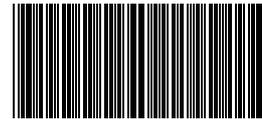




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Defence to Amended Statement of Claim

COURT DETAILS

Court	Supreme Court of NSW
Division	Equity
List	Equity General
Registry	Supreme Court Sydney
Case number	2018/00009555

TITLE OF PROCEEDINGS

First Plaintiff	Owen Brewster
First Defendant	BMW AUSTRALIA LTD ACN 004675129

FILING DETAILS

Filed for	BMW AUSTRALIA LTD, Defendant 1
Legal representative	John Pavlakis
Legal representative reference	
Telephone	9258 6000

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 (BMW Defence to FASOC.pdf)

[attach.]

Form 7A (version 5)
UCPR 14.3

DEFENCE TO FURTHER AMENDED STATEMENT OF CLAIM

COURT DETAILS

Court	Supreme Court of NSW
Division	Equity
List	General (Class Action)
Registry	Sydney
Case number	2018/9555

TITLE OF PROCEEDINGS

Plaintiff	Owen Brewster
Defendant	BMW Australia Ltd ACN 004 675 129

FILING DETAILS

Filed for	BMW Australia Ltd , Defendant
Filed in relation to	Plaintiff's claim
Legal representative	John Pavlakis, Ashurst Australia
Legal representative reference	JPAV/EPE/1000 015 279
Contact name and telephone	John Pavlakis, 02 9258 6062
Contact email	john.pavlakis@ashurst.com

HEARING DETAILS

PLEADINGS AND PARTICULARS

Defined terms used in this Defence have the meaning given to them in the Further Amended Statement of Claim (SOC) unless otherwise indicated.

THE PROCEEDINGS AND THE PARTIES

- 1 As to paragraph 1, the Defendant:
 - (a) admits that the Plaintiff brings this proceeding purportedly as a representative proceeding pursuant to Part 10 of the *Civil Procedure Act 2005* (NSW) in his own right and on behalf of the persons described in the paragraph (**Group Members**); and
 - (b) otherwise, does not know and does not admit paragraph 1.
- 2 As to paragraph 2, the Defendant:

- (a) says that a search of the Plaintiff's name on the National Exchange of Vehicle and Driver Information System (**NEVDIS**) database records that the Plaintiff is the registered owner of a BMW E46 Series 3 Model 318I vehicle with VIN number WBAAZ72070NG12182 with a retail date 31 July 2003; and
- (b) otherwise, does not know and does not admit paragraph 2.

3 As to paragraph 3, the Defendant:

- (a) admits that during the Relevant Period, Group Members acquired a vehicle manufactured by Bayerische Motoren Werke AG (**BMW AG**) or its related entities (together, **BMW Manufacturers**), such vehicles hereafter referred to as **BMW Vehicles**;
- (b) admits that Group Members acquired their respective BMW Vehicle:
 - i. for \$40,000 or less; or
 - ii. where the BMW Vehicle was a kind ordinarily acquired for personal, domestic or household use or consumption;
- (c) admits that the represented class is limited to Group Members who did not acquire a BMW Vehicle, or hold themselves out as acquiring a BMW Vehicle for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land;
- (d) admits that the represented class is limited to Group Members who acquired a BMW Vehicle for the purpose of driving the BMW Vehicle or permitting the BMW Vehicle to be driven;
- (e) admits that the purpose listed in sub-paragraph (d) above is a purpose that was known to the Defendant;
- (f) admits that Group Members acquired the BMW Vehicles as a consumer within the meaning of section 4B of the *Trade Practices Act 1974* (Cth) (**TPA**) or sections 3(a) or (b) of the Australian Consumer Law, being Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) (**ACL**); and
- (g) otherwise denies paragraph 3.

4 As to paragraph 4, the Defendant:

- (a) admits that it is a company duly incorporated in Australia;
- (b) admits that it is a trading corporation within the meaning of section 4 of the **TPA**;

- (c) says that the Defendant is and was at all material times a wholly owned subsidiary of BMW AG which:
 - i. is a stock corporation incorporated under the laws of Germany and has its registered office in Munich, Germany; and
 - ii. has no place of business in Australia;
- (d) admits that the BMW Manufacturers manufactured the BMW Vehicles;
- (e) other than any BMW vehicles imported by any other persons, admits that the BMW Vehicles imported into Australia were imported by it;

Particulars

Some of the BMW Vehicles were imported by persons other than the Defendant ("private imports").

- (f) admits that it did not manufacture the BMW Vehicles;
- (g) admits that in respect of the BMW Vehicles imported by it into Australia, it is a manufacturer of those vehicles within the meaning of section 74A of the TPA or section 7 of the ACL;
- (h) says that it supplied the BMW Vehicles referred to in paragraph (g) above, other than by way of sale by auction, in the course of business and in trade or commerce to dealers who then re-supply the goods to consumers; and
- (i) otherwise denies paragraph 4.

5 As to paragraph 5, the Defendant:

- (a) admits that the conduct referred to in paragraph 4(h) above was conduct in trade or commerce; and
- (b) otherwise denies paragraph 5.

6 The Defendant does not know and does not admit paragraph 6.

THE BMW VEHICLES

7 As to paragraph 7, the Defendant:

- (a) says that airbags are safety features intended to provide supplemental protection to motor vehicle occupants in the event of certain collisions;
- (b) says that it is now known that:
 - i. a number of front driver or passenger airbags manufactured or supplied by Takata Corporation and its related entities (**Takata Group**)

- use a phase-stabilized ammonium nitrate (**PSAN**) based chemical propellant;
- ii. PSAN without the use of a desiccant, can degrade over a period of time;
 - iii. such degradation is progressive with time and can be dependent on any or all of the following:
 - A. the design or characteristics of the airbag module, inflator and the propellant used in the airbag;
 - B. the design of vehicles, including the location of the airbag within the vehicle relative to any moisture-generating components of the vehicle including the air-conditioning unit;
 - C. the place and time period of manufacture of the airbag;
 - D. exposure of the inflator to certain environmental conditions, including elevated temperatures, increased temperature fluctuations or temperature cycles, high solar radiation or high absolute humidity; and
 - E. the vehicle's time in service;
 - iv. such degradation may result in the propellant burning more rapidly than it was designed to upon activation;
 - v. if the propellant burns more rapidly than it was designed to, the metal inflator housing may rupture under too much internal pressure if the vehicle is involved in a collision triggering the airbag;
 - vi. there are two classes of PSAN inflators now known as "alpha" and "beta";
 - vii. "alpha" inflators are limited to inflators manufactured or supplied by Takata Group using PSAN being a:
 - A. Programmable Smokeless Driver Inflator (**PSDI**) inflator manufactured between 1 August 2000 and 31 December 2001; and
 - B. Smokeless Passenger Inflator (**SPI**), Programmable Smokeless Passenger Inflator (**PSPI**) and PSPI-L inflator manufactured between 1 August 2000 and 31 December 2002;
 - viii. "beta" inflators are all other inflators which use PSAN either without the use of a desiccant or with the use of a calcium sulphate desiccant;

- ix. "alpha" airbag inflators may be affected by additional manufacturing issues as follows:
 - A. those manufactured at Moses Lake, Washington between 13 April 2000 and 11 September 2002 may have been the subject of inadequate compaction force being applied during manufacture; and
 - B. those manufactured at Monclova, Mexico between 4 October 2001 and October 31 2002 may have been exposed to uncontrolled moisture conditions during manufacture;
- (c) says that in respect of the airbags fitted in BMW Vehicles:
 - i. none contained an inflator manufactured in Moses Lake, Washington; and
 - ii. the possibility of rupture referred to in paragraph (b)(v) above does not arise until at least 10 years from the date of manufacture;
- (d) a "Safety Warning Notice" was published on 6 August 2017 pursuant to paragraphs 129(1)(a) and 129(1)(b) of Schedule 2 of the Competition and Consumer Act 2010 by Michael McCormack, Minister for Small Business, and the Defendant relies on the terms of the Safety Warning Notice for their full force and effect;
- (e) says that it has been reported that worldwide approximately 100 million vehicles, including at least 4 million in Australia, fitted with airbags manufactured or supplied by Takata Group have been recalled;

Particulars

Department of Infrastructure and Regional Development, Recall of vehicles in Australia fitted with Takata airbags, Report on progress and status of the recalls, July 2017 p 3.

Media Release of Hon Michael Sukkar MP dated 28 February 2018, <http://mss.ministers.treasury.gov.au/media-release/004-2018/>

- (f) says that worldwide there have been approximately 230 reported cases of injury said to have been associated with the rupture of defective airbags manufactured or supplied by Takata Group;

Particulars

ACCC, Product Safety Australia, *About the compulsory Takata airbag recall*, <https://www.productsafety.gov.au/recalls/compulsory-takata->

[airbag-recall/about-the-compulsory-takata-airbag-recall#compulsory-recall](https://www.productsafety.gov.au/recalls/compulsory-takata-airbag-recall/about-the-compulsory-takata-airbag-recall#compulsory-recall), 15 January 2018.

Media Release of Hon Michael Sukkar MP dated 28 February 2018, <http://mss.ministers.treasury.gov.au/media-release/004-2018/>

- (g) says that worldwide there have been 23 reported deaths said to have been associated with the rupture of defective airbags manufactured or supplied by Takata Group;

Particulars

ACCC, Product Safety Australia, *About the compulsory Takata airbag recall*, <https://www.productsafety.gov.au/recalls/compulsory-takata-airbag-recall/about-the-compulsory-takata-airbag-recall#compulsory-recall>, 15 January 2018.

Media Release of Hon Michael Sukkar MP dated 28 February 2018, <http://mss.ministers.treasury.gov.au/media-release/004-2018/>

- (h) says that there has been one reported death in Australia said to have been associated with the rupture of a defective airbag manufactured or supplied by Takata Group; and

Particulars

ACCC, Product Safety Australia, *About the compulsory Takata airbag recall*, <https://www.productsafety.gov.au/recalls/compulsory-takata-airbag-recall/about-the-compulsory-takata-airbag-recall#compulsory-recall>, 15 January 2018.

Media Release of Hon Michael Sukkar MP dated 28 February 2018, <http://mss.ministers.treasury.gov.au/media-release/004-2018/>

- (i) otherwise denies paragraph 7.

8 As to paragraph 8, the Defendant:

- (a) says that each of the BMW Vehicles the subject of an airbag-related product safety recall referred to in paragraphs 11 and 11A of the SOC were fitted with at least one front driver or passenger airbag manufactured or supplied by Takata Group (**Takata Airbag**); and
- (b) otherwise denies the paragraph.

9 [Not used]

~~As to paragraph 9, the Defendant:~~

~~(a) admits that at least one safety recall referred to in paragraphs 11 or 11A of the SOC had been issued in respect of the following BMW Vehicles:~~

- ~~i. BMW 3 Series E46 production range between 1998 and 2006;~~
- ~~ii. BMW 5 Series E39 production range between 1999 and 2003;~~
- ~~iii. BMW X5 E53 production range between 1999 and 2003;~~
- ~~iv. BMW E70 X5 production range between 2006 and 2013; and~~
- ~~v. BMW E71 X6 production range between 2006 and 2013.~~

~~(b) repeats paragraph 8 above; and~~

~~(c) otherwise denies paragraph 9.~~

10 As to paragraph 10, the Defendant:

- (a) repeats paragraph 3(b) and 3(d), 7 and 8 above;
- (b) admits that BMW Vehicles are goods within the meaning of sections 4 and 74A(2)(a) of the TPA and section 2 of the ACL;
- (c) otherwise denies paragraph 10.

11 As to paragraph 11, the Defendant:

- (a) says that it issued voluntary recall notices identifying the following BMW Vehicles:
 - i. on 10 May 2013 for BMW 3 Series E46 year range between December 2001 and March 2003, and was later expanded on a staged basis between July 2014 and May 2015 to include BMW 3 Series E46 year range between 1999 and 2006 (Product Recall Australia No. 2013/13576);
 - ii. on 8 August 2016 for BMW 5 Series E39, BMW 3 Series E46 and BMW E53 X5 year range between 2002 and 2005 (Product Recall Australia No. 2016/15581);
 - iii. on 2 March 2017 for BMW 5 Series E39, BMW 3 Series E46 and BMW E53 X5 year range between 2000 and 2004 (Product Recall Australia No. 2017/15881);
 - iv. on 28 July 2017 for BMW E70 X5 year range between 2007 and 2012 and E71 X6 year range between 2007 and 2012 (Product Recall Australia No. 2017/16230);

- v. on 12 September 2017 for BMW E70 X5 year range between 2007 and 2012 and E71 X6 year range between 2007 and 2012 (Product Recall Australia No. 2017/16298);
- vi. on 12 February 2018 for BMW E70 X5 year range 2013 and E71 X6 year range 2013 (Product Recall Australia No. 2018/16580); and
- vii. on 12 February 2018 for BMW E70 X5 year range 2013 and E71 X6 year range 2013 (Product Recall Australia No. 2018/16566).

(a1) says that it issued recall notices identifying the following BMW Vehicles:

- viii. on 18 June 2018 for BMW E83 X3 year range between 2004 and 2007 (Product Recall Australia No. 2018/16822); and
 - ix. on 20 June 2018 for BMW E8x 1 Series (CPA: 33113), BMW E9x 3 Series (CPA: 33767) and BMW E83 X3 Series (CPA: 32549) year range between 2004 and 2015 (Product Recall Australia No. 2018/16809).
- (b) it gave the Commonwealth Minister a written notification of each of the recalls referred to in paragraph (a);
 - (c) the Commonwealth Minister published a copy of each of the notices referred to in paragraph (b) above on the internet;
 - (d) relies on terms of the notices, as amended from time to time, for their full force and effect; and
 - (e) otherwise denies paragraph 11.

11A As to paragraph 11A, the Defendant:

- (a) on or about 28 February 2018, the Minister by written notice published on the internet, issued a compulsory recall notice in respect of the vehicles identified therein (**Compulsory Recall Notice**);
- (b) relies on terms of the Compulsory Recall Notice, as amended from time to time, for their full force and effect; and
- (c) otherwise denies paragraph 11A.

12 As to paragraph 12, the Defendant:

- (a) repeats paragraph 4(h);
- (b) admits that it marketed and promoted BMW Vehicles within Australia during the Relevant Period;

- (c) says that during the Relevant Period the Defendant implicitly represented to purchasers of new BMW Vehicles within Australia that newly manufactured BMW Vehicles were safe to drive and travel in at the time of purchase;
- (d) says that during the Relevant Period the Defendant implicitly represented to purchasers of new BMW Vehicles within Australia that newly manufactured BMW Vehicles would remain safe to drive and travel in in the future provided that those vehicles were:
- i. driven safely in compliance with all applicable road rules and in compliance with instructions of the Owner's Handbook provided by BMW;
 - ii. subject to appropriate repairs after any collision or accident;
 - iii. subject to after-purchase servicing in accordance with the service booklet provided by BMW; and
 - iv. subject to compliance with safety product recall notices should they be issued over the life of the vehicle;
- (e) says that the representation in (d) was a representation as to a future matter;
- (f) says that it had reasonable grounds for making the representation in (d);
- (g) says that it initiated a voluntary recall campaign referred to in paragraph 11 above and made the representations contained in those notices;
- (h) says that it is complying with the Compulsory Recall Notice referred to in paragraph 11A above;
- (i) says that it has no ability to prevent BMW Vehicles from being driven;
- (j) says that it has no ability to prevent BMW Vehicles from being sold as second-hand vehicles; and
- (k) otherwise denies paragraph 12.

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.

FAILURE TO SUPPLY GOODS OF MERCHANTABLE QUALITY – TPA s74D

23 As to paragraph 23, the Defendant:

- (a) repeats paragraph 4(h), 7, 10 and 12;
- (b) says that if the fact of the BMW Vehicle containing an airbag which has been the subject of a product safety recall was specifically drawn to the Group Member's attention before the Group Member acquired the BMW Vehicle, by operation of section 71(1)(a) of the TPA, the BMW Vehicle is taken to be of merchantable quality; and
- (c) otherwise denies paragraph 23.

24 The Defendant denies paragraph 24.

25 The Defendant denies paragraph 25 and says further that insofar as the BMW Vehicles were not of merchantable quality (which is denied):

- (a) pursuant to section 74J(1) and (2) of the TPA a cause of action under section 74D(1) of the TPA must be brought within three years after the day on which the cause of action accrued, which in the case of Group Members is relevantly the day upon which the Group Member first became aware (or ought reasonably to have become aware) that the goods were not of merchantable quality;
- (b) pursuant to section 74J(3) of the TPA it is a defence if such an action was not commenced within 10 years after the time of the first supply to a consumer of the goods;
- (c) any claim by a Group Member under section 74D(1) of the TPA which accrued on or before 9 January 2015 is barred by section 74J(1) and (2) of the TPA;
- (d) any claim by a Group Member under section 74D(1) of the TPA accrued by on or about the dates of the first recall notice applicable to the Group Member's BMW Vehicle referred to in paragraphs 11 and 11A above;
- (e) accordingly, the claims made under section 74D(1) of the TPA by Group Members who acquired a BMW 3 Series E46 with a model year between December 2001 and March 2003 are barred by section 74J of the TPA; and

- (f) further and in any event, all claims relating to BMW Vehicles first supplied to a consumer on or before 9 January 2008 are barred by section 74J(3).
- 26 Not used.
- 27 Not used.
- 28 Not used.
- 29 Not used.

FAILURE TO SUPPLY GOODS OF ACCEPTABLE QUALITY – ACL s54

- 30 As to paragraph 30, the Defendant:
- (a) admits that by reason of section 54 of the ACL, there is a guarantee that BMW Vehicles supplied in trade or commerce and other than by way of sale by auction to Group Members on or after 1 January 2011 are of acceptable quality; and
- (b) otherwise denies the paragraph.
- 31 As to paragraph 31, the Defendant:
- (a) repeats paragraph 4(g), 7, 10 and 12; and
- (b) denies paragraph 31.
- 32 As to paragraph 32, the Defendant:
- (a) says that if the fact of the BMW Vehicle containing an airbag which has been the subject of a product safety recall was specifically drawn to the Group Member's attention before the Group Member acquired the BMW Vehicle, by operation of section 54(4) of the ACL, the BMW Vehicle is taken to be of acceptable quality; and
- (b) otherwise denies that paragraph.
- 33 The Defendant denies paragraph 33 and says further that:
- (a) section 272 of the ACL does not create a right of action to recover damages;
- (b) no action under section 271 of the ACL may be brought against the Defendant in respect of BMW Vehicles acquired by the Group Members unless those vehicles were imported into Australia by the Defendant;
- (c) insofar as the guarantee in section 54 of the ACL has not been complied with in respect of the BMW Vehicles (which is denied), it is only because of an act, default or omission of Takata Group who is a person other than the manufacturer or an employee or agent of the manufacturer;

- (d) in the premises of subparagraph (c) above, and by reason of section 271(2) of the ACL, the Defendant is not liable to Group Members in respect of any non-compliance with the guarantee in section 54 of the ACL;
- (e) pursuant to section 273 of the ACL a cause of action under section 271 of the ACL must be brought within three years after the day on which the cause of action accrued, which in the case of Group Members is relevantly the day upon which the Group Member first became aware (or ought reasonably to have become aware) that the goods were not of acceptable quality;
- (f) any claim by a Group Member under section 271 of the ACL which accrued on or before 9 January 2015 is barred by section 273 of the ACL;
- (g) any claim by a Group Member under section 271 of the ACL accrued by on or about the dates of the first recall notice applicable to the Group Member's BMW Vehicle referred to in paragraph 11 and 11A above; and
- (h) accordingly, the claims made under section 271 of the ACL by Group Members who acquired a BMW 3 Series E46 with a model year between December 2001 and March 2003 are barred by section 271 of the ACL.

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

42 The Defendant denies paragraph 42 and repeats paragraphs 7, 10 and 12 above.

42A As to paragraph 42A, the Defendant:

(a) repeats paragraphs 7, 10 and 12 above; and

(b) otherwise denies paragraph 42A.

42B The Defendant denies paragraph 42B and repeats paragraphs 7, 10 and 12 above.

42C The Defendant denies paragraph 42C.

43 As to paragraph 43, the Defendant:

- (a) repeats paragraph 5(a) above; and
- (b) otherwise denies paragraph 43.

44 The Defendant denies paragraph 44 and repeats paragraph 7, 10 and 12 above.

45 As to paragraph 45, the Defendant:

- (a) denies paragraph 45; and
- (b) says that whether each Group Member relied on any alleged representation or conduct is not capable of determination as a common question.

46 The Defendant denies paragraph 46.

47 The Defendant denies paragraph 47 and says further that:

- (a) a cause of action under any of sections 82 and 87 of the TPA and sections 236 and 237 of the ACL must be brought within six years after the day on which the cause of action accrued;
- (b) any claim by a Group Member under section 82 or 87 of the TPA or section 236 or 237 of the ACL which accrued on or before 9 January 2012 is barred pursuant to sections 82 and 87 of the TPA and 236 and 237 of the ACL respectively; and
- (c) claims (which are denied) made by Group Members under section 82 or 87 of the TPA or section 236 or 237 of the ACL are barred if the Group Member's BMW Vehicle was first acquired or purchased (or alternatively first acquired or purchased by the Group Member) on or before 9 January 2012.

UNCONSCIONABLE CONDUCT

48 As to paragraph 48, the Defendant:

- (a) repeats paragraph 10 and 12 above;
- (b) says that at or around the date of each of the voluntary product safety recalls referred to in paragraph 11 above, it knew:
 - i. of the matters set out in those recall notices;
 - ii. that each of the BMW Vehicles subject to the voluntary product safety recalls referred to in paragraph 11 was fitted with at least one Takata Airbag;
- (c) says that on or around the following dates it received or became aware of the following material from the ACCC or Department of Infrastructure and

Regional Development and accordingly became aware of the matters referred to in those materials on or around those dates:

- i. July 2017, *Recall of vehicles in Australia fitted with Takata Airbags: Report on the progress and status of recalls*;
 - ii. 5 August 2017, *Safety Warning Notice to Public* ;
 - iii. 11 August 2017, letter and accompanying *Disclosure Notice to give information and produce documents under section 133D(1) of the Competition and Consumer Act 2010*;
 - iv. 16 August 2017, *Urgent Recall of Vehicles containing Takata Alpha Airbags*";
 - v. 23 August 2017, letter and accompanying *Variation to Disclosure Notice to give information and produce documents under section 133D(1) of the Competition and Consumer Act 2010*;
 - vi. 21 September 2017, *Proposed Recall Notice: Motor Vehicles with Specified Takata Airbag Inflators and Specified Salvaged Takata Airbag Inflators*;
 - vii. 9 October 2017, *Supplier conference - summary*;
 - viii. 1 November 2017, *Additional questions following meeting on Friday 27 October 2017*;
 - ix. 23 February 2018, *ACCC Recommendation Pursuant to s 132D(2) of the Competition and Consumer Act 2010 (Cth)*;
 - x. 27 February 2018, *Consumer Goods (Motor Vehicles with Affected Takata Airbag Inflators and Specified Spare Parts) Recall Notice 2018*;
 - xi. 28 February 2018, Explanatory Statement Issued by the Hon Michael Sukkar, Assistant Minister to the Treasurer *Consumer Goods (Motor Vehicles with Affected Takata Airbag Inflators and Specified Spare Parts) Recall Notice 2018*;
- (d) on or around 18 August 2017, 25 August 2017, 1 September 2017, October 2017 and November 2017, it provided to the ACCC the information set out in its response to the notice issued pursuant to section 133D of the Competition and Consumer Act 2010;

Particulars

- A. BMW Australia – Response to Information request dated 18 August 2017 titled 'Urgent Recall of Vehicles containing Takata Alpha Airbags'
- B. BMW Australia Ltd - Response to s 133D Disclosure Notice – Stage 1 dated 25 August 2017
- C. BMW Australia Ltd - Response to s 133D Disclosure Notice – Stage 2 dated 1 September 2017
- D. BMW Australia Ltd – Submissions Regarding Proposed Recall Notice: Motor Vehicles with Specified Takata Airbag Inflators and Specified Salvaged Takata Airbag Inflators dated October 2017
- E. BMW Australia Ltd - Response to letter dated 1 November 2017: Additional Questions Following Meeting on Friday 27 October 2017 dated November 2017

(e) otherwise denies the paragraph.

49 As to paragraph 49, the Defendant denies paragraph 49 and says that none of the conduct alleged was in connection with the supply or possible supply of goods to Group Members.

49A As to paragraph 49A, the Defendant:

- (a) denies paragraph 49A; and
- (b) says that whether each Group Member relied upon the conduct alleged is not capable of determination as a common question.

50 The Defendant denies paragraph 50.

51 As to paragraph 51, the Defendant:

- (a) denies paragraph 51; and
- (b) repeats paragraph 47.

TAKATA CORPORATION AND ASSOCIATED ENTITIES

52 Takata Group engaged in the development, manufacture and sale of airbag systems.

53 At all material times, Takata Corporation was the ultimate parent company of Takata Sachsen Gmbh and TK Holdings, Inc.

- 54 Takata Sachsen Gmbh and TK Holdings, Inc sold Takata Airbags to the BMW Manufacturers.
- 55 The Defendant repeats paragraphs 4(d) and 4(e) above.
- 56 From at least in or around 2000, when Takata began to test PSAN inflators, Takata Corporation knew that certain PSAN inflators were not performing to the specifications and that certain PSAN inflators had sustained failures, including ruptures, during testing.
- 57 From in or around 2000 until in or around 2015, Takata Corporation knowingly induced various automobile manufacturers to purchase airbag systems from Takata Corporation that contained faulty, inferior, non-performing, non-conforming or dangerous PSAN inflators by submitting false and fraudulent reports and other information that concealed the accurate test results for the inflators.

Particulars

Attachment B "Statement of Facts" to Rule 11 Plea Agreement, *United States of America v Takata Corporation* Case No. 16-20810, United States District Court Eastern District of Michigan Southern Division

- 58 From in or around 1999, Takata Sachsen GMBH and TK Holdings, Inc produced and sold to the BMW Manufacturers driver and passenger side airbag systems containing inflators that utilised PSAN propellant which were then installed in BMW Vehicles.

PROPORTIONATE LIABILITY

- 59 If (which is denied), by reason of the claims against the Defendant made in the SOC in respect of contraventions of section 52 of the TPA or section 18 of the ACL (the **Claims**) the Defendant is liable to the Plaintiff or any Group Member for any loss or damage (**Claimed Loss**), it says as follows in paragraphs 60 to 63.
- 60 The Claims are apportionable claims within the meaning of section 87CB of the TPA and section 87CB of the CCA.
- 61 Each of Takata Corporation, Takata Sachsen Gmbh and TK Holdings, Inc is a person whose acts or omissions caused the Claimed Loss for the reasons set out in paragraphs 1 and 7–10 of the SOC and paragraphs 52 to 58 above.
- 62 In the premises of paragraphs 59 to 61 above, the Defendant, Takata Corporation, Takata Sachsen Gmbh and TK Holdings, Inc are, in respect of the Claims, each a concurrent wrongdoer within the meaning of Part VIA of the TPA and 87CB of the ACL.

63 In the premises of paragraph 59 to 62 above, any liability of the Defendant in relation to each of the Claims is limited to an amount reflecting that proportion of the Claimed Loss that the court considers just having regard to the extent of the Defendant's responsibility for the Claimed Loss.

FAILURE TO TAKE REASONABLE STEPS IN RESPONSE TO RECALL NOTICES

64 If (which is denied) by reason of the Claims the Defendant is liable to the Plaintiff or any Group Member for the Claimed Loss, it says as follows in paragraphs 65 to 70 below.

65 The Claims are claims within the meaning of 82(1B) of the TPA and section 137B of the CCA.

66 The Defendant did not intend to cause, and did not fraudulently cause, the Claimed Loss.

67 In respect of the Plaintiff, part of the Claimed Loss was suffered as a result of his failure to take reasonable care.

Particulars

- A. The Plaintiff failed to take timely action in response to the product safety recalls referred to in paragraphs 11 and 11A of the SOC to ensure that the airbag in his BMW Vehicle was replaced.
- B. On or around 25 May 2015, 29 March 2016, 2 August 2017 and 28 February 2018, the Plaintiff was sent correspondence in respect of replacement of the Plaintiff's vehicle's passenger-side airbag.
- C. On or around 11 August 2016 and 24 April 2017, the Plaintiff was sent correspondence in respect of replacement of the Plaintiff's vehicle's driver's-side airbag.
- D. The Plaintiff's daughter, Kirsten Bond, was contacted by phone and message left on 19 February 2018 in respect of replacement of both airbags.
- E. The Plaintiff was contacted on 11 May 2018 in respect of replacement of both airbags.
- F. On 15 May 2018, the airbags in the Plaintiff's vehicle were replaced.

68 By reason of the matters pleaded in paragraph 67 above, the amount of any Claimed Loss that the Plaintiff may recover under section 236(1) of the ACL is to be reduced having regard to the Plaintiff's share in the responsibility for the Claimed Loss.

69 If a Group Member other than the Plaintiff has failed to take appropriate action in response to the product safety recalls referred to in paragraphs 11 and 11A of the SOC the Group Member has suffered the loss or damage partly as a result of their failure to take reasonable care.

70 By reason of the matters pleaded in paragraph 69 above, the amount of any Claimed Loss that the Group Member may recover under section 236(1) of the ACL is to be reduced having regard to the Group Member's share in the responsibility for the Claimed Loss.

FAILURE TO MITIGATE LOSS

71 In further answer to the whole of the SOC:

(a) the Plaintiff has failed to mitigate any loss; and

Particulars

The Defendant repeats the particulars to paragraph 67 above.

(b) the Defendant will rely on any failure by other Group Members to mitigate any loss.

LOSS OR DAMAGE TO BE REDUCED BY AMOUNT OF FINANCIAL BENEFIT OR INCENTIVE RECEIVED BY GROUP MEMBERS

72 In further answer to the whole of the SOC, the Defendant says that to the extent that any Group Member has received a financial benefit or incentive in connection with the voluntary recalls or Compulsory Recall Notice, the Group Member's alleged loss or damage should be reduced accordingly.

Particulars

The Defendant has offered Group Members a number of financial and other incentives including loan cars, onsite vehicle repair and fuel vouchers.

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

Date of signature


John Pavlakis, Solicitor on Record
14 September 2018

AFFIDAVIT VERIFYING

Name Joseph Calabro
 Address 783 Springvale Road, Mulgrave VIC 3170
 Occupation Director and Chief Financial Officer
 Date 13 September 2018

I say on oath:

- 1 I am a director and Chief Financial Officer of the Defendant.
- 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 Mulgrave, Victoria

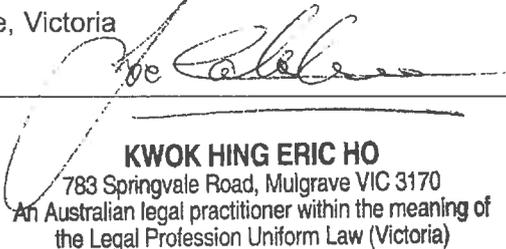
Signature of deponent

Name of witness

Address of witness

Capacity of witness

Mulgrave, Victoria


 KWOK HING ERIC HO
 783 Springvale Road, Mulgrave VIC 3170
 An Australian legal practitioner within the meaning of
 the Legal Profession Uniform Law (Victoria)

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:~~

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.]