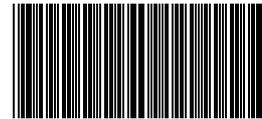




Filed: 4 September 2018 1:10 PM



D00011D510

Form 3A/B
Rule 6.2

AMENDED STATEMENT OF CLAIM

COURT DETAILS

| | |
|-------------|----------------------|
| Court | Supreme Court of NSW |
| Division | Equity |
| List | Equity General |
| Registry | Supreme Court Sydney |
| Case number | 2017/00353017 |

FILING DETAILS

| | |
|--------------------------------|-----------------|
| Filed for | Plaintiff[s] |
| Legal representative | Damian Scattini |
| Legal representative reference | |
| Telephone | (02)91463888 |
| Your reference | 07435-00001 |

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Amended Statement of Claim (e-Services), along with any other documents listed below, were filed by the Court.

Amended Statement of Claim (2018.09.04 Subaru - SFASOC.pdf)

[attach.]

Form 3A (version 7)
UCPR 6.2

SECOND FURTHER AMENDED STATEMENT OF CLAIM

COURT DETAILS

| | |
|-------------|------------------------|
| Court | Supreme Court of NSW |
| Division | Equity |
| List | General (Class Action) |
| Registry | Sydney |
| Case number | 2017/00353017 |

TITLE OF PROCEEDINGS

| | |
|-----------|---|
| Plaintiff | Kimley Lloyd Whisson |
| Defendant | Subaru (Aust) Pty Ltd ABN 95 000 312 792 |

FILING DETAILS

| | |
|--------------------------------|--|
| Filed for | Kimley Lloyd Whisson |
| Legal representative | Damian Scattini, Quinn Emanuel Urquhart & Sullivan LLP |
| Legal representative reference | 07435-00001 |
| Contact name and telephone | Damian Scattini 02 9146 3888 |
| Contact email | damianscattini@quinnemanuel.com |

Other (Equity General List)

Representative proceeding under Part 10 of the *Civil Procedure Act 2005* (NSW)

RELIEF CLAIMED

- 1 An order for compensation pursuant to section 87 of the TPA and/or section 237 of the ACL;
- 2 Further or in the alternative, damages pursuant to section 82 of the TPA and/or section 236 of the ACL;
- 3 Further or in the alternative, compensation pursuant to section 74D(1) of the TPA;
- 4 [Not used]

- 5 Further or in the alternative, damages pursuant to sections 271 and 272 of the ACL;
- 6 Interest in accordance with section 100 of the *Civil Procedure Act 2005* (NSW);
- 7 Costs;
- 8 Any other orders the Court considers appropriate.

COMMON QUESTIONS, PLEADINGS AND PARTICULARS

A. COMMON QUESTIONS

The questions of law or fact common to the claims of Group Members, or to potential sub-group members, in this proceeding are:

1. Whether the Defendant supplied Defective Vehicles;
2. Whether the Defective Vehicles are goods of a kind which are commonly bought and commonly supplied for the purpose of:
 - (a) driving or permitting to be driven;
 - (b) driving or permitting to be driven without being exposed to unnecessary danger or harm attributable to its construction; and/or
 - (c) carrying passengers without exposing them to unnecessary danger or harm attributable to its construction;
3. Whether the Defective Vehicles:
 - (a) are not safe to drive; and/or
 - (b) if driven, expose the driver and any passengers to unnecessary danger and harm attributable to its construction with at least one Takata Airbag;
4. Whether the Defendant did not take any or adequate steps to:
 - (a) warn members of the public that the Defective Vehicles were not safe to drive and/or safe for passengers;
 - (b) prevent the Defective Vehicles being driven;

- (c) ensure that Defective Vehicles were not sold as second-hand vehicles;
5. [Not used]
6. [Not used]
7. [Not used]
8. Whether any Defective Vehicles acquired by Group Members before 1 January 2011 were not of merchantable quality within the meaning of section 74D of the TPA;
9. Whether the Defendant is liable pursuant to section 74D of the TPA to compensate any Group Members who acquired a Defective Vehicle before 1 January 2011;
10. [Not used]
11. [Not used]
12. Whether:
- (a) a reasonable consumer fully acquainted with the state and condition of the Defective Vehicles would not regard the Defective Vehicles as:
- (i) acceptably fit for all the purposes for which goods of that kind are commonly supplied;
- (ii) free from defects; and/or
- (iii) safe;
- (b) the Defendant breached the Acceptable Quality Guarantee (as defined at paragraph 30 of the Pleadings) provided for in section 54(1) of the ACL in respect of any Defective Vehicles supplied to Group Members on or after 1 January 2011;
13. [Not used]
14. Whether the Defendant is liable to pay damages pursuant to section 271 and section 272 of the ACL to Group Members to whom it supplied Defective Vehicles on or after 1 January 2011;

15. Whether, during the Relevant Period, the Defendant engaged in Misleading Conduct (as defined at paragraph 42 of the Pleadings), Misleading Conduct by Silence (as defined at paragraph 42C of the Pleadings) and/or Misleading Representations (as defined at paragraph 42A of the Pleadings);
16. Whether the Misleading Conduct, the Misleading Conduct by Silence, and/or the Misleading Representations was:
 - (a) false or misleading in contravention of section 53(a) of the TPA and/or section 29(1)(a) of the ACL;
 - (b) misleading or deceptive, or likely to mislead or deceive, in contravention of section 52 of the TPA and/or section 18 of the ACL;
 - (c) misleading as to the nature, the characteristics and/or the suitability for purpose of the Defective Vehicles in contravention of section 55 of the TPA and/or section 33 of the ACL;
- 16A. Whether it can be inferred that each Group Member relied on the Misleading Conduct, the Misleading Conduct by Silence, and/or the Misleading Representations in purchasing their respective Defective Vehicle;
17. Whether the Defendant engaged in Unconscionable Conduct (as defined at paragraph 49 of the Pleadings) in contravention of section 51AB of the TPA and/or section 21 of the ACL;
18. Whether the Group Members are entitled to recover from the Defendant:
 - (a) compensation pursuant to section 87 of the TPA and/or section 237 of the ACL; and/or
 - (b) loss or damage pursuant to section 82 of the TPA and/or section 236 of the ACL.

B. PLEADINGS

THE PROCEEDING AND THE PARTIES

1. The Plaintiff brings this proceeding as a representative proceeding pursuant to Part 10 of the *Civil Procedure Act 2005* (NSW):
 - (a) in his own right;

(b) on behalf of:

(i) consumers (within the meaning of section 4B of the *Trade Practices Act 1974* (Cth) (TPA) or sections 3(1)(a) or (b) of the Australian Consumer Law, being Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (ACL), who did not acquire a commercial road vehicle as that term is used in section 4B of the TPA);

(ii) who at any time during the period 1 January 2004 to 27 February 2018 inclusive (**Relevant Period**) acquired (within the meaning of section 4 of the TPA or section 2 of the ACL) in Australia a Subaru motor vehicle fitted with a front driver or passenger airbag manufactured or supplied by Takata Corporation and/or its related entities or subsidiaries, including TK Holdings, Inc (Takata Airbag), and:

(I) which has been the subject of a ~~an~~ airbag-related product safety recall and which is listed in paragraphs 911 and 11A below (Defective Vehicles); or

(II) which is the subject of:

(a) the future recall to be issued in respect of Subaru Liberty (Model Year 2014) models on 31 March 2019;

(b) the future recall to be issued in respect of Subaru Outback (Model Year 2014) models on 31 March 2019;

(c) the future recall to be issued in respect of Subaru Exiga (Model Year 2014-2015) models on 31 March 2019;

(together, Defective Vehicle), and

(iii) who:

- (I) prior to or on 27 February 2018, had not sold or otherwise disposed of the Defective Vehicle; or
- (II) after 27 February 2018, sold or otherwise disposed of the Defective Vehicle;

(Group Members).

Particulars

The Defendant advised the Plaintiff by letter dated 24 July 2018 that the future recalls pleaded in paragraph 1(b)(ii)(II) will be made.

2. The Plaintiff:

- (a) purchased on 25 August 2014, a Defective Vehicle, being a Subaru Outback manufactured in 2010 (**Plaintiff's Vehicle**);
- (b) purchased the Plaintiff's Vehicle used from Westside Auto in Bentley, Western Australia;
- (c) paid \$12,555 for the Plaintiff's Vehicle;
- (d) acquired the Plaintiff's Vehicle for personal use;
- (e) acquired the Plaintiff's Vehicle for the purpose of:
 - (i) driving the Plaintiff's Vehicle or permitting the Plaintiff's Vehicle to be driven;
 - (ii) driving the Plaintiff's Vehicle or permitting the Plaintiff's Vehicle to be driven without being exposed to unnecessary danger or harm attributable to its construction; and/or
 - (iii) carrying passengers in the Plaintiff's Vehicle without exposing them to unnecessary danger or harm attributable to its construction;

which purpose or purposes was or were expressly or impliedly known to the Defendant;

- (e1) in acquiring the Plaintiff's Vehicle, relied on the Misleading Conduct as pleaded in paragraph 42 below, the Misleading Conduct by Silence as pleaded in paragraph 42C below and/or the Misleading Representations as pleaded in paragraph 42A below ~~reputation of the Defendant's brand (i.e. Subaru) as a make of vehicle that is safe to drive;~~
- (e2) was not aware, at the time of purchase of the Plaintiff's Vehicle, that the Plaintiff's Vehicle, was fitted with one or more Takata Airbags;
- (f) is included in any reference to Group Members in the remainder of this pleading.

3. Each Group Member:

- (a) acquired a Defective Vehicle by:
 - (i) purchasing a new Defective Vehicle;
 - (ii) purchasing a second-hand Defective Vehicle; or
 - (iii) taking on a lease in respect of a new Defective Vehicle on hire or on hire-purchase;
- (b) acquired a Defective Vehicle:
 - (i) for \$40,000 or less; or
 - (ii) where the Defective Vehicle was of a kind ordinarily acquired for personal, domestic or household use or consumption;
- (c) did not acquire a Defective Vehicle, or hold themselves out as acquiring a Defective 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) acquired a Defective Vehicle for the purpose of:
 - (i) driving the Defective Vehicle or permitting the Defective Vehicle to be driven;

- (ii) driving the Defective Vehicle or permitting the Defective Vehicle to be driven without being exposed to unnecessary danger or harm attributable to its construction; and/or
- (iii) carrying passengers in the Defective Vehicle without exposing them to unnecessary danger or harm attributable to its construction;

which purpose or purposes was or were expressly or impliedly known to the Defendant;

- (e) by reason of the matters pleaded in:
 - (i) paragraph 2(c) and 3(b) above; and
 - (ii) paragraph 10(a) below;

acquired a Defective Vehicle as a consumer within the meaning of section 4B of the TPA or section 3(1)(a) or (b) of the ACL, which was not a commercial road vehicle as that term is used in section 4B of the TPA;

- (f) acquired a Defective Vehicle from a person other than by way of sale by auction.

4. The Defendant:

- (a) is a company duly incorporated in Australia;
- (b) is a trading corporation within the meaning of section 4 of the TPA;
- (c) all material times distributed vehicles manufactured by Subaru Corporation and/or its subsidiaries, which
 - (i) is a Japanese company;
 - (ii) has no place of business in Australia;
 - (iii) manufactured the Defective Vehicles;
- (d) imported the Defective Vehicles into Australia;
- (d1) did not manufacture the Defective Vehicles;

- (e) by reason of the matters pleaded in (c), (d) and (d1) above, manufactured the Defective Vehicles within the meaning of section 74A of the TPA or section 7 of the ACL;
- (f) supplied, other than by way of sale by auction, in the course of business, and in trade or commerce:
 - (i) Defective Vehicles to other persons who acquired the goods for re-supply; and/or
 - (ii) Defective Vehicles to consumers who, by reason of paragraphs 2(c) and 3(b) above and 10(a) below, were consumers within the meaning of section 4B of the TPA or section 3 of the ACL.

- 5. The Defective Vehicles were supplied to Group Members in trade or commerce.
- 6. As at the date of the commencement of this proceeding, seven or more Group Members have claims in the nature of those described in this Statement of Claim.

THE DEFECTIVE VEHICLES

- 7. Takata Airbags:
 - (a) use ammonium nitrate as the propellant with the consequence that the inflators within the Takata Airbags:
 - (i) have a propensity to explode thereby propelling metal shrapnel towards the occupants of the Defective Vehicles;
 - (ii) have a propensity to malfunction on deployment of the Takata Airbag, by deploying too rapidly and/or with excessive force ~~failing to cause the airbag to deploy, or causing the airbag to deploy prematurely or belatedly;~~

Particulars

Particulars will be provided following evidence including expert evidence.

- (b) were the subject of a safety warning to the public published on 6 August 2017 by the Commonwealth of Australia Minister for Small Business pursuant to sections 129(1)(a) and 129(1)(b) of the ACL which:

- (i) stated, amongst other things:

"Warning

Pursuant to s 129(1)(b), the Minister warns of the possible risks involved in the use of motor vehicles containing Takata airbags supplied in Australia.

This Safety Warning has been issued because there have been serious injuries and deaths caused by faulty Takata airbags installed in motor vehicles, both in Australia and overseas.

The inflator components in Takata airbags may deteriorate and subsequently misdeploy in an incident, with the result that metal fragments from the inflator housing may propel out of the airbag, causing injury or death to the drivers/riders or passengers.

Investigation

The Australian Competition and Consumer Commission (ACCC) is investigating whether motor vehicles containing a Takata airbag will or may cause injury to any person, or a reasonably foreseeable use (or misuse) of those goods will or may cause injury to any person."

- (ii) related to all of the motor vehicles containing a Takata Airbag which were then currently subject to a product safety recall;
- (iii) related to the Defective Vehicles;-
- (c) have caused approximately 100 million vehicles to be subject of product safety recalls worldwide, including at least 4 million vehicles in Australia, fitted with Takata Airbags;
- (d) have caused at least 230 documented injuries as a result of Takata Airbags exploding during their deployment and propelling shrapnel and metal fragments within the vehicle in which they were contained;

(e) have caused at least 23 reported deaths worldwide as a result of Takata Airbags exploding during their deployment and propelling shrapnel and metal fragments within the vehicle in which they were contained;

(f) have caused at least one death in Australia.

8. Each of the Defective Vehicles is or was fitted with at least one Takata Airbag.

9. ~~The Defective Vehicles constitute those vehicles fitted with a Takata Airbag and in respect of which at least one safety recall referred to in paragraphs 11 and 11A below (Safety Recall) has been issued, being:~~

~~(i) Liberty manufactured between 2004 and 2014;~~

~~(ii) Outback manufactured between 2004 and 2014;~~

~~(iii) Impreza manufactured between 2004 and 2013;~~

~~(iv) Forester manufactured between 2009 and 2012;~~

~~(v) Tribeca manufactured between 2007 and 2013;~~

(vi) Exiga manufactured between 2010 and 2014;

10. The Defective Vehicles:

(a) are goods:

(i) acquired for an amount that did not exceed \$40,000; or

(ii) of a kind ordinarily acquired for personal, domestic or household use or consumption;

(b) are goods of a kind which are commonly bought and commonly supplied for the purpose of:

(i) driving or permitting to be driven;

(ii) driving or permitting to be driven without being exposed to unnecessary danger or harm attributable to its construction; and/or

(iii) carrying passengers without exposing them to unnecessary danger or harm attributable to its construction;

- (c) by reason of the matters pleaded in paragraphs 7 and 8 above:
 - (i) are not safe to drive; and/or
 - (ii) if driven, expose the driver and any passengers to unnecessary danger and harm attributable to its construction with at least one Takata Airbag;
- (d) are goods within the meaning of:
 - (i) by reason of paragraph 10(a) above, section 74A(2)(a) of the TPA;
 - (ii) section 4 of the TPA;
 - (iii) section 2 of the ACL.

11. The following product safety recalls were issued to the Department of Infrastructure and Regional Development by Subaru pursuant to section 128 of the ACL (**Voluntarily Initiated Recalls**) in respect of certain Defective Vehicles identified therein:

- (a) Product Recall Australia Number 2015/14715 which:
 - (i) was issued on 22 May 2015;
 - (ii) was in respect of Subaru Model Year (MY) 2004-2007 Impreza vehicles equipped with a Takata front passenger airbag SPI inflator with propellant wafers;
 - (iii) was issued on the ground that the *"passenger's front airbag inflator propellant wafers may have an increased potential for moisture intrusion over time. Moisture intrusion could potentially make the inflator assembly more susceptible to rupture during airbag deployment"* such that, *"...the ruptured inflator may create metallic fragments that could contact an occupant, increasing the risk of injury"*;
 - (iv) advised consumers that *"owners will be contacted by mail as soon as parts become available to present their vehicle to their*

preferred Subaru dealer for the replacement of the passenger's front airbag inflator at no charge."

(v) on a date unknown to the Plaintiff, was amended to state:

(I) "Airbag inflator: As it gets older, a combination of high temperatures and humidity can cause the airbag inflator propellant to degrade. If an affected vehicle is involved in a collision triggering the airbag, the metal inflator housing may explode/rupture under too much internal pressure. ... In the event that a defective airbag inflator ruptures, metal fragments may propel out through the airbag cushion towards the vehicle occupants causing serious injury or fatality";

(II) "Owners of affected vehicles should contact their local Subaru dealership or Subaru head office directly via the website at <https://www.subaru.com.au/contact-us>(link is external) to arrange for a replacement airbag inflator free of charge.

(b) Product Recall Australia Number 2016/15507 which:

- (i) was issued on 5 July 2016, and was extended to additional vehicles on 12 November 2017 and 18 April 2018;
- (ii) was in respect of Tribeca Model Year (MY) 2007-2013 vehicles fitted with a Takata front passenger airbag (Campaign numbers SI0351 and SI10394 and SI0435); Liberty Model Year (MY) 2004-2009 vehicles fitted with a Takata front passenger airbag (Campaign number SI0350); and Outback Model Year (MY) 2004-2009 vehicles fitted with a Takata front passenger airbag (Campaign number SI0350);
- (iii) was issued on the ground that the *"passenger's front airbag inflator propellant wafers may have an increased potential for moisture intrusion over time. Moisture intrusion could potentially make the inflator assembly more susceptible to rupture during airbag deployment"* such that *"...the ruptured inflator may*

create metallic fragments during deployment that could contact an occupant, increasing the risk of injury”;

(iv) *advised consumers that "owners will be contacted by mail as soon as parts are available. The letters will instruct owners to present their vehicle to their preferred Subaru dealership for replacement of the front passenger airbag at no cost."*

(v) on a date unknown to the Plaintiff, was amended to state:

(I) "Airbag inflator: As it gets older, a combination of high temperatures and humidity can cause the airbag inflator propellant to degrade. If an affected vehicle is involved in a collision triggering the airbag, the metal inflator housing may explode/rupture under too much internal pressure. ... In the event that a defective airbag inflator ruptures, metal fragments may propel out through the airbag cushion towards the vehicle occupants causing serious injury or fatality”;

(II) "Owners of affected vehicles should contact their local Subaru dealership or Subaru head office directly via the website at <https://www.subaru.com.au/contact-us>(link is external) to arrange for a replacement airbag inflator free of charge.

(c) Product Recall Australia Number 2016/15766 which:

(i) was issued on 29 November 2016, and was extended to additional vehicles on 12 November 2017 and 18 April 2018;

(ii) was in respect of Impreza Model Year (MY) 2008-2014³ vehicles equipped with a Takata front passenger airbag; and Forester Model Year (MY) 2009-2012 vehicles equipped with a Takata front passenger airbag;

(iii) was issued on the ground that the *"passenger's front airbag inflator propellant wafers may have an increased potential for moisture intrusion over time. Moisture intrusion could potentially make the inflator assembly more susceptible to rupture during*

airbag deployment" such that, "...the ruptured inflator may create metallic fragments during deployment that could contact an occupant, increasing the risk of injury";

(iv) *advised consumers that "known owners will be contacted by mail as soon as parts become available to present their vehicle to their preferred Subaru retailer for the replacement of the passenger's front airbag inflator at no charge."*

(v) *at a date unknown to the Plaintiff, was amended to state:*

(I) *"Airbag inflator: As it gets older, a combination of high temperatures and humidity can cause the airbag inflator propellant to degrade. If an affected vehicle is involved in a collision triggering the airbag, the metal inflator housing may explode / rupture under too much internal pressure. ... In the event that a defective airbag inflator ruptures, metal fragments may propel out through the airbag cushion towards the vehicle occupants causing serious injury or fatality".*

(II) *"Owners of affected vehicles should contact their local Subaru dealership or Subaru head office directly via the website at <https://www.subaru.com.au/contact-us> to arrange for a replacement airbag inflator free of charge."*

(d) *Product Recall Australia Number 2017/16012 which:*

(i) *was issued on 7 April 2017, and was extended to additional vehicles on 12 November 2017 and 18 April 2018;*

(ii) *was in respect of Subaru Model Year (MY) 2010–2014 Exiga vehicles equipped with a Takata front passenger airbag;*

(iii) *was issued on the ground that the "passenger's front airbag propellant wafers may have an increased potential for moisture intrusion over time. Moisture intrusion could potentially make the inflator assembly more susceptible to rupture during airbag deployment" such that, "...the ruptured inflator may create*

metallic fragments that could contact an occupant, increasing the risk of injury";

(iv) *advised consumers that "known owners will be contacted by mail as soon as parts become available to present their vehicle to their preferred Subaru retailer for the replacement of passenger's front airbag inflator at no charge."*

(v) *at a date unknown to the Plaintiff, was amended to state:*

(I) *"Airbag inflator: As it gets older, a combination of high temperatures and humidity can cause the airbag inflator propellant to degrade. If an affected vehicle is involved in a collision triggering the airbag, the metal inflator housing may explode / rupture under too much internal pressure. ... In the event that a defective airbag inflator ruptures, metal fragments may propel out through the airbag cushion towards the vehicle occupants causing serious injury or fatality".*

(II) *"Owners of affected vehicles should contact their local Subaru dealership or Subaru head office directly via the website at <https://www.subaru.com.au/contact-us> to arrange for a replacement airbag inflator free of charge."*

(e) Product Recall Australia Number 2017/16013 which:

(i) *was issued on 7 April 2017, and was extended to additional vehicles on 12 November 2017 and 18 April 2018;*

(ii) *was in respect of Model Year (MY) 2010–2014 Liberty and Outback vehicles equipped with a Takata front passenger airbag;*

(iii) *was issued on the ground that "passenger's front airbag propellant wafers may have an increased potential for moisture intrusion over time. Moisture intrusion could potentially make the inflator assembly more susceptible to rupture during airbag deployment" such that, "...the ruptured inflator may create*

metallic fragments that could contact an occupant, increasing the risk of injury”;

- (iv) *advised consumers that "known owners will be contacted by mail as soon as parts become available to present their vehicle to their preferred Subaru retailer for the replacement of the passenger's front airbag inflator at no charge."*
- (v) *at a date unknown to the Plaintiff, was amended to state:*
 - (I) *"Airbag inflator: As it gets older, a combination of high temperatures and humidity can cause the airbag inflator propellant to degrade. If an affected vehicle is involved in a collision triggering the airbag, the metal inflator housing may explode / rupture under too much internal pressure. ... In the event that a defective airbag inflator ruptures, metal fragments may propel out through the airbag cushion towards the vehicle occupants causing serious injury or fatality”.*
 - (II) *"Owners of affected vehicles should contact their local Subaru dealership or Subaru head office directly via the website at <https://www.subaru.com.au/contact-us> to arrange for a replacement airbag inflator free of charge.”;*
- (vi) *at a date unknown to the Plaintiff, was further amended to state that "Subaru is contacting consumers when replacement parts are expected to become available in August/September 2018. Consumers who are concerned should contact Subaru to discuss if alternative arrangements may be necessary in the interim."*

11A. A compulsory safety recall to the public (**Compulsory Recall**), was issued by Michael Sukkar, Assistant Minister to the Treasurer pursuant to section 122 of the ACL, dated 27 February 2018, in respect of certain of the Defective Vehicles identified therein.

12. The Defendant:

- (a) marketed, distributed and promoted Defective Vehicles within Australia at various times during the Relevant Period;

Particulars

The Defendant marketed its vehicles using print and electronic media, sponsorship and other forms of advertising targeted at consumers.

By way of example:

- (i) *In or about 30 April 2010, the Defendant promoted the safety of its Outback Range of on its website as follows:*

"Outback Range

5-star ANCAP Occupant Safety Rating

Every passenger can feel that much safer knowing that the Outback has been awarded the maximum 5-star crashworthiness rating for occupant safety from the respected and independent Australasian New Car Assessment Program (ANCAP). Collision avoidance and collision protection features are paramount in achieving this ANCAP rating and every Outback comes standard with... 7 airbags."

[see:<http://www.subaru.com.au:80/models/outback/2.5i/wagon/features/>]

- (ii) *The following appeared on the Defendant's website in 4 October 2012:*

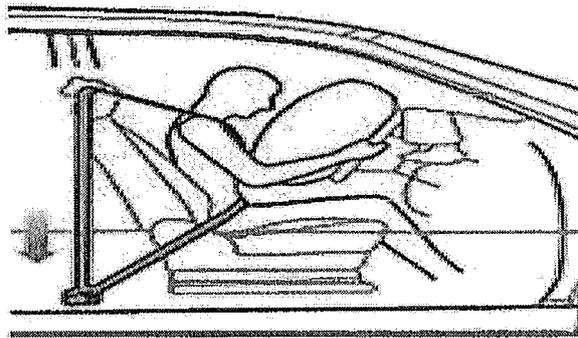
"SRS Airbags

SRS airbags are ...designed to work in conjunction with seatbelts to restrain and protect the occupants against sudden deceleration and impact with interior parts of the vehicle such as the dash, windows, steering wheel and other fixed objects. All current model Subaru vehicles feature as

standard fitment dual front... airbags. They are not options! Our philosophy is that safety is not optional or dependent on cost...Front airbags work to minimise injury to the head in a frontal accident...

ANCAP 5-star occupant safety rating

Subaru is the first manufacturer in Australia to offer a five-star occupant ANCAP safety rating on every car we sell, tested using Australian specification vehicles in Australia."



[See:<https://web.archive.org/web/20121004091240/http://subaru.com.au/subaru-dna/safety>]

(III) *Further particulars will be provided following discovery.*

(b) held the Defective Vehicles out as being:

(i) safe to drive; and

(ii) safe for passengers;

Particulars

(A) *The particulars to paragraph 12(a) above are repeated.*

(B) *The Defendant held out the Defective Vehicles as being safe to drive and safe for passengers by importing, promoting, offering for sale, or providing in whatever way to a wholesaler or supplier, the Defective Vehicles, and each time*

the Defendant failed to take the actions required as pleaded in paragraph 12(c) below.

(C) *The Defendant's actions described above constituted a holding out as pleaded in paragraph 12(b), by reference to all the circumstances of the case, including:*

(i) *the reputation of the Defendant's brand (i.e. Subaru) as a make of vehicle that is safe to drive and safe for passengers;*

(ii) *that consumers who purchase vehicles have the reasonable expectation that such vehicles may be used for the purposes listed in paragraph 3(d) above;*

(iii) *that consumers who purchase vehicles with airbags have the reasonable expectation that the airbag will deploy properly and will not malfunction during deployment as pleaded in paragraph 7(a)(ii) above;*

(iv) *further or in the alternative, that if a vehicle could not be used for the purpose described in (ii) above, or that if the airbag did not have the characteristics described in (iii) above, a reasonable person in the position of any Group Member would expect that matter to be notified to them or otherwise publicised;*

(v) *the matters set out in paragraph 3(b) above.*

(D) *Further particulars will be provided following evidence and discovery.*

(c) did not take any or adequate steps to:

(i) warn members of the public that the Defective Vehicles were not safe to drive;

(ii) prevent the Defective Vehicles being driven;

- (iii) ensure that Defective Vehicles were not sold as second-hand vehicles;
- (iv) warn members of the public that the Defective Vehicles were not safe for passengers.

Particulars

Adequate steps include, but are not limited to, taking one or more of the following steps:

- (A) *notifying registered owners of Defective Vehicles that the Defective Vehicles were fitted with at least one Takata Airbag;*
- (B) *notifying the general public and registered owners as to the nature and risks associated with Takata Airbags, including advertising in print and other media the dangers associated with Takata Airbags;*
- (C) *withdrawing from importing, manufacturing, marketing and offering for sale vehicles fitted with at least one Takata Airbag;*
- (D) *immediately recalling Defective Vehicles;*
- (E) *replacing Takata Airbags with non-Takata Airbags;*
- (F) *withdrawing from sale any Defective Vehicle that had not been repaired as described in (E) above;*
- (G) *directing dealerships and other car suppliers with which the Defendant had contact or influence to cease selling or offering for sale the Defective Vehicles, or to warn customers of the risks associated with Takata Airbags identified in paragraph 7 above;*
- (H) *reporting to the ACCC and other consumer interest organisations the information set out in (A), (B) and (D) above, with a view to the information being disseminated to*

owners and potential owners or users of the Defective Vehicles; and

(i) cease the activities referred to in paragraphs 12(a) and (b) above.

- 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. By reason of the matters pleaded in paragraphs 7, 10(b) and 10(c) above, the Defective Vehicles were not of merchantable quality within the meaning of section 74D(3) of the TPA.
- 24. Any Group Member who acquired a Defective Vehicle before 1 January 2011 suffered loss or damage by reason that the Defective Vehicles they acquired was not of merchantable quality.

Particulars of loss and damage

(A) The difference between the amount which each Group Member paid or is liable to pay for that Group Member's Defective Vehicle, and the true value of the Defective Vehicle as at the date of purchase, insofar as that difference is attributable to the matter

pleaded in paragraph 23 above (which is a matter for evidence, including expert evidence);

- (B) Loss of use of the Defective Vehicle; and/or*
- (C) Any expenditure for which a Group Member has, or is likely to, become liable as a result of:*
 - (i) the reasonable unwillingness of a Group Member to drive their Defective Vehicle where that reasonable unwillingness was connected with the fact that the Defective Vehicle was fitted with at least one Takata Airbag; and/or*
 - (ii) the time, cost and inconvenience of attending at a service centre or other place to have a replacement airbag fitted, including any:*
 - (I) transportation costs (such as taxi, private hire car and/or public transport fares) incurred due to the inability to use the Defective Vehicle during or in connection with its repair;*
 - (II) fuel costs incurred in driving, or towing costs incurred in towing, the Defective Vehicle to the location nominated by the Defendant for the replacement of the Takata Airbag;*
 - (III) compensation for missed work while attending to the fitting of the replacement airbag.*

25. By reason of the matters pleaded in paragraphs 3(e), 4(f), 5, 10(d), 23 and 24 above, the Defendant is liable, pursuant to section 74D(1) of the TPA, to compensate any Group Members who acquired a Defective Vehicle before 1 January 2011 for the loss and damage referred to in paragraph 24 above.

26. [Not used]

27. [Not used]

28. [Not used]

29. [Not used]

FAILURE TO SUPPLY GOODS OF ACCEPTABLE QUALITY – ACL s54

30. By reason of the matters pleaded in paragraphs 3(e), 4(f) and 5 above, there is a guarantee that the Defective Vehicles supplied to Group Members on or after 1 January 2011 are of acceptable quality pursuant to section 54(1) of the ACL (**Acceptable Quality Guarantee**).
31. By reason of the matters pleaded in paragraphs 7, 8, 10(b), 10(c), 11 and 11A above, a reasonable consumer fully acquainted with the state and condition of the Defective Vehicles would not regard the Defective Vehicles as:
- (a) acceptably fit for all the purposes for which goods of that kind are commonly supplied;-
 - (b) free from defects;
 - (c) safe.
32. By reason of the matters pleaded in paragraph 31 above, the Defective Vehicles did not comply with the Acceptable Quality Guarantee.
33. By reason of the matters pleaded in paragraph 4(e), 30 and 32 above, Group Members who acquired a Defective Vehicle on or after 1 January 2011 are entitled under section 271 of the ACL to recover damages from the Defendant.

Particulars of loss and damage

- (A) *The difference between the price which each Group Member paid or is liable to pay for that Group Member's Defective Vehicle, and the true value of the Defective Vehicle as at the date of purchase, insofar as that difference is attributable to the matter pleaded in paragraph 32 above (which is a matter for evidence, including expert evidence);*
- (B) *In the alternative, the difference between the lower of the price which each Group Member paid or is liable to pay for that Group Member's Defective Vehicle, or the average retail price of vehicles of the same make, model and year of manufacture as the Defective Vehicle at the time of supply, and the actual value of the Defective Vehicle insofar as that difference is attributable to the matters pleaded in paragraph 32 above;*

(C) *Further or in the alternative to (A) or (B) above, the Plaintiff repeats particulars (B) and (C) to paragraph 24 above.*

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. By the conduct pleaded in paragraphs 4(e), 4(f) and 12 above the Defendant engaged in conduct which was:

- (a) false or misleading in contravention of section 53(a) of the TPA and/or section 29(1)(a) of the ACL;
- (b) misleading or deceptive, or likely to mislead or deceive, in contravention of section 52 of the TPA and/or section 18 of the ACL;

(Misleading Conduct)

by reason of the matters pleaded in paragraphs 7, 8, 10(b), 10(c), 11 and 11A above.

42A. Further, or in the alternative to paragraph 42 above, by the conduct pleaded in paragraph 42 above, the Defendant represented that:

- (a) the Defective Vehicle was safe to drive;
- (b) it was safe to transport passengers in the Defective Vehicle;
- (c) the airbag in the Defective Vehicle did not contain any defect that made the airbag(s) or the vehicle unsafe;

- (d) the construction of the Defective Vehicle would not expose the driver or passengers to unnecessary harm;
- (e) the Defective Vehicle's airbag(s) would deploy properly in the event of an accident or collision; and/or
- (f) the Defendant would notify any purchaser (past or prospective) of any issue with the Defective Vehicle's construction that had the potential to affect the vehicle's safety at the time of purchase, or as soon as the Defendant became aware of it.

(Misleading Representations)

42B. Each of the Misleading Representations was:

- (a) false or misleading in contravention of section 53(a) of the TPA and/or section 29(1)(a) of the ACL;
- (b) misleading or deceptive, or likely to mislead or deceive, in contravention of section 52 of the TPA and/or section 18 of the ACL,

by reason of the matters pleaded in paragraphs 7, 8, 10(b), 10(c), 11 and 11A above.

42C. Further, or in the alternative to paragraph 42 and 42A:

- (a) by the conduct pleaded in paragraph 42, the Plaintiff and Group Members had a reasonable expectation that if any of the matters pleaded in paragraph 42A(a) to (f) did not exist, or were not so, that fact would be disclosed;
- (b) the Defendant's failure to disclose that any of the matters pleaded in paragraph 42A(a) to (f) did not exist, or were not so, was misleading or deceptive, or likely to mislead or deceive, in contravention of section 52 of the TPA and/or section 18 of the ACL.

(Misleading Conduct by Silence)

43. The Misleading Conduct and Misleading Conduct by Silence was conduct engaged in, and the Misleading Representations were made, by the Defendant in trade or commerce, within the meaning of:

- (a) section 52 of the TPA; and/or
- (b) section 53 of the TPA;
- (bc) section 18 of the ACL; and/or
- (d) section 29 of the ACL.

44. Further or in the alternative to the matters pleaded in paragraphs 42 and 43 above, the Misleading Conduct was conduct which was, by reason of the matters pleaded in paragraphs 7, 8, 10(b), 10(c), 11 and 11A above, misleading as to:

- (a) the nature;
- (b) the characteristics;
- (c) the suitability for purpose

of the Defective Vehicles in contravention of section 55 of the TPA and/or section 33 of the ACL.

45. Each Group Member, including the Plaintiff, relied on the Misleading Conduct, the Misleading Conduct by Silence, and/or the Misleading Representations in purchasing their respective Defective Vehicles.

Particulars

It can be inferred from all the surrounding circumstances that each Group Member relied upon the Misleading Conduct, the Misleading Conduct by Silence, and/or the Misleading Representations. Those surrounding circumstances include:

- (A) *the matters set out in paragraph 3(b) and 3(d) above;*
- (B) *the reputation of the Defendant's brand (i.e. Subaru) as a make of vehicle that is safe to drive and safe for passengers;*
- (C) *that consumers who purchase vehicles have the reasonable expectation that such vehicles may be used for the purposes listed in paragraph 3(d) above;*
- (D) *that consumers who purchase vehicles with airbags have the reasonable expectation that the airbag will deploy properly*

and will not malfunction during deployment as pleaded in paragraph 7(a)(ii) above;

(E) further or in the alternative, that if the vehicle could not be used for the purpose described in (C) above, or that if the airbag did not have the characteristics described in (D) above, a reasonable person in the position of any Group Member would expect that matter to be notified to them or otherwise publicised.

46. By reason of the matters pleaded in paragraphs 2, 3, 42 to 45 above, each of the Group Members suffered loss and damage.

Particulars of loss and damage

(A) The difference between the price which each Group Member paid or is liable to pay for that Group Member's Defective Vehicle, and the true value of the Defective Vehicle as at the date of purchase, insofar as that difference is attributable to the matters pleaded in paragraphs 42 to 45 above (which is a matter for evidence, including expert evidence);

(B) Further or in the alternative to (A) above, the Plaintiff repeats particulars (B) and (C) to paragraph 24 above.

47. By reason of the matters pleaded in paragraphs 42 to 46 above, each Group Member is entitled to:
- (a) an order pursuant to section 87 of the TPA and/or section 237 of the ACL that the Defendant is obliged to compensate any Group Member for the loss and damage referred to in the particulars to paragraph 46 above;
 - (b) further or in the alternative, an award in the amount of loss or damage suffered by each Group Member referred to in paragraph 46 above pursuant to section 82 of the TPA and/or section 236 of the ACL.

UNCONSCIONABLE CONDUCT

48. From in or around:

- (a) November 2008; or
- (b) April 2013; or
- (c) June 2014; or
- (d) May 2015; or
- (e) July 2016; or
- (f) November 2016; or
- (g) April 2017,

the Defendant knew or ought to have known of the matters referred to in paragraphs 7(a)(i), 8 and 10(c) above.

Particulars

- (I) *In November 2008, Honda issued the first recall for Takata driver side inflators with improperly manufactured propellant wafers. Due to manufacturing errors, these inflators could rupture when activated.*
- (II) *In April 2013, Takata filed a defect report in the USA stating that certain passenger side airbag modules may rupture as a result of manufacturing errors that are aggravated by exposure to hot and humid environments. This was public knowledge, or was information which was reasonably available to the Defendant.*
- (III) *In June 2014, the USA National Highway Traffic Safety Administration began investigating vehicle manufacturers after reports of ruptures of Takata airbags in hot and humid regions. As of 18 November 2014, the investigation had expanded to include ten automakers, including Subaru of America, Inc.*

(IV) *On 22 May 2015, the Defendant issued its first product safety recall to the Department of Infrastructure and Regional Development by Subaru pursuant to section 128 of the ACL, namely Product Recall Australia Number 2015/14715.*

(IVa) *The fact of each of the Voluntarily Initiated Recalls and the Compulsory Recall.*

(IVb) *The Defendant's knowledge referred to in this paragraph is a reasonable inference from the matters set out in (I) – (IVa) above, those matters being concerned with the safety of vehicles of which the Defendant was the manufacturer or importer, and which the Defendant marketed, distributed and promoted.*

(V) *Further particulars will be provided following discovery.*

49. By reason of the matters pleaded in paragraphs 7(a)(i), 7(b)-(f), 8, 10(b), 10(c), 11, 11A and 48 above, on and from:

- (i) November 2008; or alternatively,
- (ii) April 2013; or alternatively,
- (iii) June 2014; or alternatively,
- (iv) May 2015; or alternatively,
- (v) July 2016; or alternatively,
- (vi) November 2016; or alternatively,
- (vii) April 2017,

the conduct described in paragraphs 4(e), 4(f) and 12 above constituted:

- (a) unconscionable conduct in connection with the supply or possible supply of goods to a person in contravention of section 51AB of the TPA; and/or
- (b) unconscionable conduct in connection with the supply or possibly supply of goods to a person in contravention of section 21 of the ACL.

(Unconscionable Conduct).

49A. Had the Defendant not engaged in the Unconscionable Conduct, it can be inferred that:

- (a) no Group Member would have purchased a Defective Vehicle;
- (b) in the alternative, no Group Member would have paid the price which each Group Member paid or is liable to pay for that Group Member's Defective Vehicle.

Particulars

The inference can be drawn from all the surrounding circumstances, which include:

- (A) *the matters set out in paragraph 3(b), 3(d), 12(b) and 12(c) above;*
- (B) *that consumers would not knowingly purchase a vehicle that was unsafe to drive and/or unsafe for passengers, or that contained an airbag that would not deploy properly or would malfunction during deployment as pleaded in paragraph 7(a)(ii) above.*

50. By reason of the matters pleaded in paragraphs 2, 3, 48, 49 and 49A above, each of the Group Members who, in or after:

- (a) November 2008; or alternatively,
- (b) April 2013; or alternatively,
- (c) June 2014; or alternatively,
- (d) May 2015; or alternatively,
- (e) July 2016; or alternatively,
- (f) November 2016; or alternatively,
- (g) April 2017,

acquired a Defective Vehicle suffered loss and damage by reason of the Unconscionable Conduct.

Particulars of loss and damage

- (A) *The difference between the price which each Group Member paid or is liable to pay for that Group Member's Defective Vehicle, and the true value of the Defective Vehicle as at the date of purchase, insofar as that difference is attributable to the matters pleaded in paragraph 49 above (which is a matter for evidence, including expert evidence);*
- (B) *Further or in the alternative to (A) above, the Plaintiff repeats particulars (B) and (C) to paragraph 24 above.*

51. By reason of the matters pleaded in paragraphs 49, 49A and 50 above, Group Members who, in or after:

- (i) November 2008; or alternatively,
- (ii) April 2013; or alternatively,
- (iii) June 2014; or alternatively,
- (iv) May 2015; or alternatively,
- (v) July 2016; or alternatively,
- (vi) November 2016; or alternatively,
- (vii) April 2017,

acquired a Defective Vehicle are entitled to:

- (a) an order pursuant to section 87 of the TPA and/or section 237 of the ACL that the Defendant is obliged to compensate any Group Member for the loss and damage referred to in the particulars to paragraph 50 above;
- (b) further or in the alternative, an award in the amount of loss or damage suffered by each Group Member referred to in paragraph 50 above pursuant to section 82 of the TPA and/or section 236 of the ACL.

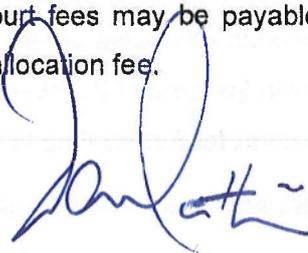
SIGNATURE OF LEGAL REPRESENTATIVE

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 claim for damages in these proceedings has reasonable prospects of success.

I have advised the plaintiff that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature



Capacity

Solicitor on the record

Date of signature

~~7 May 2018~~ 4 September 2018

NOTICE TO DEFENDANT

If you do not file a defence within 28 days of being served with this statement of claim:

- You will be in default in these proceedings.
- The court may enter judgment against you without any further notice to you.

The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.

HOW TO RESPOND

Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

You can respond in one of the following ways:

- 1 **If you intend to dispute the claim or part of the claim**, by filing a defence and/or making a cross-claim.

2 If money is claimed, and you believe you owe the money claimed, by:

- Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.
- Filing an acknowledgement of the claim.
- Applying to the court for further time to pay the claim.

3 If money is claimed, and you believe you owe part of the money claimed, by:

- Paying the plaintiff that part of the money that is claimed.
- Filing a defence in relation to the part that you do not believe is owed.

Court forms are available on the UCPR website at www.ucprforms.justice.nsw.gov.au or at any NSW court registry.

REGISTRY ADDRESS

| | |
|----------------|--|
| Street address | Supreme Court of NSW Law Courts Building 184 Phillip Street SYDNEY NSW 2000 |
| Postal address | GPO Box 3 SYDNEY NSW 2001 |
| Telephone | (02) 9146 3548 |

AFFIDAVIT VERIFYING

Name Kimley Lloyd Whisson
 Address 25 Modillion Avenue, Shelley WA 6148
 Occupation Retired
 Date 3 September 2018

I say on oath:

- 1 I am the plaintiff.
- 2 I believe that the allegations of fact in the statement of claim are true.

SWORN at SHELLEY

Signature of deponent



Name of witness MONIKA MEČEVIĆ
 Address of witness 41 - LEVEL 41, 108 ST GEORGE'S TEE, PERTH.
 Capacity of witness SOLICITOR.

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

- 1 I saw the face of the deponent.
- 2 I have confirmed the deponent's identity using the following identification document:

Driver's Licence: 153 0612

Signature of witness



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

FURTHER DETAILS ABOUT PLAINTIFF**Plaintiff**

Name Kimley Lloyd Whisson
Address 25 Modillion Avenue, Shelley WA 6148

Legal representative for plaintiff

Name Damian Scattini
Practising certificate number 83237
Firm Quinn Emanuel Urquhart & Sullivan
Address Level 15, 111 Elizabeth Street,
Sydney NSW 2000

Telephone 02 9146 3500
Fax 02 9146 3600
Email damianscattini@quinnemanuel.com
Electronic service address damianscattini@quinnemanuel.com

DETAILS ABOUT DEFENDANT**Defendant**

Name Subaru (Aust) Pty Ltd
ABN 95 000 312 792

Address 4 Burbank Place
Baulkham Hills NSW 2153