

FURTHER AMENDED STATEMENT OF CLAIM

COURT DETAILS

Court	Supreme Court of NSW
Division	Equity
List	General (Class Action)
Registry	Sydney
Case number	2017/340824

TITLE OF PROCEEDINGS

Plaintiff	Louise Haselhurst
Defendant	Toyota Motor Corporation Australia Limited ABN 64 009 686 097

FILING DETAILS

Filed for	Louise Haselhurst
Legal representative	Damian Scattini, Quinn Emanuel Urquhart & Sullivan LLP
Legal representative reference	07435-00001
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TYPE OF CLAIM

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 ~~that the Defendant is obliged to compensate any Group Member who transfers their Defective Vehicle to it by paying to any such Group Member the purchase price of the Defective Vehicle, together with the amount of any out of pocket expenses;~~
- 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 ~~Further or in the alternative, compensation pursuant to section 74B of the TPA;~~
- 5 Further or in the alternative, ~~compensation~~ 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 subgroup members, in this proceeding are:

1. Whether the Defendant supplied Defective Vehicles;:
 - (a) ~~Re-Supplied Defective Vehicles (as defined at paragraph 4(h)(i) of the Pleadings); and/or~~
 - (b) ~~Manufacturer Supplied Defective Vehicles (as defined at paragraph 4(h)(ii) of the Pleadings).~~
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 ~~the~~ or permitting to be driven without being exposed to unnecessary danger or harm attributable to its construction; and/or
 - (c) carrying passengers in the vehicle 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 their 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;
 - (b) prevent the Defective Vehicles being driven;
 - (c) ensure that Defective Vehicles were not sold as second-hand vehicles;
 - ~~5. Whether the Defendant breached the Merchantable Quality Implied Condition (as defined at paragraph 13 of the Pleadings) provided for in s71(1) of the TPA in respect of Manufacturer Supplied Defective Vehicles supplied by the Defendant before 1 January 2011;~~
 - ~~6. Whether the Defendant breached the Fit For Purpose Implied Condition (as defined at paragraph 18 of the Pleadings) provided for in s 71(2) of the TPA in respect of any Manufacturer Supplied Defective Vehicles supplied by the Defendant before 1 January 2011;~~
 - ~~7. Whether or not the Defendant is liable for loss and damage arising from the breach of the Merchantable Quality Implied Condition and/or the Fit For Purpose Implied Condition and, if so, the proper method for calculation of such loss and damage;~~
 8. Whether any ~~Re-Supplied~~ 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 ~~Re-Supplied~~ Defective Vehicle before 1 January 2011;
 - ~~10. Whether any Re-Supplied Vehicles acquired by Group Members before 1 January 2011 were not fit for purpose within the meaning of s74B of the TPA;~~
 - ~~11. Whether the Defendant is liable pursuant to s 74B of the TPA to compensate any Group Members who acquired a Re-Supplied Defective Vehicle before 1 January 2011;~~

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. Whether, in respect of any Defective Vehicles supplied to Group Members on or after 1 January 2011:~~

- ~~(a) the Defendant represented that the Defective Vehicles were reasonably fit 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 their construction; and/or~~
 - ~~(iii) carrying passengers without exposing them to unnecessary danger or harm attributable to their construction with at least one Takata Airbag;~~~~
- ~~(b) the Defective Vehicles were not fit for the purpose described in (a) above;~~
- ~~(c) the Defendant failed to comply with the Fit For Purpose Guarantee (as defined at paragraph 34 of the Pleadings) provided for in s 55 of the ACL;~~
- ~~(d) the Defective Vehicles would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure to comply with the Fit For Purpose Guarantee;~~

~~(e) the Defective Vehicles are not of acceptable quality because they are unsafe;~~

~~(f) it was reasonably foreseeable that any Group Member who acquired a Manufacturer Supplied Defective Vehicle on or after 1 January 2011 would suffer loss or damage as a result of the failure to comply with the Fit For Purpose Guarantee.~~

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); ~~to prospective purchasers (including the Group Members) that the Defective Vehicles were safe to drive.~~

16. Whether the Misleading Conduct 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 in purchasing their respective Defective Vehicle;

17. Whether the Defendant engaged in Unconscionable Conduct (as defined at paragraph 49 of the Pleadings) ~~in connection with the supply or possible supply of goods to a person~~ 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 her 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(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 ~~April 2004~~ 1 November 2000 to 27 February 2018 ~~September 2017~~ inclusive (**Relevant Period**) acquired (within the meaning of section 4 of the TPA or section 2 of the ACL) in Australia a Toyota or Lexus motor vehicle fitted with a front driver or passenger airbag manufactured or supplied by Takata Corporation (**Takata Airbag**), and which has been the subject of an airbag-related product safety recall and which is listed in paragraph 9 below (**Defective Vehicles**); 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).

2. The Plaintiff:

- (a) purchased, in January 2011, a Defective Vehicle, being a Corolla Sedan manufactured in 2010 (**Plaintiff's Vehicle**);
- (b) purchased the Plaintiff's Vehicle new at Phil Gilbert Toyota in Croydon, New South Wales;
- (c) paid \$24,600 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 reputation of the Defendant's brand (i.e. Toyota) 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 less than \$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:
- ~~(iv)~~ (i) driving the Defective Vehicle or permitting the Defective Vehicle to be driven;
 - ~~(v)~~ (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
 - ~~(vi)~~ (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 sections 3(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) is and was at all material times a wholly owned subsidiary of Toyota Motor Corporation, which
 - (i) is a Japanese company;
 - (ii) has no place of business in Australia;
 - (iii) manufactured those of the Defective Vehicles, which were not in fact manufactured by the Defendant (**Imported Defective Vehicles**);
- (d) manufactured some of the Defective Vehicles (**Toyota Australia Manufactured Defective Vehicles**);
- (e) did not manufacture the Imported Defective Vehicles;
- (f) imported the Imported Defective Vehicles into Australia;
- (g) by reason of the matters pleaded in (c), (e) and (f) above, manufactured the Imported Defective Vehicles within the meaning of section 74A of the TPA or section 7 of the ACL;
- (h) 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 ~~retailers~~ who acquired the goods for re-supply (~~**Re-Supplied Defective Vehicles**~~); 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 (~~**Manufacturer Supplied Defective Vehicles**~~).

5. The ~~Re-Supplied~~ Defective Vehicles were supplied to Group Members in trade or commerce ~~other than by way of sale by auction.~~
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) ~~haved~~ 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 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 ~~paragraphs~~sections 129(1)(a) and 129(1)(b) of the ACL Schedule 2 of the Competition and Consumer Act 2010 (Cth) 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 2.2 million vehicles in Australia, fitted with Takata Airbags;
 - (d) have caused at least 230-200 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 19 documented 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 included the following models—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:
- (a) Toyota Echo Hatch manufactured between December 2002 and October 2005;

- (b) Toyota RAV4 manufactured between July 2003 and October 2005;
- (c) Toyota Corolla manufactured between November 2000 and December 2012;
- (d) Toyota Yaris manufactured between August 2005 and December 2012;
- (e) Toyota Avensis manufactured between April 2001 and December 2009;
- (f) Toyota Rukus manufactured between February 2010 and December 2012;
- (g) Lexus SC430 manufactured between ~~January 2004~~ December 2000 and June 2010;
- (h) Lexus IS250 manufactured between August 2005 and ~~December 2012~~March 2013;
- (i) Lexus IS250C manufactured between April 2009 and December 20123;
- (j) Lexus IS350 manufactured between August 2010 and ~~December 2012~~March 2013;
- (k) Lexus IS F manufactured between August 2008 and December 20123;
- (l) Lexus LFA manufactured between February 2011 and June 20123.

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 their construction; and/or

- (iii) carrying passengers without exposing them to unnecessary danger or harm attributable to their construction ~~with at least one Takata airbag;~~
 - (c) by reason of the matters pleaded in paragraphs 7 and 8 above ~~and 11 below:~~
 - (i) are not safe to drive; and/or
 - (ii) if driven, expose the driver and any passengers to unnecessary danger and harm attributable to their construction with at least one Takata ~~a~~airbag;
 - (d) are goods within the meaning of:
 - (i) by reason of paragraph ~~10~~8(a) above, section 74A(2)(a) of the TPA;
 - (ii) section 4 of the TPA;
 - (iii) section 2 of the ACL.
11. ~~Each of the Defective Vehicles was subject to at least one of~~ the following product safety recalls were issued to the Department of Infrastructure and Regional Development by Toyota pursuant to section 128 of the ACL (**Voluntarily Initiated Recalls**) in respect of certain Defective Vehicles identified therein:
- (a) Product Recall Australia Number 2013/13544 which:
 - (i) was issued on 12 April 2013;
 - (ii) was in respect of Corolla ZZE122 and Avensis Verso ACM20 models;
 - (iii) was issued on the ground that the *“front passenger air bag inflator may have been assembled with improperly manufactured propellant wafer”* such that, *“in the event of a crash, the inflator may rupture and cause the front passenger air bag to deploy abnormally, increasing the risk of injury to the occupant”*;
 - (iv) advised consumers that *“consumers should take extra care when driving. Toyota Australia is currently preparing additional parts for*

rectification. Affected customers who have not had their passenger air replaced will be re-notified by mail instructing them to take their vehicle to their preferred Toyota Dealer to replace the passenger side airbag once parts become available. This will be performed at no cost to the owner. Customers who have already had their passenger airbag replaced are not impacted by this re-announcement.”

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

(I) “Airbag inflator: if an affected vehicle is involved in a collision triggering the airbag, the metal inflator housing explodes / ruptures under too much internal pressure. ... In the event that a defective airbag inflator ruptures, metal fragments propel out through the airbag cushion towards the vehicle occupants causing serious injury or fatality”.

(II) “owners of affected vehicles should contact their local Toyota dealership or Toyota’s head office directly by phoning 1800 987 366 or emailing questexperience@toyota.com.au to arrange for a replacement airbag inflator free of charge. It is critical that owners of cars with alpha airbags installed take immediate steps to have the airbags replaced because of the significant risk of injury or death involved in using cars with these airbags”.

(b) Product Recall Australia Number 2014/14456 which:

- (i) was issued on 28 November 2014;
- (ii) was in respect of Toyota Echo NCPI and RAV4 ACA2 models;
- (iii) was issued on the ground that *“there is a potential concern with the propellant wafers contained within the driver’s side front airbag inflator”* such that, *“during airbag deployment, the inflator could rupture resulting in metallic projectile fragments that could increase the risk of injuries”*;

(iv) advised consumers that “*affected customers will be notified of the recall by mail and asked to make an appointment at their preferred Toyota dealer as soon as parts become available.*”

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

(I) “Airbag inflator: if an affected vehicle is involved in a collision triggering the airbag, the metal inflator housing explodes / ruptures under too much internal pressure. ... In the event that a defective airbag inflator ruptures, metal fragments propel out through the airbag cushion towards the vehicle occupants causing serious injury or fatality.”

(II) “Owners of affected vehicles should contact their local Toyota dealership or Toyota’s head office directly by phoning 1800 987 366 or emailing questexperience@toyota.com.au to arrange for a replacement airbag inflator free of charge. It is critical that owners of cars with alpha airbags installed take immediate steps to have the airbags replaced because of the significant risk of injury or death involved in using cars with these airbags”.

(c) Product Recall Australia Number 2015/14700 which:

- (i) was issued on 18 May 2015;
- (ii) was in respect of Toyota ECHO and RAV4 models;
- (iii) was issued on the ground that the “*driver’s front airbag inflator propellant wafers may have an increased potential for moisture intrusion overtime. 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*

Toyota Dealer for the replacement of the driver's side airbag inflator at no charge."

- (d) Product Recall Australia Number 2015/14701 which:
- (i) was issued on 18 May 2015;
 - (ii) was in respect of Toyota Corolla, Avensis Verso and Yaris models;
 - (iii) was issued on the ground that the "*passenger's front side airbag inflator propellant wafers may have an increased potential for moisture intrusion overtime. 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 Toyota Dealer for the replacement of the passenger's front side airbag inflator at no charge.*"
- (e) Product Recall Australia Number 2015/14794 which:
- (i) was issued on 30 June 2015;
 - (ii) was in respect of Avensis Verso ACM21, Yaris NCP90, NCP91 and NCP93 models;
 - (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, "*in the event of a crash, should the passenger front airbag deploy abnormally this may increase the risk of injury to the occupant*";
 - (iv) advised consumers that "*owners will be contacted by mail as soon as parts become available to present their vehicle to a Toyota Dealer.*"
 - (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 Toyota dealership or Toyota’s head office directly via the website at <https://www.toyota.com.au/contact> or email questexperience@toyota.com.au to arrange for a replacement airbag inflator free of charge”.

(f) Product Recall Australia Number 2016/15709 which:

- (i) was issued on 31 October 2016;
- (ii) was in respect of Corolla (model ZRE152), Yaris (models NCP90, NCP91 and NCP93) and Avensis Verso (model ACM21) models;
- (iii) was issued on the ground that the “*front passenger’s airbag inflator may be susceptible to moisture intrusion over time resulting in degradation of the inflator propellant*” such that, “*if this happens, this could potentially make the inflator assembly prone to rupture during an accident, increasing the risk of injury to the vehicle occupants*”;
- (iv) advised consumers that “*owners will be contacted inviting them to make an appointment with their preferred Toyota Dealer to have the recall carried out free of charge, once parts become available.*”
- (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 Toyota dealership or Toyota’s head office directly via the website at <https://www.toyota.com.au/contact> or email questexperience@toyota.com.au to arrange for a replacement airbag inflator free of charge”.

- (g) Product Recall Australia Number 2017/15950 which:
- (i) was issued on 3 March 2017;
 - (ii) was in respect of Toyota Corolla ZZE122 and ZZE123 models;
 - (iii) was issued on the ground that the “*front driver’s air bag inflator have been assembled with propellant wafers that are subject to density reduction, caused by repeated volume change, which occurs after prolonged exposure to high temperatures*” such that, “*in the event of driver’s airbag deployment during a collision, the inner pressure of the inflator assembly could increase abnormally and the inflator body could rupture, increasing the risk of injury to the occupant*”;
 - (iv) advised consumers that “*owner’s will be contacted, inviting them to make an appointment with their preferred Toyota Dealer to have the recall carried out free of charge, once parts become available.*”
- (h) Product Recall Australia Number 2017/16010 which:
- (i) was issued on 5 April 2017;
 - (ii) was in respect of Toyota Corolla (ZRE152), Yaris (NCP93) and Rukus (AZE151) models;
 - (iii) was issued on the ground that the “*front passenger’s airbag inflator may be susceptible to moisture intrusion overtime resulting in degradation of the inflator propellant*” such that, “*in the event of an*

accident requiring front passenger airbag deployment, abnormal inflator deployment and rupture may occur resulting in metallic projectile fragments increasing the risk of injury to occupants”;

- (iv) *advised consumers that “owners will be contacted, inviting them to make an appointment with their preferred Toyota Dealer to have the recall carried out free of charge, once parts become available.”*
- (i) Product Recall Australia Number 2017/16014 which:
 - (i) was issued on 10 April 2017;
 - (ii) was in respect Toyota Echo (NCPIO/13) and RAV4 (ACA22/23) models;
 - (iii) was issued on the ground that the *“front driver’s airbag inflator may be susceptible to moisture intrusion overtime resulting in degradation of the inflator propellant”* such that, *“in the event of an accident requiring front driver’s airbag deployment, abnormal inflator deployment and rupture may occur resulting in metallic projectile fragments increasing the risk of injury to occupants”;*
 - (iv) advised consumers that *“once parts become available, owners will be re-notified inviting them to make an appointment with their preferred Toyota Dealer to have the driver’s side front airbag inflator replaced for a second time, as the original airbag inflator did not contain a desiccant (drying agent).”*

(i1) Product Recall Australia Number 2018/16664 which:

- (i) was issued on 14 March 2018;
- (ii) was in respect of Corolla Sedan (ZRE152-2007 to 2012 Production Period and ZRE-2010 to 2012 Production Period), Corolla Hatch (ZRE152-2007 to 2012 Production Period) and Rukus models (AZE151-2010 to 2012 Production Period);
- (iii) was issued on the ground that the vehicles “have had the passenger’s front airbag inflator replaced as part of the Takata inflator recall campaign. There is a possibility that in some vehicles the replacement inflator was installed incorrectly”, such that “In the event of an accident,

the passenger front air bag may not properly inflate as designed during deployment, increasing the risk of injury”; and

(iv) advised customers that “Vehicles will be inspected by the Dealer and if required, the vehicle will be rectified”.

(j) Product Recall Australia Number 2013/13545 which:

(i) was issued on 12 April 2013;

(ii) was in respect of Lexus SC430 models;

(iii) was issued on the ground that the “*front passenger-side airbag inflator may have been assembled with improperly manufactured propellant wafers*” such that, “*in the event of a crash, the inflator may rupture and cause the front passenger airbag to deploy abnormally, increasing the risk of injury to the occupant*”;

(iv) advised consumers that “*consumers should take extra care when driving. Lexus Australia is currently preparing additional parts for rectification. Affected customers who have not had their passenger air replaced will be re-notified by mail instructing them to take their vehicle to their preferred Toyota Dealer to replace the passenger side airbag once parts become available. This will be performed at no cost to the owner.*”

(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 Lexus Australia dealership or Lexus Australia head office directly

via the website at <https://www.lexus.com.au/contact> to arrange for a replacement airbag inflator free of charge”.

- (k) Product Recall Australia Number 2016/15425 which:
- (i) was issued on 2 June 2016;
 - (ii) was in respect of Lexus IS 250, IS 250C, IS 350 and IS F models;
 - (iii) was issued on the ground that the *“front passenger’s airbag inflator may be susceptible to moisture intrusion over time resulting in degradation of the inflator propellant”* such that, *“in the event of an accident requiring front passenger airbag deployment, abnormal inflator deployment and rupture may occur resulting in metallic projectile fragments increasing the risk of injury to occupants”*;
 - (iv) advised consumers that *“owners will be contacted by mail as soon as parts become available. After contact, consumers should present their vehicle to a Lexus Dealer.”*
- (l) Product Recall Australia Number 2017/15846 which:
- (i) was issued on 18 January 2017;
 - (ii) was in respect of Lexus IS 250, IS 250C, IS 350, IS F and LFA models;
 - (iii) was issued on the ground that the *“front passenger’s airbag inflator may be susceptible to moisture intrusion over time resulting in degradation of the inflator propellant”* such that, *“in the event of an accident requiring front passenger airbag deployment, abnormal inflator deployment and rupture may occur resulting in metallic projectile fragments increasing the risk of injury to occupants”*;
 - (iv) advised consumers that *“owners will be contacted directly by Lexus Australia and/or by mail. Once parts are available, owners will be contacted inviting them to present their vehicle to a Lexus Dealer for rectification.”*

(m) Product Recall Australia Number 2018/16536 which:

- (i) was issued on 22 January 2018;
- (ii) was in respect of Lexus S250 (Model GSE20), IS250C (Model GSE20), IS350 (Model GSE21) and IS-F (Model USE20);
- (iii) was issued on the ground that “If an affected vehicle is involved in a collision and the airbag deploys, the airbag inflator may rupture”, such that “In the event of an airbag inflator rupture, metal fragments could possibly shoot out, straight through the airbag cushion material towards the vehicle occupants causing serious injury or fatality.”
- (iv) noted that “This recall expands recall PRA2017/15846”;
- (v) advised customers that “owners will be contacted by letter from Lexus Australia, asking them to contact a Lexus dealership to arrange replacement of the airbag free of charge.”

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:

- (l) The following appeared on the Defendant’s website in 2011:*

✓ **Advanced safety features**
 The Corolla exceeds the world's toughest crash safety standards.

The Toyota Corolla boasts seatbelt and up to seven SRS airbags. All models are equipped with Toyota's advanced AB-i braking system, which combines Anti-skid Braking System (ABS), Brake Assist (BA) and Electronic Brake-Force Distribution (EBD) to deliver uncompromising stopping power.



Occupant protection 

[see: <https://web.archive.org/web/20110319025132/http://www.toyota.com.au:80/corolla/features/sedan-performance>];

(II) *In or about November, 2012, the Defendant promoted the safety of its Toyota Corolla on its website as having an “ANCAP 5-Star safety rating and is packed with an impressive list of safety features to help keep you and your passengers safe whilst on the road”*

[see: <https://web.archive.org/web/20121101063146/http://www.toyota.com.au/corolla>];

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

(b) held the Defective Vehicles out as being safe to drive;

Particulars

(A) The particulars to [paragraph 12\(a\)](#) above are repeated.

(B) The Defendant held out the Defective Vehicles as being safe to drive 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. Toyota) as a make of vehicle that is safe to drive;

(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).

(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.

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 of Defective Vehicles 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.

IMPLIED UNDERTAKINGS — TPA s71

Merchantable quality

13. ~~By reason of the matters pleaded in paragraphs 4(h)(ii), there is an implied condition in the contract of supply between any Group Member who acquired a Manufacturer Supplied Defective Vehicle on the one hand, and the Defendant on the other, that any Manufacturer Supplied Defective Vehicles supplied by the Defendant before 1 January 2011 is of merchantable quality within the meaning of section 71(1) of the TPA (Merchantable Quality Implied Condition).~~

14. ~~By reason of the matters pleaded in paragraphs 7, 8, 10(b), 10(c) and 11 above, the Manufacturer Supplied Defective Vehicles were not of merchantable quality within the meaning of sections 66(2) and 71(1) of the TPA in that they were not fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect.~~

- ~~15. By reason of the matters pleaded in paragraphs 13 and 14 above, the Defendant breached the Merchantable Quality Implied Condition in respect of any Manufacturer Supplied Defective Vehicles supplied by the Defendant before 1 January 2011.~~
- ~~16. Any Group Member who was supplied with a Manufacturer Supplied Defective Vehicle before 1 January 2011 suffered loss or damage by reason of the breach referred to in paragraph 15 above.~~

Particulars of loss and damage

~~Each Group Member suffered loss and or damage including:~~

- ~~(I) in the case of Group Members who have not had the Takata Airbag in their Defective Vehicle replaced, the amount paid for their Defective Vehicle or, in the alternative, the difference between the amount paid for the Defective Vehicle and its true value having regard to the matters pleaded in paragraphs 7, 8, 9, 10 and 11 above~~
- ~~(II) in the case of Group Members who have had the Takata Airbag in their Defective Vehicle replaced with another Takata Airbag, or any other airbag which uses ammonium nitrate as the propellant, the amount paid for their Defective Vehicle, or, in the alternative, the difference between the amount paid for the Defective Vehicle and its true value having regard to the matters pleaded in paragraphs 7, 8, 9, 10 and 11 above;~~
- ~~(III) in the case of Group Members in whose Defective Vehicle an airbag which does not use ammonium nitrate as the propellant cannot be fitted, the amount paid for their Defective Vehicle or, in the alternative, the difference between the amount paid for the Defective Vehicle and its true value having regard to the matters pleaded in paragraphs 7, 8, 9, 10 and 11 above;~~
- ~~(IV) in the case of Group Members who have had, or will have in the future, the Takata Airbag in their Defective Vehicle replaced, any:~~
- ~~(A) amount paid or to be paid for the replacement of the Takata Airbag;~~

~~(B) — amount paid or to be paid in connection with the replacement of the Takata Airbag, including transport costs (such as taxi, private hire car and public transport fares) and other out of pocket expenses;~~

~~(V) — other out of pocket expenses arising from:~~

~~(A) — the fact that those Group Members could not safely drive the Defective Vehicles;~~

~~(B) — the time, cost and inconvenience of attending at a service centre or other place to have a replacement airbag fitted;~~

~~(VI) — in the case of Group Members who have not, or will not in the future, drive their Defective Vehicle having regard to the matters pleaded in paragraph 7, 8, 9 and 11 above, any out of pocket expenses arising therefrom, including:~~

~~(A) — amounts paid for car hire;~~

~~(B) — amounts paid for transport costs (such as taxi, private hire car and public transport fares).~~

17. — By reason of the matters pleaded in paragraphs 13 to 15 above, the Defendant is liable for the loss and damage referred to in paragraph 16 above.

Fit for purpose

18. — By reason of the matters pleaded in paragraphs 4(h)(ii) above, there is an implied condition in the contract of supply between any Group Member who acquired a Manufacturer Supplied Defective Vehicle on the one hand, and the Defendant on the other, that any Manufacturer Supplied Defective Vehicles supplied by the Defendant before 1 January 2011 is reasonably fit for the purpose described in paragraphs 2(e) and 3(d) above within the meaning of section 71(2) of the TPA (**Fit For Purpose Implied Condition**).

Particulars

The purpose described in paragraphs 2(e) and 3(d) above were made known to the Defendant by implication.

19. ~~By reason of the matters pleaded in paragraphs 7, 8, 10(b), 10(c) and 11 above, the Manufacturer Supplied Defective Vehicles were not fit for the purpose described in paragraphs 2(e) and 3(d) above.~~
20. ~~By reason of the matters pleaded in paragraphs 18 and 19 above, the Defendant breached the Fit For Purpose Implied Condition in respect of any Manufacturer Supplied Defective Vehicles supplied by the Defendant before 1 January 2011.~~
21. ~~Any Group Member who was supplied with a Manufacturer Supplied Defective Vehicle before 1 January 2011 suffered loss or damage by reason of the breach referred to in paragraph 20 above.~~

Particulars of loss and damage

The Particulars to paragraph 16 above are repeated.

22. ~~By reason of the matters pleaded in paragraphs 18 to 20 above, the Defendant is liable for the loss and damage referred to in paragraph 21 above.~~

FAILURE TO SUPPLY GOODS OF MERCHANTABLE QUALITY – TPA s74D

23. By reason of the matters pleaded in paragraphs 7, 8, 10(b), and 10(c) ~~and~~ 11 above, the ~~Re-Supplied~~ Defective Vehicles were not of merchantable quality within the meaning of section 74D(3) of the TPA.
24. Any Group Member who acquired a ~~Re-Supplied~~ Defective Vehicle before 1 January 2011 suffered loss or damage by reason that the ~~Re-Supplied~~ Defective Vehicles they acquired was ~~were~~ not of merchantable quality.

Particulars of loss and damage

The Particulars to paragraph 16 above are repeated.

(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 ~~sub-paragraphs of~~ paragraphs 3(e), 4(h)(i), 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 ~~Re-Supplied~~ Defective Vehicle before 1 January 2011 for the loss and damage referred to in paragraph 24 above.

~~FIT FOR PURPOSE – TPS s74B~~

26. ~~The Re-Supplied Defective Vehicles were acquired for the purpose referred to in paragraph 3(d) above.~~

Particulars

~~The purpose described in paragraphs 2(e) and 3(d) above were made known to the Defendant by implication.~~

- ~~27. By reason of the matters pleaded in paragraphs 7, 8, 10(b), 10(c) and 11 above, the Re-Supplied Defective Vehicles were not reasonably fit for the purpose referred to in paragraph 25 above.~~
- ~~28. Any Group Members who acquired a Re-Supplied Defective Vehicle before 1 January 2011 suffered loss or damage by reason of the matters pleaded in paragraph 27 above.~~

Particulars of loss and damage

~~The Particulars to paragraph 16 above are repeated.~~

- ~~29. By reason of the matters pleaded in paragraphs 3(e), 4(h)(i), 5, 10(d), 26, 27 and 28 above, the Defendant is liable to compensate any Group Member who acquired a Re-Supplied Defective Vehicle before 1 January 2011 for the Loss or Damage pursuant to section 74B of the TPA.~~

FAILURE TO SUPPLY GOODS OF ACCEPTABLE QUALITY – ACL s54

30. By reason of the matters pleaded in paragraphs 3(e), 4(h)(ii) 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) and 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 paragraphs 4(d), 4(g), 7, 8, 10, 11, 30 and 32 above, Group Members who acquired a Defective Vehicle on or after 1 January 2011 are entitled under sections 271 and 272 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.

~~The Particulars to paragraph 16 above are repeated.~~

~~The Plaintiff suffered loss and damage in the amount of:~~

- (I) ~~\$24,600 in respect of (I) or (II) in the particulars to paragraph 16 above; and~~
- (II) ~~further, in respect of (IV) of the particulars to paragraph 16 above, any future cost associated with attending at one of the Defendant's authorised dealerships to have a replacement airbag fitted.~~

NOT FIT FOR PURPOSE – ACL s55

34. ~~By reason of the matters pleaded in paragraphs 3(e), 4(h)(ii) and 5 above, there is a guarantee that the Defective Vehicles supplied to Group Members on or after 1 January 2011 are reasonably fit for any disclosed purpose, and for any purpose for~~

which the supplier represents that they are reasonably fit, pursuant to section 55(1) of the ACL (~~Fit For Purpose Guarantee~~).

~~35. By reason of the matters pleaded in paragraphs 4(d), 4(f), 4(h), 10(b) and 12 above, the Defendant represented that the Defective Vehicles were reasonably fit for the purpose referred to in paragraph 10(b) above.~~

~~36. By reason of the matters pleaded in paragraphs 7, 8, 10(c) and 11 above, the Defective Vehicles are not fit for the purpose referred to in paragraph 10(b) above.~~

~~37. By reason of the matters pleaded in paragraphs 35 and 36 above, the Defendant failed to comply with the Fit For Purpose Guarantee in respect of Manufacturer Supplied Defective Vehicles supplied to Group Members on or after 1 January 2011 (**Failure to Comply**).~~

~~38. By reason of the matters pleaded in paragraphs 7, 8, 10(b), 10(c) and 11 above:~~

~~(a) the Defective Vehicles would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the Failure to Comply;~~

~~(b) the Defective Vehicles are not of acceptable quality because they are unsafe.~~

~~39. By reason of the matters pleaded in paragraphs 35, 36, 37 and 38 above, the Failure to Comply was a major failure within the meaning of section 260 of the ACL.~~

~~40. By reason of the matters pleaded in paragraphs 7, 8, 10 and 11 above, it was reasonably foreseeable that any Group Member who acquired a Manufacturer Supplied Defective Vehicle on or after 1 January 2011 would suffer loss or damage as a result of the Failure to Comply.~~

~~41. By reason of the matters pleaded in paragraph 38, 39 and 40 above, any Group Member who acquired a Manufacturer Supplied Defective Vehicle on or after 1 January 2011 is entitled under section 259(4) of the ACL to recover loss and damage from the Defendant.~~

Particulars of loss and damage

The Particulars to paragraph 33 above are repeated.

MISLEADING OR DECEPTIVE CONDUCT

42. By the conduct pleaded in paragraphs 4(d), 4(fg), 4(h), ~~4(b)~~ 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), ~~and 11~~ and 11A above.

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

- (a) section 52 of the TPA; and/or
- (b) section 18 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), ~~and 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 relied on the Misleading Conduct 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. Those surrounding circumstances include:

(A) the matters set out in paragraph 3(b) and 3(d);

(B) the reputation of the Defendant's brand (i.e. Toyota) as a make of vehicle that is safe to drive;

(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

~~The Particulars to paragraph 33 above are repeated.~~

(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 ~~who transfers their Defective Vehicle to it by paying to any such Group Member the purchase price of the Defective Vehicle, together with the amount of any out of pocket expenses of the kind referred to in the particulars to paragraph 16 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. ~~By no later than~~ From in or around:

(a) 2003; or

(b) November 2008; or

(c) April 2013; or

(d) June 2014; or

(e) May 2015; or

(f) June 2015; or

(g) June 2016; or

(h) October 2016; or

(i) January 2017; or

(j) March 2017; or

(k) April 2017; or

(l) August 2017; or

(m) March 2018;

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

Particulars

(la) In 2003, a related body corporate of the Defendant had expressed quality concerns about Takata's airbag products.

(lb) In 2003, a Takata inflator ruptured at a testing facility operated by a related body corporate of the Defendant.

(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. Honda expanded these recalls in 2009, 2010 and 2011. The fact of these recalls was public knowledge.

(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) On 12 April 2013, the Defendant issued at least two product safety recalls to the Department of Infrastructure and Regional Development by Toyota pursuant to section 128 of the ACL, namely Product Recall Australia Number 2013/13544, and Product Recall Australia Number 2013/13545.

(IV) In June 2014, the USA National Highway Traffic Safety Administration ~~asked 10~~ began investigating vehicle manufacturers, including Toyota Motor Engineering & Manufacturing North America, Inc., after reports of ruptures of ~~to recall vehicles with~~ Takata airbags in hot and humid regions ~~because of airbag ruptures~~. As of 18 November 2014, the investigation had expanded to include ten automakers.

(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 (Ia) – (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 4(d), ~~4(f), 4(h)~~, 7(a)(i), 7(b)-(f), 8, 10(b), 10(c), 11, 11A, 42 and 48 above, on and from:

(i) 2003; or alternatively

(ii) November 2008; or alternatively

(iii) April 2013; or alternatively

(iv) June 2014; or alternatively

(v) May 2015; or alternatively

(vi) June 2015; or alternatively

(vii) June 2016; or alternatively

(viii) October 2016; or alternatively

(iv) January 2017; or alternatively

(v) March 2017; or alternatively

(vi) April 2017; or alternatively

(vii) August 2017; or alternatively

(viii) March 2018,

the conduct described in paragraphs 4(d), 4(gf), 4(h) and 12 above constituted from at least November 2008 the Defendant engaged in:

- (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, 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, ~~and 48, 49~~ and 49A above, each of the Group Members who, in or after:

- (a) 2003; or alternatively
- (b) November 2008; or alternatively
- (c) April 2013; or alternatively
- (d) June 2014; or alternatively
- (e) May 2015; or alternatively
- (f) June 2015; or alternatively

- (g) June 2016; or alternatively
- (h) October 2016; or alternatively
- (i) January 2017; or alternatively
- (j) March 2017; or alternatively
- (k) April 2017; or alternatively
- (l) August 2017; or alternatively
- (m) March 2018.

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

Particulars of loss and damage

~~The Particulars to paragraph 33 above are repeated.~~

(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) 2003; or alternatively
- (ii) November 2008; or alternatively
- (iii) April 2013; or alternatively
- (iv) June 2014; or alternatively
- (v) May 2015; or alternatively
- (vi) June 2015; or alternatively

- (vii) June 2016; or alternatively
- (viii) October 2016; or alternatively
- (iv) January 2017; or alternatively
- (v) March 2017; or alternatively
- (vi) April 2017; or alternatively
- (vii) August 2017; or alternatively
- (viii) March 2018.

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 ~~who transfers their Defective Vehicle to it by paying to any such Group Member the purchase price of the Defective Vehicle, together with the amount of any out of pocket expenses of the kind referred to in the particulars to paragraph 16 above;~~
- (b) further or in the alternative, an award in the amount of the loss or damage sustained 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

~~4 December 2017~~ 7 May 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

AFFIDAVIT VERIFYING

Name Louise Haselhurst
 Address 34 Fountain Ave, Croydon Park NSW 2133
 Occupation Cleaner
 Date 1 December 2017
 Telephone (02) 9146 3888

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 CROYDON PARK

Signature of deponent

Name of witness	_____	Damian Scattini
Address of witness		Level 15,111 Elizabeth 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:

Driver's licence:

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 Louise Haselhurst
Address 34 Fountain Ave,
Croyden Park NSW 2133

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 **Toyota Motor Corporation Australia Limited**
ABN 64 009 686 097
Address 155 Bertie Street
Port Melbourne, Victoria 3207