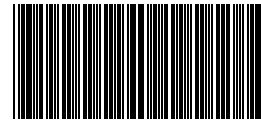




Filed: 17 September 2018 2:23 PM



D00011JJK3

Defence to Amended Statement of Claim

COURT DETAILS

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

TITLE OF PROCEEDINGS

| | |
|-----------------|--|
| First Plaintiff | Kimley Lloyd Whisson |
| First Defendant | SUBARU (AUST) PTY LTD ABN 95000312792 |

FILING DETAILS

| | |
|--------------------------------|------------------------------------|
| Filed for | SUBARU (AUST) PTY LTD, Defendant 1 |
| Legal representative | Gregory John Williams |
| Legal representative reference | |
| Telephone | 02 9353 4798 |
| Your reference | 80192455 |

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 (Defence to 2FASOC dated 17 September 2018 (low file size)).PDF)

[attach.]

Form 7A (version 5)
UCPR 14.3

DEFENCE TO SECOND FURTHER AMENDED STATEMENT OF CLAIM

COURT DETAILS

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

TITLE OF PROCEEDINGS

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

FILING DETAILS

| | |
|--------------------------------|---|
| Filed for | Subaru (Aust) Pty Ltd ABN 95 000 312 792 Defendant |
| Filed in relation to | Plaintiff's Claim |
| Legal representative | Greg Williams, Clayton Utz |
| Legal representative reference | 798/14241/80192455 |
| Contact name and telephone | Greg Williams, (02) 9353 4798 |
| Contact email | gwilliams@claytonutz.com |

HEARING DETAILS

If the proceedings do not already have a listing date, they are to be listed at

PLEADINGS AND PARTICULARS

A COMMON QUESTIONS

- 1 The Defendant does not admit:
 - a. that the questions as framed by the Plaintiff involve common issues of law or fact; or
 - b. insofar as they do, that those questions are common with respect to all Group Members.

B PLEADINGS

The Proceeding and the Parties

1 In answer to the allegations in paragraph 1 of the Second Further Amended Statement of Claim dated ~~7 May 2018~~ 4 September 2018 (**FASOC**), the Defendant:

- (a) admits that the proceeding has been commenced as a representative proceeding under Part 10 of the *Civil Procedure Act 2005* (NSW); and
- ~~(b) says that the vehicles referred to in paragraph 9(v) of the FASOC are not vehicles which contain a Takata Airbag as that term is defined in paragraph 1(b)(ii) of the FASOC because their airbags were manufactured and supplied by TK Holdings, Inc.; and~~
- (c) otherwise does not know and therefore cannot admit the allegations in paragraph 1 of the FASOC.

2 In answer to the allegations in paragraph 2 of the FASOC, the Defendant:

- (a) admits that the Plaintiff purchased a Subaru Outback manufactured in 2010 (**Plaintiff's Vehicle**);
- (b) admits that the Plaintiff's Vehicle was subject to Product Recall Australia Number 2017/16013;
- (c) says that Product Recall Australia Number 2017/16013 was issued because the subject vehicles contained a Takata Corporation manufactured front passenger airbag containing a Non-Desiccated PSAN Inflator (as defined in paragraph 7(b) below) of the genus SPI2 (as defined in paragraph 7(c)(ii) below);
- (d) says that on or about 27 December 2017 the front passenger Non-Desiccated PSAN Inflator in the Plaintiff's Vehicle was replaced with an airbag inflator which:
 - (i) does not use ammonium nitrate as a propellant; and
 - (ii) was manufactured by ZF TRW Automotive Holdings Corp or its related bodies corporate,
 (a **Final Fix Airbag Inflator**);
- (e) says that the Defendant caused the Non-Desiccated PSAN Inflator in the Plaintiff's Vehicle to be replaced with a Final Fix Airbag Inflator at no charge to the Plaintiff; and
- (e1) denies paragraph (e1); and
- (f) otherwise does not know and therefore cannot admit the allegations in paragraph 2 of the FASOC.

- 3 In answer to the allegations in paragraph 3 of the FASOC, the Defendant:
- (a) says that purchasers of its motor vehicles generally acquired them for the purpose of being driven, including with passengers in the vehicle, and that the Defendant knew of that purpose;
 - (b) admits the allegation in paragraph 3(b)(ii) of the FASOC; and
 - (c) otherwise does not know and therefore cannot admit the allegations in paragraph 3 of the FASOC.
- 4 In answer to the allegations in paragraph 4 of the FASOC, 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 s 4(1) of the *Trade Practices Act 1974* (Cth) (**TPA**);
 - (c) admits that Subaru Corporation:
 - (i) is a Japanese company;
 - (ii) has no place of business in Australia; and
 - (iii) ~~manufactured the motor vehicles pleaded in paragraphs 9(i) to 9(iv) and 9(vi) of the FASOC~~ Model Year (MY) 2004-2014 Liberty, MY2004-2014 Outback, MY2004-2014 Impreza, MY2009-2012 Forester and MY2010-2015 Exiga model motor vehicles;
 - (d) says further that ~~the motor vehicles pleaded in paragraph 9(v) of the FASOC~~ MY2007-2013 Tribeca model motor vehicles were manufactured by Subaru of Indiana Automotive, Inc., which:
 - (i) is an American company; and
 - (ii) has no place of business in Australia;
 - (e) admits that it imported the models of motor vehicles referred to ~~pleaded in~~ paragraph 9 1(b)(ii) of the FASOC (**Subaru Vehicles**) into Australia;
 - (f) admits that it did not manufacture the Subaru Vehicles;
 - (g) admits that by force of sections 74A(4) of the TPA and 7(1)(e) of Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (**ACL**) it is deemed to be the manufacturer of the Subaru Vehicles;

- (h) admits that it supplied, other than by way of sale by auction, in the course of business and trade or commerce each model of the Subaru Vehicles to other persons who acquired the goods for re-supply;
- (i) insofar as paragraph 4(f)(ii) of the FASOC is premised on paragraphs 3(b)(ii) and 10(a)(ii) of the FASOC, admits that it supplied, other than by way of sale by auction, in the course of business and trade or commerce some models of the Subaru Vehicles to persons who were consumers within the meaning of sections 4B of the TPA and/or 3 of the ACL; and
- (j) otherwise does not know and therefore cannot admit the allegations in paragraph 4 of the FASOC.

5 In answer to the allegations in paragraph 5 of the FASOC, the Defendant:

- (a) says that it supplied the Subaru Vehicles in trade or commerce; and
- (b) otherwise does not know and therefore cannot admit the allegations in paragraph 5 of the FASOC.

6 The Defendant does not know and therefore cannot admit the allegations in paragraph 6 of the FASOC.

The Subaru Vehicles

7 In answer to paragraph 7 of the FASOC, the Defendant:

- (a) says that a form of ammonium nitrate, being Phase Stabilised Ammonium Nitrate (**PSAN**), was used as a propellant in certain airbag inflators manufactured or supplied by Takata Corporation and/or its related entities or subsidiaries, including TK Holdings Inc., (together Takata) (**Relevant Takata Airbag Inflators**);
- (b) says that some of the Relevant Takata Airbag Inflators also contained a form of desiccant (**Desiccated PSAN Inflators**) whereas some did not (**Non-Desiccated PSAN Inflators**);
- (c) says that Non-Desiccated PSAN Inflators were categorised into a number of families, which included:
 - (i) Programmable Smokeless Driver Inflators (**PSDIs**), of which there were a number of genera which included the following:
 1. PSDI;
 2. PSDI-4;

3. PSDI-4K;
 4. PSDI-5;
- (ii) Smokeless Passenger Inflators (**SPIs**), of which there were a number of genera which included the following:
1. SPI;
 2. SPI2; and
- (iii) Programmable Smokeless Passenger Inflators (**PSPIs**), of which there were a number of genera which included the following:
1. PSPI;
 2. PSPI-2;
 3. PSPI-6; and
 4. PSPI-L;
- (d) says further that the Relevant Takata Airbag Inflators were and are manufactured, amongst other things:
- (i) in different factories;
 - (ii) in different locations;
 - (iii) under different conditions;
 - (iv) in accordance with different designs; and
 - (v) with different ballistic designs;
- (e) says further that the different genera of Desiccated PSAN Inflators and Non-Desiccated PSAN Inflators were manufactured differently and function differently, including as a result of:
- (i) the conditions in which they were manufactured;
 - (ii) the adequacy of their sealing;
 - (iii) the environmental conditions to which they are exposed;
 - (iv) the amount of time that has elapsed since their manufacture; and
 - (v) the vehicles in which they are fitted;
- (f) admits that certain airbags manufactured or supplied by Takata were the subject of a **Safety Warning Notice** issued by the then-Minister for Small Business pursuant to sections 129(1)(a) and 129(1)(b) of the ACL;

- (g) says that the Safety Warning Notice:
- (i) was issued on 5 August 2017;
 - (ii) related to the Subaru Vehicles; and
 - (iii) otherwise relies on the contents and effect of the Safety Warning Notice as if reproduced in full;
- (h) says that no confirmed injuries or deaths as a result of Relevant Takata Airbag Inflators exploding during their deployment and propelling shrapnel and metal fragments within the vehicle in which they were contained have occurred in Subaru Vehicles in Australia;
- (i) says that there have not been any confirmed instances of Relevant Takata Airbag Inflators exploding during their deployment and propelling shrapnel and metal fragments within the vehicle in the field in Subaru Vehicles in Australia;
- (j) does not know and therefore cannot admit the allegations in paragraphs 7(c) to 7(f) of the FASOC;
- (k) says further that the use of the terms “documented” and “reported” in paragraphs 7(d) and 7(e) of the FASOC is embarrassing; and
- (l) otherwise denies the allegations in paragraph 7 of the FASOC.

8 In answer to the allegations in paragraph 8 of the FASOC, the Defendant:

- (a) says that the following Subaru Vehicles were fitted with the following Non-Desiccated PSAN Inflator genera manufactured or supplied by Takata, all of which were fitted on the passenger side only:
- (i) ~~Model Year (MY)~~ MY2004-2007 Impreza—SPI inflators;
 - (ii) MY2004-2009 Liberty—PSPI inflators;
 - (iii) MY2004-2009 Outback—PSPI inflators;
 - (iv) MY2008-2014~~3~~ Impreza—SPI2 inflators;
 - (v) MY2009-2012 Forester—SPI2 inflators;
 - (vi) MY2010-2014 Liberty—SPI2 inflators;
 - (vii) MY2010-2014 Outback—SPI2 inflators;
 - (viii) MY2010-2015~~4~~ Liberty Exiga—SPI2 inflators;
 - (ix) MY2007-2013 Tribeca—PSPI-L inflators;

- (b) says further that in relation to a number of the Subaru Vehicles the Defendant has caused to be replaced, free of charge, Non-Desiccated PSAN Inflators with Final Fix Airbag Inflators; and
- (c) otherwise denies the allegations in paragraph 8 of the FASOC.
- 9 ~~[Not used] In answer to the allegations in paragraph 9 of the FASOC, the Defendant:~~
- ~~(a) repeats the matters in paragraph 8 above and paragraphs 11 and 11A below;~~
and
- ~~(b) otherwise denies the allegations in paragraph 9 of the FASOC.~~
- 10 In answer to the allegations in paragraph 10 of the FASOC, the Defendant:
- (a) admits that the Subaru Vehicles ~~pleaded in paragraph 9 of the FASOC:~~
- (i) are goods of a kind ordinarily acquired for personal use or consumption;
 - (ii) are goods of a kind commonly bought and commonly supplied for the purpose of driving and being driven;
 - (iii) are goods within the meaning of sections 4 and 74A(2)(a) of the TPA and section 2 of the ACL;
- (b) denies the allegation in paragraph 10(c) of the FASOC; and

Particulars

- (i) Paragraphs 7 and 8(a) above
- (c) otherwise does not know and cannot admit the allegations in paragraph 10 of the FASOC.
- 11 In answer to the allegations in paragraph 11 of the FASOC, the Defendant:
- (a) admits that notices of voluntary recall were given to the Minister then administering Part XI of the *Competition and Consumer Act 2010* (Cth) (**CCA**) on or around the dates pleaded in paragraphs 11(a) to 11(e) of the FASOC pursuant to section 128 of the ACL in relation to the certain Subaru Vehicles ~~pleaded in paragraph 9 of the FASOC~~ (**Voluntarily Initiated Recall Notices**);
 - (b) relies on the contents and effect of the Voluntarily Initiated Recall Notices pleaded in paragraphs 11(a) to 11(e) of the FASOC as if reproduced in full;
 - (c) says further that the language pleaded in paragraphs 11(a)(v), 11(b)(v), 11(c)(v), 11(d)(v) and 11(e)(v) of the FASOC was used as a response to the Australian Competition and Consumer Commission (**ACCC**) proposing a

compulsory recall notice under section 122 of the ACL on 21 September 2017 and, in particular, Schedule 2 to that proposed notice;

(d) says further:

- (i) that the recall in paragraph 11(b) of the FASOC concerned MY2007-2013 Tribeca vehicles which contained PSPI-L genus inflators, and MY2004-2009 Liberty vehicles and MY2004-2009 Outback vehicles which contained PSPI genus inflators;
- (ii) that the recall in paragraph 11(c) of the FASOC concerned MY2008-~~2014~~ 2013 Impreza vehicles and MY2009-2012 Forester vehicles which contained SPI2 genus inflators;
- (iii) that the recall in paragraph 11(d) of the FASOC concerned MY2010-2014 Liberty Exiga vehicles which contained SPI2 genus inflators; and
- (iv) that the recall in paragraph 11(e) of the FASOC concerned MY2010-2014 Liberty and Outback vehicles which contained SPI2 genus inflators.

11A In answer to the allegations in paragraph 11A of the FASOC, the Defendant:

- (a) admits that a compulsory recall notice was issued under section 122 of the ACL by a responsible Minister on or around 27 February 2018 in relation to vehicles containing Relevant Takata Airbag Inflators, ~~which include the Subaru Vehicles pleaded in paragraph 9 of the FASOC~~ (**Compulsory Recall Notice**);
- (b) relies on the contents and effect of the Compulsory Recall Notice pleaded in paragraph 11A of the FASOC as if reproduced in full;
- (c) says further that the Compulsory Recall Notice:
 - (i) permits the sale of new or demonstrator vehicles containing Relevant Takata Airbag Inflators until 31 December 2018;
 - (ii) permits the replacement of Relevant Takata Airbag Inflators in the course of the conduct of the recalls with new Relevant Takata Airbag Inflators until 31 December 2019; and
- (d) otherwise does not know and cannot admit the allegations in paragraph 11A of the FASOC.

12 In answer to the allegations in paragraph 12 of the FASOC, the Defendant:

- (a) admits that it marketed, distributed and promoted the Subaru Vehicles within Australia at various times between 1 January 2004 and 27 February 2018 but no such activities were engaged in in respect of any MY of a model on a date after the date on which that MY was first subject to a recall in respect of a Relevant Takata Airbag Inflator;
- (b) does not admit the allegation in paragraph 12(b) of the FASOC;
- (c) denies the allegations in paragraph 12(c) of the FASOC; and

Particulars

- (i) paragraphs 7 and 8(a) above

- (d) otherwise does not admit the allegations in paragraph 12 of the FASOC.

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

23 In answer to the allegations in paragraph 23 of the FASOC, the Defendant:

- (a) repeats the matters in paragraphs 7, 8 and 10 above; and
- (b) denies the allegations in paragraph 23 of the FASOC.

24 The Defendant denies the allegations in paragraph 24 of the FASOC.

25 In answer to the allegations in paragraph 25 of the FASOC, the Defendant:

- (a) repeats the matters in paragraphs 2, 3, 4, 5, 10, 23 and 24 above; and
- (b) denies the allegations in paragraph 25 of the FASOC.

26 [Not used]

27 [Not used]

28 [Not used]

29 [Not used]

Acceptable Quality

30 In answer to the allegations in paragraph 30 of the FASOC, the Defendant:

(a) repeats the matters in paragraphs 2, 3, 4 and 5 above; and

(b) denies the allegations in paragraph 30 of the FASOC.

31 In answer to the allegations in paragraph 31 of the FASOC, the Defendant:

(a) repeats the matters in paragraphs 7, 8, 10, 11, 11A and 30 above; and

(b) denies the allegations in paragraph 31 of the FASOC.

32 In answer to the allegations in paragraph 32 of the FASOC, the Defendant:

(a) repeats the matters in paragraph 31 above; and

(b) denies the allegations in paragraph 32 of the FASOC.

33 In answer to the allegations in paragraph 33 of the FASOC, the Defendant:

(a) repeats the matters in paragraphs 4, 30 and 32 above;

(b) denies the allegations in paragraph 33 of the FASOC;

(c) says further that any non-compliance with the acceptable quality guarantee, which is denied, was caused by the acts, defaults or omissions of Takata such that section 271(2)(a) of the ACL applies to debar any recovery from the Defendant pursuant to section 271(1); and

Particulars

(i) Paragraph 7 above and paragraphs 48 and 53 below

(d) says further that in relation to those Subaru Vehicles which have had Relevant Takata Airbag Inflators replaced:

(i) insofar as such vehicles were originally purchased within 3 years of the date of replacement of the Non-Desiccated PSAN Inflator with a Final Fix Airbag Inflator, the Defendant has remedied any failure to comply with the guarantee in section 54 of the ACL, having been required by the Group Member to do so, and done so in accordance with an express warranty it gave in respect of such Subaru Vehicles; and

- (ii) insofar as such vehicles were originally purchased within 3 years of the date of replacement of the Non-Desiccated PSAN Inflator with another Relevant Takata Airbag Inflator, the Defendant is continuing to remedy any failure to comply with the guarantee in section 54 of the ACL, having been required by the Group Member to do so, will have remedied any such failure within a reasonable time and is doing so in accordance with an express warranty it gave in respect of such Subaru Vehicles,

such that section 271(6) of the ACL applies to debar any recovery from the Defendant pursuant to section 271(1).

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 In answer to the allegations in paragraph 42 of the FASOC, the Defendant:

- (a) repeats the matters in paragraphs 4, 7, 8 and 10 to 12 above; and
- (b) denies the allegations in paragraph 42 of the FASOC.

42A In answer to the allegations in paragraph 42A of the FASOC, the Defendant:

- (a) repeats the matters in paragraphs 4, 7, 8 and 10 to 12 above;
- (b) says further that the use of the expression “unnecessary harm” in paragraph 42A(d) of the FASOC is embarrassing;
- (c) says further that the use of the expression “deploy properly” in paragraph 42A(e) of the FASOC is embarrassing;
- (d) denies the allegations in paragraph 42A of the FASOC.

42B In answer to the allegations in paragraph 42B of the FASOC, the Defendant:

- (a) repeats the matters in paragraphs 7, 8, 10 to 11A and 42A above; and

- (b) denies the allegations in paragraph 42B of the FASOC.
- 42C In answer to the allegations in paragraph 42C of the FASOC, the Defendant:
- (a) repeats the matters in paragraphs 42 and 42A above; and
- (b) denies the allegations in paragraph 42C of the FASOC.
- 43 In answer to the allegations in paragraph 43 of the FASOC, the Defendant:
- (a) repeats the matters in paragraphs 42 to 42C above; and
- (b) denies the allegations in paragraph 43 of the FASOC.
- 44 In answer to the allegations in paragraph 44 of the FASOC, the Defendant:
- (a) repeats the matters in paragraphs 7, 8 and 10 to 11A above; and
- (b) denies the allegations in paragraph 44 of the FASOC.
- 45 ~~If the alleged conduct of the Defendant was misleading, which is denied, then the Defendant~~ In answer to the allegations in paragraph 45 of the FASOC, the Defendant:
- (a) denies the alleged Misleading Conduct, Misleading Conduct by Silence, and Misleading Representations; and
- (b) otherwise does not know and cannot admit the allegations in paragraph 45 of the FASOC.
- 46 In answer to the allegations in paragraph 46 of the FASOC, the Defendant:
- (a) repeats the matters in paragraphs 2, 3 and 42 to 45 above; and
- (b) denies the allegations in paragraph 46 of the FASOC.
- 47 In answer to the allegations in paragraph 47 of the FASOC, the Defendant:
- (a) repeats the matters in paragraphs 42 to 46 above;
- (b) denies the allegations in paragraph 47 of the FASOC; and
- (c) says further in answer to the allegations in paragraph 47(b) of the FASOC that if any loss or damage has been suffered, then:
- (i) insofar as Group Members have been offered a replacement airbag inflator, whether a Final Fix Airbag Inflator or a new Non-Desiccated PSAN Inflator, but have not taken up that offer of replacement;
- (ii) such Group Members' loss or damage is partly a result of their failure to take reasonable care by having the Non-Desiccated PSAN Inflator in their Subaru Vehicle replaced;

- (iii) if the Defendant's conduct has caused such Group Members to suffer loss or damage (which is denied) then it was unintentional and not caused fraudulently; and
- (iv) in those premises, the amount of the loss or damage Group Members may recover under sections 82(1) of the TPA and 236(1) of the ACL is to be reduced to the extent that the Court considers just and equitable having regard to the Group Members' share in the responsibility for their loss or damage, pursuant to sections 82(1B) of the TPA and 137B of the CCA.

Unconscionable Conduct

48 In answer to the allegations in paragraph 48 of the FASOC, the Defendant:

- (a) repeats the matters in paragraph 7 and 10(b) above;
- (b) denies the allegations in paragraph 48 of the FASOC insofar as they relate to paragraph 7(a)(i) of the FASOC;
- (c) admits knowledge of the matters in paragraph 8(a)(i) above from 19 May 2015 and of the matters in paragraphs 8(a)(ii) to 8(a)(viii) above from 1 June 2016;
- (d) otherwise denies that it knew, or ought to have known, of the matters in paragraph 8 at the dates pleaded in paragraph 48 of the FASOC; and
- (e) otherwise denies the allegations in paragraph 48 of the FASOC.

49 In answer to the allegations in paragraph 49 of the FASOC, the Defendant:

- (a) repeats the matters in paragraphs 4, 7, 8, 10, 11, 11A, 12 and 48 above;
- (b) denies the allegations in paragraph 49 of the FASOC;
- (c) repeats the matters in paragraph 4(h)(i) above and says further that insofar as the Defendant supplied Subaru Vehicles to persons who acquired the goods for re-supply the alleged conduct was not conduct to which section 51AB of the TPA or section 21 of the ACL applies; and
- (d) says further that the Compulsory Recall Notice:
 - (i) permits the sale of new or demonstrator vehicles containing Relevant Takata Airbag Inflators until 31 December 2018; and
 - (ii) permits the replacement of Relevant Takata Airbag Inflators in the course of the conduct of the recalls with new Relevant Takata Airbag Inflators until 31 December 2019.

- 49A In answer to the allegations in paragraph 49A of the FASOC, the Defendant:
- (a) repeats the matters in paragraphs 7, 8, 10, 48 and 49 above;
 - (b) says that if, which is denied, the alleged conduct of the Defendant was unconscionable, then it denies the inference which is alleged in paragraph 49A of the FASOC; and
 - (c) otherwise denies the allegations in paragraph 49A of the FASOC.
- 50 In answer to the allegations in paragraph 50 of the FASOC, the Defendant:
- (a) repeats the matters in paragraphs 2, 3, 48, 49 and 49A above; and
 - (b) denies the allegations in paragraph 50 of the FASOC.
- 51 In answer to the allegations in paragraph 51 of the FASOC, the Defendant:
- (a) repeats the matters in paragraphs 48 to 50 above; and
 - (b) denies the allegations in paragraph 51 of the FASOC.

Claims Time-barred

- 52 Further or alternatively, pending receipt of further particulars of the Group Members' claims, the Defendant says that if any Group Member suffered loss or damage as alleged in the FASOC, which is denied, as a result of any of the matters alleged in paragraphs 7, 10 and 23 to 25 of the FASOC, which is denied:
- (a) where a Subaru Vehicle was first supplied to a consumer prior to 22 November 2007, by reason of section 74J(3) of the TPA no action can be brought after 10 years from the date of the first supply of the goods and in those premises any claims under section 74D of the TPA are barred by section 74J(3) of the TPA; and
 - (b) where a Subaru Vehicle was supplied to a Group Member between 22 November 2007 and 1 January 2011 and that Group Member's alleged cause of action accrued on or before 22 November 2014, by reason of section 74J(1) of the TPA no action can be brought after 3 years from the date when the cause of action accrued and in those premises any claims under section 74D of the TPA are barred by section 74J(1) of the TPA.
- 53 Further or alternatively, pending receipt of further particulars of the Group Members' claims, the Defendant says that if any Group Member suffered loss or damage as alleged in the FASOC, which is denied, as a result of any of the matters alleged in paragraphs 7, 8, 10 to 11A and 30 to 33 of the FASOC, which is denied, where a Subaru Vehicle was supplied to a Group Member after 1 January 2011 and that

Group Member's alleged cause of action accrued on or before 22 November 2014, by reason of section 273 of the ACL no action can be brought after 3 years from the date when the cause of action accrued and in those premises any claims under section 271 of the ACL are barred by section 273 of the ACL.

54 Further or alternatively, pending receipt of further particulars of the Group Members' claims, the Defendant says that if any Group Member suffered loss or damage as alleged in the FASOC, which is denied, as a result of any of the alleged conduct of the Defendant in paragraphs 4, 7, 8, 10 to 12 and 42 to 51 of the FASOC, which is denied, then where the Group Member purchased the Subaru Vehicle by no later than 22 November 2011 that Group Member's claims arising from the allegations in paragraphs 4, 7, 8, 10 to 12 and 42 to 51 of the FASOC are barred by sections 82(2) or 87(1CA) of the TPA or sections 236(2) or 237(3) of the ACL as the case may be.

Failure to Mitigate Losses

54A Further and in the alternative, in answer to the entirety of the allegations made in the FASOC the Defendant says that:

- (a) it has recalled or intends to recall the Subaru Vehicles in order to replace the Relevant Takata Airbag Inflators with a Final Fix Airbag Inflator;
- (b) it would be unreasonable if a Group Member did not respond to such a recall within a reasonable period of time in order to have any such Relevant Takata Airbag Inflator in their Subaru Vehicle replaced with a Final Fix Airbag Inflator;
- (c) to the extent a Group Member has not (or does not) reasonably respond to such a recall, they have (or will have) failed to mitigate any loss or damage they have suffered;
- (d) to the extent a Group Member has not (or does not) reasonably respond to a recall, the Defendant remains (or will remain) ready and willing to replace the Relevant Takata Airbag Inflator in their vehicle as and when that Group Member responds to the recall, subject to the availability of replacement airbag inflators at the time of a response; and
- (e) to the extent a Group Member has not (or does not) reasonably respond to a recall, the Defendant will rely on the failure of any such Group Member to mitigate any loss or damage they have suffered.

Proportionate Liability

55 Further and in the alternative, the claims made in the FASOC against the Defendant:

(a) for damages pursuant to section 82 of the TPA or section 236 of the ACL at paragraph 47(b) of the FASOC are:

- (i) claims for economic loss;
- (ii) claims arising from alleged contraventions of section 52 of the TPA or section 18 of the ACL;
- (iii) apportionable claims pursuant to section 87CB(1) of the TPA or section 87CB(1) of the *Competition and Consumer Act 2010* (Cth).

56 If, which is denied, the Plaintiff and Group Members suffered loss or damage as alleged in the FASOC:

(a) at all material times:

- (i) Subaru Corporation manufactured the vehicles pleaded in paragraph 8(a)(i)-(viii) above;
- (ia) Subaru of Indiana Automotive, Inc. manufactured the vehicles pleaded in paragraph 8(a)(ix) above;
- (ii) Subaru Corporation and Subaru of Indiana Automotive, Inc. acquired airbags for inclusion in those vehicles;
- (iii) Subaru Corporation and Subaru of Indiana Automotive, Inc. provided the airbag manufacturer with design requirements and specifications and relied on the manufacturer supplying airbags which met those requirements and specifications;
- (iv) Takata manufactured airbags and Non-Desiccated PSAN Inflators for inclusion in those airbags;
- (v) Takata informed Subaru Corporation and Subaru of Indiana Automotive, Inc. that the airbags met Subaru Corporation's their design requirements and specifications and otherwise made, from time to time, representations to Subaru Corporation and Subaru of Indiana Automotive, Inc. that the Non-Desiccated PSAN Inflators were safe for use in motor vehicles;
- (vi) Subaru Corporation and Subaru of Indiana Automotive, Inc. relied on the information provided by and the representations made by Takata;

- (vii) Subaru Corporation and Subaru of Indiana Automotive, Inc. included airbags which contained Non-Desiccated PSAN Inflators in the vehicles pleaded in paragraph 8(a) above;
 - (viii) Takata, either directly or through its related entities, supplied, in trade or commerce, Non-Desiccated PSAN Inflators to consumers in Australia, by virtue of such inflators being a component in the Subaru Vehicles;
 - (ix) Takata knew or ought to have known that Subaru Corporation, either directly or through its related entities, would use the Non-Desiccated PSAN Inflators in vehicles manufactured by Subaru Corporation and Subaru of Indiana Automotive, Inc. for distribution or sale to Australian consumers;
- (b) in or around January 2017, Takata pleaded guilty to a charge of fraud in the United States of America, pursuant to which a Statement of Facts was filed and agreed and stipulated to by Takata as to its truth and accuracy;
- (c) Takata admitted in the Statement of Facts referred to above that it prepared and supplied to vehicle manufacturers false, fraudulent and misleading information and reports about the performance and safety of the Non-Desiccated PSAN Inflators;
- (c1) at all material times up to January 2017, Takata did not modify or correct the representations referred to above in subparagraph (a);
- (d) between April 2013 and early 2017, Subaru Corporation made the following representations to the Defendant regarding the Subaru Vehicles:
- (i) that the Defendant was not affected by recalls that were being undertaken in the United States of America in relation to certain airbag inflators because no Subaru Vehicles were equipped with defective airbag inflators;
 - (ii) that the Subaru Vehicles were not affected by airbag inflator issues;
 - (iii) that the issues with defective airbag inflators were due to manufacturing issues and not design issues;
 - (iv) that it had decided to recall certain Takata passenger airbags worldwide and that this would affect 33,548 Subaru MY2004-2007 Impreza vehicles that contained SPI genus inflators in Australia and

this was related to manufacturing issues in respect of certain SPI
genus inflators;

(v) that the recall of MY2004-2007 Impreza vehicles was being conducted
out of an abundance of caution;

(e) if, which is denied, the allegations in the FASOC are established then it will
have been established that:

- (i) Takata Airbags (as defined in paragraph 1(b)(ii) of the FASOC) used
ammonium nitrate with the consequence that the inflators in those
airbags had a propensity to explode and propel metal shrapnel
towards the occupants of Subaru Vehicles;
- (ii) Takata Airbags used ammonium nitrate with the consequence that the
inflators in those airbags had a propensity to malfunction on
deployment;
- (iii) Subaru Vehicles by reason of their inclusion of a Takata Airbag were
not safe to drive and/or if driven exposed the vehicle occupants to
unnecessary danger and harm;
- (iv) the Defendant marketed and held out the Subaru Vehicles as being
safe to drive and failed to take adequate steps to warn the public that
the vehicles were not safe to drive, to prevent them from being
driven or to prevent their sale as second-hand vehicles;
- (v) the Defendant by reason of those matters had by engaging in the
conduct at paragraph 56(e) engaged in misleading conduct within
sections 52 of the TPA and/or 18 of the ACL;
- (vi) had the purchasers of Subaru Vehicles known of the Takata Airbag's
presence in those vehicles and the characteristics of those airbags,
they would not have acquired the Subaru Vehicles and avoided the
loss and damage alleged or would have paid a lower price for them;
and

(f) but for the representations made by Subaru Corporation, the Defendant would
not have offered the Subaru Vehicles for sale and the Plaintiff and Group
Members would not have purchased the Subaru Vehicles.

57 If, which is denied, the Plaintiff and Group Members suffered loss or damage as
alleged in the FASOC, then, in the premises of paragraph 56 above, Subaru
Corporation:

- (a) engaged in conduct which 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;
- (b) engaged in that conduct in trade or commerce within the meaning of the TPA and/or the ACL; and
- (c) thereby caused the damage or loss claimed in paragraphs 46 and 47 of the FASOC.

58 In the circumstances pleaded, Subaru Corporation is:

- (a) a person who is one of two or more persons whose acts or omissions caused, independently of each other or jointly, the damage or loss claimed in paragraphs 46 and 47 of the FASOC; and
- (b) a concurrent wrongdoer in relation to the claims in paragraphs 46 and 47 of the FASOC as that term is defined in:
 - (i) section 87CB(3) of the TPA; and
 - (ii) section 87CB(3) of the CCA.

58A If, which is denied, the Plaintiff and Group Members suffered loss or damage as alleged in the FASOC, then, in the premises of paragraph 56 above:

- (a) by making the representations referred to in paragraph 56(a) above; and/or
- (b) failing to take steps to notify Subaru Corporation and/or its related entities and/or the public regarding the safety or function of the Non-Desiccated PSAN Inflators (including by failing to notify that the inflators did not meet Subaru Corporation's specifications and by affirmatively omitting critical information and falsifying the information presented to Subaru Corporation and/or its related entities).

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

59 If, which is denied, the Plaintiff and Group Members suffered loss or damage as alleged in the FASOC, then, in the premises of paragraph 56 above, Takata:

- (a) owed to the Plaintiff and Group Members, by reason of the matters pleaded in paragraph 56 above and as persons who would or might travel in vehicles containing airbags and airbag inflators it designed and manufactured, a duty to exercise reasonable care and skill in designing and manufacturing those

airbags and airbag inflators to avoid the risk of injury or loss to consumers
(**Takata Duty of Care**); and

(b) breached the Takata Duty of Care;

Particulars of breach

- (i) Paragraphs 7, 8, 10, 11, 11A, 12, 42, 43, 45, 46 and 47 of the FASOC.
- (ii) Failed to disclose material facts to vehicle manufacturers, including Subaru Corporation and Subaru of Indiana Automotive, Inc., about the Relevant Takata Airbag Inflators.
- (iii) Failed to inform vehicle manufacturers, including Subaru Corporation and Subaru of Indiana Automotive, Inc., about the Relevant Takata Airbag Inflators as soon as was reasonably practical.

60 If, which is denied, the Plaintiff and Group Members suffered loss or damage as alleged in the FASOC, then, in the premises of the preceding paragraphs, Takata caused the damage or loss claimed in paragraphs 46 and 47 of the FASOC.

61 In the circumstances pleaded, Takata is:

- (a) a person who is one of two or more persons whose acts or omissions caused, independently of each other or jointly, the damage or loss claimed in paragraphs 46 and 47 of the FASOC; and
- (b) a concurrent wrongdoer in relation to the claims in paragraphs 46 and 47 of the FASOC as that term is defined in:
 - (i) section 87CB(3) of the TPA; and
 - (ii) section 87CB(3) of the CCA.

62 In the premises of paragraphs 55 to 61 above, pursuant to s 87CD(1) of the TPA and/or s 87CD(1) of the CCA:

- (i) the liability of the Defendant in relation to the claims in the FASOC is limited to an amount reflecting that proportion of the damage or loss claimed in paragraphs 46 and 47 of the FASOC that the court considers just having regard to the extent of the Defendant's responsibility for that damage or loss; and
- (ii) the court may give judgment against the Defendant for not more than that amount.

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


Solicitor on the record

14 September 2018

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AFFIDAVIT VERIFYING

Name Anthony Ross Thomas
 Address Level 2, 2-4 Burbank Place, Baulkham Hills, NSW 2153
 Occupation Company Secretary
 Date 14 September 2018

I affirm:

- 1 I am the Company Secretary of the Defendant and am authorised to make this affidavit 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

Sydney

Signature of deponent



Name of witness

Richard Abraham

Address of witness

Level 15 1 Bligh Street, Sydney NSW 2000

Capacity of witness

Solicitor

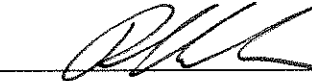
And as a witness, I certify the following matters concerning the person who made this affidavit (the deponent):

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

Drivers Licence # 4093TG

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.]

FURTHER DETAILS ABOUT FILING PARTY**Filing party**

Name Subaru (Aust) Pty Ltd ABN 95 000 312 792
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Legal representative for filing party

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