

**BMW AUSTRALIA LTD**

**SUBMISSION REGARDING**

**PROPOSED RECALL NOTICE:**

**MOTOR VEHICLES WITH SPECIFIED TAKATA AIRBAG  
INFLATORS AND SPECIFIED SALVAGED TAKATA AIRBAG  
INFLATORS**

**OCTOBER 2017**

## Introduction

We refer to the Commission's proposed recall notice dated 21 September 2017 in relation to specified Takata Airbag Inflators and specified salvaged Takata Airbag Inflators (**Recall Notice**).

We also refer to the Supplier Conference on 9 October 2017 at which OEMs made oral submission to the Commission regarding the Recall Notice and in particular, definitional issues associated with that notice.

As previously indicated by BMW Australia in response to the Commission's notice under section 133D of the *Competition and Consumer Act 2010* (Cth), BMW Australia takes the issue of public safety very seriously.

Following the Supplier Conference, BMW Australia wishes to make further submissions regarding several issues relating to the Recall Notice.

BMW Australia has carefully reviewed the Recall Notice and has several concerns as set out below. In BMW Australia's view, clarification (and alteration) in line with these submissions would assist all affected Suppliers better understand and therefore more effectively comply with the Recall Notice. It would also ensure that the recall does not impose undue and unnecessary restrictions on Suppliers which, through no fault of their own, they are not able to meet (and thus risk penalties). That is, there needs to be a level of flexibility in relation to the recall process, to take into account matters such as the individual circumstances of Suppliers and their customer base.

Our submissions address the following matters:

1. Definition of Alpha Inflators;
2. Support for the directions from the National Highway Traffic Safety Administration (**NHTSA**);
3. The necessity for flexibility in the recall process;
4. Proposed Enforceable Undertaking;
5. Creation of Universal Minimum Standards;
6. Vehicle identification and information assistance;
7. Online Sales Ban;
8. Workshop Capacity; and
9. BMW Australia's estimated cost of compliance based on the draft recall notice.

## 1. Definition of Alpha Inflators

- 1.1 BMW Australia supports the prioritisation of recalling all Alpha Inflators. In order to facilitate this recall it is imperative that a clear definition of an Alpha Inflator is determined so that they may be identified and removed as soon as possible.
- 1.2 The Recall Notice requires Suppliers to recall Affected Takata Airbag Inflators which are defined as:
- 'an airbag inflator made by Takata that uses either Phase Stabilised Ammonium Nitrate (PSAN) without desiccant (including an Alpha Inflator) or PSAN with calcium sulphate desiccant.'*
- 1.3 The definition of an Alpha Inflator as expressed in the Recall Notice at section 4 is:
- 'a Takata inflator using Phase Stabilised Ammonium Nitrate (PSAN) without desiccant, which was not made as designed.'*
- 1.4 BMW Australia submits that this definition is unduly broad and should be more clearly articulated given what is understood to be a substantial risk to customers and the understandably onerous requirements on Suppliers to recall them.
- 1.5 BMW Australia in reliance upon the Defect Information Report (DIR) released by Takata on 11 April 2013, submits that the latest scientific information indicates that the Alpha Inflators were manufactured at two plants within a specified time period, namely:
- (a) Moses Lake, Washington between April 13, 2000 and September 11, 2002; and
  - (b) Monclova, Mexico between October 3, 2001 and October 31, 2002.
- 1.6 In order to ensure the most effective and timely recall, and also having regard to the concerns expressed in paragraph 1.4 above, BMW Australia submits that the definition of Alpha Inflators must specify:
- (a) the locations where these particular inflators were produced;
  - (b) the period in which they were produced; and
  - (c) the circumstances in which they are considered to be defective.
- 1.7 To do otherwise would result in undue strain upon Suppliers to repair inflators that are not yet considered to be dangerous.
- 1.8 To assist the Commission in clarifying this issue, we suggest wording along the lines set out below for the definition of Alpha Inflator:
- (a) *'A Takata inflator using Phase Stabilised Ammonium Nitrate (PSAN) without desiccant, produced between 13 April 2000 and 11 September 2002 at Takata's plant in Moses Lake, Washington which may be defective due to inadequate compaction force being applied; and*
  - (b) *'A Takata Inflator using Phase Stabilised Ammonium Nitrate (PSAN) without desiccant, produced between 4 October 2001 and October 31 2002 at Takata's plant in Monclova, Mexico which may be defective due to exposure to uncontrolled moisture conditions.*

- 1.9 The above definition, which incorporates the latest scientific information provided in the latest DIR, would ensure that those inflators that degrade over time are not captured by the onerous Alpha Inflator recall regime.
- 1.10 To highlight the necessity for this clarification, BMW Australia notes that passenger front airbags fitted to BMW E46 vehicles built between 12/2001 to 03/2003 (as per VIN list on Recall code 0072330100) contained an Alpha Inflator (per the proposed definition). These inflators were manufactured at the Monclova Plant, Mexico. BMW Australia is not aware of any other vehicles which fall within the 2013 DIR report. As such, requiring BMW Australia to recall a wider range of E46 vehicles is contrary to the latest science and imposes unnecessary burdens upon BMW Australia.

## **2. Support for the directions from the NHTSA**

- 2.1 BMW Australia submits that, in conducting the recall of Affected Takata Airbags, the United States National Highway Transport Safety Authority (**NHTSA**) strategy should be adopted.
- 2.2 As the Commission would be aware, NHTSA has been actively involved in the recall process for Takata airbags in the United States and on 3 November 2015 initiated a Coordinated Remedy Order (**CRO**) which outlines a detailed recall regime.
- 2.3 NHTSA is empowered by paragraph 48 of the CRO to modify its terms to "account for and timely respond to newly obtained facts, scientific data, changed circumstances, and or other relevant information that may become available". BMW Australia notes that NHTSA has amended the CRO four times under this power in light of further research and consultation with industry. The Third Amendment to the CRO (**Third Amendment**) incorporated the numerous recall expansions which were being made partly due to evidence from three independent testing groups.
- 2.4 BMW Australia submits that the spirit of the NHTSA approach should be adopted in Australia as it more accurately reflects the needs for flexibility in light of changing scientific information and accommodates the practical concerns of Suppliers as noted at the Supplier Conference.
- 2.5 Generally speaking, the approach of the NHTSA has been to identify the degree of risk posed by a particular inflator and structure the recall accordingly. The original CRO at paragraph 38 identifies the primary risk factors that underlie this approach:
- (a) the age of the inflator;
  - (b) geographic location; and
  - (c) the location of the inflator in the vehicle.

Based on the above factors, vehicles are arranged into priority groups with their own specific recall schedule. These priority groups have been updated in line with further developments. The Third Amendment contains an annexure which displays all of the relevant vehicles and the priority group in which they fall.

- 2.6 In contrast to the Recall Notice which appears to adopt a one size fits all approach to Beta Inflators, by prioritising those Beta inflators that are of the highest risk of rupture, the NHTSA approach is better positioned to manage the risks to customers while recognising the practical realities of this large scale recall.

### ***Timetable***

- 2.7 BMW Australia submits that the timetable set out in the Recall Notice should be adjusted so that the recall is based on Suppliers having parts available as opposed to being determined by the request of customers.

- 2.8 The current timetable set out in the Recall Notice requires that Alpha Inflators be replaced within 24 hours and certain Beta Inflators within 1 month following contact by a customer. For newer Beta airbags a recall must be initiated within 5 years and three months from the date the inflator was manufactured or by 31 December 2020 (whichever is earlier). BMW Australia and other Suppliers, despite their best efforts, will often be unable to comply with this timetable due to a shortage of available replacement parts. Furthermore, even if the available parts are on hand it may not be possible for the repairs to be conducted within the time frame specified.
- 2.9 As a matter of fairness, the imposition of penalties due to a failure to meet an unachievable or unduly restrictive deadline would be inappropriate if reasonable attempts were taken by Suppliers to comply with the schedule. Accordingly BMW Australia submits that some flexibility must be permitted.
- 2.10 While BMW Australia appreciates the desire of the Commission to replace affected inflators as quickly as possible, the practical reality is that access to replacement airbags has been reduced by global demand. In response to this market shortage the NHTSA approach has focused upon making parts available to customers within set timelines. Below is an extract from page 16 of the Third Amendment which makes clear how the obligations of Suppliers can be structured on the basis of parts availability.

Priority Group	Sufficient Supply & Remedy Launch Deadlines
Priority Group 1	March 31, 2016
Priority Group 2	September 30, 2016
Priority Group 3	December 31, 2016
Priority Group 4	March 31, 2017
Priority Group 5	June 30, 2017
Priority Group 6	September 30, 2017
Priority Group 7	December 31, 2017
Priority Group 8	March 31, 2018
Priority Group 9	June 30, 2018
Priority Group 10	March 31, 2019
Priority Group 11	March 31, 2020
Priority Group 12	September 30, 2020

- 2.11 BMW Australia proposes that the recall timetable be structured similarly to the above. We are also willing to further engage with the Commission in order to adapt these procedures or advise further on an alternative timetable which reflects the composition of the priority groups, in particular the age of the vehicles contained.

### **Completion Schedule**

- 2.12 Currently, all Suppliers are required by section 5 (1)(b) of the Recall Notice to complete the recall by 31 December 2020. BMW Australia confirms that Suppliers are subject to significant penalties for non-compliance with the deadline, whatever the circumstances including matters that are beyond their control.
- 2.13 BMW Australia submits that the Commission should include staggered completion rates similar to the NHTSA approach rather than a fixed deadline of 31 December 2020.
- 2.14 Further, as set out below, BMW Australia submits that an adjusted calculation rate (not a 100% completion rate) should be adopted, as a matter of fairness.
- 2.15 In certain instances, the December 2020 target may be unachievable or unnecessary. The NHTSA approach as identified in paragraph 35 of the Third Amendment is to stagger the percentage completion rates quarterly. This will more effectively allow Suppliers to arrange for

appropriate schedules, track progress and report to the Commission. Below is an extract of the schedule adopted in the CRO:

End of Quarter (after remedy launches)	Percentage of campaign vehicles remedied
1st	15%
2nd	40%
3rd	50%
4th	60%
5th	70%
6th	80%
7th	85%
8th	90%
9th	95%
10th	100%

- 2.16 A staggered completion rate is also able to adapt more effectively to developments in scientific knowledge. Takata and other parties are still conducting investigations and may produce reports which alter the recall process. Rather than developing a fixed deadline, an approach based on the proportion of vehicles remedied would more be a more effective method of conducting the recall.
- 2.17 While BMW Australia generally supports the NHTSA completion timetable, the requirement for a 100% completion rate is inappropriate. As set out above, BMW Australia's primary concern is that Suppliers do not control all of the variables necessary in order to ensure this goal is reached. Further, while every effort may be made by Suppliers to encourage customers to seek replacement airbags, the practical reality is that Suppliers are not able to force customers to take this step. In light of this, BMW Australia strongly supports the Commission's approach in the Recall Notice to examine 'satisfactory replacement rate[s]' with respect to reporting requirements. BMW Australia submits that this type of terminology be applied to any completion threshold.
- 2.18 In relation to these vicissitudes, BMW Australia notes that numerous vehicles with affected inflators may no longer be registered or have fallen into disuse. The Australian Bureau of Statistics estimated that as of 1 January 2017 approximately 4% of vehicles are taken off the register. It is therefore impossible to achieve a 100% completion target as the number of relevant vehicles have and will continue to decline. Any completion threshold must take into these factors. In this regard, BMW Australia would also like to refer to Section 6 of this submission which sets out potential means to increase vehicle owner awareness and recall completion rates, specifically a ban on re-registration or renewal of registration of affected vehicles.
- 2.19 BMW Australia is willing to further consult with the Commission on the establishment of an appropriate completion rate threshold and general completion schedule that is tailored to the specific conditions and progress of the recall in Australia.

***Detailed classification of defective parts according to risk***

- 2.20 As set out above, the CRO contains an extensive system for calculating which inflators should be given priority. The Recall Notice does not contain a sufficient delineation between Beta airbags whose safety varies dramatically.
- 2.21 For example, the BMW X5 2011, 2010 and 2009 models are currently considered in the United States to be in Priority Group 9 which require replacement by June 30, 2018. However, in Australia these may need to be repaired within 30 days of a customer request. BMW Australia submits that there is no substantiated reason for this divergence in timeframes.

- 2.22 Furthermore, the 31 December 2020 deadline does not account for the current state of scientific knowledge. BMW Australia submits that as Beta Inflators only become dangerous over time different deadlines depending on the age of the inflator would be more appropriate.
- 2.23 In summary, BMW Australia submits that a far more effective and indeed fairer timeline would be one that is based on the risk factors identified in the United States as well as matters such as the availability of parts. Inflexible deadlines based upon factors that have no bearing on safety should not be relied upon as they will cause unnecessary interference with the goal of achieving public safety.
- 2.24 BMW Australia is available to assist the Commission in designing and implementing a regime based on the principles derived from the United States.

### **3. The necessity for flexibility**

- 3.1 Some of the matters raised about highlight the necessity for flexibility in the terms of the Recall Notice.
- 3.2 BMW Australia submits, in line with concerns raised at the Suppliers Conference, that the Recall Notice does not adequately provide a necessary degree of flexibility. For instance, not only does the Recall Notice fail to account for the unique position and needs of Australians living in rural or remote areas, it also fails to provide for the differing nature of the Suppliers vehicles.

#### *Customers in Rural and Remote areas*

- 3.3 With respect to Alpha Inflators, the requirement to replace the inflator within 24 hours of being contacted may be physically impossible. Firstly, section 5(4)(b) of the Recall Notice requires the Supplier to offer to tow the vehicle or supply a qualified technician. This presents significant logistical problems where individuals are located in rural or remote parts of Australia. Even if the customer was to drive the car to a dealership that is capable of conducting the repairs it may still be impossible for the vehicle to be repaired in the timeframes articulated in the Recall Notice.
- 3.4 On this issue, we refer to our primary submission that the proposed timetable be replaced with one in line with the spirit of NHTSA. Doing so would address the issues posed by the rural/remote location of BMW Australia's customers. However, in the alternative BMW Australia submits that the Recall Notice at a minimum be altered to provide a more realistic timeline for rural or remote customers. In establishing this timetable, we suggest adopting the definitions of rural and remote developed by the Australia Bureau of Statistics. These changes would ensure that the standards represent a more realistic schedule.
- 3.5 Another example of the inflexibility of the Recall Notice is the requirement that Suppliers offer to tow any vehicles with Alpha Inflators. However, this requirement is not necessary with respect to BMW vehicles as the Alpha Inflators (per the proposed definition above) are located on the passenger side. The relevant BMW vehicle contains technology that prevents the deployment of the passenger airbag in a collision where no person (or heavy object) is located in that seat. As a result, customers are able to drive the car to the dealership provided they do not bring passengers. The result of this provision in the Recall Notice is an unnecessary, slower and more costly recall of Alpha Inflators.
- 3.6 Ultimately, BMW Australia provides the above as examples of the rigid approach of the Recall Notice. A more structured method in line with the principles of NHTSA or alternatively an enforceable undertaking would better address these concerns.

## 4. Proposed Enforceable Undertaking

- 4.1 BMW Australia understands the Commission's concern that a voluntary recall could be seen as ineffective given the danger to the public associated. However, BMW Australia submits that rather than adopting a mandatory recall, the Commission should consider working with Suppliers to reach an agreement on the terms of an enforceable undertaking to conduct a recall in accordance with certain terms.
- 4.2 Any system of enforceable undertaking would of course require the Commission's input and oversight. BMW Australia submits that this approach would allow Suppliers to work with the Commission to set clear parameters based on their individual circumstances. Indeed certain Suppliers have displayed superior safety records with respect to their vehicles. Evidence of a better safety record could be taken into account in this individualised process.
- 4.3 To assist the Commission to understand the potential content of such undertakings, BMW Australia submits that it would likely take the structure of NHTSA styled procedures and timetables. This would be in line with BMW Australia's opinion that NHTSA is reflective of the latest scientific knowledge and best practice.

## 5. Creation of Universal Minimum Standards

- 5.1 Part B of Schedule 2 to the Recall Notice requires each Supplier to submit an engagement plan to the Commission. BMW Australia does not have any material objection to the various aspects of the minimum standard for the engagement plan. However, BMW Australia submits that the Recall Notice should instead create a rigorous universal standard to which all Suppliers must comply. This universal standard would replace the need for individual engagement plans. These standards should be sufficiently comprehensive and reflective of best practice so that Suppliers can reply upon compliance as fulfilment of their obligations under a Recall Notice.
- 5.2 A universal community engagement plan would better facilitate the recall as the current requirement for **each** Supplier to provide an engagement plan results in the unnecessary duplication of effort. Not only is it inefficient for the Commission to review up to 50 differing engagement plans, individual plans may prevent effective collaboration between Suppliers. We note that in the United States, some Suppliers achieved greater efficiencies by taking advantage of existing market infrastructure. Specifically, companies with capacity and expertise in mass communication were employed to assist the Suppliers reach consumers and comply with NHTSA. We note that the Takata airbag recall has been one which has touched upon a large proportion of the industry. As such an industry based approach is appropriate.
- 5.3 Furthermore, BMW Australia is concerned that variance in individual engagement plans may result in some consumers not being reached as part of those plans. In this regard, BMW Australia submits that the Commission will find monitoring compliance with a universal standard more efficient than the current proposal in the Recall Notice.
- 5.4 BMW Australia also submits that the standard should be designed in such a way as to ensure that compliance with its terms discharges the Suppliers obligations. While BMW Australia is engaging significant resources in order to contact each individual customer, we request that the Commission recognises that the decision to ultimately repair the vehicle rests with the consumer. BMW cannot force owners to bring their car in for repairs. A rigorous standard would thus provide Suppliers with a degree of certainty about the obligations and allow them to focus attention on engaging with as many people as possible.



## **6. Vehicle identification and information assistance**

- 6.1 BMW Australia submits that the Commission should take a more active role in assisting Suppliers identify the relevant vehicles subject to the recall. BMW Australia has previously engaged with data provided by NEVDIS through AustRoads Ltd. Unfortunately, this experience was hampered by inaccurate data and restrictions on the capacity of BMW Australia under privacy law to share this information with third parties who were assisting in the engagement process. Furthermore, other regulatory restrictions were imposed upon the engagement plan.
- 6.2 BMW Australia requests that the Commission assist Suppliers obtain better access to information and reduce the restrictions on the use of this information. We note that any information obtained would only be used for the purposes of the recall. This may involve facilitating the exchange of information from a variety of government agencies in excess of Vehicle Identification Numbers.
- 6.3 Specifically, BMW Australia would like the Commission to explore the possibility of obtaining data with respect to registration plates which could then be shared with relevant agencies such as Civic Compliance Victoria and toll operators to identify and notify the owners of relevant vehicles. Innovative ideas such as these could assist Suppliers in reaching those customers who have not been contacted by the extensive information campaigns or who have otherwise ignored warnings. We note that this is a concept that has received support from other Suppliers.
- 6.4 In addition, BMW Australia supports a ban on re-registration or renewal of affected vehicles which have not been repaired. BMW Australia requests that the Commission consider the difficult task which must be completed by Suppliers and provide additional regulatory support. BMW Australia is willing to work with, and provide specific information to, relevant regulatory agencies in order to identify unrepaired vehicles. Specifically, BMW Australia could provide authorities with information obtained through NEVDIS which can be used to prevent registration where necessary. BMW Australia wishes to note that not only is it willing to enter into a cost sharing model with the relevant agencies it is also considering implementing this proposal independently of any industry consensus.

## **7. Online sales ban**

- 7.1 Page 7 of the Recall Notice describes a situation that occurred in April 2017 in Las Vegas where an Alpha Inflator was found in a car despite not being the replacement airbag installed by Honda. This situation reveals the need for the second hand market of Alpha and Beta Inflators to be closely monitored.
- 7.2 Under section 9 of the Recall Notice, it is the obligation of Suppliers to develop a salvage plan in order to assist in reducing access to salvaged parts. However, BMW Australia is concerned that the proposal in the Recall Notice to provide a financial incentive for the return of the airbag will be an ineffective method which could be easily exploited since it could lead to a situation where a customer engages in exploitative conduct to return the airbag to Suppliers. This has the potential to lead to a perverse second hand market for airbags.
- 7.3 As a solution to this potential problem, BMW Australia submits that the Commission should impose a ban on the sale of such products. By providing Suppliers with legislative backing, these bans would support the efforts of Suppliers to have the defective airbags returned as the failure to do so could result in significant penalties to the second hand distributor.
- 7.4 BMW Australia considers that the type of intervention of the Commission in relation to banning online sales would be more effective than the alternative proposed in section 9 of the Recall Notice.

## **8. Workshop Capacity**

- 8.1 BMW Australia submits that, in its current form, the Recall Notice and the overwhelming quantity of vehicles which would be affected will cause an immediate and long-lasting shortage of workshop and personnel capacity to perform the required work. Consequently, it is highly unlikely that, even leaving aside the critical issue of replacement part supply, (discussed above) Suppliers will not be able to comply with any mandated 30 day time frames to complete the necessary work. As such, Suppliers would be placed in situations of immediate default and become exposed to claims, significant compliance costs and potential penalties.
- 8.2 BMW Australia submits that the Commission must carefully assess the effect that the Recall Notice may have on the Australian labour market, commercial and industrial property requirements as well as potential migrant labour related issues (for example, the availability of migrant skilled labour visas if labour supply shortages arise). Furthermore, even if new domestic or foreign labour can be acquired, the Commission should also be aware of training and accreditation lead times.

## **9. BMW estimate of costs of compliance based on draft wording**

- 9.1 Based on modelling undertaken by BMW Australia, the estimated cost of performing repair work on proposed affected vehicles (which includes vehicles already subject to announced recalls) is expected to be between \$115 million to \$130 million.
- 9.2 BMW Australia has also estimated that in addition to the cost of performing repair work, the cost of compliance with the Recall Notice in its current draft is expected to be between \$79 million to \$139 million.
- 9.3 The above estimates have been prepared on the short to medium term basis of three (3) financial years. Naturally, if the effects of the Recall Notice extend beyond this time frame, additional costs would be incurred.

## **Conclusion**

BMW Australia is committed to the development of an efficient and thorough recall procedure.

The submissions are provided by BMW Australia to assist the Commission in drafting a Recall Notice that reflects the practical realities and latest scientific knowledge for the ultimate benefit of the public whilst ensuring that Suppliers are not unduly subject to requirements (including timing) that they will in all likelihood be unable to meet.

We are happy to answer any questions of the Commission in relation to these submission or the Recall Notice.

Michael Witt  
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