



24 July 2017

Australia Competition and Consumer Commission

Dear ACCC

### **The Takata airbag recall**

Takata airbags are installed in 2.3m cars across Australia, and pose a catastrophic risk of injury or death. The gas used to inflate the bag in case of accident, ammonium nitrate, becomes volatile over time. When a defective airbag deploys, the ammonium nitrate burns aggressively, causing its metal canister to explode, sending shrapnel flying with immense force through the fabric of the airbag. A voluntary recall was commenced in 2009.

### **Nissan, Honda and Toyota**

CHOICE has uncovered evidence that at least four of the 15 car manufacturers involved in the recall have, in some cases, replaced faulty Takata airbags with new Takata airbags that carry the same risk of failure. Toyota, Mazda and Subaru have all confirmed that this has occurred in relation to some of their recalled cars. These businesses have not informed consumers who sought replacements for their faulty airbags that in some cases their cars will be subject to further recalls due to the replacement airbag also carrying a risk of rupturing explosively.

In contrast, on 2 March 2017 BMW issued a recall noting that “as part of a recent Takata airbag recall, the airbag inflator may have been replaced and the replacement airbag module may not deploy correctly”<sup>1</sup>.

CHOICE contacted the remaining 11 car manufacturers, seeking information on whether or not these companies were also using faulty Takata airbags as replacements for cars affected by their recalls. None of these companies would confirm or deny that this was occurring.

### **Australian Consumer Law**

Section 18 of the ACL prohibits misleading and deceptive conduct, or conduct likely to ‘lead into error’.<sup>2</sup> The product safety recalls initiated by Toyota, Mazda and Subaru recommended that consumers contact their car dealership to arrange to have the potentially dangerous airbags replaced. Consumers responding to these recalls would reasonably assume that the replacement airbags are not affected by the same fault, and consequently are safe.

By failing to inform consumers of the fault in their replacement airbags, or of the fact that the airbags will need to be recalled again in the future, Toyota, Mazda and Subaru have misled consumers.

### **Detriment**

The detriment in this situation is potentially enormous, due to the following factors:

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<sup>1</sup> See recall notice via <https://www.productsafety.gov.au/recall/bmw-group-australia-ltd-bmw-5-series-e39-3-series-e46-and-e53-x5>

<sup>2</sup> *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44.

**Unlocking the power of consumers**

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- This is the largest product safety recall in automotive history, affecting 2.3m Australian cars. The number of recalled cars that have been re-fitted with flawed Takata airbags is currently unknown. CHOICE has confirmed that four manufacturers are doing this in some cases, but the conduct may be widespread across all manufacturers involved in the Takata recall.
- The level of risk associated with the airbags is also unknown – different estimates have been provided regarding likelihood of rupture<sup>3</sup> and likely ‘safe’ lifespan of the bags<sup>4</sup>. With this level of unknown risk, transparency is vital, but manufacturers are deliberately withholding relevant information from consumers. Car manufacturers should be erring on the side of caution – they just do not know when these airbags will fail, or how many will fail, but they continue to put them into consumers’ cars without informing them first.
- The provision of remedies is not equitable. All consumers who have a car subject to a Takata airbag-related recall have the same problem. However, some consumers are receiving non-faulty replacement airbags that will not definitely be subject to future recalls. Other consumers are receiving a solution that is at best temporary, and at worst dangerous.
- Most worryingly, failing to inform consumers of whether or not their car is being refitted with potentially faulty Takata airbags will compromise the success of future recalls, which could result in injuries or deaths occurring that are preventable. Consumers who have proactively responded to an initial Takata recall may ignore later recalls under the assumption that they have dealt with that safety issue already. ACCC court action highlighting this conduct will assist in undoing the damage already done due to Toyota, Mazda and Subaru's misleading opacity.

I hope that you will consider investigating this matter. CHOICE is of the view that this conduct is irresponsible, and will lead to further injuries and deaths if left uncorrected.

This complaint is based on evidence uncovered through a CHOICE investigation. We are happy to provide further detail if needed.

Yours sincerely,

CHOICE

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<sup>3</sup> Up to 50% in some Honda models.

<sup>4</sup> The National Highway Traffic Safety Administration (US) estimates the risk of rupture develops after six years; Takata claims it takes 12.5 years.

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