

## **EXPLANATORY STATEMENT**

Issued by the Hon Michael Sukkar, Assistant Minister to the Treasurer

*Competition and Consumer Act 2010*

*Consumer Goods (Motor Vehicles with Affected Takata Airbag Inflators and Specified Spare Parts) Recall Notice 2018*

Following receipt of a recommendation from the Australian Competition and Consumer Commission (**ACCC**), I, the Honourable Michael Sukkar, Assistant Minister to the Treasurer, have issued the *Consumer Goods (Motor Vehicles with Affected Takata Airbag Inflators and Specified Spare Parts) Recall Notice 2018* (**Recall Notice**) pursuant to s 122 of the Australian Consumer Law (**ACL**) (which is Schedule 2 of the *Competition and Consumer Act 2010* (Cth)(**CCA**)).

The Recall Notice imposes a mandatory recall for all motor vehicles of a kind intended to be used, or of a kind likely to be used, for personal, domestic or household use or consumption installed with frontal driver side and/or passenger side Takata airbag inflators that use phase stabilised ammonium nitrate (**PSAN**) propellant and do not have a desiccant or have a calcium sulphate desiccant (**Affected Takata Airbag Inflators**). The Recall Notice also applies to Affected Takata Airbag Inflators that are spare parts or spare parts that contain Affected Takata Airbag Inflators (**Spare Parts**).

### **Commencement**

The Recall Notice commences on the day following its registration on the Federal Register of Legislation.

### **Sunsetting**

The Recall Notice is not subject to sunseting due to section 54 of the *Legislation Act 2003*.

### **Purpose of the Recall Notice**

The purpose of the Recall Notice is to protect Australian vehicle occupants from the serious risk of injury or death if an Affected Takata Airbag Inflator in their vehicle ruptures when the airbag system deploys following a vehicle collision.

The Recall Notice serves this purpose by requiring suppliers of vehicles in Australia to replace all Affected Takata Airbag Inflators in their vehicles with new airbag inflators that either use PSAN propellant with a desiccant that is not calcium sulphate or use an alternative chemical propellant technology. Replacements must be completed by no later than 31 December 2020, unless otherwise approved on application to the ACCC.

The Recall Notice prioritises replacement of a sub-category of Affected Takata Airbag Inflators known as 'alpha' which pose an extreme risk of rupture due to known manufacturing issues at Takata plants during certain periods.

The Recall Notice also prioritises replacement of Affected Takata Airbag Inflators in older vehicles, inflators installed in the driver side of vehicles as well as vehicles in locations with high heat and humidity.

This prioritisation of certain categories of Affected Takata Airbag Inflators also acknowledges that it will not be possible to replace all Affected Takata Airbag Inflators in all Australian vehicles at once, due to global shortages of replacement parts, the need for some manufacturers to develop new replacement parts for certain vehicle models and limitations to dealer workshop capacity to undertake replacements.

The staged recall will ensure that the Affected Takata Airbag Inflators posing the greatest safety risk to the Australian public are prioritised for replacement and that all Affected Takata Airbag Inflators are replaced in Australian vehicles as soon as practicable.

## **Background**

### *The safety risk posed by Affected Takata Airbag Inflators*

Due to inadequate sealing, the moisture-sensitive PSAN propellant in an Affected Takata Airbag Inflator is exposed to moist air and absorbs small particles of water. This moisture ingress causes the PSAN propellant to degrade over time by forming pores, channels and micro-cracks. The rate of degradation is significantly driven by daily temperature fluctuations, making vehicles exposed long-term to hot and humid climates particularly vulnerable.

Over time, degradation of the propellant will affect the performance of the inflator by leading to a more aggressive burn rate of the PSAN propellant when the Affected Takata Airbag Inflator is ignited to deploy the airbag following a vehicle accident.

The more aggressive burn rate of the propellant leads to an increase in pressure within the Affected Takata Airbag Inflator's steel casing that it is not designed to withstand. The increased pressure causes the inflator casing to rupture and project metal shrapnel towards vehicle occupants.

Degradation of the propellant can reach an unsafe point between six and twenty-five years post manufacture of the vehicle depending on the climate that the vehicle is exposed to over time. In the most severe hot and humid climatic conditions, the defect can manifest as early as between six and nine years post-manufacture.

In addition, there is a sub-category of Affected Takata Airbag Inflators known as 'alpha' that are affected by known manufacturing problems at Takata plants during certain periods. Due to the effect of these manufacturing problems on inflator performance, alpha inflators pose an extreme safety risk and should be urgently replaced.

### *Injuries and deaths caused by Affected Takata Airbag Inflators*

Ruptures of Affected Takata Airbag Inflators have caused at least 23 reported deaths and at least 230 reported injuries globally. It is likely that total injuries and deaths are underreported because first responders and investigators may not always consider this cause of injury or death in the context of a serious vehicle accident.

Serious injuries reported to date include vision loss, lacerations to the face, neck and body, severed vocal chords, spinal damage and head injuries including brain

damage. Many of the incidents involving a fatality have occurred at low speed and, due to the nature of the injuries, first responders have thought vehicle occupants had been shot or stabbed due to the shrapnel wounds.

There have been two apparent ruptures of Affected Takata Airbag Inflators in Australia resulting in death and injury.

In April 2017, a woman in Darwin was seriously injured when the driver side Affected Takata Airbag Inflator in her 2005 Toyota RAV4 ruptured and metal shrapnel likely from the inflator housing struck her in the head.

In July 2017, a man in Sydney died when the driver side Affected Takata Airbag Inflator in his 2007 Honda CR-V ruptured and metal shrapnel likely from the inflator housing struck him causing fatal injuries.

At the time of both of these incidents, the relevant vehicles were included in voluntary recall campaigns by Honda and Toyota for replacement of the Affected Takata Airbag Inflators.

There have also been six apparent ruptures during testing and/or destruction of Affected Takata Airbag Inflators taken from Australian vehicles as a result of voluntary recalls.

#### *Action taken by suppliers of vehicles with Affected Takata Airbag Inflators*

Between 2009 and 2017, nine vehicle suppliers have voluntarily recalled approximately 2.7 million vehicles with Affected Takata Airbag Inflators in Australia, with an overall replacement rate of approximately 63%.

The effectiveness of these voluntary recall campaigns has varied greatly between suppliers, with replacement rates ranging from 36% to 84%. Five suppliers have replacement rates for their voluntary recalls of 50% or less.

There are also approximately 1,324,477 vehicles with Affected Takata Airbag Inflators in Australia that are not subject to current voluntary recalls. Many of these vehicles are over six years of age, with a significant number over nine years of age.

#### *Federal Government action to address the safety risk posed by Affected Takata Airbag Inflators in Australia*

On 5 August 2017, the then Minister for Small Business, the Honourable Michael McCormack, issued a safety warning notice pursuant to s 129 of the ACL warning the public about the possible risks involved in the use of motor vehicles containing Takata airbags supplied in Australia. This warning notice also stated that the ACCC was investigating the safety risks associated with using vehicles containing Takata airbag inflators.

On 21 September 2017, the then Minister for Small Business, the Honourable Michael McCormack, issued a proposed recall notice (**PRN**) pursuant to s 132A of the CCA. This included a draft recall notice (**DRN**), applying to motor vehicles installed with specified Takata airbag inflators and those inflators supplied as spare parts.

#### **ACCC consultation with suppliers and other interested parties**

Pursuant to section 132A(3)(e) of the CCA, the PRN invited persons who supply, or propose to supply, motor vehicles installed with Affected Takata Airbag Inflators and

those inflators supplied as spare parts to notify the ACCC if they wanted the ACCC to hold a conference in relation to the proposed issue of a recall notice.

A number of suppliers made such requests and the ACCC held a conference on 9 October 2017 in Melbourne. Nineteen vehicle suppliers were represented at the conference as well as three other interested parties at the invitation of the ACCC. The conference provided attendees with a reasonable opportunity to be heard on the PRN by way of oral submissions on relevant topics.

Suppliers and interested parties were also invited to make written submissions on the proposed recall. The ACCC received written submissions from sixteen vehicle manufacturers and four other interested parties.

The ACCC also consulted with a number of suppliers and interested parties on an individual basis so that they could raise confidential issues in relation to the PRN and DRN.

During the consultation period, concerns were raised by suppliers in relation to the practical implementation of a recall notice in the terms of the DRN. In particular, suppliers expressed concern that it would not be practically possible to comply with the proposed replacement timetable for every affected vehicle in Australia given global shortages of replacement parts, the need for some suppliers to design new parts and have them approved as well as dealer workshop capacity restraints.

### **ACCC recommendation to the Minister**

Section 132D(2) of the CCA requires the ACCC, as soon as practicable after a supplier conference is held, to provide the Minister with notice of its recommendation that the Minister either issue a recall notice in the same or modified terms as the DRN, or not issue a recall notice at all.

Having regard to information gathered during its investigation, including from the supplier conference and written submissions, the ACCC recommended to the Assistant Minister to the Treasurer, the Honourable Michael Sukkar, that a recall notice be issued in modified terms from the DRN issued on 21 September 2017.

### **Decision**

As the Assistant Minister to the Treasurer I have accepted the ACCC's recommendation to issue the Recall Notice, which is in modified terms from the DRN issued on 21 September 2017. I have made this decision because it appears to me that:

- a reasonably foreseeable use of vehicles fitted with Affected Takata Airbag Inflators may cause injury to drivers and passengers; and
- one or more suppliers of vehicles fitted with Affected Takata Airbag Inflators have not taken satisfactory action to prevent those goods causing injury to drivers and passengers.

In making my decision to issue the compulsory recall, I have relied on the substantial evidence which establishes that there is a serious safety risk for occupants of vehicles more than 6 years old which are fitted with Affected Takata Airbag Inflators.

I have also considered the cost and time burden that the Recall Notice will place on suppliers. In deciding to issue the Recall Notice I have given priority to the safety of Australian consumers. I consider that the burden of the Recall Notice on suppliers is mitigated by the flexibility that is built into the Recall Notice for variation of some requirements and the fact that many suppliers are already undertaking voluntary recalls or have indicated that they plan to do so in future.

## **Disallowance**

The Recall Notice is not subject to disallowance due to section 44 of the *Legislation Act 2003*.

## **NOTES ON SECTIONS**

### **PART 1**

#### **SECTION 1 – NAME**

This section provides that the title of the Recall Notice is the *Consumer Goods (Motor Vehicles with Affected Takata Airbag Inflators and Specified Spare Parts) Recall Notice 2018*.

#### **SECTION 2 – COMMENCEMENT**

This section provides that the Recall Notice commences the day after registration on the Federal Register of Legislation.

#### **SECTION 3 – AUTHORITY**

This section provides that the authority for making the Recall Notice is section 122 of the ACL (being Schedule 2 to the CCA).

#### **SECTION 4 – DEFINITIONS**

This section defines the meaning of certain terms used within the Recall Notice. It also identifies where certain terms used in the Recall Notice have the same meaning as those terms used in the ACL and other relevant legislation.

Notably, the term “Supplier” is defined with three categories:

*Supplier* means any person who is the first person to, in trade or commerce, supply a Vehicle in Australia, and may include:

- (a) the Original Equipment Manufacturer of the Vehicle or a Related Body Corporate of the Original Equipment Manufacturer;
- (b) a licenced distributor of the Original Equipment Manufacturer or of a Related Body Corporate of the Original Equipment Manufacturer; or
- (c) a person who is licensed or approved under the *Motor Vehicles Standards Act 1989* (Cth) and/or Motor Vehicles Standards Regulations 1989 (Cth) to supply new and/or second hand vehicles in Australia and does not fall within (a) or (b) above.

Note 1 - A Dealer is not a Supplier in relation to Vehicles and Spare Parts that it supplies to Consumers.

Note 2 - A person is not a Supplier in relation to a Vehicle or Spare Part that it imports on behalf of another party, unless the person also supplies the Vehicle or Spare Part in Australia by way of sale, exchange, lease, hire or hire-purchase.

Category (c) of the definition of “Supplier” is intended to capture persons who import used vehicles into Australia via the Registered Automotive Workshop Scheme and persons who import new vehicles into Australia under the Specialist and Enthusiast Vehicles Scheme for supply in trade or commerce.

The term “Vehicle” is also defined in the Recall Notice to mean a motor vehicle that is supplied in Australia and that is intended to be used, or is of a kind likely to be used, for personal, domestic or household use or consumption and that has an Affected Takata Airbag Inflator installed.

This definition is consistent with the broad definition of “consumer goods” under s 2 of the ACL and is also a necessary element of the power to issue a recall notice pursuant to s 122 of the ACL for “consumer goods of a particular kind”. To fall within the definition of “consumer goods” in s 2 of the ACL, it is not necessary that motor vehicles are purchased for personal, domestic or household use or consumption, only that they “are of a kind likely to be used” for one of those purposes.

It is intended that the definition of “Vehicle” in the Recall Notice includes a broad range of new and second hand vehicles intended to be used, or of a kind likely to be used, for personal, domestic or household use or consumption, including:

- passenger cars (including hatchbacks, sedans, station wagons, people-movers and 4WDs);
- campervans and motorhomes;
- utility vehicles (including utes, pick-up trucks and vans); and
- motorcycles.

Where the term vehicle is not capitalised in the Recall Notice, it is intended to have the same meaning as the definition of Vehicle in the Recall Notice, except that it may also include vehicles without an Affected Takata Airbag Inflator.

## **PART 2**

### **SECTION 5 – RECALL**

This section outlines the obligations of different parties in regard to the recall of Vehicles and replacement of Affected Takata Airbag Inflators in Vehicles and the recall of Affected Takata Airbag Inflators in Spare Parts. This section also establishes a number of consumer rights in regard to recall and replacement.

Sub-section 5(1) makes it clear that nothing in the Recall Notice alters supplier obligations and consumer rights and remedies under the ACL, CCA and the *Trade Practices Act 1974 (Cth)*(TPA) or otherwise under Australian law. This includes the consumer guarantee provisions in the ACL and implied warranties provisions in the TPA. Persons who, in trade or commerce, supply Vehicles or Spare Parts must continue to comply with all their legal obligations in relation to the supply of these goods. This includes Dealers, salvage yards, independent caryards and automotive workshops and all categories of Suppliers under the Recall Notice.

Sub-section 5(2) is the core operative provision of the Recall Notice in respect of the recall of Vehicles and replacement of Affected Takata Airbag Inflators. Recalls of Vehicles must be initiated in accordance with the requirements of Schedules 1 and 2 and replacements must be undertaken in accordance with the requirements of section 6 of the Recall Notice and Schedule 1.

Given the enhanced safety risk of Alpha Inflators and the need for Suppliers to act swiftly in relation to replacement of this type of Affected Takata Airbag Inflator, it is the intention that initiation of recalls for Alpha Inflators, and those voluntary recalls already on foot, not wait for approval by the ACCC of the Supplier's Communication and Engagement Plan. However, it is intended that communications for Alpha Inflator recalls, including those currently on foot or initiated following commencement of the Recall Notice, are consistent with the requirements of Schedule 2, particularly in regard to the use of clear and simple language to adequately convey the serious safety risk.

Sub-section 5(2) also requires that a Supplier must complete replacements by no later than 31 December 2020 or such other date as approved by the ACCC on application.

Sub-sections 5(3) – (5) specify when a Supplier will be taken to have completed its replacement obligations under the Recall Notice. Where an Affected Takata Airbag Inflator has not been replaced, a Supplier will be taken to have complied with its recall obligations if it satisfies the ACCC that a Vehicle was not presented for replacement despite adequate notification of the owner, the owner could not be notified, the Vehicle was not registered for two consecutive years or the Vehicle was scrapped (including statutory write-off), exported or stolen.

Notably, pursuant to sub-section 5(5) a Supplier with less than 100% completion rates has an ongoing obligation to use its best endeavours to identify Vehicles with Affected Takata Airbag Inflators that are presented to its Dealer network and seek to replace the Affected Takata Airbag Inflators in those Vehicles.

Sub-section 5(6) provides that the cost of replacing an Affected Takata Airbag Inflator is to be covered by the Supplier, including any necessary transportation costs incurred by the Consumer or the Dealer. This section also specifies certain circumstances where the Supplier must offer to tow a Vehicle or send a qualified technician to the Vehicle's location, or offer at the Customer's request to provide a loan or hire car or alternative transportation that is reasonable in the circumstances of the Consumer.

Sub-section 5(7) allows a Supplier to apply to the ACCC to vary a date specified in the Recall Notice, including in Schedule 1 and outlines factors that the ACCC will have regard to in considering any such variation application.

Subsection 5(8) requires a Supplier to put in place arrangements with its Dealers to allow Consumers to take their Vehicles to any Dealer within the Supplier's Dealer network for replacement of the Affected Takata Airbag Inflator.

Sub-section 5(9) makes clear that a Supplier may satisfy any of its obligations under the Recall Notice by action undertaken by a Dealer, or another authorised representative of the Supplier on the Supplier's behalf. A Supplier must ensure that

any Dealer or other authorised representative complies with the requirements and prohibitions of the Recall Notice when acting on behalf of the Supplier.

Sub-sections 5(10) – (13) outline obligations that the Recall Notice places on persons who, in trade or commerce, supply Spare Parts.

Pursuant to sub-section 5(10), such persons who are, or become, aware that they have a Spare Part (that is not intended for use as a replacement in accordance with the Recall Notice) must notify a Supplier as soon as practicable so that the Supplier can make arrangements for the Spare Part to be safely retrieved.

The person must notify a Supplier that supplies a vehicle into which the Spare Part could be installed. Notification can be via the Supplier's head office or Dealer network. For example, a person who has a Spare Part salvaged from a Vehicle, may notify a Dealer of that brand of vehicle or the brand's Australian head office to make arrangements for the retrieval of the Spare Part. Where the origin of the Spare Part is not known, it is intended that the person with the Spare Part in their possession may make an assessment about what kind of vehicle the Spare Part could be installed into and notify a Supplier accordingly.

Pursuant to sub-section 5(11) persons who, in trade or commerce, supply airbag inflators and/or airbags must use their best endeavours to identify Spare Parts in their possession. Best endeavours in relation to this obligation are intended to include checking Vehicle recall details (including Recall Databases and Recall Initiation Schedules) available on Supplier websites and regularly checking the Product Safety Australia Website.

Sub-section 5(12) requires a notified Supplier to cover the cost of retrieving a Spare Part and requires the Supplier to handle the part in the same way it must handle any Affected Takata Airbag Inflator removed from a Vehicle pursuant to subsection 6(5) of the Recall Notice.

Sub-section 5(13) prohibits a person, in trade or commerce, from supplying a Spare Part or installing one in any vehicle unless specifically permitted by the Recall Notice in accordance with requirements of section 6.

This prohibition is consistent with the general prohibition in s 127(2) of the ACL that a person must not, in trade or commerce, supply consumer goods of the kind to which a recall notice relates that contain a defect or dangerous characteristic identified in the recall notice.

Sub-section 5(14) prohibits a person, in trade or commerce, from supplying a new or demonstration Vehicle under any circumstances after 31 December 2018. Where such a Vehicle is supplied before this time, the person must comply with the other provisions of the Recall Notice, particularly with the requirements in section 7 that concern communications to Consumers at the time of supply of a new Vehicle.

The intention behind sub-section 5(14) is to put a stop date on the supply of new Vehicles with Affected Takata Airbag Inflators into Australia from overseas. This provision acknowledges that at the commencement of the Recall Notice some Vehicles may be in transit by sea from overseas manufacturing plants and will be



installed with new Affected Takata Airbag Inflators that will not pose a safety risk for a period of time.

## **SECTION 6 – REPLACEMENT, QUARANTINE AND DESTRUCTION OF AFFECTED TAKATA AIRBAG INFLATORS**

Subsections 6(1)-(4) place obligations on Suppliers in regard to the type of replacement airbag inflators they may use to replace Affected Takata Airbag Inflators in Vehicles and the information they provide to Consumers about the type of replacement they have received.

Sub-section 6(1) provides that an Alpha Inflator is not to be used as a replacement under any circumstances. This is due to the fact that Alpha Inflators pose additional risk to safety because they have manufacturing defects in addition to the latent safety defect posed by all Affected Takata Airbag Inflators that manifests over time.

Sub-section 6(2) provides that a Supplier is to use its best endeavours to avoid replacing an Affected Takata Airbag Inflator with another Affected Takata Airbag Inflator, sometimes referred to as a “like for like” replacement. An Affected Takata Airbag Inflator is not to be used as a replacement under any circumstances after 31 December 2019.

Sub-section 6(3) allows a Supplier to use new Affected Takata Airbag Inflators as replacements where it considers that it is not possible to utilise an alternative replacement. It is the intention of the Recall Notice that, regardless of its age, a second-hand Affected Takata Airbag Inflator must not be used to replace another Affected Takata Airbag Inflator.

Sub-section 6(3) provides that if, prior to 31 December 2019, it is considered necessary to use a new Affected Takata Airbag Inflator as a replacement then the Supplier must notify the Consumer orally and in writing at the time of replacement that the replacement is also faulty and will require replacement again as soon as possible after recall action is initiated to avoid future risk of injury or death. This information must also be recorded in the Vehicle’s service record, on a Durable Label affixed in the Vehicle’s engine bay and on a notice affixed on the front windscreen. The information must be conveyed in clear and simple terms as required by Schedule 2 of the Recall Notice.

Sub-section 6(4) imposes obligations on Suppliers to notify Consumers with Vehicles that have received a “like for like” replacement prior to the commencement of the Recall Notice if they have not already done so in substantially similar language to that set out in sub-section 6(3).

Subsections 6(5) – (7) outline requirements around the quarantine and destruction of Affected Takata Airbag Inflators.

Sub-section 6(5) requires a Supplier to immediately quarantine Affected Takata Airbag Inflators that have been removed from Vehicles or otherwise come into the Supplier’s possession, power or control and ensure that they are labelled and handled in a manner to prevent re-use and are ultimately destroyed or used in testing (unless they are new and intended to be used to replace another Affected Takata Airbag Inflator).

Sub-section 6(6) requires a Supplier to provide instructions to its Dealers or other authorised agents regarding quarantine, labelling and handling of Affected Takata Airbag Inflators. Such instructions must be provided to the ACCC on request.

Pursuant to sub-section 6(7), a Supplier must provide evidence of the ultimate destruction of an Affected Takata Airbag Inflator or its use in testing as the case may be on request by the ACCC.

## **SECTION 7 – NOTIFICATION OF CONSUMERS**

Sub-sections 7(1) – (7) relate to the obligation on a Supplier to establish a Communication and Engagement Plan.

Paragraph 7(1)(a) requires a Supplier that falls within category (a) or (b) of the definition of Supplier to develop and implement a Communication and Engagement Plan that, at a minimum, addresses the requirements of Schedule 2.

Paragraph 7(1)(b) requires a Supplier that falls within category (c) of the definition of Supplier to develop and implement a Communication and Engagement Plan that adopts some or all of the measures outlined in Schedule 2 as are reasonable and appropriate in the circumstances of the Supplier. For example, mainstream media advertising (e.g. television, newspapers and radio) may not be reasonable for a grey importer to undertake if they are a small business and have only imported a small volume of enthusiast type Vehicles.

Sub-section 7(2) requires a Supplier to submit their proposed Communication and Engagement Plan to the ACCC for approval within one month of the commencement of the Recall Notice.

Sub-section 7(3) provides that where the Recall Notice requires specified language for specified communications, that language must be used. However, all communications with consumers pursuant to the Recall Notice must, at a minimum, use clear and simple language in accordance with the requirement in Schedule 2.

Sub-section 7(4) allows for re-submission of a Supplier's proposed Communication and Engagement Plan to the ACCC if the ACCC considers that it is inadequate. If an adequate Communication and Engagement Plan is not submitted to the ACCC prior to the time a recall is required to be initiated under the Recall Notice, then the ACCC may prescribe the communications and engagement required by the Supplier.

Pursuant to sub-section 7(5) a Supplier may also apply to the ACCC for approval to amend a Communication and Engagement Plan.

Sub-section 7(6) outlines the matters the ACCC will have regard to when assessing the adequacy of a Supplier's proposed Communication and Engagement Plan and any proposed amendments to the Plan over time. The matters listed in this section should provide a Supplier with a good guide about the kind of Communication and Engagement Plan that the ACCC will consider adequate based on the Supplier's circumstances.

Sub-section 7(7) provides that where recalls are already on foot prior to the commencement of the Recall Notice and recall initiation is scheduled prior to the approval of a Communication and Engagement Plan under the Recall Notice, a

Supplier must at a minimum ensure that its communications in relation to such recall activity is consistent with the requirements in Schedule 2. It is not intended that Suppliers interrupt or delay such activity whilst awaiting approval of their proposed Communication and Engagement Plan by the ACCC.

Sub-sections 7(8) prescribes certain communications to prospective purchasers and buyers in relation to the supply of new Vehicles with Affected Takata Airbag Inflators that may not yet be under active recall under the Recall Notice.

Sub-section 7(9) requires a Supplier to provide clear instructions to its Dealers regarding the communications required under sub-section 7(8). Suppliers must also provide their Dealers with copies of the written communications and Durable Labels required by sub-section 7(8).

## **SECTION 8 – RECALL DATABASE AND RECALL INFORMATION ON SUPPLIER’S WEBSITE**

This section outlines the obligation for Suppliers to implement and maintain an online Recall Database and provide recall information on their website.

Sub-section 8(1) provides that the obligations in this section are mandatory for a Supplier that falls within category (a) or (b) of the definition of Supplier.

Sub-section 8(2) requires a Supplier to establish and maintain a Recall Database on its website that allows Consumers to check the recall status of their vehicles according to the Vehicle Identification Number (**VIN**).

Sub-section 8(3) outlines the minimum information that a Supplier’s Recall Database must include.

Sub-section 8(4) requires a Supplier to, as soon as practicable but by no later than 1 July 2018, publish relevant documents relating to the Supplier’s Takata-related vehicle recalls on its website’s recall page. These documents are the Supplier’s Recall and Replacement Timetable, Recall Initiation Schedule and Quarterly Completion Schedule.

Sub-section 8(5) also requires a Supplier to provide the ACCC with access to its Recall Database via an Application Program Interface (API) if reasonably practicable to do so. The API will allow the ACCC to, in due course, establish a VIN-look up portal on its website that will link to information provided in the Suppliers’ Recall Databases. This will allow Consumers to visit the one website to check the Takata recall status of multiple vehicles. The ACCC will work with Suppliers to ensure that data is provided in such a way that the API works seamlessly.

Importantly, pursuant to sub-section 8(6) a Supplier must provide means for Consumers to update their contact details with the Supplier via the Supplier’s website.

Sub-section 8(7) requires a Supplier’s Recall Database to make clear that a Vehicle not currently under active recall, may later be recalled and that all planned recalls are set out in the Supplier’s Recall Initiation Schedule.

Sub-section 8(8) requires Suppliers that have used, or are continuing to use, new Affected Takata Airbag Inflators as replacements to include messaging on their websites to inform Consumers that in some cases replacement airbags may need to be replaced again to ensure long term safety.

Sub-section 8(9) requires that a Supplier's Recall Database webpage and direct consumer communications must alert Consumers with Vehicles that have had a frontal airbag replaced following a collision that their vehicle may also have had an Affected Takata Airbag installed that requires replacement, and encourage them to contact a Dealer or other authorised representative to have the airbag checked.

Sub-section 8(10) provides Suppliers with some flexibility around the requirements in this section, by allowing them to apply to the ACCC for variation.

Sub-section 8(11) requires Suppliers that fall within category (c) of the definition of Supplier to use their best endeavours to, at a minimum, publish on their website (should they have one) a searchable list of affected Vehicles that they have supplied by VIN as well as their Recall Initiation Schedule.

## **SECTION 9 – SECOND-HAND VEHICLES**

Sub-sections 9(1) – (3) outline obligations for Suppliers to develop a Second-hand Vehicle Action Plan to maximise replacements of Affected Takata Airbag Inflators in the second-hand vehicle market. This Plan must be submitted to the ACCC within two months of the commencement of the Recall Notice and must be designed to ensure distribution of information regarding the recall status of Vehicles in the second-hand vehicle market and encourage and support replacement of Affected Takata Airbag Inflators in the second-hand vehicle market.

It is intended that this Plan would be directed towards used Vehicles being supplied via the following avenues:

- auction houses;
- Dealers;
- independent used cars lots;
- online platforms (including Carsales, eBay, Gumtree, Facebook, etc.); and
- off lease programs and fleets.

Pursuant to sub-section 9(2) the ACCC may suggest improvements to a Second-hand Vehicle Action Plan that it considers inadequate and a Supplier must submit a revised Plan that addresses these suggestions. If no adequate Plan is submitted and approved by the ACCC, then the ACCC may prescribe communications and replacement support that the Supplier must undertake in relation to second-hand Vehicles.

Sub-section 9(3) outlines the matters that the ACCC will have regard to when assessing the adequacy of a proposed Second-hand Vehicle Action Plan or prescribing a Plan for a Supplier.

Sub-section 9(4) outlines obligations on persons who, in trade or commerce, supply second hand Vehicles.

Paragraph 9(4)(a) requires a person who, in trade or commerce, supplies second-hand vehicles to check the VIN of each second-hand vehicle in their possession, power or control and intended for sale to ascertain whether the vehicle is under active recall or is scheduled for future recall by a Supplier. Second hand traders will be able to check VINs on the Recall Databases that will be maintained on Supplier websites as well as the vehicle make and model on the Recall Initiation Schedule that will also be published on a Supplier's website, as well as the Product Safety Australia Website.

Paragraph 9(4)(b) prohibits a person who, in trade or commerce, supplies second hand Vehicles from supplying a Vehicle that is under active recall. This is consistent with s 127(2) of the ACL, which prohibits a person from, in trade or commerce, supplying a Vehicle that is subject to a compulsory recall.

Paragraphs 9(4)(c) and 9(4)(d) prescribe communications that must be made to prospective purchasers by second-hand vehicle traders prior to the sale of a second-hand Vehicle that is not under active recall. The nature of these communications corresponds with the age of the Vehicle.

Paragraph 9(4)(e) requires second-hand vehicle traders to obtain the contact details of persons who purchase Vehicles that are not yet under active recall, and seek their consent to provide them to the relevant Supplier so that the Supplier can contact them when recall action is initiated in respect of the Vehicle.

## **SECTION 10 – CONSUMER DISPUTE RESOLUTION**

Subsection 10(1) requires that a Supplier must establish a consumer dispute resolution system, or update an existing system, to ensure that it meets the requirements in this section.

Subsection 10(2) provides that a Supplier must use its best endeavours to ensure that this dispute resolution system meets the requirements in the relevant Australian Standard AS/NZS 10002:2014 *Guidelines for complaint management in organizations*, tailored as necessary to the Supplier's circumstances. The system must at a minimum include a dedicated Consumer complaints person or team and a system for prompt escalation of Consumer complaints not able to be resolved by front-line complaints personnel.

Subsection 10(3) provides that if a Supplier is informed of a Consumer complaint by a Regulator, including the ACCC and state & territory fair trading authorities, or the Department of Infrastructure, Regional Development & Cities then the Supplier must use its best endeavours to promptly and fairly address and manage the dispute in accordance with the Supplier's obligations under the ACL.

## **SECTION 11 – RECORD KEEPING AND REPORTING**

Section 11 outlines requirements for Suppliers to keep records and report to the ACCC in relation to matters relevant to the Recall Notice.

Sub-section 11(1) outlines a number of matters that a Supplier must keep records on. These records will be required to allow Suppliers to accurately prepare the reports that they must make to the ACCC pursuant to section 11 of the Recall Notice and Schedule 1.

Sub-section 11(2) allows the ACCC to request any of the records required to be held by a Supplier pursuant to section 11(1).

Sub-section 11(3) requires a Supplier to obtain the contact details of persons who have made complaints to them in relation to the recall as well as persons involved in reports relating to misdeployment of an Affected Takata Airbag Inflator in a Vehicle supplied by the Supplier, including incidents that have resulted in injury or death. The Supplier must obtain a person's consent to provide their contact details to the ACCC.

Where a person advises a Supplier that they do not wish to have their Vehicle's Affected Takata Airbag Inflator replaced, sub-section 11(4) requires the Supplier to seek the person's consent to provide their contact details to the ACCC. Where the person refuses consent, the Supplier must note this and provide the VIN and other details about the relevant Vehicle to the ACCC.

Pursuant to sub-section 11(5) a Supplier must notify the ACCC of any report that it becomes aware of relating to the misdeployment of an Affected Takata Airbag Inflator that it or a Related Body Corporate has supplied worldwide. Such reports must be made to the ACCC within two days of coming to the attention of the Supplier. Sub-section 11(5) also lists the relevant details that a Supplier must include in such reports, where known.

Sub-section 11(6) outlines the documents that a Supplier must provide to the ACCC and the time period in which those documents must be provided. These requirements are mirrored elsewhere in the Recall Notice, but repeated in this sub-section for convenience.

Sub-section 11(7) requires a category (a) or (b) Supplier to provide the ACCC with a report in relation to certain information relating to consumer complaints and misdeployments of Affected Takata Airbag Inflators (including those associated with injuries or deaths) required to be tracked pursuant to sub-section 11(1). These reports must be provided to the ACCC within 10 business days of the end of each calendar quarter.

Sub-section 11(8) provides that a Supplier's reporting obligations under the Recall Notice, except for those reports required pursuant to sub-section 11(5), cease once the Supplier has satisfied its obligations under the Recall Notice pursuant to sub-sections 5(3), (4) and (5).

## **SECTION 12 – INDEPENDENT AUDITOR**

Sub-sections 12(1) – (4) outline requirements around the obligation for a Supplier to appoint an independent auditor to monitor the Supplier's compliance with the Recall Notice. This obligation only applies to a Supplier that falls within category (a) or (b) of the definition of Supplier in the Recall Notice. This means that grey importers are excluded from the requirements outlined in this section.

Sub-section 12(1) outlines the role of the independent auditor and the content of the reports that they are to make for the Supplier. The appointment of an independent auditor to report on Suppliers' compliance with the Recall Notice is intended to provide the ACCC with regular objective assessments of Supplier compliance, but

also provide Suppliers with regular and unbiased feedback on their fulfilment of the Recall Notice's requirements and recommendations for improvement.

Sub-section 12(2) provides that a Supplier must submit the name and qualifications of its proposed independent auditor to the ACCC before the commencement of the third calendar quarter of 2018. The ACCC will assess whether the proposed auditor is acceptable, taking into account their qualifications and level of independence from the Supplier. The ACCC will notify the Supplier if its proposed independent auditor is accepted.

Sub-section 12(3) provides that the ACCC will consider joint nominations of an independent auditor by multiple Suppliers.

Sub-section 12(4) requires the independent auditor to provide a report to the Supplier and the ACCC at the end of each calendar quarter, or at an earlier date if requested by the Supplier or ACCC.

Sub-section 12(5) provides that a Supplier may apply to the ACCC for an exemption from the requirements of section 12 based on the Supplier's Supply Profile, the replacement rates achieved at the time of the commencement of the Recall Notice or any other factors that the Supplier considers relevant.

Sub-section 12(6) provides that a Supplier's obligations under this section will cease once the Supplier has satisfied its obligations under the Recall Notice pursuant to sub-sections 5(3), (4) and (5) or if a Supplier makes an application to the ACCC to end the obligation and the ACCC determines that the independent auditor's monitoring and reporting is no longer of assistance in improving the Supplier's compliance with the Recall Notice and replacement rates.

## **SECTION 13 – APPLICATIONS TO THE ACCC**

This section requires applications to the ACCC under the Recall Notice to be made in writing, be submitted via the specified link on the Product Safety Australia Website and be accompanied by supporting documents or information (if applicable).

## **SECTION 14 – DOCUMENTS WHICH MAY BE PUBLISHED ON THE PRODUCT SAFETY AUSTRALIA WEBSITE**

This section provides that the ACCC may publish any document provided to the ACCC under the Recall Notice on the Product Safety Australia Website.

The intention behind this requirement is to provide regular relevant information to the public regarding the recall's progress and the performance of individual Suppliers as well as providing transparency around the ability for Supplier's to apply to the ACCC to vary some of their obligations and deadlines under the Recall Notice.

## **SCHEDULE 1 – RECALL AND REPLACEMENT TIMETABLE, RECALL INITIATION SCHEDULE AND QUARTERLY COMPLETION SCHEDULE**

Schedule 1 outlines requirements for Suppliers around the timing of initiation and completion of recalls for Vehicles with Affected Takata Airbag Inflators.

Recalls must be initiated and completed for different categories of Affected Takata Airbag Inflators in accordance with the Recall and Replacement Timetable prescribed at clause 1 of Schedule 1.

This Timetable provides that recalls for Alpha Inflators must be initiated within one week of commencement of the Recall Notice. Alpha Inflators must be replaced within five business days after the replacement part arrives at the dealership nominated by the Consumer (or another date requested by the Consumer), where the replacement part must be provided to the nominated dealership within two weeks of the Consumer's request for a replacement. The two week period for shipment is to allow for the transport of replacement parts across Australia (particularly remote areas) by road if necessary. The five day period once the part arrives at the nominated dealership is to balance constraints at the workshop level (e.g. available space, qualified staff) with the importance of having Alpha Inflators replaced quickly given their significant safety risk.

Recalls for other types of Affected Takata Airbag Inflators must be initiated as soon as practicable after the ACCC approves a Supplier's proposed Communication and Engagement Plan submitted under sub-section 7(2) of the Recall Notice. A Supplier must complete replacements of all such inflators as soon as practicable, but in any event prior to 31 December 2020 unless an alternative date is approved by the ACCC on application by the Supplier pursuant to sub-section 5(7) of the Recall Notice.

Clause 2 provides that recalls of Vehicles that are scheduled to be initiated after 2 April 2018, must be listed in a Supplier's Recall Initiation Schedule, which must be submitted to the ACCC by 2 April 2018. The Supplier must also publish this on its website as soon as practicable and by no later than 1 July 2018 in accordance with sub-section 8(4) of the Recall Notice. A Supplier may apply to vary its Recall Initiation Schedule pursuant to clause 6 of Schedule 1 and in accordance with section 13 of the Recall Notice.

Clause 3 provides that Suppliers must meet the Recall and Replacement Timetable that applies to them at a minimum in accordance with the Default Quarterly Completion Schedule in Schedule 1. This states the percentage of replacements that the Supplier must achieve each quarter and is cumulatively calculated by reference to the total number of Affected Takata Airbag Inflators that the Supplier has supplied in Vehicles in Australia. Suppliers may apply to the ACCC for an alternative Quarterly Completion Schedule pursuant to clause 7 of Schedule 1 and in accordance with section 13 of the Recall Notice.

Importantly, clause 4 of Schedule 1 requires that Suppliers must prioritise the following types of Vehicles for replacement in the Supplier's Recall Initiation Schedule:

- Vehicles currently registered in areas of high heat and humidity;
- Older Vehicles, particularly those that are older than 6 years (unless they have already had a replacement using a new Affected Takata Airbag Inflator, in which case the date of replacement is the point of temporal relevance); and
- Vehicles with driver-side inflators.



These priority factors reflect the known climatic and temporal risk factors that increase the likelihood of PSAN degradation and inflator rupture as well as the likelihood of serious injury or death when a rupture does occur and are based on the best evidence available.

Pursuant to clause 5 of Schedule 1, Suppliers must use their best endeavours to replace all Affected Takata Airbag Inflators in a Vehicle at the same time.

Schedule 1 also requires Suppliers to make a number of different monthly and quarterly reports to the ACCC relating to their recall progress and compliance with their applicable Quarterly Completion Schedule. The intention behind this reporting is to ensure that the ACCC is able to closely monitor recall activity and compliance with the Recall Notice.

On 1 July 2018, a Supplier must provide the ACCC with a Baseline Commencement Report pursuant to clause 9 of Schedule 1 which will provide a snapshot of their recall and replacement status prior to commencement of their applicable Quarterly Completion Schedule.

Clause 10 of Schedule 1 outlines the content of the Quarterly Completion Reports that a Supplier must submit to the ACCC within 10 business days of the end of each calendar quarter commencing 1 July 2018. Amongst other things, these reports will track a Supplier's compliance with the applicable Quarterly Completion Schedule.

Clause 11 of Schedule 1 also prescribes monthly reports that must be provided to the ACCC by Suppliers. The monthly reports must provide the Supplier's replacement rates for the preceding calendar month and are similar to current reporting by Suppliers conducting voluntary recalls to the Commonwealth Department of Infrastructure, Regional Development and Cities.

Clause 12 provides that Suppliers must also provide the ACCC with a VIN Status Report, that provides information relevant to each Vehicle by VIN, including recall status. The VIN Status Report must be provided to the ACCC by 1 June 2018 and updated each month thereafter.

Clause 13 provides that the ACCC will provide Suppliers with instructions for the form of reports required by Schedule 1 prior to the commencement of reporting obligations under the Schedule. Suppliers must provide their reports pursuant to Schedule 1 in the form prescribed by the ACCC.

## **SCHEDULE 2 – COMMUNICATION AND ENGAGEMENT PLAN**

Schedule 2 of the Recall Notice outlines the matters that must be addressed in a Supplier's Communication and Engagement Plan as required by section 7 of the Recall Notice.

The purpose of the Communication and Engagement Plan is to ensure that messaging in relation to Takata-related recalls is accessible, consistent, appropriately conveys the serious safety risk posed by Affected Takata Airbag Inflators and that communications encourage Consumers to present their Vehicles for replacement.

The matters covered in Schedule 2 that must be addressed in a Supplier's Plan include:

- the form and content of direct communications to individual Consumers and an escalation strategy for such communications where they have not yet proved effective;
- the form and content of public communications designed to raise awareness of the recalls more generally within the community;
- the use of clear and simple language and appropriate stylistic tools (bold font, capitalisation, imagery) in communications in order to appropriately convey the serious safety risk;
- methods to ensure that Consumers are encouraged to present their Vehicles for replacement and are able to easily make such arrangements (e.g. a dedicated telephone number for bookings, appropriate instructions to staff, emphasis that replacements are free);
- methods to ensure that information relating to a Supplier's recalls is easily accessible (e.g. options for a Culturally and Linguistically Diverse (CALD) audience, information on Supplier's website); and
- methods to ensure that accurate Consumer contact information is obtained and maintained (by ensuring that multiple sources of contact information are used beyond NEVDIS data and that this data is updated frequently).

Notably clause 5 of Schedule 2 includes examples of best practice communications to Consumers to adequately convey the serious safety risk posed by Affected Takata Airbag Inflators and the need for replacement.

It is the intention that Suppliers adopt this language where practicable, particularly in direct written communications to individual Consumers, but may adapt the language where necessary. For example in communications to a broader audience (e.g. television, radio, digital, print advertising) or where there may be practical limitations (e.g. for SMS/text messaging, where shorter messages are more appropriate).