

9 October 2017

Director

Standards and Policy

Consumer Product Safety Branch

Australian Competition and Consumer Commission

GPO Box 3131

CANBERRA ACT 2601

[REDACTED]

Dear Director

Submission by Subaru Aust Pty Ltd to Draft Recall Notice

1. Introduction

- 1.1 Subaru (Aust) Pty Ltd (**Subaru Australia**) makes this submission in respect of the Draft Recall Notice issued by the Minister for Small Business on 21 September 2017 pursuant to s 132A of the *Competition and Consumer Act 2010* (Cth) (**CCA**) (**Draft Recall Notice**).
- 1.2 The safety of its customers is critically important to Subaru Australia. Therefore, Subaru Australia supports further measures to increase awareness of the risks associated with Affected Takata Airbag Inflators, and improve the rate of replacement of Affected Takata Airbag Inflators. Subaru Australia recognises that appropriate action by the ACCC is likely to improve both awareness and response.
- 1.3 Subaru Australia is already conducting five voluntary recalls in Australia, with plans for more. Subaru Australia is committed to improving completion rates of existing voluntary recalls, announcing additional recalls in respect of Affected Takata Airbag Inflators in a timely manner that reflects the relative risk of each cohort of affected vehicles, and ensuring that consumers have access to timely and accurate information. In the interests of continuous improvement, Subaru Australia has recently refined aspects of its recall program with a view to improving customer communications and as a result has seen an improvement in replacement rates.
- 1.4 In Subaru Australia's view, the appropriateness of any further recall action should be measured by reference to the following criteria:

- (a) ability to enhance customer awareness in a way that will encourage effective action without creating undue consumer anxiety or panic;
 - (b) ability to improve replacement rate as soon as reasonably practicable;
 - (c) ability for Suppliers to prioritise the replacement of Affected Takata Airbag Inflators by reference to those presenting the highest risk at any given time;
 - (d) promotes the most rapid replacement of inflators that is practically achievable;
 - (e) whether the requirements are evidence based; and
 - (f) whether the requirements create negative unintended consequences for consumers.
- 1.5 Subaru is concerned that the Draft Recall Notice does not satisfy a number of these criteria.
2. **Constructive Engagement to Address Challenges**
- 2.1 The Takata airbag recall is a recall of "*unprecedented complexity*"¹ and "*unprecedented scale.*"² This poses a challenge to stakeholders involved in the existing voluntary recalls - challenges that will continue, and indeed will be exacerbated, should a compulsory recall requiring the immediate recall of a significant amount of additional Affected Takata Airbag Inflators be ordered. Chief amongst these are:
- (a) the global shortage of spare parts; and
 - (b) the capacity of Australian dealer networks to replace inflators.
- 2.2 Globally, over 100 million Affected Takata Airbag Inflators are currently under recall - a figure that continues to rise as further recalls are announced in jurisdictions with existing recall programs such as the United States, or recalls are commenced in additional jurisdictions such as China.
- 2.3 Given these challenges, while Subaru Australia supports measures designed to improve recall rates it has some

¹ NHTSA Third Amendment to the Coordinated Remedy Order - [3].

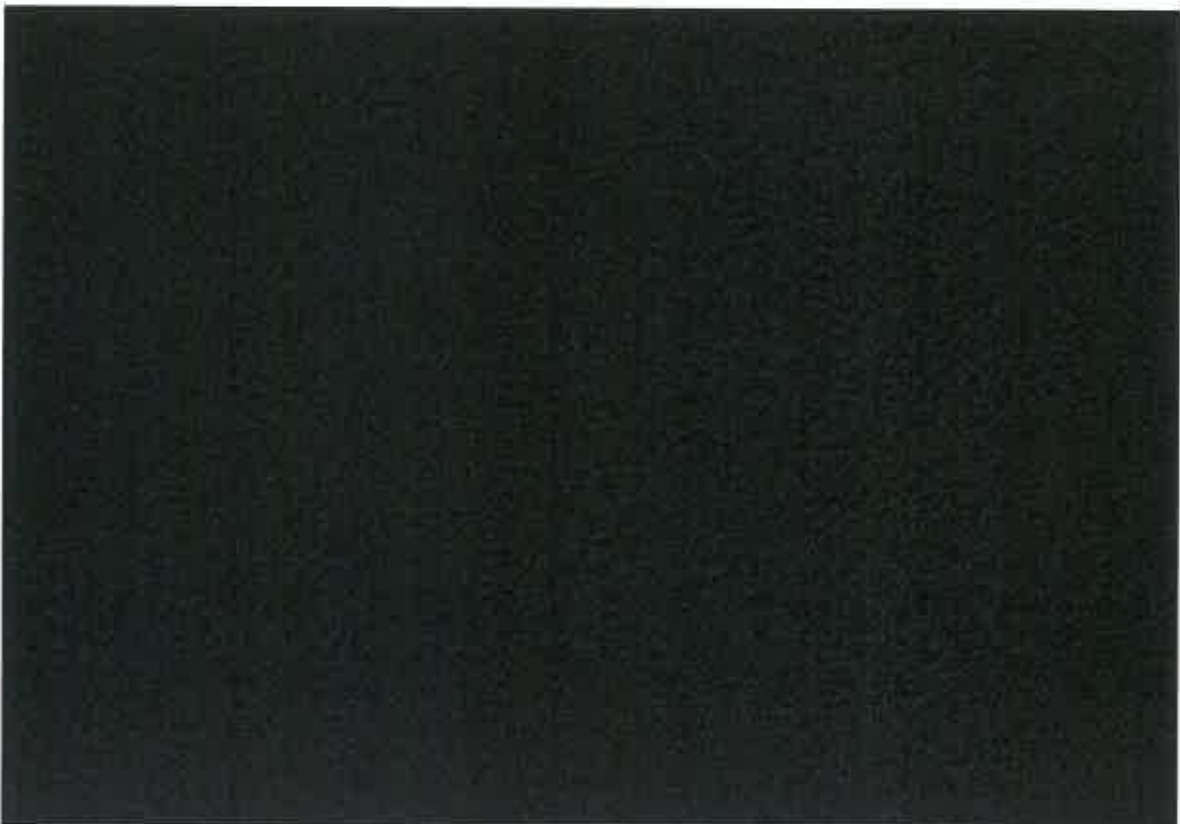
² Department of Infrastructure and Regional Development, Recall of vehicles in Australia fitted with Takata airbags, July 2017, p 3 (DIRD Report).

concerns about how the Draft Recall Notice will operate in practice, [REDACTED], [REDACTED], and whether unintended consequences may arise for consumers, retailers of second-hand Vehicles, and Suppliers.

- 2.4 Subaru Australia welcomed the opportunity to participate in the Conference on 9 October 2017 to discuss these matters, and how they may be addressed in a manner that will allow for the orderly, timely and effective replacement of Affected Takata Airbag Inflators in a way that prioritises those giving rise to the greatest risk, but in all circumstances as soon as is practically possible. To that end, Subaru Australia has considered the Draft Recall Notice against the criteria in section 1.4 above, and this analysis informs the submissions below.

3. **Confidentiality of Submission**

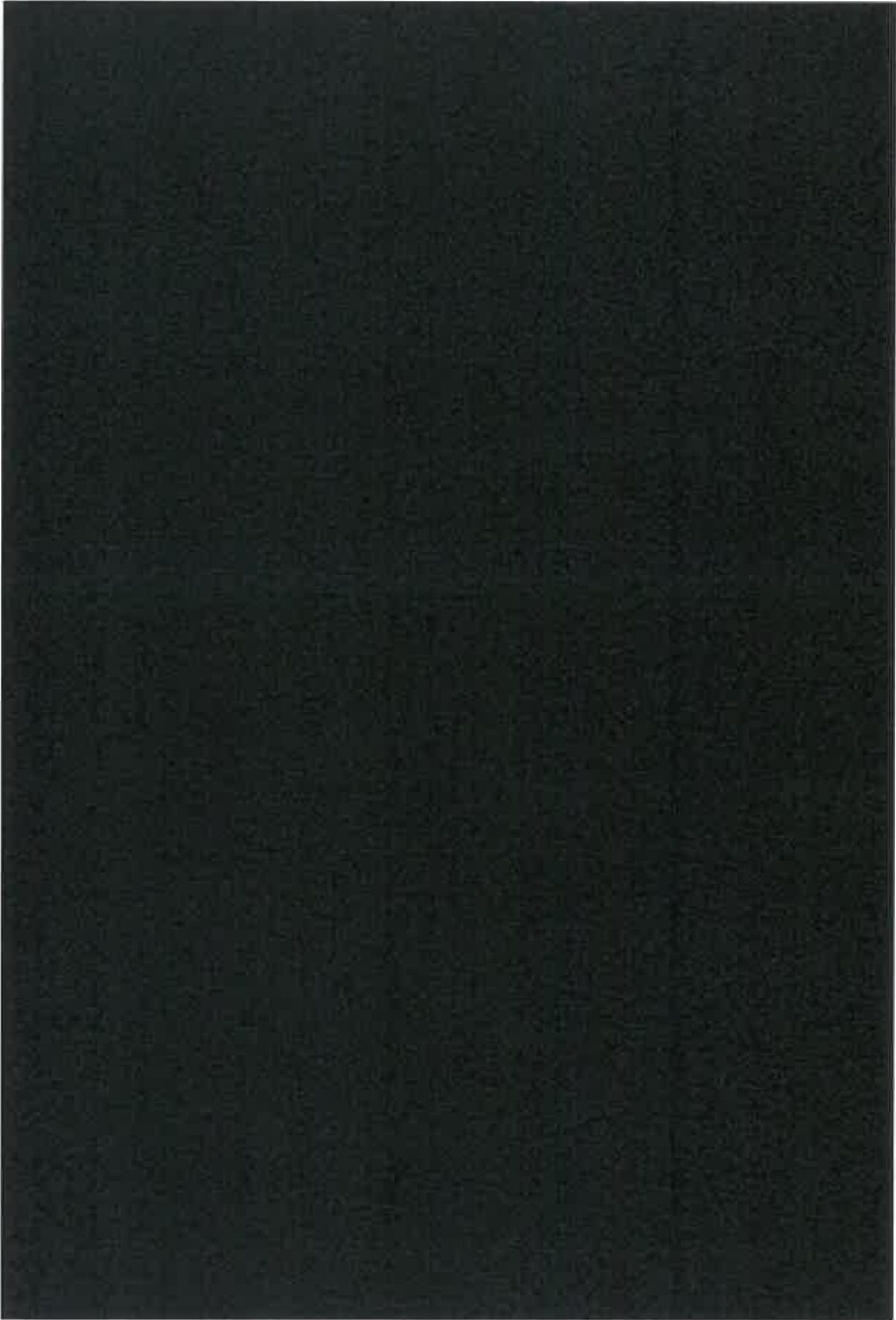
- 3.1 Parts of section 2, sections 4 to 6 (in whole), parts of section 7, and Confidential Attachment 1 (in whole) of this submission contain confidential information about Subaru Australia's business, commercial and financial affairs such that section 155AAA of the Competition and Consumer Act 2010 applies. These sections and attachments will not be published on the consultation hub.





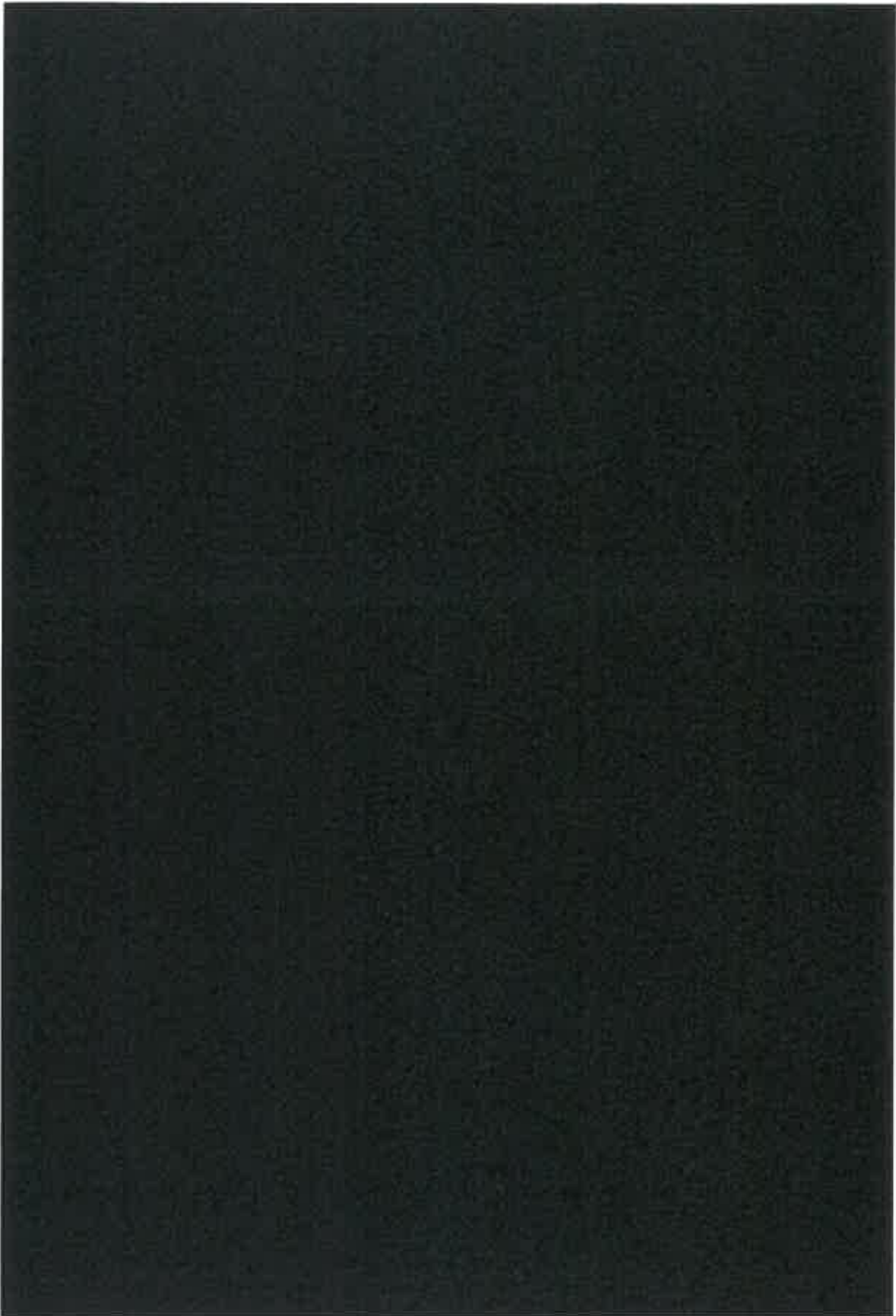
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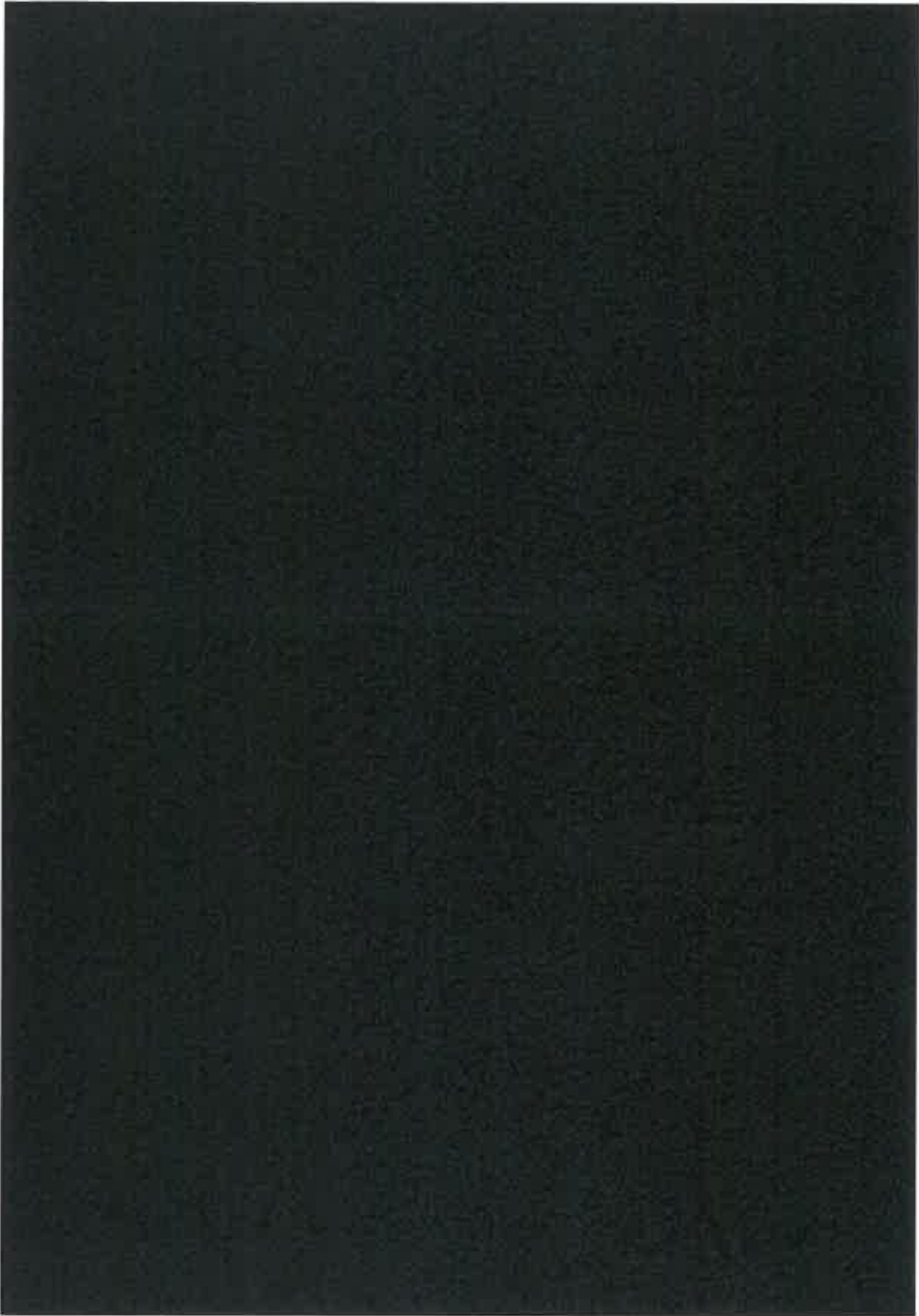
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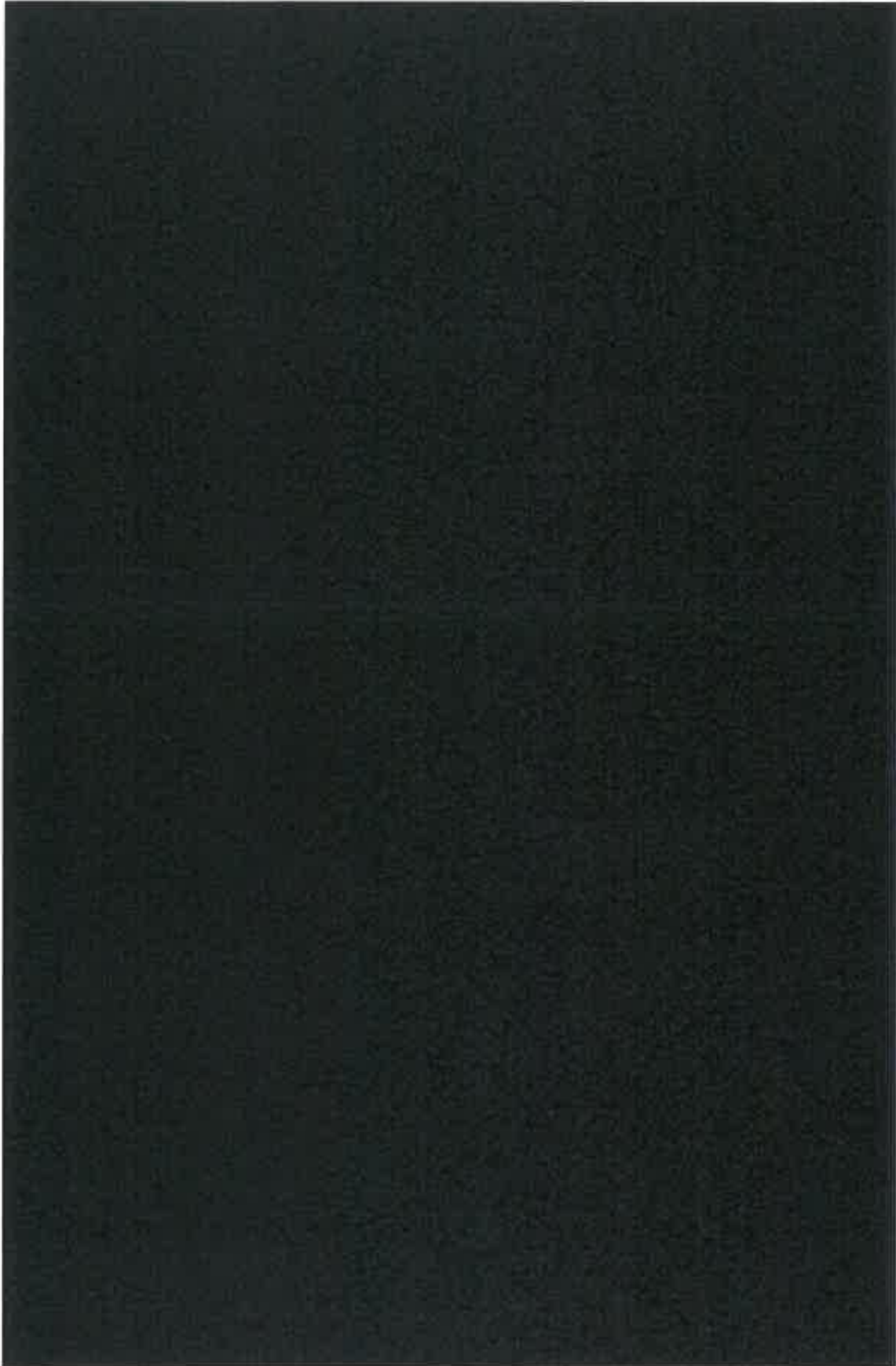
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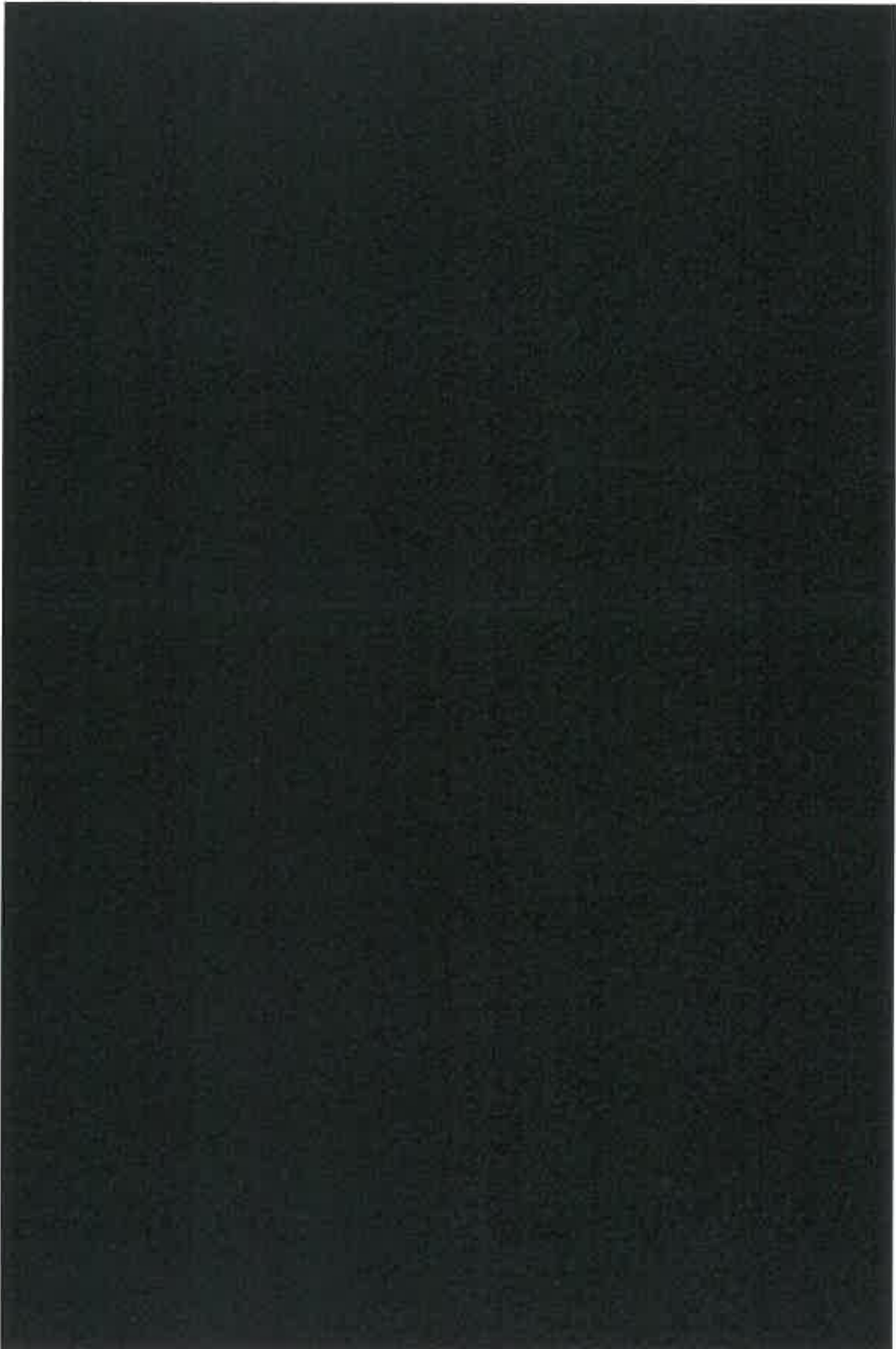
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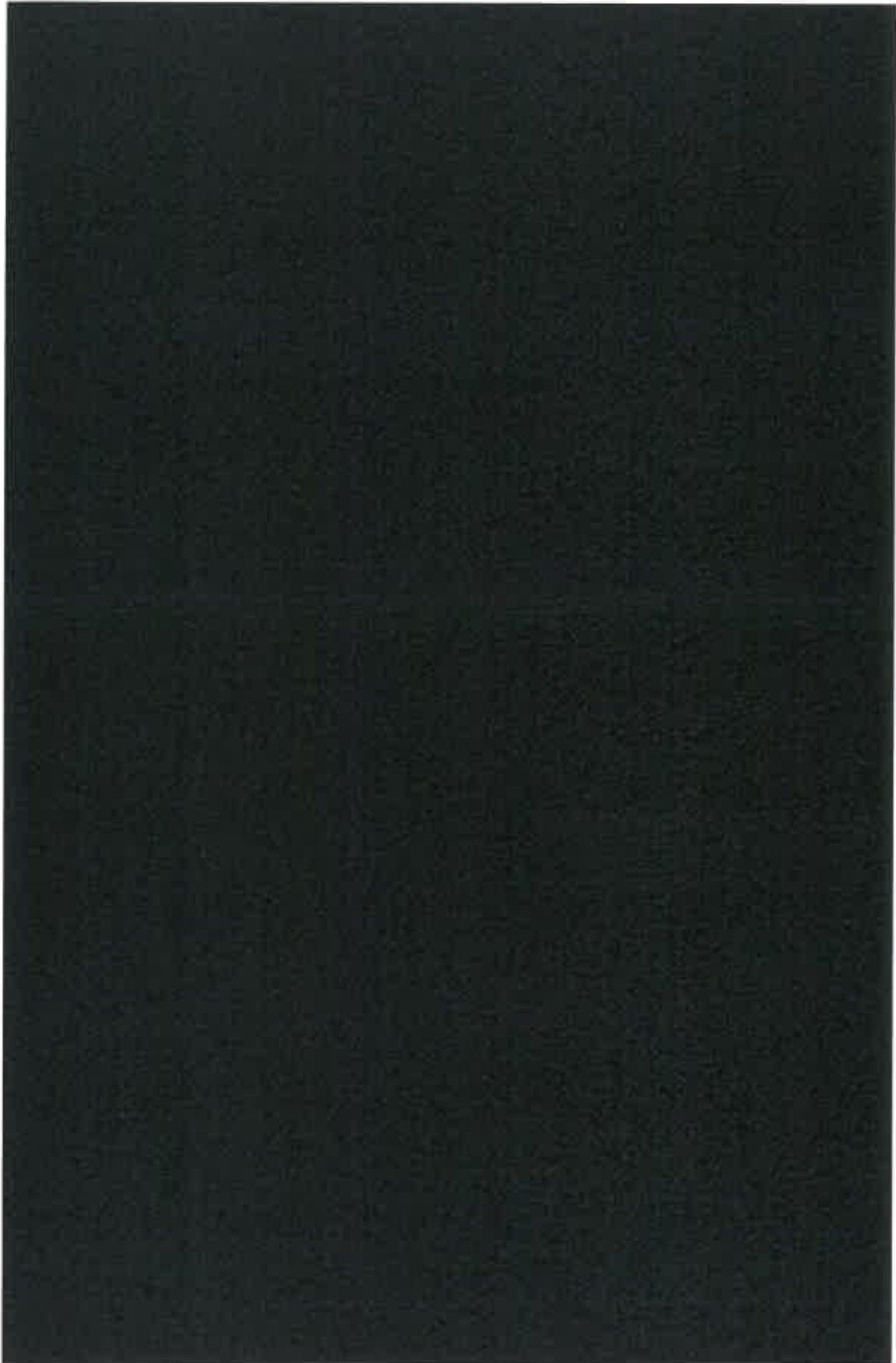
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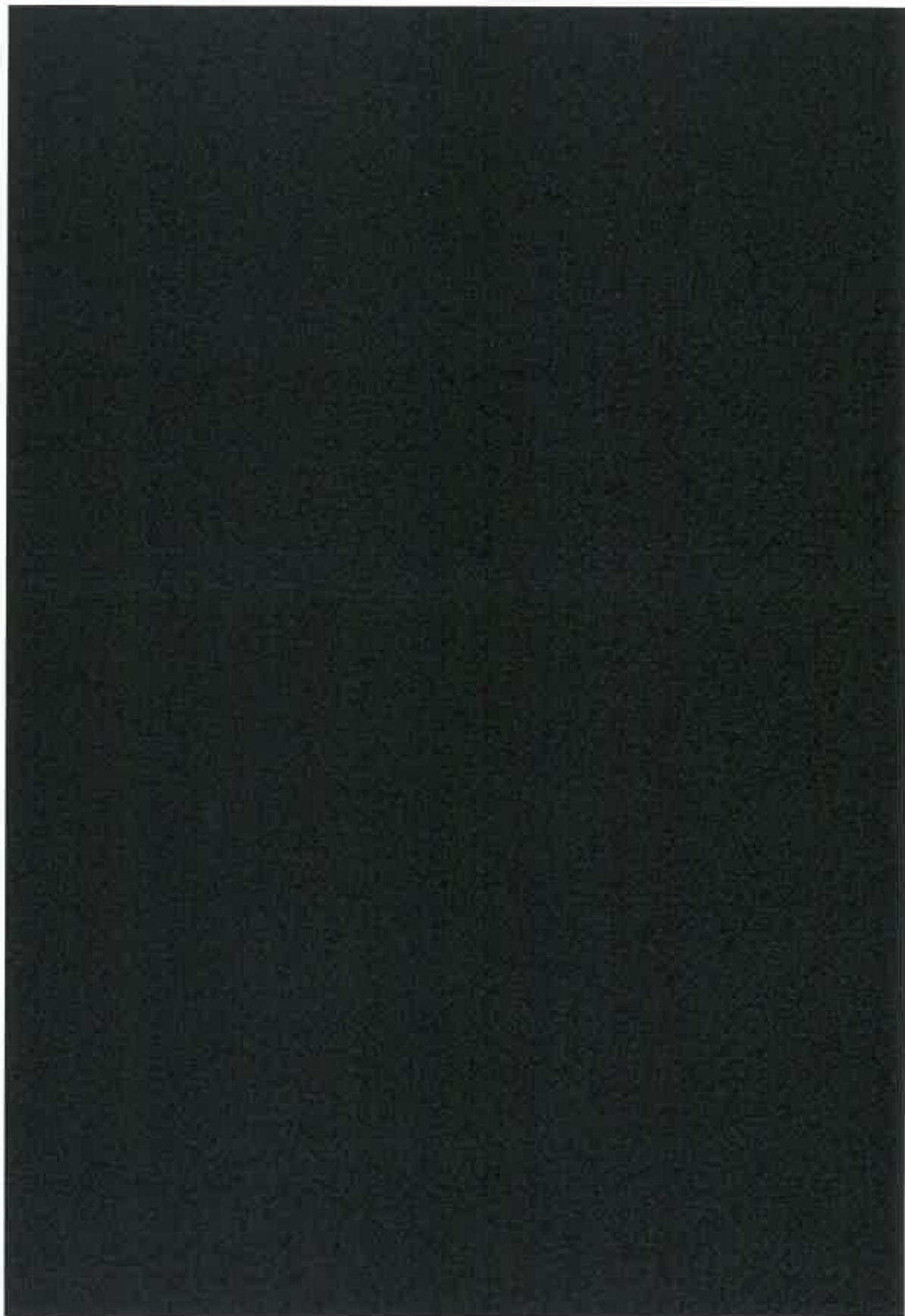
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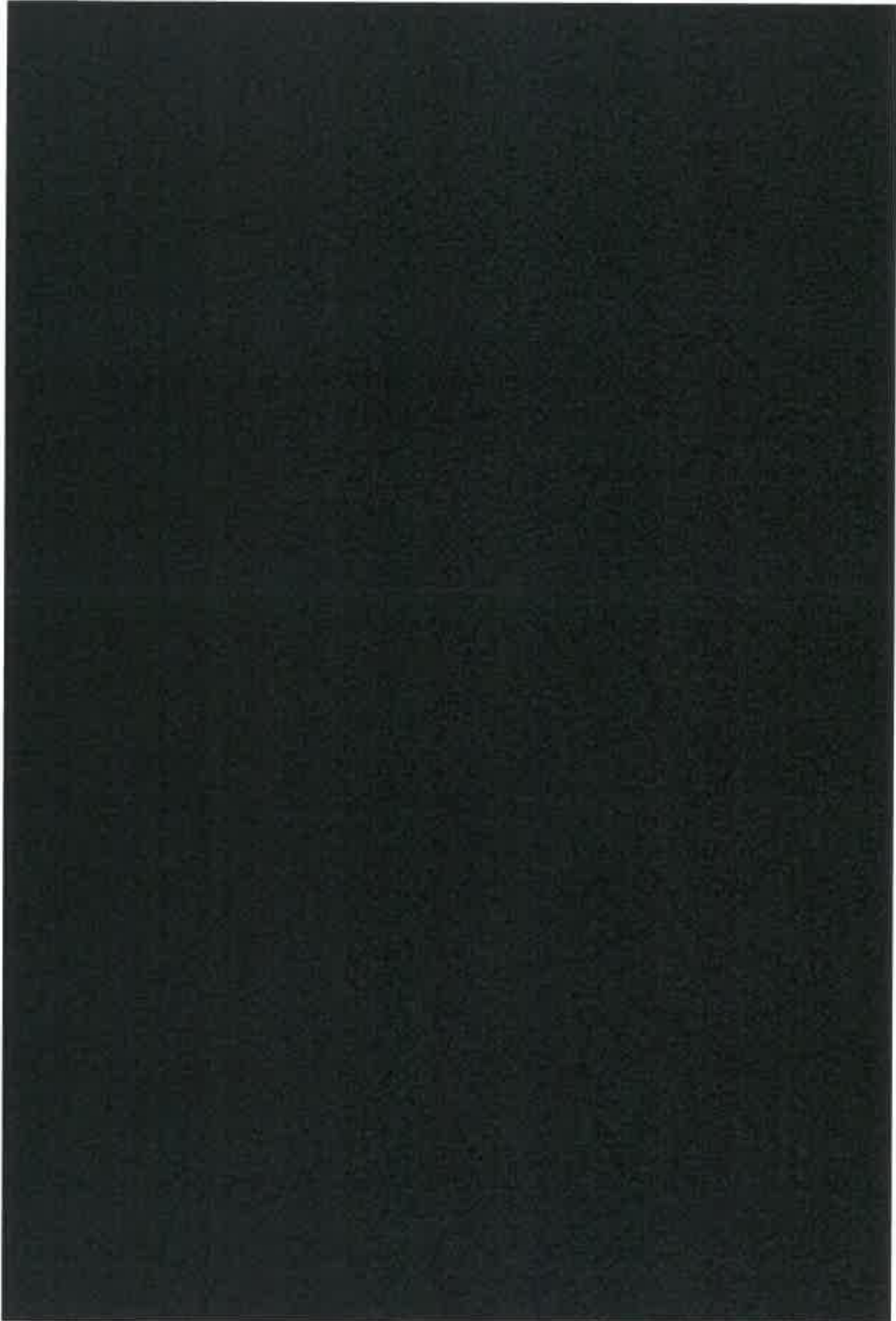


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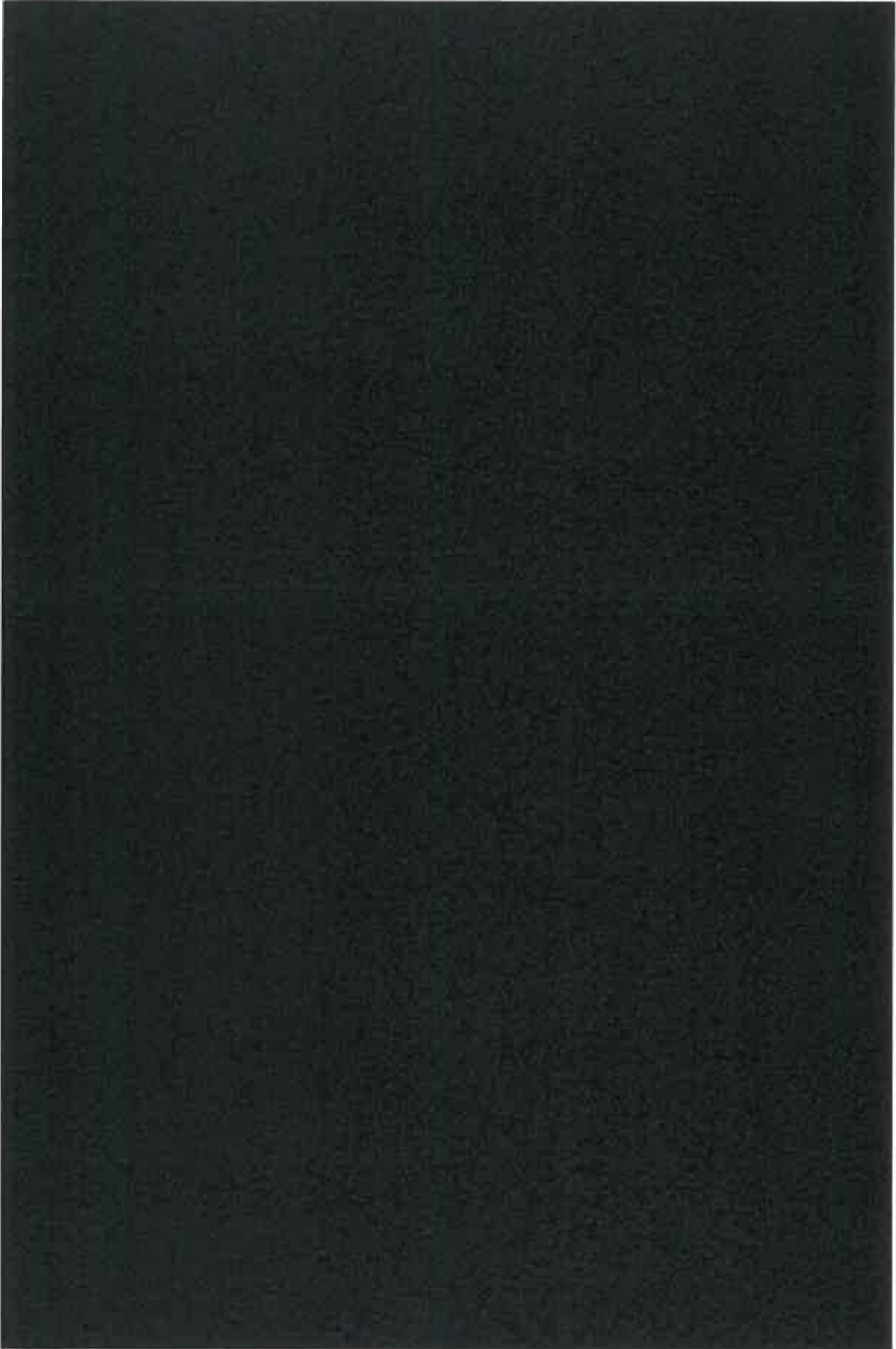


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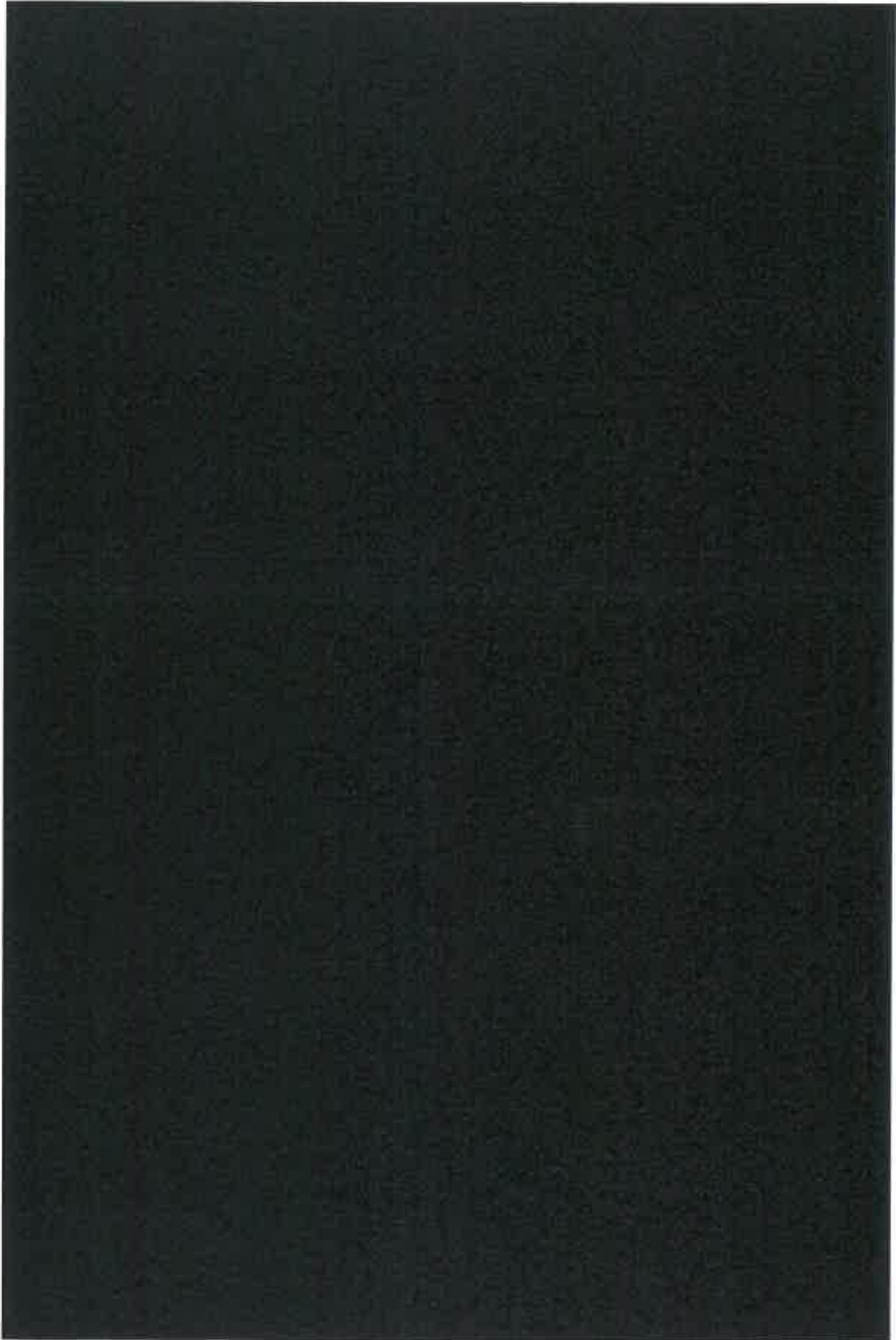


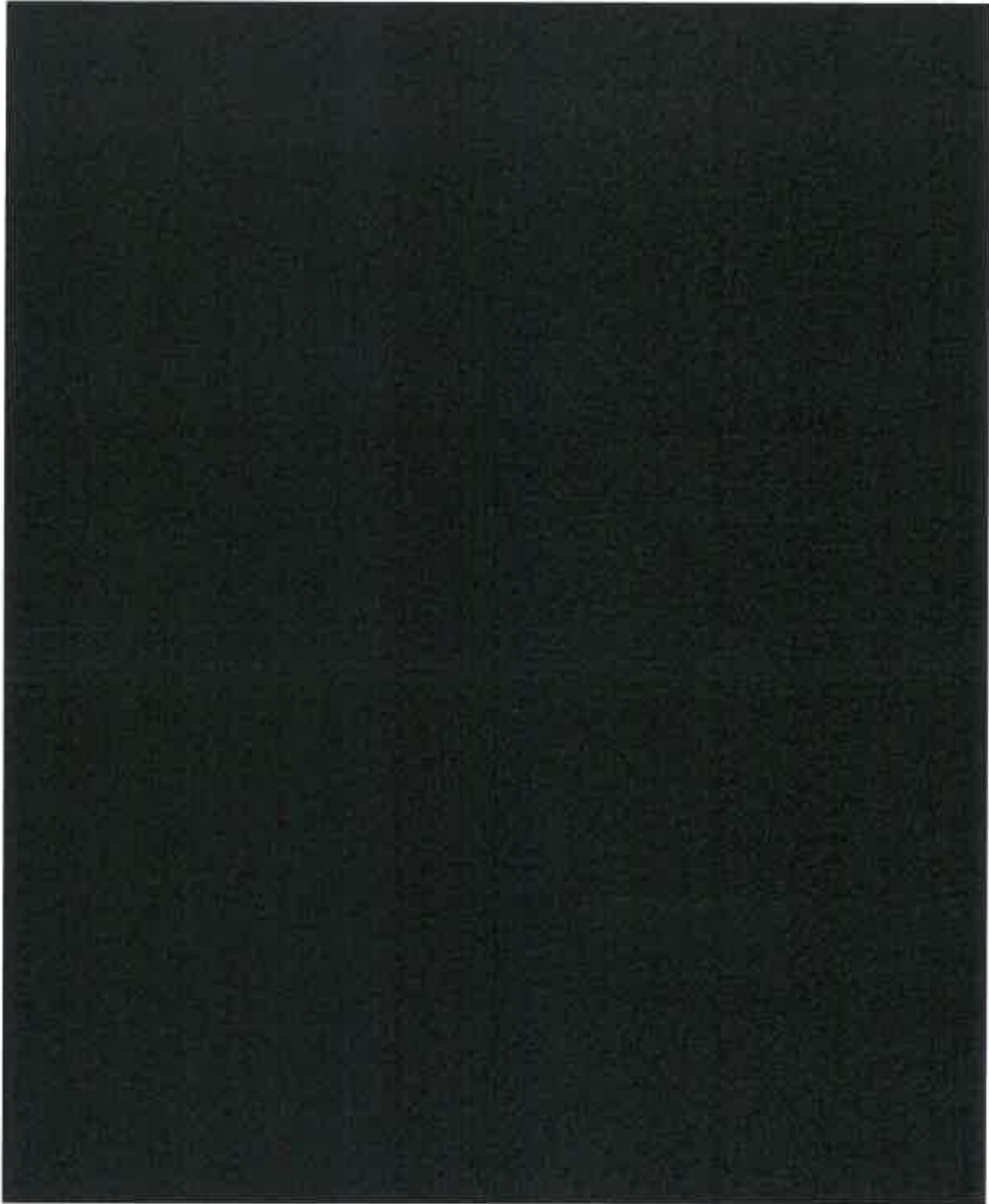
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7. Additional Submissions

Schedule 2

- 7.1 The Draft Recall Notice requires Suppliers to refrain from making factually accurate statements which could assist in managing the recall, while also requiring Suppliers to make certain absolute statements about the risk posed by Affected Takata Airbag Inflators after 5 years which do not reflect Subaru's understanding of the

risk as described in the Blomquist Report. It is not clear how such an approach is in the best interests of customer.

7.2 While Subaru Australia appreciates the ACCC's intention that Suppliers use clear and compelling language when informing consumers of the potential risks in order to improve recall rates (and indeed, to seek to encourage the replacement of Affected Takata Airbag Inflators before they pose any risk to consumers):

- (a) it does not agree with the prohibition on including *"information that is likely to minimise or mitigate the perception of risk"* found in Schedule 2, Part B Item 2(b) unless this is coupled with a clear ability to explain to consumers the concept of relative risk. In circumstances where the logistics of conducting the recall necessarily require judgments about the relative degree of risk posed by different Affected Takata Airbag Inflators, communications to Consumers which *"minimise or mitigate"* perception of risk will be required from time to time to explain to Consumers why priority is being given to a higher risk vehicle. As such, this blanket prohibition will impede the orderly conduct of the recall; and

- (b) it has concerns regarding the absolute nature of the language contained in the mandatory statements regarding the nature of the risks, or when they are said to arise. For example, Part A(1)(b) requires the following statement to be made for vehicles with inflators manufactured more than five years previously: ***"Your vehicles airbag is defective and poses a risk of serious injury and death."*** This statement is inconsistent with Subaru Australia's understanding of when the risk of rupture is said to arise (as set out in 5.7 above), and the ACCC's own FAQs which state: ***"ACCC expects manufacturers to immediately replace all airbag inflators that may present a safety risk, with priority given to alpha affected airbags and vehicles six years and older, as the safety risk occurs after six years from manufacture of the airbag"***⁸.

⁸ <https://www.productsafety.gov.au/news/faqs-on-takata-airbag-recalls> (accessed 6 October 2017).

- 7.3 A requirement imposed on Suppliers to publish statements which do not reflect what is known about the risk posed by Affected Takata Airbag Inflators is not the best interests of consumers as it could cause unnecessary panic or anxiety, and risks unintended consequences under the consumer guarantee provisions of the ACL.
- 7.4 Further, the Draft Recall Notice does not allow Suppliers to inform vehicle owners about risk in circumstances where it is not possible for the Supplier to replace an Airbag immediately. As noted above, this would likely be the case for Subaru Australia. The communications in Schedule 2 Part A, section (1) all assume that a Supplier will be able to comply with the timelines in Schedule 1. There is no provision for communication with vehicle owners in circumstances where the Supplier does not presently have the capability to replace the inflator in a vehicle which is nevertheless subject to a recall. The absence of such communications highlights the difficulty with the Draft Recall Notice referred to at 7.1 above, namely that it makes no provision for communications which manage vehicle owner expectation of risk and explain the need to prioritise replacement on the basis of risk.

Timing of Certain Obligations

- 7.5 There is some uncertainty as to when certain obligations arise under Schedule 1: for example:
- (a) it is not clear whether the period of one month for the replacement of an Affected Takata Airbag Inflator arises from the date on which the Dealer is contacted by the consumer, or the date on which the Supplier is contacted by the consumer (noting that in some instances, the Supplier will never be contacted by the consumer who will deal only with a Dealer); and
 - (b) while the obligation to initiate a recall for Affected Takata Airbag Inflators where less than five years have passed since manufacture at the date of the notice arises "*within five years and three months from the date of manufacture of the Affected Takata Airbag Inflator, or by 31 December 2019, whichever is earlier*", Part A(1)(c) of Schedule 2 to the Draft Recall Notice appears to contemplate a communication to customers in respect of these vehicles ahead of initiation of recall. It is not clear when this obligation arises.
- 7.6 Further, the timing of certain steps required by the Draft Recall Notice appears inconsistent. There is an

apparent inconsistency between the requirement in Schedule 1 to initiate recalls immediately upon commencement of the Recall Notice, and the requirement in section 7(2) to submit a communication and engagement plan to the ACCC within one month of commencement of the Recall Notice.

- 7.7 A similar observation can be made with respect to the obligations to submit plans for Salvaged Affected Takata Airbag Inflators (section 9(2)) and Secondhand Consumer Goods (section 10(2)).
- 7.8 For the avoidance of doubt, in order to ensure that the ACCC is satisfied with the adequacy of its plans, Subaru Australia will proceed on the basis that the various plans are not to be implemented until the ACCC has indicated that they meet the minimum requirements of the notice.

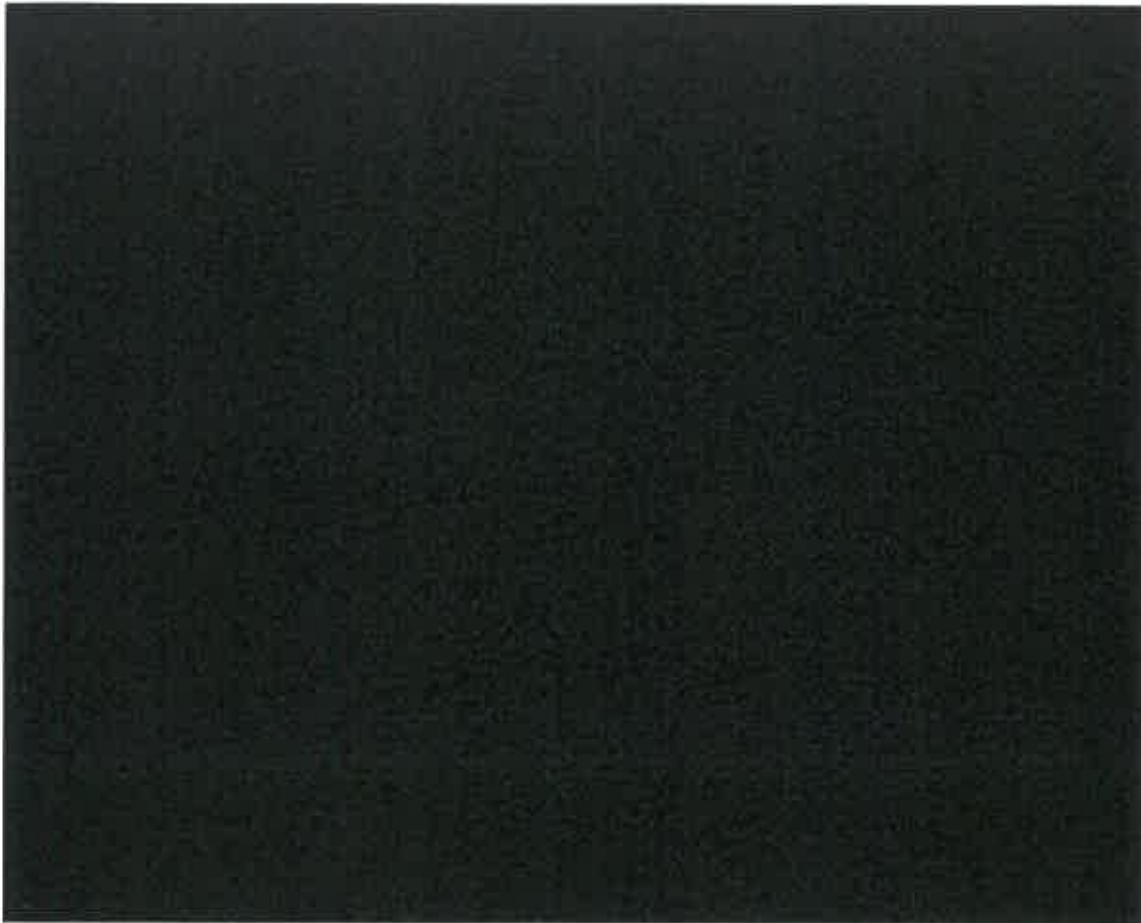
Salvaged Inflators and Second-hand Consumer Goods

- 7.9 While Subaru Australia agrees that steps should be taken to clearly communicate the recall to all parties who may be in possession of an Affected Takata Airbag Inflator, it believes that addressing the recovery of Affected Takata Airbag Inflators from Vehicles that have been scrapped or are otherwise unregistered and not in use is best handled through an industry based approach that deals with scrapyards (which may contain vehicles or parts from many different Suppliers) systematically and addresses the issue on a 'once and for all' basis.
- 7.10 Given Subaru Australia's understanding of the operation of s 127(2) of the ACL (see 6.3 and 6.4 above), it does not agree that any incentive should be provided to replace Affected Takata Airbag Inflators in either secondhand or salvage situations.

Age of Affected Takata Airbag Inflators vs Model Year

- 7.12 For ease of administration Subaru Australia suggests timetabling the initiation of recalls based on the Model Year (MY) of the Vehicle into which the inflator is installed rather than the time since the manufacture of the Affected Takata Airbag Inflators.

Handling of Replaced Affected Takata Airbag Inflators



7.14 The process described in 7.13 is not dependent on establishing whether Takata intend to conduct testing on the Affected Takata Airbag Inflator. Therefore, Subaru Australia requests either:

- (a) the deletion of the words "promptly destroyed so that it cannot be reused, unless it is intended to be used for testing, in which case"; or
- (b) an indication from the ACCC that the above process is otherwise acceptable.

Elements of the Draft Recall Notice are Beyond Power

7.15 Subaru Australia considers that the requirement, in section 5(c) of the Draft Recall Notice that a refund be provided in certain circumstances is beyond the power of the Minister to order in a compulsory recall notice. It goes beyond a recall measure and specifies a remedy to be delivered to a consumer in the event of a failure to comply with the recall notice that is akin to the remedy for a major failure under the consumer guarantee regime.

7.16 That is a function of the Courts in applying the provisions of the Australian Consumer Law. For the

avoidance of any doubt, Subaru Australia does not agree for the purposes of the Draft Recall Notice to undertake to provide any refund for the purposes of section 123(1) (c) or 123(4) of the Australian Consumer Law.

- 7.17 Similarly, for the reasons set out in 7.2(b) above, Subaru Australia considers that some of the Prescribed Language contained in Schedule 2 to the Draft Recall Notice is beyond the power of the Minister to order in respect of Affected Takata Airbag Inflators that are less than 6 years old.

Annexure A - US NHTSA Program

8. Overview of Subaru Australia's Understanding:

- 8.1 The US NHTSA program is embodied in NHTSA's Co-ordinated Remedy Order, last amended on 27 December 2016. The NHTSA program, recognising the practical limitations on the supply of replacement inflators⁹, allocates vehicles affected by the NHTSA action into twelve priority groups, with prioritisation assigned according to the following criteria: (1) age of inflator; (2) geographic location of inflator (adopting a three zone system to divide the United States into affected regions); and (3) location of the inflator in the vehicle (eg driver, passenger or both)¹⁰.
- 8.2 The timelines outlined above reflect the adoption of 5 year from date of manufacture rule, similar to that proposed in the draft notice, but only for Zone A vehicles.
- 8.3 Furthermore, nothing in the NHTSA program reflects or resembles the obligation in the proposed notice to complete recalls for vehicles within one month of customer request. To the contrary:
- (a) the NHTSA program provides for a deadline for Affected Vehicle Manufacturers to acquire a sufficient supply of remedy parts and launch a remedy program which goes well beyond the initial recall dates proposed above¹¹. For example, the priority group 6 (vehicles recalled in January through June 2016), the deadline to launch a remedy program is 30 September 2017; and
 - (b) the NHTSA program incorporates an obligation to implement and execute the recall program so as to achieve certain targets for recall completion which contemplate recall completion in 10 quarters after launch of the remedy program¹².
- 8.4 Accordingly, NHTSA has made a remedy order which provides for a timetable of rolling recalls. Nothing in that program resembles the ACCC's proposed requirement for an immediate recall of all affected airbags, nor is there any maximum time within which an airbag must be

⁹ see Third Amendment to the Co-ordinated Remedy Order, paragraphs 11-12.

¹⁰ see Third Amendment to the Co-ordinated Remedy Order, paragraph 33.

¹¹ see Third Amendment to the Co-ordinated Remedy Order, paragraph 34.

¹² see Third Amendment to the Co-ordinated Remedy Order, paragraph 35.

replaced. In Subaru Australia's submission this is a much better model than the proposed one month rule, which would give Australian vehicles suppliers almost no flexibility in adapting customer demand to service capacity.

- 8.5 The NHTSA schedule is based on evidence provided to NHTSA by experts which is available on NHTSA's website, in particular the Blomquist Report and the analysis for Exponent dated July 2016. The critical finding of those reports (summarised at paragraph 29 of the Blomquist Report) is that risk is a function of time and climate (in particular temperature cycling and humidity). Mr Blomquist's opinion is that the time required to degrade propellant to create a rupture risk in areas of high absolute humidity (described as Zone A) is six to nine years. However in Zone B it is ten to fifteen years and in Zone C it is fifteen to twenty five years. The five year limit in the proposed notice is not founded on available evidence.

Yours sincerely,
Subaru (Aust) Pty Limited



Colin Christie
Managing Director



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