 years after the day 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;
- (b) any Group Member who, before 9 January 2015:
- (i) received a recall notice from the defendant in relation to their Affected Vehicle; or
 - (ii) was otherwise notified that vehicles of the same model as the Group Member's Affected Vehicle were the subject of a recall,

was aware or ought reasonably to have been aware that the guarantee in section 54 had not been complied with on or before that date;

Particulars

The means by which the defendant notified owners of Affected Vehicles that their vehicles were the subject of a recall will be a matter for evidence, but included the steps identified in paragraph 12(c) herein.

- (c) in the premises, the claim of any Group Member to which paragraph 33A(b) herein applies is not actionable and is time-barred by operation of section 273 of the ACL;
- (d) it otherwise relies on section 273 of the ACL for its full force and effect.

34. [not used]

35. [not used]

36. [not used]

37. [not used]

38. [not used]

39. [not used]

40. [not used]

41. [not used]

MISLEADING OR DECEPTIVE CONDUCT CLAIM

42. The defendant denies paragraph 42 and says that:

- (a) none of the conduct referred to in paragraphs 4(f), 4(g) or 12 of the Statement of Claim (other than the conduct referred to in paragraph 12(b)) constituted a representation as to future matters for the purposes of section 51A of the TPA or section 4 of the ACL;
- (b) to the extent that the conduct referred to in paragraph 12(b) constituted a representation as to future matters, it had reasonable grounds for making the representations at the time they were made, due to the matters referred to in paragraphs 7(a)(i)(A)(V), 10(c), 24(b) and 48 herein.

- 42A. As to paragraph 42A of the Statement of Claim, the defendant:
- (a) repeats paragraphs 4, 12 and 42 herein;
 - (b) says that, prior to the Voluntarily Initiated Recalls and Compulsory Recalls, the defendant represented that the Affected Vehicles were safe to drive and safe to transport passengers;
 - (c) says that the plaintiff has not adequately pleaded or particularised the conduct by which, or the time period during which, the alleged Misleading Representations were made, whether they were express or implied and, if implied, the circumstances from which the implications arise; and
 - (d) otherwise does not admit sub-paragraphs (a) – (f).
- 42B. As to paragraph 42B of the Statement of Claim, the defendant:
- (a) repeats paragraph 42A herein;
 - (b) denies paragraph 42B.
- 42C. As to paragraph 42C of the Statement of Claim, the defendant;
- (a) repeats paragraph 42A herein;
 - (b) otherwise denies paragraph 42C.
43. The defendant denies paragraph 43.
44. The defendant denies paragraph 44.
45. The defendant denies paragraph 45.
46. The defendant denies paragraph 46 and repeats sub-paragraph 24(b) herein.
47. The defendant denies paragraph 47.
- 47A. In further response to the matters alleged in paragraphs 42 to 47 of the Statement of Claim, the defendant:
- (a) says that, with respect to the misleading or deceptive conduct alleged to have been engaged in by the defendant on or after 26 July 2001:
 - (i) to the extent that any Group Member's causes of action under sections 82 or 87 of the TPA or sections 236 or 237 of the ACL for alleged contraventions by the defendant of section 52 of the TPA or section 18 of the ACL (**MDC Causes of Action**) accrued on or before 9 January 2012,

the claim is not actionable and is time-barred by operation of sub-sections 82(2) and 87(1CA) of the TPA or sub-sections 236(2) and 237(3) of the ACL;

(ii) each Group Member's MDC Causes of Action accrued on the date on which they acquired their Affected Vehicle;

(b) says that with respect to misleading or deceptive conduct alleged to have been engaged in by the defendant before 26 July 2001:

(i) to the extent that any Group Member's MDC Causes of Action accrued on or before 9 January 2015, the claim is not actionable and is time-barred by operation of sub-sections 82(2) and 87(1CA) of the TPA as in force at the time of the defendant's conduct;

(ii) repeats sub-paragraph (a)(ii) herein;

(c) otherwise relies on the limitation periods in sections 82 and 87 of the TPA and 236 and 237 of the ACL for their full force and effect.

47B. In further response to the matters alleged in paragraphs 42 to 47 of the Statement of Claim, the defendant says that, if it is determined that any Group Member suffered loss or damage by reason of the defendant engaging in conduct that contravened section 52 of the TPA or section 18 of the ACL (which is denied) then:

(a) where:

(i) a Group Member was aware, or ought to have been aware, that his or her Affected Vehicle was the subject of one of the Voluntarily Initiated Recalls or Compulsory Recall and did not take steps to have the Affected Takata Airbag fitted in his or her Affected Vehicle replaced within a reasonable time; or

Particulars

A Group Member ought to have been aware that their Affected Vehicle was subject to a Voluntarily Initiated Recall or the Compulsory Recall where:

1. *the Group Member had received a recall notice from the defendant; or*

2. *was otherwise notified that vehicles of the same model as the Group Member's Affected Vehicle were the subject of a recall.*

(ii) did not make reasonable inquiries as to whether the Affected Vehicle was the subject of a Voluntarily Initiated Recall or the Compulsory Recall before purchasing the Affected Vehicle,

the Group Member suffered any loss or damage partly as a result of his or her failure to take reasonable care;

(b) the amount of loss or damage that such a Group Member may recover under section 82 of the TPA or section 236 of the ACL should be reduced by an amount that the Court determines to be just and equitable having regard to the claimant's share in the responsibility for the loss and damage pursuant to sub-section 82(1B) of the TPA or section 137B of the CCA (as applicable).

UNCONSCIONABLE CONDUCT CLAIM

48. As to paragraph 48, the defendant:

(a) in relation to the matters alleged in sub-paragraph 7(a)(i) of the Statement of Claim:

(i) repeats sub-paragraph 7(a)(i) herein;

(ii) admits that it knew about the matters described in each Voluntarily Initiated Recall applied to the Affected Vehicles the subject of those recalls by the date on which it notified the responsible Commonwealth Minister of the recalls as referred to in paragraph 11 herein;

(iii) otherwise denies that it knew the matters alleged in sub-paragraph 7(a)(i) of the Statement of Claim;

(b) in relation to the matters alleged in paragraph 8 of the Statement of Claim:

(i) repeats paragraph 8 herein;

(ii) says that:

(A) it knew that the Affected Vehicles were fitted with at least one Affected Takata Airbag at the time they were first supplied by the defendant to a person for re-supply or a consumer;

- (B) it does not know (and did not know at the alleged times) whether Affected Vehicles that have had their Affected Takata Airbags replaced continue to be fitted with an Affected Takata Airbag or not;
 - (iii) otherwise denies that it knew the matters alleged in paragraph 8 of the Statement of Claim;
 - (c) in relation to the matters alleged in sub-paragraph 10(c) of the Statement of Claim:
 - (i) repeats sub-paragraphs 10(c) and 48(a) herein; and
 - (ii) otherwise denies that it knew the matters alleged in sub-paragraph 10(c) of the Statement of Claim;
 - (d) otherwise denies the paragraph.
49. The defendant denies paragraph 49.
- 49A. The defendant denies paragraph 49A.
50. The defendant denies paragraph 50.
51. The defendant denies paragraph 51 and repeats sub-paragraph 24(b) herein.
- 51A. In further response to the matters alleged in paragraphs 42 to 47, the defendant:
- (a) says that, with respect to alleged unconscionable conduct engaged in by the defendant on or after 26 July 2001:
 - (i) to the extent that any Group Member's causes of action under sections 82 or 87 of the TPA or sections 236 or 237 of the ACL for alleged contraventions by the defendant of section 51AB of the TPA or section 21 of the ACL (**Unconscionability Causes of Action**) accrued on or before 9 January 2012, the claim is not actionable and is time-barred by operation of sub-sections 82(2) and 87(1CA) of the TPA or sub-sections 236(2) and 237(3) of the ACL;
 - (ii) each Group Member's Unconscionability Causes of Action accrued on the date on which they acquired their Affected Vehicle;
 - (b) says that, with respect to the unconscionable conduct alleged to have been engaged in by the defendant before 26 July 2001:
 - (i) section 82 of the TPA did not apply to that conduct;

- (ii) to the extent that any Group Member's Unconscionability Causes of Action accrued on or before 9 January 2016, any claim under section 87 is not actionable and is time-barred by operation of sub-section 87(1CA) of the TPA as in force at the time of the defendant's conduct;
- (iii) repeats sub-paragraph (a)(ii) herein;
- (c) otherwise relies on the limitation periods in sections 82 and 87 of the TPA and 236 and 237 of the ACL for their full force and effect.

PROPORTIONATE LIABILITY

In further answer to the Statement of Claim:

52. If, which is denied, the defendant is found liable to the Group Members then the defendant says as follows:
- (a) the MDC Causes of Action are apportionable claims within the meaning of section 87CB of the CCA and the TPA;
 - (b) for the reasons set out below Takata Corporation, TK Holdings Inc. and Takata de Mexico, S.A. de C.V. are concurrent wrongdoers;
 - (c) the defendant's liability in respect of the MDC Causes of Action should be limited pursuant to s 87CD of the CCA and TPA to an amount reflecting that the proportion of loss or damage that the Court considers just, having regard to the extent of the concurrent wrongdoers' responsibility for the loss and damage suffered by the Group Members;
 - (d) any judgment against the defendant in respect of the MDC Causes of Action must be limited to not more than that amount pursuant to section 87CD of the CCA and TPA.
53. At all material times:
- (a) Takata Corporation, TK Holdings Inc. and Takata de Mexico, S.A. de C.V., developed, tested, manufactured and sold Affected Takata Airbags that were fitted into the Affected Vehicles;
 - (b) the defendant purchased and supplied Nissan motor vehicles fitted with Affected Takata Airbags.
54. For the purpose of this apportionment claim only (and without admission) the defendant:
- (a) repeats paragraphs 7 and 42-47 of the Statement of Claim;

- (b) says that the Group Members' loss (if any) has been caused in whole or in part by the acts or omissions of Takata Corporation, TK Holdings Inc. and Takata de Mexico, S.A. de C.V..

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 for the defendant

Date of signature

17 September 2018

AFFIDAVIT VERIFYING

Name: Ian Moreillon
Address: 260-270 Frankston-Dandenong Road, Dandenong South, Victoria
Occupation: Director, Customer Experience & Franchise Quality
Date: 17 September 2018

I affirm:

1. I am an officer of Nissan Motor Co. (Australia) Pty Ltd and am authorised to verify this defence on its behalf.
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.

AFFIRMED at DANDENONG
SOUTH

Signature of deponent



Signature of witness



Name of witness Andrew Lee

Address of witness 260-270 Frankston-Dandenong Road,
Dandenong South, Victoria

Capacity of witness Solicitor

CERTIFICATE UNDER SECTION 34(1)(C) OF OATHS ACT 1900

I, Andrew Lee, a solicitor, certify the following matters concerning the making of this affidavit by the person who made it:

1. I saw the face of the person.
2. I have known the person for at least 12 months.

Signature of
authorised witness



Date: 17 September 2018.

FURTHER DETAILS ABOUT FILING PARTY**Filing party**

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Victoria.

Legal representative for filing party

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