

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 4/08/2021 10:34:51 AM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged: Concise Statement  
File Number: VID438/2021  
File Title: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v  
MERCEDES-BENZ AUSTRALIA/PACIFIC PTY LTD  
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 4/08/2021 2:31:54 PM AEST

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



NCF1

## CONCISE STATEMENT

**FEDERAL COURT OF AUSTRALIA**  
**DISTRICT REGISTRY: Victoria**  
**DIVISION: GENERAL**

**No. VID OF 2021**

### **AUSTRALIAN COMPETITION & CONSUMER COMMISSION**

Applicant

**MERCEDES-BENZ AUSTRALIA/PACIFIC PTY LTD**  
**ACN 004 411 410**

Respondent

### **INTRODUCTION**

1. These proceedings concern the failure by the Respondent, Mercedes-Benz Australia/Pacific Pty Ltd (**Mercedes**), between July 2018 and March 2020 (the **Relevant Period**), to comply with a compulsory recall notice concerning defective Takata airbags, by failing to take adequate steps to ensure all of its communications to consumers met the requirements of the Recall Notice.

### **IMPORTANT FACTS GIVING RISE TO THE CLAIM**

2. Throughout the Relevant Period, Mercedes supplied Mercedes-Benz vehicles in Australia and was responsible for dealing with recall issues for Mercedes-Benz vehicles in Australia.
3. The compulsory recall (**Recall**) was imposed on suppliers of motor vehicles in Australia by the *Consumer Goods (Motor Vehicles with Affected Takata Airbag Inflators and Specified Spare Parts) Recall Notice 2018 (Recall Notice)*, with effect from 1 March 2018. The purpose of the Recall Notice was to protect Australian vehicle occupants from the risk of serious injury or death from the force of shrapnel fragments if an Affected Takata Airbag Inflator (**ATAI**) in their vehicle misdeployed when the airbag system was activated following a vehicle collision.

---

Filed on behalf of the Applicant, the Australian Competition & Consumer Commission

File ref: 20207796

Prepared by: Claudia Oakeshott  
AGS lawyer within the meaning of s 551 of the *Judiciary Act* 1903

Address for Service:  
The Australian Government Solicitor,  
4 National Circuit, Barton, ACT 2600  
claudia.oakeshott@ags.gov.au

Telephone: 02 6253 7285  
Lawyer's Email:  
claudia.oakeshott@ags.gov.au

4. The Recall Notice required that each affected vehicle be recalled and the ATAI replaced. It mandated a different recall process for two kinds of ATAIs: Alpha inflators, and non-Alpha inflators (which were also known as Beta inflators). All Mercedes-Benz affected vehicles were fitted with non-Alpha (or Beta) inflators.
5. The Recall Notice required suppliers to communicate with consumers in a way that emphasised the danger of the Takata airbags (particularly the risk of serious injury or death from the force of shrapnel fragments in the event of airbag inflator misdeployment and rupture) and drew attention to the urgency of having those airbags replaced.
6. Due to the risk to consumers, and the need to maximise rates of replacement of ATAIs, the Recall Notice required suppliers to initiate the recall of affected vehicles fitted with non-Alpha ATAI in accordance with a Communication and Engagement Plan (**CEP**) approved by the ACCC (Recall Notice, ss 5(2) and 7).
7. The minimum requirements of a CEP were specified in Schedule 2 to the Recall Notice, and included that in all communications with consumers pursuant to the Recall Notice, the supplier must:
  - (a) identify the risk posed by ATAI rupturing in clear, simple language that emphasises the risk of injury or death from shrapnel in “appropriately urgent terms” (Recall Notice, Schedule 2, paragraph [5]);
  - (b) not include information or phrases that are “likely to minimise or mitigate the perception of the risk” (the Recall Notice identifies as examples “No ruptures have been observed in [the Supplier’s] vehicles to date” and “we are only conducting this recall as a precaution”) (Recall Notice, Schedule 2, paragraph [6]); and
  - (c) use language designed to capture attention and be impactful, and must use bold text to highlight particularly impactful words such as “urgent” and “kill” (Recall Notice, Schedule 2, paragraph [7]).
8. The Mercedes CEP was approved by the ACCC on 26 June 2018 (**Mercedes CEP**). Although it was varied on four occasions, all versions of the Mercedes CEP were proposed in accordance with s 7 and Schedule 2 to the Recall Notice and
  - (a) acknowledged the requirement to avoid including information or phrases that are likely to minimise or mitigate the perception of the risk;
  - (b) acknowledged the requirement to use language designed to capture attention and be impactful;
  - (c) stated

that Mercedes would use “attention-capturing, high-impact language in all general and direct communications to consumers in order to try and avoid consumers ignoring notices”; and (d) stated that Mercedes would use language “to create urgency and highlight the importance of this Recall”.

9. Mercedes established a Takata Call Centre to communicate with consumers about the Recall. The Mercedes Takata Call Centre operated throughout the Relevant Period, and its staff were representatives of Mercedes.
10. During the Relevant Period, various staff in the Mercedes Takata Call Centre used training materials, email templates and user guides for communications with consumers that contained language which minimised the risk posed to vehicle occupants by ATAs, which was contrary to the Mercedes CEP and the Recall Notice.
11. On at least 73 occasions during the Relevant Period, staff of the Mercedes Takata Call Centre made statements to consumers by phone or email in respect of the Recall that minimised the risk in relation to the ATAs. Those statements were to the effect that:
  - (a) it was okay or safe to drive affected vehicles with ATAs (for vehicles over 6 years old);
  - (b) there were no incidents, accidents, injuries or deaths caused by non-Alpha inflators, either in Mercedes-Benz vehicles, or at all; and
  - (c) Mercedes was undertaking the recall as a precaution.
12. By way of example, consumers were told:

We've not actually had any problems with our airbags but we are recalling them for customer peace of mind anyway.

We here at Mercedes are doing the recall as a precautionary measure ...and to ensure our customers feel great when they're still driving their vehicle.

The reason we're in this recall is more of a precautionary measure and an ease of mind for our customers.

You are still okay to drive your vehicle up until the point of completion of this recall, and that's due to the fact that the Beta hasn't shown any faults.

So for both proactive precaution and ease of mind, we're included in this recall and we're switching out the Beta airbag to ensure that, you know, our customers feel the best that they can be when they're in their vehicle.

The ACCC who are running this recall, they've said that, "Yeah, you're all okay to still be driving ... because your car holds a Beta airbag and not an Alpha airbag".

So it's just a precautionary recall that the ACCC are doing.

13. Mercedes did not have any, or any adequate, controls or monitoring in place to prevent the Mercedes Takata Call Centre staff or other representatives of Mercedes from communicating with consumers in words which minimised the risk in relation to the ATAs or were otherwise inconsistent with the requirements of the CEP and the Recall Notice, or identify that they were doing so.

#### **SUMMARY OF RELIEF SOUGHT FROM THE COURT**

14. The ACCC seeks the relief set out in the accompanying Originating Application, comprising declarations under s 21 of the *Federal Court of Australia Act 1976* (Cth), pecuniary penalties against Mercedes under s 224 of the Australian Consumer Law (**ACL**), which is Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**CCA**), a compliance program pursuant to s 246(2)(b) of the ACL, and costs.

#### **PRIMARY LEGAL GROUNDS FOR RELIEF SOUGHT**

15. In making the statements outlined above in communications with consumers, Mercedes did not conduct the Recall in accordance with the requirements of the Recall Notice and the Mercedes CEP, and thereby contravened s 127(1) of the ACL on each occasion.
16. The conduct of the Mercedes Takata Call Centre staff during the Relevant Period was undertaken on behalf of Mercedes and within their actual or apparent authority, such that their conduct is taken to have been engaged in by Mercedes pursuant to s 139B(2) of the CCA.

#### **ALLEGED HARM**

17. As a result of the conduct of Mercedes, consumers were not appropriately warned of the risk of serious injury or death as required under the Recall Notice. On the contrary, they were given the impression that there was not a serious safety risk and the recall was precautionary. Given the safety risk posed by the misdeployment of defective

ATAs, it was critical that owners of vehicles fitted with ATAs understood the seriousness of the risk and that the urgency and importance of complying with the Recall Notice was emphasised.

This Concise Statement was prepared by Claudia Oakeshott and Roseanna Bricknell of AGS.

Date: 4 August 2021



Claudia Oakeshott  
AGS lawyer  
For and on behalf of the Australian Government Solicitor  
Solicitor for the Applicant

#### **CERTIFICATE OF LAWYER**

I, Claudia Oakeshott, certify to the Court that, in relation to the concise statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 4 August 2021



AGS lawyer  
for and on behalf of the Australian Government Solicitor  
Solicitor for the Applicant