Federal Court of Australia

Ford Motor Company of Australia Pty Ltd v Capic [2023] FCAFC 179

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| Appeal from: | *Capic v Ford Motor Company of Australia Pty Ltd* [2021] FCA715*Capic v Ford Motor Company of Australia Pty Ltd (Revised Common Questions)* [2021] FCA 1320 |
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| File number: |  |
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| Judgment of: | **YATES, BEACH AND DOWNES JJ** |
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| Date of judgment: | 14 November 2023 |
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| Catchwords: | **CONSUMER LAW** – representative proceedings – alleged defects in motor vehicles by reason of deficiencies in transmission system – where primary judge found affected vehicles were not of acceptable quality when supplied to consumers contrary to the guarantee in s 54 *Australian Consumer Law* – whether primary judge applied statutory test – the meaning of acceptable quality in a propensity case – extent to which after supply events should be taken into account when assessing whether guarantee has been met – whether error by primary judge in deciding that component posed a safety risk **DAMAGES** – whether s 271(1) *Australian Consumer Law* gives rise to separate causes of action – whether s 271(6) *Australian Consumer Law* is engaged when failure to repair within reasonable time – construction of s 272 *Australian Consumer Law* – whether earlier decision of Full Court which construed same statutory provision should be followed – whether question of assessment should be remitted to primary judge  |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) Sch 2 (*Australian Consumer Law*)ss 54, 271(1), 271(2), 271(6), 272*Evidence Act 1995* (Cth) s 135*Federal Court of Australia Act 1976* (Cth) Pt IVA, s 33Z(3) *Trade Practices Act 1974* (Cth) s 74D Sale of Goods Act 1893 (UK) s 14(2)United States Code (US) Title 28 § 1782 |
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| Cases cited: | *Australian Competition and Consumer Commission v Jayco Corporation Pty Ltd* [2020] FCA 1672*Australian Competition and Consumer Commission v Mazda Australia Pty Ltd* (2021) 158 ACSR 31; [2021] FCA 1493*Capic v Ford Motor Company (No 3)* [2017] FCA 771*Capic v Ford Motor Company of Australia Limited (No 4)* [2017] FCA 1575*Capic v Ford Motor Company of Australia Pty Ltd* (2021) 154 ACSR 235;[2021] FCA 715*Capic v Ford Motor Company of Australia Pty Ltd (Revised Common Questions)* [2021] FCA 1320*Courtney v Medtel Pty Ltd* (2003) 126 FCR 219;[2003] FCA 36*Dwyer v Volkswagen Group Australia Pty Ltd* [2023] NSWCA 211*Gill v Ethicon Sàrl (No 5)* [2019] FCA 1905*Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association* [1969] 2 AC 31*Medtel Pty Ltd v Courtney* (2003) 130 FCR 182; [2003] FCAFC 151*Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* (2021) 287 FCR 181; [2021] FCAFC 153*Pearson v Minister for Home Affairs* (2022) 295 FCR 177; [2022] FCAFC 203*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28*Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 408 ALR 503; [2023] FCAFC 10*Toyota Motor Corporation Australia Limited v Williams* (2023) 296 FCR 514; [2023] FCAFC 50*Vautin* *v BY Winddown, Inc. (formerly Bertram Yachts) (No 4)* (2018) 362 ALR 702; [2018] FCA 426 |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Number of paragraphs: | 324 |
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| Date of hearing: | 20–24, 28 March 2023 |
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| Counsel for the Appellant: | Ms W Harris KC w/ Mr M Costello KC and Mr T Farhall |
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| Counsel for the Respondent: | Mr J Gleeson SC w/ Dr F Roughley and Mr P Strickland |
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| Counsel for the Respondent: | Corrs Chambers Westgarth |

ORDERS

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|  | NSD 1321 of 2021 |
|   |
| BETWEEN: | FORD MOTOR COMPANY OF AUSTRALIA PTY LTD ACN 004 116 223Appellant |
| AND: | BILJANA CAPICRespondent |

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| order made by: | YATES, BEACH AND DOWNES JJ |
| DATE OF ORDER: | 14 NOVEMBER 2023 |

THE COURT ORDERS THAT:

1. Within 14 days, the parties provide to the Full Court an agreed form of orders, including the answers to the common questions and costs order, having regard to the findings made.
2. If the parties cannot agree on a form of orders and answers to the common questions, then, by 1 December 2023, the parties provide to the Full Court a form of orders (other than costs), and answers to the common questions, which they propose, to be accompanied by written submissions not exceeding five pages.
3. By 1 December 2023, the parties file and serve submissions regarding costs (not exceeding three pages) if agreement cannot be reached on the issue of costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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THE COURT:

# Introduction

1. This is an appeal by FordMotor Company of Australia Pty Ltd (**Ford**) from orders made on 13 August 2021 and 18 November 2021, and the judgment delivered on 29 June 2021 in *Capic v Ford Motor Company of Australia Pty Ltd* (2021) 154 ACSR 235;[2021] FCA 715 (**J**) and the further judgment delivered on 3 November 2021 in *Capic v Ford Motor Company of Australia Pty Ltd (Revised Common Questions)* [2021] FCA 1320 (**CQJ**).
2. The primary judge found that Ford had supplied certain vehicles that were not compliant with the statutory guarantee of acceptable quality in s 54 of the *Australian Consumer Law* (**ACL**), being Sch 2 of the *Competition and Consumer Act 2010* (Cth), by reason of deficiencies in the transmission system giving rise to a propensity for the vehicles to exhibit “a troubling range of behaviours”.
3. Ms Biljana Capic, the respondent to the appeal brought by Ford, has brought a cross-appeal on behalf of herself and the group whom she represents.
4. Both sides have filed Notices of Contention in the other’s appeal.
5. When referring to Ms Capic in her capacity as the group’s representative, we will refer to her as the respondent and when referring to her in her own capacity, we will call her Ms Capic.

## The case brought below

1. The proceedings below concerned various problems alleged to exist with 73,451 vehicles, manufactured by Ford Motor Company (**Ford US**) between July 2010 and December 2016, and imported into Australia by Ford (**Affected Vehicles**). The dates they were supplied new ranged from 22 September 2010 to 29 December 2017. They each contained a 6-speed dry dual clutch PowerShift transmission called the “**DPS6**”. The Affected Vehicles were manufactured under three model lines: Focus, Fiesta and EcoSport.
2. Ms Capic brought these proceedings as a representative proceeding under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) on behalf of herself and the group whom she represents. The group consists principally of the persons who purchased these vehicles new together with subsequent second-hand purchasers between 1 January 2011 and 29 November 2018.
3. Relevantly to this appeal and cross-appeal, Ms Capic brought a claim under s 271(1) of the ACL seeking damages pursuant to s 272(1) of the ACL on the basis that the Affected Vehicles were not of acceptable quality when supplied to consumers contrary to the guarantee in s 54 of the ACL.
4. Before the primary judge, it was alleged that the Affected Vehicles as supplied (which included a car purchased by Ms Capic) suffered from two sets of deficiencies.
5. The first set were described by the primary judge as **Component Deficiencies**. It was claimed that the DPS6 posed four risks related to components within it, namely:
6. Input shaft seals which had a tendency to leak permitting lubricants from the gearbox side of the transmission to enter the part of the bell housing containing the otherwise dry clutch and drive plates and contaminate them;
7. Inadequate **friction material** on the faces of the clutch and drive plates (the friction material is also referred to as the **clutch lining**);
8. A transmission control module (**TCM**) which contained a printed circuit board (**PCB**) to which was affixed, amongst other things, two types of integrated circuits or chips known as an “**ATIC 91**” chip and an “**ATIC 106**” chip. These were affixed to the PCB by means of solder. It was claimed that the coefficients of thermal expansion of the PCB and the ATIC 91 and ATIC 106 chips were different and that repeated heating and cooling of the TCM (which is attached to the transmission assembly) created a risk of the solder cracking; and
9. A rear main oil seal which had a tendency to leak thereby permitting lubricants to enter the bell housing from the engine side of the transmission and contaminate the clutch and drive plates.
10. The second set were said to give rise to a risk of certain symptoms (the principal, but not only, symptom being shudder) because of what were said to be two architecture features of the DPS6 (described variously as the **Architecture Deficiencies** or the **Architectural Deficiencies**). These were (1) inadequate heat management and (2) inadequate damping of torsional vibrations. These problems were designated as associated with the architecture of the DPS6 because of a contention that they could not be cured without changes to that architecture and that this in fact had not occurred.

## Ruling by primary judge in relation to admission of documents

1. During the trial, Ford objected to the respondent’s attempt to tender certain documents on the basis that it would be procedurally unfair for them to be admitted. For the most part, this objection was upheld: [924]–[955] J.

## Overview of findings by the primary judge relating to claims by Ms Capic

1. The following is a summary of the findings of the primary judge in relation to the claims by Ms Capic on her own behalf and which are relevant to the appeal and cross-appeal.
2. Ms Capic purchased a 2012 Ford Focus on 24 December 2012.
3. In relation to the Component Deficiencies, it was Ms Capic’s case that each of the first three risks eventuated in the case of her vehicle and gave rise to a range of symptoms including shudder. Her case, however, was not that her vehicle was not of acceptable quality because three of the risks materialised; it was rather that it was not of acceptable quality because it was supplied with the four risks inherent in it.
4. As to this part of Ms Capic’s case, the primary judge decided that:
5. Ms Capic established the existence of each of the risks except the risk said to arise from the rear main oil seal: [5] J. We observe that no appeal has been brought in relation to the rear main oil seal;
6. for each risk, Ms Capic had a separate cause of action under s 271(1) of the ACL entitling her to claim damages from Ford under s 272: [5] J;
7. in the case of Ms Capic’s vehicle, the three accepted risks also manifested themselves and, after they did, her vehicle displayed a troubling range of behaviours which caused Ms Capic to take her vehicle for servicing and to complain about these problems: [6] J;
8. Ford did not satisfactorily resolve the problem relating to the friction material: [8] J;
9. the risk inherent in the input shaft seals with which Ms Capic’s vehicle was supplied was eliminated when they were replaced by Ford, but this was not done within a reasonable time: [10]–[11] J;
10. the risk posed by the TCM failing was not removed when Ford installed a software update known as “**15B22**” which detected solder cracking before actual symptoms became perceptible to the driver: [7] J;
11. the risk posed by the TCM failing was removed when Ms Capic’s vehicle received a new TCM with the revised ATIC 91 chip, but this was not done within a reasonable time: [7], [10]–[11] J;
12. Ms Capic did not demonstrate the existence of the problem with the original ATIC 106 chips: [7] J.
13. Ford asserted below that it was entitled to rely upon s 271(6) of the ACL in response to Ms Capic’s claim, but this was rejected by the primary judge because of the findings made above. The primary judge was therefore satisfied that Ms Capic was entitled to sue Ford for the reduction in value damage which she suffered as a result of the supply to her of a vehicle with the three inherent risks: [11] J.
14. As to the Architecture Deficiencies, the primary judge decided at [13] J that:
15. the heat management case failed;
16. the manner in which the DPS6 damped torsional vibrations generated a risk that the gears in Ms Capic’s vehicle would rattle and her vehicle would display a slight shudder at low speeds;
17. Ford described the gear rattling and a slight shudder at low speeds as “normal operating characteristics” of the DPS6 and so did not attempt to resolve them. However, the primary judge considered that the fact that gear rattling and a slight shudder at low speeds were described as normal operating characteristics did not have the consequence that they cannot constitute a breach of the guarantee of acceptable quality;
18. the fact that Ms Capic’s vehicle was supplied with these two problems inherent in it had the consequence that it was not of acceptable quality for the purposes of s 271(1) and she had another cause of action against Ford in respect of them.
19. Ms Capic was awarded damages for reduction in value in the amount of $6,820.91 and other reasonably foreseeable loss and damage under s 272(1) of the ACL: [14]–[15] J. Although Ms Capic made a claim for damages for inconvenience, distress and vexation in her pleadings, she did not pursue it in her submissions and so the primary judge made no award for it: [16] J.

## Overview of findings by the primary judge relating to claims by the group

1. The following is a summary of the findings by the primary judge in relation to the claim by the group and which are relevant to the appeal and cross-appeal.
2. As to the Component Deficiencies, the primary judge decided that:
3. the vehicles which were supplied with the original input shaft seals posed a risk of failure with the consequence that all of these vehicles were at the time of their supply not of acceptable quality: [19] J;
4. the vehicles which were supplied with the original clutch lining material (known as “**B8080**”) suffered from a risk of developing symptoms such that they did not comply with the guarantee of acceptable quality: [23] J;
5. the vehicles supplied with TCMs containing the original ATIC 91 chip were not of acceptable quality at the time of their supply because of the risks they posed: [30] J;
6. the claim based on the supply of vehicles with TCMs containing the original ATIC 106 chip failed: [29] J;
7. the vehicles supplied with a TCM with the revised ATIC 91 chip were not in breach of the guarantee of acceptable quality: [29] J;
8. the claim based on the supply of vehicles with an inherent risk of failure due to the rear main oil seal failed: [33] J. We observe that no appeal has been brought in relation to the rear main oil seal.
9. As to the application of s 271(6) of the ACL to the claim concerning the input shaft seals, the primary judge decided that:
10. in vehicles in which the original input shaft seals had not been replaced, those group members have claims under s 271(1) for reduction in value damages under s 272(1)(a) and (if applicable) other reasonably foreseeable loss and damage under s 272(1)(b) of the ACL: [20] J;
11. where the input shaft seals had been replaced with seals containing both the new “FKM” elastomer and a steel outer backing on the inner seal, the issue of whether the repair was effected within a reasonable time had not been tried and turned on the individual position of each group member: [21] J. It could not be known whether these group members have claims for reduction in value damages, although they may have claims for other reasonably foreseeable loss and damage under s 272(1)(b) of the ACL: [22] J;
12. where the input shaft seals had been replaced with seals containing only the new FKM elastomer but not the new steel backing on the inner seal, the extent of the remaining risk was not established: [22], [680] J.
13. As to the application of s 271(6) of the ACL to the claim concerning the clutch lining, the primary judge decided that:
14. in the case of vehicles in which the original clutch lining (the B8080) was not replaced, those group members have claims under s 271(1) for reduction in value damages under s 272(1)(a) and (if applicable) other reasonably foreseeable loss and damage under s 272(1)(b) of the ACL: [24] J;
15. in the case of vehicles which received replacement clutches using clutch lining known as “**RCF1o**”, this replacement removed the relevant risk. The issue of whether the repair was effected within a reasonable time had not been tried and turned on the individual position of each group member. It could not be known whether these group members have claims for reduction in value damages, although they may have claims for other reasonably foreseeable loss and damage under s 272(1)(b) of the ACL: [25] J;
16. in the case of vehicles which received a replacement clutch known as a “**half-hybrid B8040/B8080 clutch**”, this replacement did not remove the relevant risk. As s 271(6) does not apply, these group members have claims for reduction in value damages as well as for other reasonably foreseeable loss and damage under s 272(1)(b) of the ACL: [26] J;
17. in the case of vehicles which were supplied with the half-hybrid B8040/B8080 clutch, the group members did not have a claim in respect of the clutch lining: [27] J;
18. in the case of vehicles which were supplied with RCF1o, the group members did not have a claim in respect of the clutch lining: [28] J.
19. As to the application of s 271(6) of the ACL to the claim concerning vehicles supplied with TCMs containing the original ATIC 91 chip, the primary judge stated at [30] J that:

…The Respondent applied two fixes. First, each vehicle which was presented for service after 27 October 2015 received a software update known as 15B22. It did not address the physical problem of solder cracking but it detected that problem before the symptoms associated with it became perceptible to the driver and disabled the vehicle in a sufficiently confronting way, attended with warning lights and messages, that it may be accepted that a driver would take the vehicle in for service almost immediately and without fail. Secondly, once new TCMs with the revised ATIC 91 chip became available these were inserted into vehicles which showed symptoms of TCM failure or which had been brought in for service due to the operation of the warning system instituted by the 15B22 software update.

1. At [32] J, the primary judge found that the replacement of the original TCM with a new TCM with the revised ATIC 91 chip was “a successful repair and removed the risk posed by the original TCM” but that, again, “in the case of each such group member it is not presently known whether the replacement was effected within a reasonable time”. For this reason, the primary judge concluded that it could not be known whether these group members have claims for reduction in value damages.
2. As to the Architecture Deficiencies, the primary judge decided that:
3. the claim based on the supply of vehicles with an inherent risk of failure because of the way in which heat was managed in the DPS6 failed: [34] J;
4. the DPS6 did not suffer from the Architecture Deficiency constituted by inadequate torsional damping; however, all Affected Vehicles had a risk that they would develop rattling gears and slight shudder at low speeds due to the manner in which the DPS6 damps torsional vibrations, with the consequence that the Affected Vehicles did not comply with the guarantee of acceptable quality: [35], [530] J.
5. The group members sought damages on an aggregate basis, but the primary judge determined that he could not be satisfied that a reasonably accurate assessment could be made of the total amount to which group members would be entitled, as required by s 33Z(3) of the *Federal Court of Australia Act*: [36] J.

# Ford’s appeal on liability

1. By grounds 1, 2 and 3 of the Amended Notice of Appeal, Ford raises related complaints about the manner in which the primary judge construed s 54 of the ACL, and approached the task of assessing whether the statutory guarantee had been met. We turn then to consider that provision, and the issues raised by these grounds generally, before addressing the grounds themselves in more detail.
2. Section 54(1) of the ACL relevantly provides that, if a person supplies goods to a consumer in trade or commerce (as was the case here), there is a guarantee that the goods are of acceptable quality.
3. Sections 54(2) and 54(3) of the ACL provide guidance as to the meaning of “acceptable quality” in s 54(1) as follows:

(2) Goods are of ***acceptable quality*** if they are as:

(a) fit for all the purposes for which goods of that kind are commonly supplied; and

(b) acceptable in appearance and finish; and

(c) free from defects; and

(d) safe; and

(e) durable;

as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard as acceptable having regard to the matters in subsection (3).

(3) The matters for the purposes of subsection (2) are:

(a) the nature of the goods; and

(b) the price of the goods (if relevant); and

(c) any statements made about the goods on any packaging or label on the goods; and

(d) any representation made about the goods by the supplier or manufacturer of the goods; and

(e) any other relevant circumstances relating to the supply of the goods.

(emphasis original.)

1. In Ford’s appeal, there are three issues raised in connection with the proper interpretation of s 54, and the approach taken by the primary judge in its application, being:
2. whether the primary judge applied the correct statutory test. In particular, whether the primary judge applied s 54 as requiring a standard of perfection;
3. the meaning of “acceptable quality” in s 54 in a propensity case;
4. whether, and to what extent, after supply events are taken into account when assessing whether the guarantee in s 54 has been met.

## Whether primary judge applied the correct statutory test

1. As observed at [52]–[53] J, the respondent’s case that the Affected Vehicles were not of acceptable quality was made on the basis that the vehicles had a propensity towards, or risks of, certain identified misbehaviours. The case was therefore about the existence of propensities (or risks) of identified forms of vehicle misbehaviour. The method of proof selected by the respondent was to seek to demonstrate that the propensities or risks existed because of particular mechanical features of the DPS6.
2. We turn then to consider the reasons of the primary judge.
3. At [54] J, the primary judge identified the nature of the evidence which the respondent relied on to prove the existence of the risks of the alleged misbehaviours. At [55] J, the primary judge identified that a more fulsome explanation of the respondent’s case that the vehicles suffered from the risks of misbehaviour identified by Dr Greiner (the respondent’s expert) was contained in Section XVI of the reasons. At [58] J, the primary judge summarised the case that Ford was required to meet on the existence of the alleged propensity of the vehicles to misbehave.
4. In section VI of the reasons, the primary judge addressed the issue of the leaking input shaft seals. Harking back to the earlier discussion concerning the manner in which the respondent sought to establish liability, the primary judge observed at [221] J that:

[The] question in the case is whether the vehicles pose a risk of a particular set of failures and are, for that reason, not of acceptable quality under s 54. **Whether that risk proceeds from features of the input shaft seals which have their origins in manufacturing processes or instead design processes (or both) is irrelevant to that question**.

(emphasis added.)

1. Section VIII of the reasons addressed the “TCM Issue”. The respondent contended that, before the introduction of the 15B22 software update, this posed a safety issue. The primary judge considered this to be something of a side issue. At [388] J, the primary judge again referred to the actual question for determination, being whether the vehicles were of acceptable quality within the meaning of s 54 of the ACL. His Honour continued:

The safety risk the Applicant puts forward is that which arises from the ATIC 91 chip and is limited to the symptom consisting of a total loss of motive power. If one makes the assumption that the Applicant succeeds in proving that, as sold, the vehicles had a real risk of a total loss of motive power whilst driving then the question is whether a vehicle with that real risk is of acceptable quality within the meaning of s 54. If on the other hand, the Applicant fails to show the existence of such a real risk then the issue does not seem to arise. **On this view of affairs, the question of whether the real risk was also a safety risk does not seem to matter very much**.

(emphasis added.)

1. Section X of the reasons addressed the alleged Architecture Deficiencies. The primary judge observed at [456] J that:

…The question of whether the damping systems for the DPS6 are adequate from an engineering perspective is not quite the same question as whether vehicles fitted with a DPS6 are of acceptable quality for the purposes of ACL s 54. For example, it is often said that the Sydney Harbour Bridge is over-engineered in the sense that it was built much stronger than it needed, in fact, to be. In that sense, its engineering was inadequate because excessive resources had been devoted to achieving a strength which was of no practical utility. The bridge however is perfectly adequate from the perspective of all those who have driven over it.

1. The primary judge continued at [500] and [512] J:

…It is not enough to say that the damping was inadequate per se. This is because this is a case under ACL s 54 and the Applicant needs to show that the vehicles were not of acceptable quality. **That question is a consumer-facing question**…

…

…Assuming in the Applicant’s favour that the use of clutch slip generated heat and that the heat management system was not sufficient to deal with this, the question then arises: what actual problem did this cause? By itself a hot transmission does not translate into a vehicle which is not of acceptable quality within the meaning of s 54. **There must be something about the excess heat which impacts negatively on a consumer’s enjoyment of a vehicle fitted with the DPS6.**

(emphasis added.)

1. At [529] and [530] J, the primary judge stated:

…To label the engineering qualities of the DPS6 with the word ‘deficiency’ or its damping system with the word ‘inadequate’ carries a particular risk that such a designation will contaminate the assessment of the statutory question. Where that word is used in an engineering context that risk is augmented. **What is a deficiency from an engineer’s perspective may not necessarily be unacceptable from a consumer’s perspective.**  Indeed, it is precisely the prospect of such an outcome which underpins the Respondent’s contention that the DPS6 complies with the s 54 guarantee because shudder, harsh gear shifts, rattle, shunting and mechanical sounds during gear shifts are but its normal operating characteristics. Such an outcome is not logically excluded merely because a transmission engineer might think the torsional damping provided in the DPS6 could have been better.

I therefore do not accept the Applicant’s contention that the DPS6 suffered from the Architectural Deficiency constituted by inadequate torsional damping. However, as I have explained I do accept that torsional vibrations caused 2 of the 5 normal operating characteristics which the Respondent admitted. **Rejection of this contention does not, however, tell one anything about whether those characteristics meant the vehicles did or did not comply with the guarantee of acceptable quality in s 54.**

(emphasis added.)

1. Section XII of the reasons addressed the topic of acceptable quality.
2. After identifying that the issue is governed by s 54 of the ACL, the primary judge quoted the provision at [603] J, and then stated at [606]–[607] J:

… [F]or present purposes, the issue is whether the vehicles were of ‘acceptable quality’ within the meaning of s 54(1). The language of s 54(1) suggests that the guarantee applies at the time of supply of vehicles. The issue is therefore whether the vehicles were of acceptable quality at the time of supply.

‘Acceptable quality’ is defined in s 54(2), extracted above. The relevant portions of this are the requirement that the vehicles be fit for all purposes for which such vehicles are commonly supplied, be free from defects, be safe and be durable. In deciding whether the vehicles satisfied those requirements one is required by s 54(2) to have regard ‘to the matters in subsection (3)’, also extracted above.

1. The next section of the primary judge’s reasons, which spans [614] to [637] J, contains an analysis by the primary judge of the matters listed in s 54(3) of the ACL. At [614] J, the primary judge introduced this section by stating:

It is therefore necessary to consider whether each of the inherent risks of failure I have concluded existed were such as to mean that the vehicles were not of acceptable quality. However, that assessment is required by s 54(2) to be conducted having regard to the matters in s 54(3) which are therefore mandatory matters which the Court must assess…

1. The primary judge then proceeded to address each of the matters in s 54(3), before stating at [637] J that, having surveyed the mandatory matters in s 54(3), it was necessary to consider each of the problems which had been identified. The primary judge then did so, and referred back to his consideration of the matters in s 54(3), without repeating them, which he was entitled to do: see, for example, [640] and [669] J. No error is shown by taking such an approach as it is plain that, when making such references, the primary judge was referring to the section of his reasons which addressed the mandatory considerations in s 54(3) at [614]–[637] J.
2. It is a central contention by Ford on its appeal that the primary judge erred because he applied a standard of “acceptable quality” that demanded perfection, or something close to perfection, which is not the standard envisioned by the statutory phrase. When making this submission, Ford focused on particular sentences or paragraphs in his Honour’s reasons for judgment, such as the final sentence of [671] J that, “New cars should not have a tendency to rattle, even slightly”.
3. However, having regard to the reasons as a whole, especially those extracted above, that is not a fair characterisation of the approach taken by the primary judge. In particular, had the primary judge applied such a standard then (for example) he would not have observed at [612] J (quoted below) that not every inherent risk of failure will have the consequence that goods are not of acceptable quality, or emphasised that the test of acceptable quality is gauged by reference to a consumer’s *reasonable* expectations.
4. A related submission by Ford is that the primary judge applied the standard in absolute terms, and not by reference to what a reasonable consumer (with the requisite knowledge) would regard as acceptable. This submission was advanced on the basis that his Honour’s reasons addressed the issue of whether the vehicles were free from defects without mention of, or regard to, the expectations of the hypothetical reasonable consumer. Again, Ford focused on particular paragraphs within the judgment to demonstrate this.
5. However, there was no error in the approach taken by the primary judge. As is evident from the reasons which are extracted or noted above, the primary judge identified the basis upon which the case had been brought under s 54, namely that the vehicles had a propensity towards, or risks of, certain identified misbehaviours. In the course of addressing the evidence, and making factual findings about whether that case had been established, the primary judge reinforced that he was addressing the respondent’s case under s 54: see, for example, [221], [388], [456] and [530] J. As we have noted, the primary judge then set out the text of s 54 and addressed the nature of the respondent’s case within that specific framework, with express references made in [612] and [613] J to the consumer’s reasonable expectations. After addressing the mandatory matters in s 54(3) by reference to the facts as found, the primary judge then addressed each of the alleged problems, referring back to the s 54(3) analysis but also through the prism of acceptable quality which had been the subject of earlier analysis in the reasons. That he did so is apparent from a fair reading of the reasons as a whole including particular paragraphs of the reasons which will be addressed in relation to specific grounds of appeal. In these circumstances, it was not necessary for the primary judge to refer repeatedly and expressly to the fact that he was assessing whether the vehicles were of acceptable quality by reference to the perception of the reasonable consumer within the meaning of s 54. It is plain that his Honour did so. No error has been demonstrated.

## The meaning of “acceptable quality” in s 54 in a propensity case

1. It was common ground on the appeal that a propensity case which alleges breach of the statutory guarantee contained in s 54 of the ACL turns on two interrelated variables, namely the severity of the problem if it arises and the probability of the problem arising. It is the assessment of those variables which informs the conclusion as to whether the goods are of acceptable quality as required by the statutory guarantee.
2. So much was accepted by the primary judge. We agree that is the correct approach.
3. The relevant aspects of the primary judge’s reasons are at [608]–[613] J:

The Applicant’s case took as its starting point that the vehicles fitted with the DPS6 had various risks of failure. The Applicant contended that goods with a risk of failure would not be of acceptable quality. She relied on this Court’s decision in *Courtney v Medtel Pty Ltd* [2003] FCA 36; 126 FCR 219 (‘*Medtel*’). In that case it was found that Mr Courtney was entitled to recover damages for the pain, suffering, loss of enjoyment of life and economic loss associated with having removed from his chest cavity a particular kind of sub-optimal pacemaker. The pacemaker unwisely utilised ‘yellow spool solder’ which is bad. The use of yellow spool solder was generally attended by a risk of dendritic failure which is why Mr Courtney had the pacemaker removed. On inspection of the blighted pacemaker following its successful explantation from Mr Courtney it was ascertained that it had always functioned normally and, indeed, had it not been explanted it would probably not have failed prematurely. The risk with the yellow-spool solder, though real, would likely never have eventuated in Mr Courtney’s case. With hindsight one could say that the explantation had been unnecessary. Indeed, this is precisely what the manufacturer did say in resisting Mr Courtney’s claim.

The trial judge, Sackville J, understandably rejected this unattractive submission. He concluded that the pacemaker was not of merchantable quality because it had a superadded risk of failure, that is, a superadded risk that it would be unable to fulfil the purpose of restoring or maintaining the heart rate of patients experiencing electrical heart-related problems: *Medtel* [224]. It was not to the point that in the individual case the risk might not have transpired. The Full Court upheld the trial judge’s conclusions: *Medtel v Courtney* [2003] FCAFC 151; 130 FCR 182. Branson J with whom Jacobson J agreed observed at [78]:

In my view, having regard to the evidence before the primary judge … no error can be shown to have been involved in his Honour’s conclusion that a pacemaker that has only the ordinary or usual risk of premature failure is more fit for the purpose of being used as a pacemaker than a pacemaker that has, by reason of the method of its manufacture, an appreciably higher risk of premature failure. In this case it was reasonable to expect, at the time of the supply to Mr Courtney of his pacemaker, that Mr Courtney’s pacemaker had been manufactured in a way which gave rise to only the ordinary or usual risk of premature failure. However, the use of yellow spool solder in the manufacture of Mr Courtney’s pacemaker meant that Mr Courtney’s pacemaker had an appreciably higher risk of premature failure than the ordinary or usual risk of premature failure to be expected in pacemakers.

This reasoning has been applied to other goods with an inherent risk which renders them not of acceptable quality: eg, components in satellite broadband devices in *APS Satellite Pty Ltd (formerly known as “SkyMesh Pty Ltd”) v Ipstar Australia Pty Ltd*  [2016] NSWSC 1898 (‘*APS Satellite*’) at [69]-[82] per Rein J (while the case was not on all fours with *Medtel*, his Honour recognised the reasoning in *Medtel* as an authoritative approach to ‘prone to failure’ cases); high density polyethelene containment liner in *Protec Pacific Pty Ltd v Steuler Services GmbH & Co KG* [2014] VSCA 338 at [516]-[531] per Tate, Santamaria and Kyrou JJA (although the claim failed); and, ocean going recreational fishing vessels in *Vautin v BY Winddown, Inc. (formerly Bertram Yachts) (No 4)* [2018] FCA 426; 362 ALR 702 (‘*Vautin*’)at [145]-[151] per Derrington J.

The Respondent submitted that *Medtel* was distinguishable because a pacemaker was a non-discretionary good upon which a consumer’s life might depend. There was no comparison to be made between the nature of a pacemaker and the nature of a vehicle or between the potential for a pacemaker to fail and the potential for a vehicle to exhibit non-safety related issues. Further, there was no way the pacemaker in Mr Courtney’s chest could have been checked for yellow spool solder; explantation was the only reasonable course open.

I accept that not every inherent risk of failure will have the consequence that goods are not of acceptable quality. The conclusion in any particular case will be a function of the nature of the feared failure and the extent of the risk of its occurrence, measured against the consumer’s reasonable expectations of how the product ought to behave. Sometimes the failure will be trivial or the risk insubstantial and in such cases the claim may fail. Further than this, at least in principle, seems dangerous to go.

Plainly enough the risk in *Medtel* was a very serious risk from Mr Courtney’s perspective but I do not read the case as stipulating that inherent risk claims are confined to those where the risk is life-threatening or of some similar ominous standard separate from the standard embedded in the statutory questions embodied in s 54(2) itself: the consumer’s reasonable expectations of the fitness for purpose, appearance, lack of defects, safety and durability of the product in question (see *Medtel* at [224] per Sackville J). In *APS Satellite* the risk was that the satellite kit was prone to leak which is hardly the stuff of drama. In *Vautin* the way in which the vessel had been constructed exposed its hull to a risk of delamination in heavy seas. These perils are not of the genre to which the Respondent seeks to confine the *Medtel* principle. I conclude that the principle is not so confined.

1. As part of its appeal, and by reference to this analysis, Ford is critical of the primary judge’s evaluation of the variables. While Ford accepts that the likelihood of the problems arising with the vehicles was undoubtedly higher than was desirable, it submits that the magnitude of the consequences of the risk manifesting were within the parameters that a reasonable consumer would accept, taking into account that the Affected Vehicles were purchased with a warranty and that the consequences if the components did fail “were, at worst, intermittent issues that might impact the driver’s comfort”. Ford submits that this is an important distinction from the authorities on propensity relied on by the primary judge.
2. Ford contrasts the present case with *Courtney v* ***Medtel*** *Pty Ltd* (2003) 126 FCR 219;[2003] FCA 36 where the consequence of the risk materialising was potentially fatal. It submits that, in such a case, the risk of failure does not have to be very high when the consequence of failure is death. In relation to the other cases cited by the primary judge, Ford refers to the fact that, in those cases, the product became unusable, which was not the situation with the Affected Vehicles which had “at worst, intermittent issues that might impact the driver’s comfort”.
3. However, there is no textual basis for confining the statutory language of “acceptable quality” in s 54 of the ACL to “not potentially fatal” or “unusable”. This is demonstrated by the nature of the requirements in s 54(2) which include but are not limited to the appearance or finish of the goods, and durability. Thus the guarantee may be breached in circumstances which fall short of a possible fatality or complete uselessness.
4. Further, having regard to the unchallenged factual findings of the primary judge which are summarised above, the consequence of the problems arising in the Affected Vehicles cannot (in truth) be described as being “at worst, intermittent issues that might impact the driver’s comfort”.
5. No error has been shown in the primary judge’s reasons on this issue.

## Whether, and to what extent, after supply events are taken into account when assessing whether the guarantee has been met

1. There is no dispute on this appeal that the question whether the reasonable consumer would have regarded the quality of the goods as acceptable is to be determined at the time of supply, which accords with the authorities: *Australian Competition and Consumer Commission v Mazda Australia Pty Ltd* (2021) 158 ACSR 31; [2021] FCA 1493 (***ACCC v Mazda***) at [101] (O’Callaghan J); see also *Medtel Pty Ltd v Courtney* (2003) 130 FCR 182; [2003] FCAFC 151 (***Medtel (FC)***) at [57] (Branson J, with whom Jacobson J agreed).
2. Further, the parties do not dispute that s 54 requires consideration of at least some knowledge acquired after supply, or else it would not be possible to hold that goods were not of acceptable quality by reason of a latent or hidden defect: see *Medtel (FC)* at [57]. Indeed, it is well-recognised that the question under s 54 is to be determined taking into account the relevant information known at the time of the trial, including “after-acquired” knowledge: *Gill v Ethicon Sàrl (No 5)* [2019] FCA 1905 at [3540] (Katzmann J); ***Vautin*** *v BY Winddown, Inc. (formerly Bertram Yachts) (No 4)* (2018) 362 ALR 702; [2018] FCA 426 at [143] (Derrington J); *ACCC v Mazda* at [101]; *Australian Competition and Consumer Commission v Jayco Corporation Pty Ltd* [2020] FCA 1672 (***ACCC v Jayco***) at [27] (Wheelahan J); *Medtel (FC)* at [70].
3. The issue raised in this appeal is the identification of the relevant information known at the time of the trial which is to be taken into account in assessing whether the guarantee of acceptable quality has been met.
4. As to this, Ford submits that the assessment required by s 54(2) is performed from the standpoint of “a reasonable consumer *fully acquainted with the state and condition of the goods*” and that the emphasised words indicate that *all* available information is to be considered. On that basis, Ford submits that the analysis must therefore take account of the fact that as problems emerged, fixes would be identified and made available, the Affected Vehicles’ warranties would be extended, and not every vehicle would experience symptoms but those that did would be repaired (at no cost). Ford submits that, if this is accepted, then, in circumstances where the hypothetical reasonable consumer “fully acquainted with the state and condition of the goods” knew (a) that cars sometimes (indeed, almost inevitably) develop problems, (b) that there was a risk (not a certainty) that the vehicle may develop one or more behaviours, (c) that if it did, the car could at all times continue to be driven, and (d) that repairs were available at no cost to the consumer, they would regard the Affected Vehicles as being of “acceptable quality” and, therefore, compliant with the s 54 guarantee when supplied as new.
5. Ford relies upon the reasoning of Lord Reid and Lord Guest in *Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association* [1969] 2 AC 31 in support of the proposition that all after-acquired knowledge is to be taken in account. That case involved, amongst other things, the operation of s 14(2) of the Sale of Goods Act 1893 (UK) which provided an implied contractual condition when goods are bought by description that the goods should be of merchantable quality. Lord Reid (at pp 75–76) and Lord Guest (at pp 108–109) held, in effect, that it is not appropriate to take into account certain parts of after-acquired knowledge, but disregard other parts.
6. In *Medtel (FC)*, the Full Court was met with a similar argument in reliance on the same authority for the purposes of determining whether a product was of merchantable quality within the meaning of s 74D of the *Trade Practices Act 1974* (Cth). Branson J, with whom Jacobson J agreed, rejected the argument, stating at [69]–[70]:

Lord Pearce, with whom in this regard Lord Wilberforce agreed, took a different approach from that adopted by Lord Reid, Lord Guest and, it seems, Lord Morris of Borth‑y‑Gest. His Lordship observed (at 118–119):

‘Logic might seem to indicate that the court should bring to the task [of estimating merchantability] all the after-acquired knowledge which it possesses at the date of trial. But I do not think that this is always so. For one is trying to find what market the goods would have if their subsequent ascertained condition had been known. As it is a hypothetical exercise, one must create a hypothetical market. Nevertheless the hypothetical market should be one that could have existed, not one that could *not*have existed at the date of delivery. Suppose goods contained a hidden deadly poison to which there was discovered by scientists two years after delivery a simple, easy, inexpensive antidote which could render the goods harmless. They would be unmarketable at the date of delivery if the existence of the poison was brought to light, since no purchaser could then have known the antidote to the poison. Hypothesis is no reason for complete departure from possibility. One must keep the hypothesis in touch with the facts as far as possible.’

(Emphasis in original.)

In my view, in the context of s 74D of the Act, the approach of Lord Pearce to the use of after‑acquired knowledge in the *Hardwick Game Farm* case is compelling. Section 74D, as is mentioned above, calls for the quality, or fitness for purpose, of the goods to be measured against what it was reasonable to expect in that regard at the time of the supply of the goods to the consumer. That measurement must be undertaken, in my view, in the light of information concerning the goods available at the time of trial. However, the issue remains whether the goods were as fit for the relevant purpose as it was reasonable to expect at the time of their supply to the consumer.

1. On Lord Pearce’s approach, whilst one brings into the hypothetical construct knowledge about the nature of the latent defect at the time of trial (which the respondent contends would include, in a propensity case, the problems which may arise and knowledge of the extent of the risk of such problems being encountered), and one also brings into the construct the fact that at the time of supply a warranty is given, one does not also incorporate knowledge that, at some time after supply, a remedy will be discovered for a latent defect with which the goods were supplied or that an extended warranty program might eventuate. We consider that this is the correct approach.
2. Further, to the extent that Ford’s submissions contend that the warranties in place in relation to the Affected Vehicles are relevant to the question of whether the goods complied with the statutory guarantee of acceptable quality, that suggestion is rejected. As stated by Wheelahan J in *ACCC v Jayco* at [43] and cited with approval by O’Callaghan J in *ACCC v Mazda* at [102], a manufacturer’s warranty should generally have no bearing on the question of whether the goods comply with the statutory guarantee of acceptable quality. See also ***Toyota*** *Motor Corporation Australia Limited v Williams* (2023) 296 FCR 514; [2023] FCAFC 50 at [45] (Moshinsky, Colvin and Stewart JJ).
3. As submitted by Mr Gleeson SC for the respondent, the Court can take into account all evidence at trial which bears on the propensity of the risk. However, evidence as to the discovery, availability, and effectiveness of remedies for the defects in the Affected Vehicles which are discovered after the date of supply is more relevant to the question of loss or damage than to the quality of the vehicles at the time of supply. We note that such a conclusion is aligned with *Medtel (FC)* at [73] and *Vautin* at [173].

## Ground 1 Amended Notice of Appeal

1. By this ground, Ford contends that the primary judge erred in finding that the Affected Vehicles failed to comply with the statutory guarantee by reason of their tendency to display a slight vibration or shudder under light acceleration at slow speeds or during a coast down, as the transmission upshifts or downshifts; and a slight audible rattle, particularly when operated within an enclosed area such as a carpark.
2. On the basis that the Affected Vehicles were “economical, entry-level vehicles” fitted with the DPS6 which offered improved fuel economy and efficiency, it is said that these tendencies were “two very minor behaviours”, which only manifested, if at all, in specific circumstances. They were also described as “normal operating characteristics” of these vehicles. This means that Ford accepts that the Affected Vehicles objectively had these performance characteristics in normal operating conditions.
3. Ford submits that, having regard to the s 54(3) factors (including the nature and price of the goods), a reasonable consumer would not regard a tendency to display those “slight” behaviours, which were normal operating characteristics of the type of vehicle being acquired, as rendering the Affected Vehicles not of “acceptable” quality, especially as it is a matter of common experience that all cars sometimes experience slight vibrations and noises. Ford contends that, by holding otherwise, the primary judge imposed a standard approaching perfection and, in any event, higher than the statutory standard of “acceptable quality”.
4. Ford submits that the wholly disproportionate outcome of the primary judge’s approach would be that every purchaser of an Affected Vehicle – whether or not they experienced the rattle or vibration – would have been entitled to reject their vehicle and require a refund or replacement from the supplier on this basis alone pursuant to s 259 of the ACL. It contends that this would create a disincentive for manufacturers and suppliers to supply economical, low-budget goods (which necessarily involve making quality trade-offs to achieve a lower price).
5. For the following reasons, this ground of appeal must fail.
6. We have already rejected Ford’s contention that the primary judge imposed a standard approaching perfection. Further, although Ford is critical of the statement by the primary judge that “[n]ew cars should not have a tendency to rattle, even slightly” ([671] J) as demonstrating that the primary judge applied such a standard, Ford did not grapple with the evidence of Dr Greiner that if a vehicle’s ordinary operation “involves vibration, shuddering, jerking, shunting and/or rattling that is perceptible to the driver, this indicates that the vehicle is defective” nor did it contend that the primary judge’s finding had no proper basis in the evidence.
7. As to the label given by Ford to the tendencies as being “normal operating characteristics” of the Affected Vehicles, the reasons of the primary judge concerning that description included the following at [655], [658] and [659] J:

Regardless of where these [tendencies] fit into the Applicant’s case, the Respondent’s position was that these behaviours were ‘normal operating characteristics’ of the DPS6 and as such could not have the consequence that the vehicles were not of acceptable quality. This is a form of argument by definition. Its limitations may be illustrated. A car with a tendency to explode in a fireball would not be of acceptable quality even if the manufacturer successfully proved that this behaviour was a normal operating characteristic of the vehicle. This might suggest that proof by a manufacturer that a characteristic is a normal operating characteristic is not legally responsive to a contention that the characteristic is such as to mean that the requirements of s 54(2) are not satisfied.

…

I have found it difficult to conceptualise the Respondent’s submissions in a way which can be reconciled with the text of s 54. If a good *X* has a particular quality *a* which means that one of the integers in s 54(2) is not satisfied it is difficult to see that it can be legally significant that *a* is a normal operating characteristic of *X*. Accepting that it is such a characteristic cannot without more lead to the conclusion that s 54(2) is satisfied (in this case to do so would be inconsistent with the initial hypothesis). To avoid that inconsistency it is therefore necessary to accommodate the submission within the interstices of s 54(2) itself. But when the argument is broken down and distributed across the integers of s 54(2) the problem merely recurs. Thus in terms of s 54(2)(a), if *X* is not fit for a purpose for which goods like *X* are commonly supplied because of *a*, then it is difficult to see how the fact that *a* is a normal operating characteristic of *X* can lead to a different outcome. The same point may be made in relation to each of s 54(2)(b)-(e). Perhaps the point is made most clearly with the safety requirement in s 54(2)(d). It cannot be to the point that a quality which makes a good unsafe is also one of its normal operating characteristics.

I therefore conclude that the Respondent’s factual contention that the five characteristics of the DPS6 are its ‘normal operating characteristics’ is irrelevant to any legal issue which arises from s 54(2) …

1. No error has been shown in the reasons or the conclusion reached by the primary judge. To put it another way, whether it is usual or “normal” for goods to have a particular characteristic does not assist in the evaluation of whether those goods are of acceptable quality within the meaning of s 54(2) of the ACL. The focus is required to be on the characteristic itself through the lens of the reasonable consumer in the circumstances outlined in the provision.
2. In this regard, it is relevant that the primary judge did not accept Ford’s contention below that all dual clutch transmissions or all dry dual clutch transmissions have these normal operating characteristics or that these behaviours “are found in millions of other vehicles”: [665] J. Ford does not appeal this finding. That is not surprising as it was supported by the evidence of the respondent’s expert, Dr Greiner, who said that he was “not aware of any other example of manufacturers feeling it necessary to describe ‘normal operating characteristics’ to their customers in this manner”. He said that the types of issues which Ford labelled “normal” for the operation of the DPS6 were “unacceptable for a modern transmission system” and “not issues that a consumer would expect when purchasing a vehicle, regardless of whether the vehicle is a B- or C-segment vehicle, regardless of whether or not the vehicle is a ‘luxury’ vehicle, and regardless of what sort of transmission system the vehicle has”. Dr Greiner’s views were supported by documents prepared by senior Ford US engineers that the presence of rattle and “judder” (a term used within Ford US to refer to the subset of shudder that occurs immediately after a vehicle takes off from rest) was unacceptable: see [485]–[491] J.
3. Another finding of the primary judge which Ford does not appeal, but which is relevant to the s 54(2) analysis, is that the DPS6 was marketed as “an automatic transmission with smooth gear shifts”: [629] J. It is not possible to reconcile this finding, and the obvious impact of such marketing on the reasonable consumer’s perceptions as to what would be acceptable, with Ford’s submissions in connection with this ground. It is notable that Ford did not attempt such an exercise.
4. Finally, we do not accept that s 54 should be read down because it could otherwise lead to a “disproportionate outcome”. If the outcome is disproportionate as claimed (which we do not accept in any event), then such a policy consideration is a matter for Parliament. Nor should this Court take into account additional factors not referred to in s 54, which is the approach pressed by Ford.
5. For these reasons, ground 1 of Ford’s Amended Notice of Appeal fails.

## Ground 2 Amended Notice of Appeal

1. By this ground, Ford contends that the primary judge erred in finding that the Affected Vehicles failed to comply with the statutory guarantee by reason that they were fitted with the original input shaft seals, the B8080 clutch lining and the original ATIC 91 chip.
2. Ford’s submissions concerning this ground challenge the primary judge’s findings on the basis that the primary judge ought to have, but did not have, regard to all information which was available at the time of trial, which it contends is the correct approach required to be taken under s 54. We do not accept those submissions, for the reasons explained above.
3. We also observe that, even if it had been appropriate to have regard to all information available at the time of trial, it would not alter the outcome in this case given that, despite spending hundreds of millions of dollars attempting to do so, Ford did not establish that it had developed a fix for all issues ([13], [314], [315] J), and the warranty data (which underestimates the scale of the problem: [322] J) indicated that, compared with industry standards, the needs of these vehicles for transmission-related repair even just during the warranty period was “frequent” and the DPS6 failed at an “extreme rate” compared to other transmission systems.
4. The second basis upon which Ford advances this ground is that the primary judge failed to appreciate the important distinction between the consequences of the failure of the components in this case (as part of the evaluation required in a propensity case) and the authorities cited by him at [609]–[610] J, namely death or the goods becoming unusable. We do not accept that submission, for the reasons explained above.
5. The third basis upon which Ford advances this ground of appeal is that the primary judge otherwise did not apply the correct statutory test. We do not agree, for the reasons already given.
6. Finally, having regard to the unchallenged findings of fact of the primary judge which we have identified above, and the additional finding concerning safety which is challenged by ground 3 (but which is rejected for the reasons given below), the primary judge’s finding that the Affected Vehicles failed to comply with the guarantee of acceptable quality within the meaning of s 54 of the ACL when supplied as new by reason of being fitted with the original input shaft seals, the B8080 clutch lining, and the original ATIC 91 chip was correct.
7. In this regard, we note that Ford accepts that, if ground 2(a) fails, then ground 2(b) (which related to the supply of second-hand vehicles) also fails.
8. For these reasons, ground 2 of Ford’s Amended Notice of Appeal fails.

## Ground 3 Amended Notice of Appeal

1. By this ground, Ford contends that the primary judge erred in holding that the original ATIC 91 chip posed a “safety risk” and ought to have held that Affected Vehicles fitted with the original ATIC 91 chip were as safe as a reasonable consumer fully acquainted with the state and condition of the vehicles would regard as acceptable within the meaning of s 54(2)(d) of the ACL.
2. This ground raises a challenge to the primary judge’s finding at [411] J that the old (or original) ATIC 91 chip posed a safety risk in the vehicles in which it was installed and poses such a risk in those vehicles in which it remains and which have not had the 15B22 software update.
3. This ground also raises a challenge to the primary judge’s finding at [647]–[648] J that, prior to installation of the 15B22 warning software update, vehicles supplied with the original ATIC 91 chip were not as “safe” as a reasonable consumer fully acquainted with the goods would regard as acceptable.
4. To address that challenge, it is necessary to track through key findings made by the primary judge concerning this issue.

### Reasons of the primary judge

1. At [333] J, the primary judge made the following observations:

[Where] there was failure in the ATIC 91… the TCM goes offline. The clutches are designed so that, absent communications from the TCM, they mechanically place themselves into neutral by disengaging the clutch plate from the drive plate. This is referred to as a fail-safe mode and operates in a similar fashion to a dead man’s switch. If the failure is very brief (in the order of milliseconds) then this process will not progress very far and the disengagement of the clutches may not be detectable at all or perhaps only as a brief shudder. If the failure is longer in duration (a few seconds) then the effect is a power loss. The full disengagement of the clutch will mean, in that circumstance, that the power of the engine is no longer being applied through the drivetrain to the wheels. For that reason, the failure of the ATIC 91 chip leads to potentially more significant disruptions in the driving experience…

1. As the issue of solder cracking between the ATIC 91 chip and the TCM was not in dispute ([340] J), the primary judge proceeded to make these findings at [342] and [343] J:

A consequence of sufficient cracking is disruption in electrical conductivity between the PCB and the chip but this may take some time to occur. Disruption to the conductivity of the solder leads to interference in the communications passing to and from the relevant ATIC. Disruptions of this kind vary in their severity. When a degradation in the solder first occurs it may have little or no direct result since the crack involved may be very small and may not yet materially disrupt the flow of electricity. As the problem worsens, however, there may be complete although intermittent disruptions to conductivity which may be only of very short duration (in the order of milliseconds). As more cracks develop the problem deepens and the disruptions may become more frequent or of longer duration or both until, at last, there is a complete break.

The progressive symptoms which solder cracking can generate depends on where it occurs… [D]amage to the ATIC 91 chip can generate failures resulting from attempts of various durations to disengage the clutch caused by the fail-safe mode…

1. At [344] J, the content of a Ford US 6 panel report is set out which included an assessment by Getrag (the manufacturer) of what a customer might experience in a vehicle suffering from degenerative cracking in the solder affixing an ATIC 91 chip to the PCB as follows:

Customer experience: (Symptoms For Atic91)

1. Loss of motion condition may occur while driving or stopped
2. Indication to customer:
* *Consistently* – PRNDL on cluster will start flashing, “D” or other position will be blinking
* *May* be accompanied by Check Engine Light
* *May* be accompanied by various messages in cluster Message center including: Transmission Malfunction, Transmission Overheating, Hill Assist not available.
1. Vehicle coasts to side of road, engine remained running.

Braking & Steering assist still active.

1. Pedal response:
* Experience 1: Neutral (open clutch)
* Attempt to accelerate, engine rev’s.
* No Forward/No Reverse
* Steering and brakes still functional
* Experience 2: No throttle response
* Attempt to accelerate, engine remains at idle.
* No Forward/No Reverse
* Steering and brakes are still functional.
1. Once stopped:
* If engine turned off and restart is attempted – will not crank. No Start.
* Allow vehicle to sit with key off for 5 – 10 minutes, then car may crank and start and drive normally
1. Codes Set may include:
* TCM: P0607 and/or P06B8 Control Module or NVRAM failure
* ABS/IPC: U0101 and U1013 loss of communication with TCM
* PCM/IPC: P0850 Park/Neutral Switch Input
1. The primary judge then interpreted aspects of the report at [345] J and made the following findings at [346] and [347] J:

Each of these symptoms is consistent with the point made earlier that failure of the ATIC 91 manifests itself as attempts by the clutches to disengage themselves when the TCM goes offline (the consequence of the vehicle’s neutral fail-safe mode). As I have foreshadowed, when a power cut occurs the mechatronic actuators in the transmission default to the open position. The symptoms which arise from this problem depend on how long the TCM is offline. It is easy to understand that when the TCM is offline for several seconds then this will be experienced by the driver as the kind of complete loss of power which results when the vehicle puts itself in neutral gear. When the TCM is offline for only a matter of milliseconds then, as Dr Greiner explained, this might be experienced as a shudder.

Because the solder cracking problem is progressive rather than instantaneous the course of symptoms is also progressive. At first, the cracking will be asymptomatic (so far as the driver is aware), then there may be symptoms such as the shudder described by Dr Greiner which may be followed by very brief, but discernible, losses of driving power; **finally, there may be a loss of driving power for a substantial period of time (in the order of many seconds). I accept Dr Greiner’s evidence, which is consistent with common sense, that these final stages of the problem are dangerous. If a vehicle overtaking another suffers a three second power loss this generates a real risk of an accident. Other similar examples may be imagined such as turning in front of oncoming traffic.**

(emphasis added.)

1. Before continuing, the significance of the acceptance by the primary judge of the evidence of Dr Greiner, an independent expert, cannot be overstated. No attempt was made by Ford to challenge that acceptance, or to justify its position that the primary judge was in error on the issue of safety notwithstanding the acceptance of this evidence.
2. At [353]–[355] J, the content of a letter apparently sent by Ford US to Getrag, which attached approximately 650 pages of material, is set out. That letter included this statement (with the reference to “MAM” being a reference to the TCM):

Following significant analysis into the DPS6 mechatronic actuation module (MAM) field issues, Ford has determined that the best course of action for affected vehicles is to initiate a customer satisfaction action aimed at correcting all vehicles equipped with DPS6 transmissions built since November, 2009. This action includes a warranty extension on 2.47M DPS6 equipped vehicles along with a potential software re-flash aimed at earlier issue detection and failure mode mitigation for all vehicles that Ford has developed.

The initiation of these actions, along with corresponding customer notification, is pending finalization of a robust service part supply plan. Discussion on this plan has been ongoing and I ask for your team's continued support as we finalize these details.

Currently we are forecasting that these actions will cost us over $579M through the 2024 calendar year, not including our normal warranty coverage. There is significant technical data that demonstrates Getrag is fully responsible for this issue based on the robustness of the design independent of any other factors.

1. After analysing this letter and other evidence relating to the ATIC 91 chip, the primary judge stated at [366] J that:

Despite all of these uncertainties, I am prepared to infer that the use of the original ATIC 91 chip did pose a real risk of failure. The primary reason for this is the engineering evidence which reveals the progressive nature of the problem and its physical consequences. It was a problem which was more likely to occur the longer the vehicle was driven and it was a problem which got worse not better once it manifested itself. The problem was sufficient to persuade Ford US to embark on a program seeking to remediate the problem by replacing the ATIC 91 chips in new vehicles and progressively replacing them where necessary in vehicles which were already on the road. The claim made by Ford US against Getrag, foreshadowed in the letter extracted above, suggested that the costs to Ford US were in excess of half a billion US dollars. A subsequent, and substantial, settlement was reached between Ford US, Getrag and Continental. One may infer therefore that the description of the problem in the theoretical terms proposed by Dr Greiner (and in Ford US’ own documents) corresponded with a real world problem, certainly a nine digit one.

1. At [368] J, the primary judge stated:

Consequently, I find that there was a real risk of the solder cracking on the original ATIC 91 chip. Where this risk eventuated, it would cause, in turn, the series of steadily worsening symptoms to which I have already referred. Whether the most serious of those symptoms – complete loss of motive power for several seconds – would occur depended on how long the vehicle continued to be driven once the initial less serious symptoms were manifest. Those symptoms included, as noted above, shudders and brief power drops as well as various warning messages lighting up on the dashboard such as flashing of the ‘D’ symbol on the gear selector. It will be necessary to return to this topic when assessing the Applicant’s submission that the ATIC 91 posed a safety risk.

1. The primary judge’s analysis of the safety risk associated with the original ATIC 91 chip (prior to the 15B22 software update) included the following findings at [388]–[399] J:

**The Applicant contended that the TCM solder issue represented a safety issue prior to the introduction of the 15B22 software update. The first question which arises is why this matters. The actual question for determination is whether the vehicles were of acceptable quality within the meaning of ACL s 54**. The safety risk the Applicant puts forward is that which arises from the ATIC 91 chip and is limited to the symptom consisting of a total loss of motive power. If one makes the assumption that the Applicant succeeds in proving that, as sold, the vehicles had a real risk of a total loss of motive power whilst driving then the question is whether a vehicle with that real risk is of acceptable quality within the meaning of s 54. If on the other hand, the Applicant fails to show the existence of such a real risk then the issue does not seem to arise. On this view of affairs, the question of whether the real risk was also a safety risk does not seem to matter very much.

However, the parties were united in their view that this was something they should debate…

**Having registered my objection to the question, it is then appropriate to consider the position of the two chips**…

Turning then to the position of the ATIC 91 chip, I have accepted that there was a real risk that vehicles in the cohort might develop solder cracking and therefore a real risk that the vehicles equipped with an old ATIC 91 might develop symptoms associated with that risk. The only risk which was put as a safety risk was the risk that there might be a loss of motive power for a period of sustained duration, perhaps a few seconds or more. This was a symptom which would only appear after earlier symptoms such as shudder or a very brief power drop had gone unremedied. And it may also have been preceded by lights appearing on the dashboard when the symptoms made themselves known.

The question then is whether that risk is a safety risk. If one takes out of the picture the antecedent symptoms including the flashing lights on the gear selector so that the first and only symptom of the solder cracking was a sustained period of loss of motive power, then I would not hesitate to describe the risk to safety as real. On this, admittedly artificial, hypothesis there would be a real risk of solder cracking which would first manifest itself when the vehicle suddenly lost power. That could happen in an overtaking situation or midway through an intersection. The potential for a serious accident is obvious.

What makes the situation more complex is that, as the Respondent submits, long before a driver experienced that power loss, there would have been a range of lesser symptoms of increasing severity and the display of flashing lights on the gear selector. Here the thinking is that these symptoms and those flashing lights would have been likely to cause the driver of the vehicle to take it in for servicing. On this view, whilst there might be a risk of ultimate loss of motive power this risk must be much reduced by the practical reality that very few vehicles are likely to be driven to the point where it materialises.

I have found this a difficult submission to assess. My initial impression of the problem was that one needed to identify what the risk of this particular symptom was. Whilst I have accepted that there is a real risk of solder cracking and hence a real risk of the symptoms associated with solder cracking, this statement does not permit one to deduce anything about the risk of a particular symptom. Conceptualised that way, this suggests that it was one for the Applicant to prove as the party bearing the onus of proof. If so, then the fact that the evidence does not permit any conclusions to be drawn entails that the Applicant fails to show that the risk of a total loss of motive power was a real risk and, therefore, that it was a safety risk.

A corollary of that line of thought would be, in fact, that the Applicant fails to prove that there is a real risk of any particular symptom. This follows because the same argument can be made in relation to each individual symptom. This leads one to the curious, although not necessarily logically indefensible position, that there is a real risk of the set of symptoms but no real risk in relation to any individual symptom.

Another way of looking at the problem, however, is this. There is a real risk of solder cracking and hence of the symptoms it entails. Those symptoms include a total loss of motive power for a sustained period of time. Indeed, this was not in dispute on the evidence. Having accepted that that symptom was amongst the class of symptoms of which there was a real risk, the challenge then becomes how to accommodate the fact that it is the end-stage symptom into the analysis. Here the answer may lie in the distinction between the legal burden of proof (which at all times lay on the Applicant) and the evidentiary burden (which might, depending on the circumstances, shift).

I think this second way of looking at the problem is better than the first. There are two reasons for this. First, I am concerned about the artificiality identified in the penultimate paragraph although I accept that it is not an incoherent outcome. Secondly, the nature of the proposition under consideration, on inspection, shows that it was really a defensive proposition put forward by the Respondent and was not something which the Applicant was required to negative. The relevant propositions were these:

(1) there was a real risk of solder cracking;

(2) there was therefore a real risk of the symptoms associated with solder cracking;

(3) those symptoms included a complete loss of motive power for more than a transitory period of time; but

(4) the risk of that symptom was so small as not to constitute a safety risk because the nature of the anterior symptoms would have caused the vehicle to be serviced before there ever could be a complete loss of power for more than a transitory period of time.

Framed that way, it is apparent that the fourth proposition was a matter for the Respondent to prove and not a matter for the Applicant to disprove. The Applicant bore the onus of proving that there was a risk (or real risk as I have preferred to characterise it). She proved that there was a real risk of solder cracking and that the symptoms which could flow from that included a non-transitory total loss of power. At that point the evidentiary burden shifted to the Respondent to prove that, in fact, the symptom would never have arisen because the vehicle would have been serviced on the occurrence of the earlier less severe symptoms.

I am not satisfied that the evidence makes good that contention. No doubt the idea that many vehicles would be presented for service before arriving at a complete loss of motive power for more than a transitory period of time has an anecdotal attractiveness. However, I do not think that just because I can follow the line of thought that it proves it as a fact. No doubt for many vehicles this will be true but I do not think I can say it is inevitably so. Further, there is the additional problem that prior to at least mid-2014 but very possibly up until a later date, if presented for service the problem would not be fixed because the new TCM with the revised ATIC 91 chip was not available.

Once that conclusion is arrived at it seems therefore that the real risk of solder cracking carried with it a risk of a non-transitory loss of power. As I have said, I am satisfied that this risk was a safety risk.

(emphasis added.)

1. At [411] J, after addressing Ford’s evidence, the primary judge concluded:

To the extent that it matters I therefore conclude that the old ATIC 91 chip posed a safety risk in the vehicles in which it was installed and poses such a risk in those in which it remains which have not had the 15B22 software update.

1. At [647]–[648] J, the primary judge made the critical findings relating to the ATIC 91 chip:

I have concluded that vehicles which were supplied with a TCM containing an original ATIC 91 chip had a real risk of developing solder cracks. If the cracks developed the consequence was a gradual reduction in the solder’s conductive efficiency and a corresponding propensity for interruptions in the distribution of electrical power to the TCM. As this occurred a steadily increasing range of transmission faults would arise. **Where the TCM was offline for a matter of milliseconds this might be perceptible to the driver as a shuddering sensation; as the problem worsened, however, the vehicle might sustain a total loss of motive power for a period of seconds – which was unsafe. This was a fault which could, albeit in rare circumstances, result in a serious accident.**

Having regard to the matters set out above, I do not think that vehicles supplied with the original ATIC 91 chip can be said to be fit for the purpose of being driven as a motor vehicle (s 54(2)(a)) or that they were free from defects (s 54(2)(c)) or that they were safe (s 54(2)(d)). Consequently, at the time they were supplied vehicles containing the original ATIC 91 chip were not of acceptable quality.

(emphasis added.)

1. There are two limbs to Ford’s arguments in relation to this ground, each of which will be addressed in turn.

### Whether primary judge answered irrelevant question

1. Ford submits that the primary judge addressed a freestanding question, “untethered to any suggested legal standard”, of whether the original ATIC91 chip posed a “safety risk”: [388]–[389] J. Ford complains that the primary judge did so despite (correctly) noting that there was a disconnect between the purported issue and the statutory test, and registering an “objection to the question”: [389]–[390] J. Ford submits that the primary’s judges analysis bore no resemblance to the analysis required by s 54(2)(d) of the ACL, nor to the concept of “safety defect” defined by s 9 of the ACL, and imposed an evidentiary burden on Ford to prove that a risk of loss of motive power “would never have arisen”, which Ford failed to discharge: [397]–[398] J. Ford complains that the finding that a “safety risk” existed should not have been made in these circumstances: [399], [411] J.
2. For the following reasons, we do not accept Ford’s submissions and, to this extent, we respectfully disagree with the observation by the primary judge that the issue of safety did not matter to the ultimate question of whether the vehicles were of acceptable quality within the meaning of s 54 of the ACL.
3. By [6AB(e)] of the Fourth Further Amended Statement of Claim (**statement of claim**), it was alleged (amongst other things) that each of the Affected Vehicles contained a transmission system of a type that caused abnormal safety issues, which issues included intermittent loss of power (which allegation Ford denied). By [29] of that pleading, it was alleged by the respondent that, by reason of this and other defects, the Affected Vehicles were not of acceptable quality within the meaning of s 54(2) of the ACL.
4. These disputed allegations brought into play s 54(2)(d) of the ACL which identifies that goods will be of acceptable quality if they are as safe as a reasonable consumer would regard as acceptable having regard to the matters in s 54(3). Part of the pathway which the respondent relied upon to obtain a finding that the Affected Vehicles were not of acceptable quality was the pleaded allegation of fact that there were abnormal safety issues. That is the allegation which the primary judge addressed at [388]–[411] J.
5. That the primary judge was required to address it arose not only by reason of the pleadings, but also by reason of the submissions by the parties at trial. The respondent’s closing submissions included a section entitled “Safety” which was cross-referenced to its pleaded case and described this as a “safety-related claim”. These submissions concluded with the following:

In summary, at the time Ford dealers supplied the Affected Vehicles to consumers, they were not – contrary to the statutory guarantee that applied pursuant to s 54 of the ACL – as defect-free, fit for purpose, safe or durable as a reasonable consumer would regard as acceptable having regard, inter alia, to the supply of these vehicles as “new” vehicles priced and advertised competitively with other new vehicles in that segment of the market.

1. Ford’s closing submissions also contained a section entitled “Safety” which opened with the submission, “There was no safety issue with the DPS6”. Later, these submissions stated, “The Applicant relies on a handful of other matters as establishing a safety issue with the DPS6 transmission. None of them do so”, with further submissions explaining why this was so. The respondent’s closing submissions in reply also contained a section entitled “Safety”, and contained further submissions in relation to that issue.
2. For these reasons, the primary judge did not answer an irrelevant question.

### Whether conclusion as to safety as part of s 54 analysis was wrong

1. Ford next submits that:

Much later in the judgment and without any further analysis, his Honour held “I do not think [the] vehicles … were safe”. That appears to be a component of his ultimate conclusion of non-compliance with s 54: J[648]. That approach was also wrong…

1. After referring to evidence adduced by it at trial, Ford then submits that:

A reasonable consumer would not regard the Affected Vehicles as non-compliant on the basis of a risk that, if a car was not serviced despite many months of progressively serious driveability issues and warnings, it might ultimately experience brief losses of motive power. There was no breach of the guarantee in s 54(2)(d).

1. For the following reasons, we do not accept these submissions.
2. Ford does not challenge or seek to overcome the findings made by the primary judge, which are set out above and which provide ample support for the ultimate conclusions at [647]–[648] J. Its attack on these conclusions must fail for this reason alone.
3. Further, by its submissions, Ford seeks to reiterate aspects of the evidence which it led at trial from its lay witness, Mr Cruse, but without addressing other evidence which was inconsistent with the evidence of Mr Cruse, including evidence which was accepted and relied upon by the primary judge, such as the assessment by Getrag contained in the Ford US 6 panel report (which set out the consumer experiences) and the expert evidence of Dr Greiner: [344]–[347] J.
4. Importantly, Ford chose not to lead any evidence from Ford US witnesses about these matters despite being “fully at liberty” to call such persons and it being obvious, including to the primary judge, that it was those persons and not Mr Cruse who “undoubtedly know more about the DPS6 than anyone else”: [224], [491] J. Instead, Ford attempted to counter the argument regarding safety by reference to the (then) Department of Infrastructure and Regional Development’s (**DIRD**) termination of a safety investigation into the DPS6: [400]–[409] J. The DIRD had done so on the basis that it was satisfied that the ATIC 91 chips did not pose a safety issue. However, the primary judge was not satisfied on the evidence which was before him that DIRD’s investigation was adequate for the purpose of assessing safety: [409] J.
5. Ford also challenges the primary judge’s findings as to safety by reference to the 15B22 software update which was introduced, but the fact of that software update is irrelevant: the findings which are under challenge by this ground of appeal concern the safety (or otherwise) of vehicles *prior* to any installation of that software and those which have not received the software update: see [388], [411] J.
6. Ford also complains that what the primary judge did was to reverse the burden of proof at [397]–[398] J, submitting that it was not for Ford to prove that the Affected Vehicles were safe but it was for the respondent to prove that they were so unsafe that they breached s 54. However, what the primary judge did was to recognise that the respondent bore the legal (and initially, the evidentiary) burden of proof (as occurred at [397] J) but then found that, upon the respondent proving a real risk of solder cracking, and that the symptoms which could flow from that included a non-transitory total loss of power, the evidentiary burden shifted to Ford to prove that, in fact, the symptoms would not have arisen because the vehicle would have been serviced on the occurrence of the earlier less severe symptoms (being a defensive proposition put forward by Ford, which it maintained on this appeal). Those statements do not constitute a “reversal” of the burden of proof and there is no error in the primary judge’s approach.
7. Ford then submits that, even if it did bear such an evidentiary burden, the primary judge “effectively” required Ford to show that the symptoms would “in every single case” lead a consumer affected by them to bring their car in for service. However, that overstates the overall findings as set out in [397]–[398] J.
8. This criticism also overlooks the finding at [385] J, which was not challenged on this appeal, that there was no direct evidence as to the specific date that TCMs with the new ATIC 91 chip became available in Australia. This had the consequence that, in any event, the primary judge could not have made a finding that there was no safety risk on the premise that vehicles would have been presented for service and the symptoms associated with solder cracking would be averted. That is because the ATIC 91 chip would not have been replaced during such a service and so the safety risk would not have been removed. This was recognised by the primary judge at [398] J.

### Conclusion

1. For these reasons, ground 3 of Ford’s Amended Notice of Appeal fails.

## The respondent’s Notice of Contention

1. Because grounds 1 to 3 of the Amended Notice of Appeal have failed, it is not necessary to address paragraphs 1 and 2 of the respondent’s Notice of Contention beyond what we have held in relation to grounds 1 to 6 of the Amended Notice of Cross-Appeal, below.

# Respondent’s appeal on liability

## Grounds 1 and 2 Amended Notice of Cross-Appeal

1. These grounds of appeal relate to a ruling by the primary judge that certain documents not be admitted into evidence (which are a subset of what were described by the primary judge as the **schedule 1 documents**). For convenience, we will refer to the 66 documents (on our reckoning) which are the subject of these grounds using that name, but recognise that a longer list of documents was sought to be tendered at trial. The respondent contends that the schedule 1 documents ought to have been admitted into evidence by the primary judge and taken into account as part of the assessment under s 54 of the ACL.
2. By paragraph 1 of its Notice of Contention in the cross-appeal, Ford asserts that the “ultimate conclusions” of the primary judge should be affirmed because the schedule 1 documents are irrelevant or of insufficient weight to affect the learned primary judge’s conclusions.

### Relevant procedural history

1. On 20 December 2017, the primary judge granted leave for the respondent to apply under § 1782 of Title 28 of the United States Code to the United States District Court for the Central District of California for the production by Ford US of several classes of documents: *Capic v Ford Motor Company of Australia Limited (No 4)* [2017] FCA 1575.
2. Of the schedule 1 documents which were not admitted into evidence, all but one had been obtained from Ford US under § 1782 of Title 28 of the United States Code in April 2018 (**US discovery documents**).
3. Almost a year after those documents were produced, on 18 April 2019, the solicitors for Ford (**Allens**) sent a letter to the solicitors for the respondent (**Corrs**), which stated (amongst other things) that:

We have assumed that your client is no longer seeking to rely on documents obtained through US Discovery. Please let us know if this is not the case.

1. On 6 August 2019, Corrs sent a letter to Allens, which included the following passage:

In your letter of 18 April 2019, you stated that your client had assumed that our client “is no longer seeking to rely on documents obtained through US Discovery”, and asked us to let you know if that is not the case. We are not sure why your client drew that assumption and advise that your client should not assume that our client does not intend to rely upon any of the documents obtained through US discovery.

1. On 30 August 2019, Corrs sent a further letter to Allens, which stated as follows:

1 We refer to the Third Further Amended Statement of Claim filed by our client on 29 January 2019 (3FASOC).

2 The 3FASOC pleads the Affected Vehicles contained (or was part of a model line containing) a transmission system of a type that had (or had a propensity to have) various defects (the “Vehicle Defects”) including quality, performance, reliability, durability, safety and comfort issues. **That pleading also foreshadows the provision of further particulars with our expert evidence**.

3 Although our expert evidence is not due until midway through November, work on it has commenced, and we are now able to provide some further information about the alleged Vehicle Defects. **It remains our intention to provide further particulars once our expert evidence has been served**, but if we are able to provide additional particulars any earlier we will.

4 In addition to the existing particulars of the Vehicle Defects, the Applicant gives the following particulars:

(a) the “Powershift Transmission” system that was fitted in the Affected Vehicles did not have a dual mass fly wheel or alternative damping measures adequate for a dry dual clutch design; and

(b) this problem – which was a design, or architectural, defect – caused or contributed to some of the quality issues, performance issues, durability issues and comfort issues pleaded in the 3FASOC, by increasing friction variability and reducing robustness to vehicle noise, vibration and harshness.

5 **We suspect that the existence of this design/architectural issue is already well known to your client, as** **there are documents produced in the US discovery which address the existence and implications of this problem**.

(original emphasis removed; emphasis added.)

1. On 30 April 2019, the primary judge made pre-trial directions which included an order requiring the respondent to provide Ford with a draft index of documents to be included in the electronic court book.
2. On 6 May 2020, Corrs emailed Allens attaching its proposed court book index, pursuant to the orders of the primary judge, which included 29 of the schedule 1 documents. This was more than five weeks before the trial was due to commence on 15 June 2020.
3. On 8 May 2020, Allens sent an email to Corrs in response which included the statement: “Please confirm whether it is the Applicant’s intention to tender all of these documents at trial”.
4. That confirmation was not provided in writing, but it is a reasonable, if not obvious, inference that the inclusion of the documents in the index was for the purpose of tendering them, especially in light of the orders made on 30 April 2019 and what was stated in the respondent’s opening submissions as set out below. We ask rhetorically – what other purpose could there be?
5. On 21 May 2020, Corrs sent an email to Allens which attached an updated court book index. A further 31 of the schedule 1 documents were contained in that list. As such, as at 21 May 2020 (that is, more than three weeks prior to trial), 60 of the 66 schedule 1 documents were in the court book index provided on behalf of the respondent to Ford.
6. On 27 May 2020, more than two weeks prior to trial, the respondent served her opening submissions on Ford. Those submissions stated as follows at [25]:

**The Applicant’s documentary tender includes** … **(iii) material obtained on discovery from Ford US in proceedings in the United States District Court Central District of California relating to the development of the DPS6, investigations by Ford US and its suppliers as to the root causes of Defects, and corrective measures approved by Ford US to be implemented to attempt to remedy the Defects**; (iv) documents recording regulatory investigations in relation to the safety of the Affected Vehicles and Ford’s interactions with those regulators; (v) documents related to the settlement of claims by Ford US against Getrag DPS6; (vi) records of settlements initiated by Ford with consumers; (vii) “Lessons Learned” documents which record the mistakes Ford and/or its parent Ford US believes were made in designing the DPS6; (viii) forecasts of the financial impact to Ford of the DPS6; and **(ix) depositions given by Ford US personnel in US proceedings regarding the DPS6.**

(emphasis added.)

1. On 28 May 2020, Corrs sent an email to Allens with a further updated court book index, which contained the same schedule 1 documents as had been included in the index provided on 21 May 2020.
2. On 2 June 2020, Allens sent a letter to Corrs in the following terms:

We note that the Applicant has included over 2,600 documents in its proposed tender bundle. More than 1,600 of those documents are documents obtained from Ford Motor Company, a non-party to the proceeding, pursuant to the Applicant's s1782 application. As you know, the Respondent objects to the tender of any of the Ford Motor Company documents otherwise than in accordance with the Confidentiality Regime.

Please confirm whether the Applicant intends to seek to tender all of the documents in the proposed tender bundle at trial and, if so, please say when, and specify the basis upon which, the Applicant proposes to tender these documents.

The Respondent reserves its rights to object to the tendering of any of the documents in the Applicant's proposed tender bundle.

1. On 3 June 2020, Corrs sent a letter (dated 2 June 2020, but apparently sent on 3 June 2020). That letter (relevantly) stated:

2 As we have previously explained, we intend to tender the documents in the court book at the conclusion of the opening submissions.

3 You have asked us to identify the basis upon which we intend to tender those documents. We are not sure what you mean by that, but we have indicated to you on several occasions that, in our view, the existing confidentiality orders do not constrain our ability to tender the documents in the court book designated by your client or its parent as “Confidential Documents” or as containing “Confidential Information”.

4 Your letter indicates that your client may object to the tender of those documents. If it intends to do so, please explain the basis for any objection your client intends to make.

1. On 5 June 2020 (with the trial due to commence some 10 days later), Allens sent a letter to Corrs regarding the proposed court book. That letter read, in part, as follows:

We understand that the Applicant intends to tender all of the over 2,600 documents in its proposed tender bundle at the conclusion of the parties’ opening submissions.

When requesting in our letter of 1 June 2020 that the Applicant specify the basis upon which the Applicant proposes to tender these documents, the Respondent was requesting that the Applicant specify the basis of that tender from both a relevance and an admissibility perspective. The Respondent requires this information, identifying the issues in the proceeding each document is stated to be relevant to and the basis on which it is asserted to be admissible, to inform its approach to any objections it may make to the tendering of these documents.

For the avoidance of doubt, the Respondent reserves its rights to object to the tendering of any of the documents in the Applicant's proposed tender bundle.

1. On 8 June 2020, Corrs sent a letter to Allens informing it that the respondent did not intend to comply with the request in the 5 June letter but that it proposed to adopt the “usual process”, namely that: “(a) your client object to the proposed tender of particular documents if it wishes to, and if there is a reasonable basis for it to do so; and (b) our client respond to those objections”.
2. On 9 June 2020, Allens sent a letter to Corrs, which read in part as follows:

The Respondent maintains that the position set out in its letter of 5 June 2020 is the appropriate course. It is presently unclear to the Respondent and to the Court what the Applicant submits should be drawn from the 2,600 documents in her proposed tender bundle. Noting that the Applicant has advised of her intention to tender all of these documents at the conclusion of the parties’ opening submissions, it was the Respondent's expectation that this question would be addressed in the Applicant’s written outline of her opening submissions. It was not. The Respondent is entitled to adequate notice of the use that the Applicant intends to make of any or all of these documents.

As previously stated, and for the avoidance of doubt, the Respondent’s position is that:

1 the indiscriminate tendering of the documents in bulk at the end of opening submissions (or indeed at any other time) will be opposed;

2 all Ford Australia and Ford US documents in the tender bundle must be dealt with in accordance with the existing Australian and US confidentiality regimes; and

3 the Respondent reserves its rights to object to the tendering of any particular documents; we note, however, that if the Applicant seeks to refer to each document in the course of the trial, the trial would run well past its estimated duration.

In particular, it is the Respondent’s position that only documents that are referred to in the trial (in witness statements, oral evidence or submissions) should be tendered. The Court should not be asked to take into account documents that are not referred to in the trial.

1. On 11 June 2020, in a pre-trial interlocutory hearing, counsel for Ford raised the volume of documentary evidence with the primary judge. The relevant extracts from that hearing are as follows:

MR SCERRI: …Your Honour, what they’ve said to us they want to do, what they’ve threatened to do, is to tender 1600 US documents and about 1000 Australian documents, and they’re seeking to tender those as a bundle and in that context – and we’ve written to them and said, “Well, you need to tell us what you’re tendering these about,” and to suggest that it’s practical for us to be – to get instructions and be armed and, at some stage next week, either – I think they’re talking about at the end of the closings that we would then have to deal with document by document with 2600 documents is just a ridiculous proposal, in our submission, your Honour.

And there’s lengthy correspondence about this and they’ve constantly said, “You’re jumping at shadows. There’s no issue. If they’re truly confidential, justify it.” So our two objections are that the idea of tendering 2600 documents as a bundle is quite inappropriate. It’s not what should happen and that would certainly derail the trial because it would take us minutes to deal with each one - - -

HIS HONOUR: What do you think – I mean, it’s not unusual to have a bundle of a couple of thousand documents in a case like this and for it to be tendered.

MR SCERRI: As a bundle, your Honour? That’s not my experience.

HIS HONOUR: As the court book. Yes, I’ve seen that.

MR SCERRI: The practice does vary from judge to judge, but normally judges say, “You can’t tender 2600 documents, expect me to read them, unless you take me to them in the course of the trial.”

HIS HONOUR: No. I agree with – I agree with that, but the practice of having a court book with a file of documents in it, particularly in electronic trials, pretty common. Normally, people signal particular objections to particular documents. That’s one topic, I suppose - - -

MR SCERRI: Yes.

HIS HONOUR: - - - and then another topic is confidentiality, assuming relevance is made out.

MR SCERRI: Yes. And we are very – we have raised the issue of the relevance of the US documents, but that’s the issue. Our principal concern is that we don’t want this to delay the trial or to disrupt it next week and if it does, we’ll be seeking costs against the applicant because the applicant has caused this. They didn’t – they weren’t proposing – when they applied last week for these orders, they hadn’t given notice to Ford US about them. They wanted the orders – they wanted the Confidentiality Act regime varied without notice to Ford US and your Honour said you would not make those orders without giving Ford an opportunity – Ford US an opportunity to be heard and we say that’s the correct thing and I’m pleased that Mr Kidd is here.

…

MR SCERRI: …I think I said we will review whether [we] want to maintain this, but **it would help an awful lot if Mr Pike could say whether he really wants to tender all of our thousand documents**, because if he doesn’t, if we just look at the ones that he wants to tender, to date we haven’t been able to get them to say whether they want to tender them all or not. They just say that’s what they’re tendering. So I wonder whether that could be another step in the process, your Honour. It will save a lot of time.

…

HIS HONOUR: And in relation to the matter you just raised, so – Mr Pike, so there’s 1600 of these documents. Mr Scerri is asking whether you’re actually going to tender them all. I take it your answer to that is you’re tendering all of them?

MR PIKE: **Yes. Consistent with the orders that were made over a month ago, we gave notice that that is what we intended to do**.

HIS HONOUR: So he’s not going to back off the tender of any of those.

MR SCERRI: Yes. I understand, your Honour…

(emphasis added.)

1. On 15 June 2020, the trial commenced before the primary judge.
2. On 17 June 2020, being the third day of trial, the parties discussed with the primary judge the tendering of the court book:

MR PIKE: Yes, and there also is – at some stage in the not too distant future I would wish to tender the court book.

…

MR SCERRI: Your Honour, in relation to tendering the court book, if that means that Mr Pike is going to tender 1000 [sic] of pages of documents that are in the review book at the moment, we will be objecting to that. **The tender should be selective, and we should have an opportunity to object to tenders and that should happen, in our submission, at the end of the evidence, so we see what’s still relevant**.

HIS HONOUR: We could do it this way. What you say sounds practical. We could start with the court book, we know what the court book is and the documents which are in the court book. Witnesses can be shown that. We will all know what they are. Many of the documents probably won’t be referred to, hopefully, and when we get a little bit further into the trial, perhaps towards the end of the trial, there can be some indication from Mr Pike’s side as to which parts of the court book are going to be tendered and then we can remove – sorry, by both sides about which parts of the court book are going to be tendered and then parts which aren’t going tendered by anyone can be removed and the parts which are contested can be ruled upon .....

…

MR PIKE: **I do understand the issue, and I don’t really mind which way we move forward. My only issue is, I do want to know sooner rather than later if there is material that is to be objected to, what it is and what the basis of the objection is, rather than find out at the end of the case that there is an objection**.

HIS HONOUR: I think this might be a false issue. I mean, Mr Scerri is saying he wants to know what you are actually tendering.

MR PIKE: We served the list on 11 May, I think it was.

HIS HONOUR: The last time we had a Mexican standoff between the two parties was in relation to the 50 witnesses where – and I thought that that would eventually blow over, but I was wrong about that and they’re all coming. So I wonder whether this debate will end up being the same. **So if I take the course you’re suggesting, Mr Scerri, then what will happen is at the other end of the trial Mr Pike will say, “I’m tendering all of them”**.

MR SCERRI: **And** **that will be a problem, your Honour…**

(emphasis added.)

1. It is important to note that it was Ford’s counsel who proposed that the tender of the documents in the court book occur at “the end of the evidence”. Ford did not make any submission or apply for any direction that the respondent be required to tender the documents at an earlier stage in the trial, such as following opening submissions or prior to any witnesses being called.
2. Instead, on 22 June 2020, Allens sent a letter to Corrs which noted that Ford objected to the respondent tendering the documents “in bulk so that she can refer to them only in closing submissions” as that would “not give the Respondent an adequate opportunity to respond to submissions concerning the documents”.
3. Within the first week of the trial, the respondent identified the issues to which the documents were relevant by letter dated 19 June 2020. That letter attached a spreadsheet setting out that information.
4. On 10 July 2020, Corrs sent an email to Allens attaching a list of the documents that the respondent intended to tender, with the relevance identified for each document listed therein. The email noted that the list “may be subject to change depending on the documents discussed during evidence and while closing submissions are prepared”, and that the list included:

3. a number of additional documents relevant to the facts in issue.

1. On 14 July 2020, Allens sent an email to Corrs which stated: “Our client does not object to the tender of the documents in your list relevant to items (1) *and (3)* in your email” (emphasis added). The email also stated that Ford “reserve[d] the right to submit that documents in the list are not probative of any issue in the proceeding and/or that little or no weight should be given to them”.
2. Following this, a further five schedule 1 documents were notified by the respondent on 16 July 2020.
3. On 18 July 2020, the respondent served her closing submissions on Ford. One of the schedule 1 documents was notified for the first time in those submissions.
4. Those closing submissions and its annexure made reference to all but five of the schedule 1 documents. Relevantly, those five documents had already been disclosed in the court book index circulated on 21 May 2020 and, according to the respondent, were originally included in the annexure to the closing submissions (prior to it being amended).
5. On 23 July 2020, counsel for Ford accepted during the trial that “the material is all admissible” but that the issue was what the primary judge did “as a matter of procedural fairness”.
6. On 27 July 2020, the primary judge made timetabling orders for the filing and service of submissions on the question of whether Ford ought not to be permitted to rely on any of the schedule 1 documents.
7. On 28 July 2020, Corrs sent an email to the Associate to the primary judge which read:

As foreshadowed by Mr Pike SC on Friday, the Applicant has undertaken an audit of her tender list to identify where each document included in the list was referred to in evidence, submissions or during the hearing. Following that audit the Applicant provided a revised list to the Respondent, who has indicated that it does not object to the tender of the documents contained in it.

1. That attached tender list comprised 917 documents, and included all 66 of the schedule 1 documents.
2. On 29 July 2020, the Associate to the primary judge emailed the parties and stated that his Honour had “admitted these documents into evidence”.
3. The parties then provided written submissions to the primary judge about the tender of the documents, culminating in the primary judge’s decision to exclude certain documents which included the schedule 1 documents which are the subject of the cross-appeal.

### Reasons of the primary judge

1. The primary judge found that the respondent had run her case on the basis that she would make her claims good by reference to Dr Greiner’s evidence. His Honour stated at [930]–[931] J:

However, the subscribed particulars to §6AB make no reference to the expert evidence of Dr Greiner. It is clear nevertheless that the Applicant ran her case on the basis that the way in which she sought to make good the defects allegations in §6AB was on the basis of Dr Greiner’s evidence. This is so for two reasons: (a) **a letter dated 30 August 2019 from the Applicant’s solicitors to the Respondent’s solicitors explained that the way she would prove at least some of the alleged defects would be by means of the expert testimony of Dr Greiner** (this is in the electronic Court Book under ‘particulars’); and, (b) the way the trial was conducted centred on the evidence of Dr Greiner. In terms, the case put and met was that the vehicles suffered from the four Component Deficiencies and the two Architectural Deficiencies.

As a matter of procedure, therefore, it is apparent that Dr Greiner’s reports served the purpose both of providing the Respondent with the particulars of how §6AB would be proved and also the evidence to make good that proof. **Consequently, Dr Greiner’s evidence provides the metes and bounds of the dispute between the parties**.

(emphasis added)

1. His Honour went on to cite the principle that parties may jointly choose to conduct their case on a basis other than that formally alleged in the pleadings: [932] J.
2. After acknowledging that it was agreed between the parties that the documents were not referred to in Dr Greiner’s report, and that some had been provided to him but not included in his report, the primary judge stated at [933] J: “I do not regard the fact that the Respondent knew some of these documents had been provided to Dr Greiner although not relied upon by him is of any legal significance”.
3. The primary judge accepted that the documents were relevant to the allegations in [6AB] of the respondent’s statement of claim: [934] J. However, his Honour considered that “the way in which the [respondent] conducted her case on clutch shudder is that she would prove its existence on the basis of Dr Greiner’s evidence” because she had “elected to nominate Dr Greiner’s evidence as the particulars to §6AB”: [935] J. The primary judge considered that, as those documents were not in Dr Greiner’s reports, it followed that they fell outside the particularised case: [935] J.
4. In response to the respondent’s submission that the documents tended to prove the matters identified by Dr Greiner, the primary judge stated at [936] J:

…that submission impermissibly elides the allegations of material fact in §6AB (which delimit and define what is relevant in the proceeding) with the particulars provided for that allegation by means of Dr Greiner’s reports (which give notice to the Respondent of how that case is to be proved). That the parties have acquiesced in the Applicant proving the allegations in §6AB by means of Dr Greiner’s reports does not entail that the Applicant is therefore entitled to lead additional evidence to support Dr Greiner’s conclusions.

1. Consequently, the primary judge accepted Ford’s submission that it was procedurally unfair for the respondent to rely upon the documents in question to prove the allegations in [6AB] of her statement of claim because “[u]ntil the delivery of her closing written submissions the Applicant has never given the Respondent any meaningful indication that she would seek to prove the allegations in §6AB by means of these documents”: [937] J.
2. While the primary judge appeared to accept that, in advance of the trial, the respondent had given notice of her intention to tender some of these documents, his Honour considered that this did not overcome the fact that she had not given Ford “notice of an intention to prove the allegations in §6AB other than by means of the subscribed particulars to that allegation or by means of Dr Greiner’s reports”: [938] J.
3. His Honour considered that Ford had been deprived of an opportunity to consider whether to:

… (a) tender some of the other §1782 documents perhaps to contradict the documents upon which the Applicant now seeks to rely; (b) ask its own witnesses about the documents; and, (c) perhaps call other witnesses.

1. At [939] J, his Honour stated:

Parties are often confined to the way in which they have run their case (often by being tied to their particulars) and this is not usually thought to require evidence from the other party that they would be prejudiced if some other course were taken. In any event, the prejudice pointed to by the Respondent – especially the possibility of considering whether to tender additional documents – is to my mind reasonably obvious.

1. In respect of the respondent’s contention that not admitting the documents into evidence was a drastic action compared to other steps that could be taken, his Honour noted that it would not be in keeping with orderly trial management to give Ford the opportunity to reopen its case several months after the trial had concluded just to meet a case not foreshadowed at trial: [940]–[941] J.
2. The primary judge also rejected the respondent’s submission that Ford had consented to the use of the documents because it had consented to the final form of the tender list (which included the schedule 1 documents), stating at [942]–[943] J:

… As a matter of formality, at the time the Respondent objected to the use of Schedule 1 documents on the basis that they were not yet formally in evidence. They would not find their way into evidence until 10.22 am on 29 July 2020 when my Associate informed the parties that the documents identified in document TDL.010.006.0001 would be received into evidence. By this time, the trial had been completed subject to the cleaning up of some loose ends (such as the tender of documents).

When the Schedule 1 documents were received into evidence on 29 July 2020 it is true that this occurred with the agreement of the Respondent. However, that agreement must be seen in context. On the last day of the trial, 24 July 2020, the Respondent had indicated that there were a number of documents in the draft list then provided to it which were not referred to anywhere in the evidence or in the submissions (by contrast the Schedule 1 documents were referred to in the Applicant’s closing written submissions if not anywhere else). It was the Respondent’s position that these never-referred-to documents should not be tendered. The Applicant appears to have agreed with this and removed documents of that kind from the final form of list. The Respondent then agreed to the tender of the balance. However, it is quite clear that this took place against a backdrop which included the Respondent’s continuing objection to the Schedule 1 documents. I do not think that its entitlement to make that objection was thereby lost. It continued to assert that reliance could not be placed upon the documents. Where the Respondent makes good its objection, the course I will take is to revoke to the extent necessary the interlocutory order by which the documents were admitted.

1. The primary judge concluded that it would be procedurally unfair for the respondent to have been permitted to prove the allegations in [6AB] by relying on those schedule 1 documents drawn from the US discovery: [944] J.

### Whether the primary judge erred

1. In our respectful view, there was no procedural unfairness in the respondent seeking to rely on these documents. The primary judge erred in concluding that there was.
2. Two considerations appear to have underpinned the primary judge’s finding. The first consideration was his Honour’s finding that the respondent’s case was run on the basis that the defects pleaded in [6AB] of the statement of claim were both particularised by, and to be proved by, Dr Greiner’s reports. The second consideration was that the procedural unfairness that would be visited upon Ford by the receipt of the schedule 1 documents lay in denying Ford the opportunity to consider whether to: (a) tender additional documents; (b) ask its own witnesses about the documents; and (c) call other witnesses.
3. As to the first consideration, the primary judge’s finding was influenced by two matters: the contents of the letter of 30 August 2019 (the pertinent parts of which we have quoted above) and the fact that the conduct of the trial centred on Dr Greiner’s evidence.
4. While it may be accepted that Dr Greiner’s evidence was central to the respondent’s case, we do not think it is correct to conclude that the respondent manifested any intention, by the letter of 30 August 2019 or otherwise, to limit the proof of her case to that evidence, and to that evidence alone.
5. The letter of 30 August 2019 referred to the fact that the respondent’s pleading foreshadowed the provision of further particulars with the respondent’s expert evidence. It did not, however, confine the proof of the respondent’s case to the intended expert evidence.
6. The letter provided the further particulars that the “Vehicle Defects” included the fact that the “PowerShift Transmission” system did not have adequate damping measures, and that this architectural defect caused or contributed to some of the quality issues, performance issues, durability issues, and comfort issues that had been pleaded, by increasing friction variability and reducing robustness to vehicle noise, vibration and harshness. The letter specifically referred to “documents produced in the US discovery” which addressed “the existence and implications of this problem”. It is true that the letter did not, in terms, go further to say that the respondent intended to rely on these documents, but the letter cannot be read as saying that the respondent would not rely on these documents, or that her evidence would be confined to expert evidence.
7. As the events we have summarised above show, the respondent did give notice to Ford, well in advance of the hearing, that she intended to rely on 60 of the 66 schedule 1 documents, and her opening submissions (which, as we have said, were served two weeks prior to trial) specifically referred to the fact that her documentary tender included “material obtained on discovery from Ford US … relating to the development of the DPS6, investigations by Ford US and its suppliers as to the root causes of Defects, and corrective measures approved by Ford US to be implemented to attempt to remedy the Defects”.
8. It is important to observe that, at this critical point, Ford’s objection was not that the schedule 1 documents were beyond the respondent’s particularised case or constituted an unforeseen or impermissible mode of proof. Rather, Ford’s objections were threefold. Firstly, Ford said that it objected to any tender that was not in accordance with a particular confidentiality regime. Secondly, Ford wanted advance notice of the basis on which the respondent would tender each document. Thirdly, Ford objected to the “bulk” tender of documents by the respondent at the conclusion of her opening.
9. It is also important to note that, at the pre-trial interlocutory hearing on 11 June 2020, the respondent confirmed, unequivocally, that she intended to tender a large number of documents, which included the schedule 1 documents.
10. Further, it was Ford’s suggestion, on the third day of the trial, that the tender of the documents the respondent had foreshadowed should be on a “selective” basis “at the end of the evidence”. The respondent was prepared to accept that proposal provided that Ford indicated “sooner rather than later if there is material to be objected to” so that she was not left in the position of “find[ing] out at the end of the case that there is an objection”.
11. It is apparent, therefore, that the parties acquiesced in a procedure, advanced by Ford itself, whereby the debate about the admissibility of the documents, whose tender the respondent had clearly foreshadowed, would take place at the *end* of the evidence.
12. In these circumstances, Ford could not legitimately complain that this course would be procedurally unfair to it because it would deny it the opportunity to: (a) tender additional documents; (b) ask its own witnesses about the documents; and (c) call other witnesses.
13. For these reasons, Grounds 1 and 2 of the Amended Notice of Cross-Appeal should be upheld.
14. Absent any procedural unfairness, one course open to Ford would have been to seek to rely on the exercise, in its favour, of the discretion to reject evidence under s 135 of the *Evidence Act 1995* (Cth). However, Ford did not take this step at trial, and it is not open to it to take that step now.
15. Because the tender of the schedule 1 documents was rejected on the basis of procedural unfairness, there has been no ruling on their admissibility as evidence. Further, no detailed submissions have been advanced in this appeal directed to the admissibility of the documents beyond reference to a handful of documents to which we were taken in the course of oral submissions. It appears to us that these documents are, prima facie, relevant to the issues in the case and admissible. However, having said that, we have already dismissed Grounds 1, 2, and 3 of the appeal. In these circumstances, there is no necessity for the respondent to rely on these particular documents and a ruling on the admissibility of the schedule 1 documents as a whole seems to us to be a barren exercise.
16. In light of these matters, it is not necessary for us to address paragraph 1 of Ford’s Notice of Contention in the cross-appeal.

## Grounds 3 and 4(b) Amended Notice of Cross-Appeal

### The case below

1. At trial, the respondent sought findings that the kinds of issues experienced by Affected Vehicles as set out at [6AB(a)(i)] and [6AB(b)]–[6AB(g)] of the statement of claim had, as part of their root causes, the DPS6’s system for managing torsional vibrations and heat, and that there was a causal relationship between the Component Deficiencies and the Architecture Deficiencies. That this was so is apparent from the respondent’s closing submissions: see, for example, [256], [284]–[288], [293(b)], [319], [321], [325(b)], [362], [375].
2. Not only did Ford challenge that causal relationship but Ford’s case was that vehicles fitted with a DPS6 displayed five characteristics that were **normal operating characteristics** which included **firm gear shifting** under aggressive acceleration and a **slight shunting sensation** at low speeds: see [521] J.
3. The normal operating characteristics were referred to by Dr Greiner in his expert report in reply.
4. In relation to firm gear shifting, Dr Greiner stated the following:

At paragraph 95b of the Kuhn Report, Mr Kuhn states that „firm gear shifting under aggressive acceleration“ „is not unusual behaviour and is a simple matter of transmission calibration and/or customer preference“. Whilst it is true that „sporty“ vehicles or „Sport“ transmission profiles typically behave in this manner, this is not the only cause of „firm“ shifts with the DPS6. In paragraph 583 of my First Report I describe how dry clutch friction variability in the DPS6 resulted in difficulties in torque transfer during shifts, such that shifts could be very harsh if torque was too high – shifts could also be delayed, with engine flares, if torque was too low.

…

In my opinion, „firm“ or „harsh“ shifts that are the result of unpredictability in clutch performance (e.g., due to friction variability) are not what I would associate with the consistent „firm“ shifts of a „sporty“ vehicle. In my experience and opinion, these „firm“ or „harsh“ shifts of an inconsistent nature are not considered acceptable in the industry.

1. The topic of harshness had also been addressed by Dr Greiner in his first report, where he expressed the opinion at [306(a)] that the “DPS6’s cardanic clutch design contributes to…upshift and downshift **harshness** during normal driving, due to essentially undamped torsional vibrations” (emphasis original). He addressed, in general terms, the notion of harshness under the rubric “Comfort (Noise, Vibration and Harshness)” as part of a subjective measurement of how a vehicle feels from the perspective of its driver or passengers at [118]–[120]. However, Dr Greiner’s first report makes no overt link between the opinion expressed at [306(a)] and these earlier paragraphs (and the report was more than 200 pages long). Nor did Dr Greiner make any link between the topic of firm gear shifting in his reply report and the topic of harshness in his first report.
2. In relation to the slight shunting sensation, Dr Greiner stated in his expert report in reply:

At paragraph 95e of the Kuhn Report, Mr Kuhn explains the „slight shunting sensation at very low speeds“ experienced with the DPS6 Transmission. „Shunting“ is an alternate way of describing the „rocking“ motion that I described at paragraph 117 of my First Report, which is how a driver may perceive shudder. Whilst shudder will always be a possibility caused by an internal combustion engine – due to the rotational irregularities of such engines, which I explain in section 5.2.1 of my First Report – shudder can be effectively mitigated through the use of adequate torsional damping. In a vehicle with adequate torsional damping, a driver should not experience this „shunting“ or „rocking“ motion. It certainly shouldn’t be considered a normal operating characteristic of a vehicle in series production.

While I agree with each of the factors that Mr Kuhn suggests affect the „degree to which the ,shunting‘ movement may occur and [be] felt by the [driver]“ – e.g., vehicle weight, engine mount tuning, engine idle speed – I consider these to be secondary measures. The primary measure affecting the degree to which shudder may occur and be perceived is the implementation (or lack thereof) of adequate torsional damping measures.

1. The respondent’s closing submissions stated as follows:

The Respondent says the operating characteristics of the DPS6 inherently involve some NVH issues, and these are just “normal operating characteristics” as opposed to an indicia the vehicles are not of acceptable quality.

We understand the argument to be that the “Normal Operating Characteristics” of the DPS6 are those which are left over after all of the Component Deficiencies and their attendant problems are fixed.

The Applicant’s response is threefold.

***First*, these “Normal Operating Characteristics” are a distraction if the Court accepts that the Component Deficiencies themselves and/or in combination with the Architectural Deficiencies, were sufficient to render the Affected Vehicles non-compliant with the s 54 guarantee of acceptable quality. They do not matter**.

*Second*, the “Normal Operating Characteristics” postulated understate the kinds of durability, reliability, NVH/Comfort and performance issues Affected Vehicles are prone to experience even after all Component Deficiencies have been fixed. Mr Kuhn frankly acknowledged that what is “normal” for a vehicle is a product of its design: T1151.31-35; T1153.12-16. The evidence is clear that Affected Vehicles have unusual (but for them, “normal” in the sense of typical or common) operating characteristics by reason of the particular design of the DPS6.

*Third*, the fact an operating characteristic is “normal” does not make it any less defective if by reason of that particular characteristic (or its underlying root cause), the vehicle is not of acceptable quality. The descriptor “normal” adds nothing.

(emphasis added.)

### Reasons of the primary judge

1. In a section of the judgment dealing with the negative consequences of torsional vibrations, the primary judge referred to Dr Greiner’s evidence concerning harshness at [451] and [452] J, but decided that he did not accept that evidence at [502] J and [506] J. At [506] J, the primary judge referred to [66] of Dr Greiner’s expert report in reply (which is set out above). His Honour there stated:

…I do not feel that I can safely conclude that harsh gear shifts resulted from the use of inner dampers and clutch slip because (a) that is not referred to specifically in the documents upon which Dr Greiner relied beyond general observations about NVH issues and judder and more significantly (b) I do not understand Dr Greiner’s explanation of the phenomenon. In his report in reply at §66 Dr Greiner made some more comments about harsh gear shifts but this time he linked the problem to frictional variability in the clutch lining material. He had explained that problem at §583 in his report in chief in terms which I can readily follow. However, it is not an explanation of how harsh gear shifts can result from torsional vibrations in the absence of variability in the friction material…

1. In a separate section of the judgment concerning Ford’s position, the normal operating characteristics were listed in [521] J.
2. As part of the analysis concerning those characteristics, the primary judge stated that he was not persuaded by Dr Greiner’s evidence about firm gear shifting (because he did not follow his explanation) and “I am unable to say whether the firm gear shifts are a consequence of the transmission of torsional vibrations through the drivetrain due to the low level of torsional damping provided in the DPS6. I could not follow Dr Greiner’s explanation and the Respondent proffered no explanation”: [523] J.
3. As to the slight shunting sensation, the primary judge found at [525] J:

Neither Dr Greiner nor any other witness gave evidence to the effect that shunting could be caused by torsional vibrations independently of the behaviour of the clutch lining and I am therefore left in the same position as for [firm gear shifting]. That is I am unable to say whether it is caused by torsional vibrations but since the Respondent has admitted that it was a feature of the Affected Vehicles, I find as much.

1. At [528] J, the primary judge reiterated that he was unable to say that firm (or “harsh”) gear shifting and shunting were caused by the transmission of torsional vibrations: see also [654] J.
2. The primary judge then made the following findings at [672]–[673] J:

However I have pointed out above that the Applicant made no attempt to connect the normal operating characteristics to its case alleging that all Affected Vehicles were defective due to the root causes of inadequate torsional damping and inadequate heat management. This is significant because as I explain more fully below in Section XVI, the Applicant chose to particularise its case based on the evidence given by Dr Greiner. This choice meant that the trial of the s 54 question was conducted exclusively on the basis of the four alleged Component Deficiencies and two alleged Architectural Deficiencies. As I am not satisfied that the Applicant has connected 3 of the 5 normal operating characteristics to its Architectural Deficiency case (and the Applicant did not submit they were connected to the Component Deficiencies), it would be procedurally unfair to consider these characteristics in assessing whether the Respondent has complied with statutory guarantee where it was never asked to meet this case at trial.

I therefore conclude that all vehicles fitted with a DPS6 were supplied in breach of s 54(2), as they are prone to slight shudder at low speeds and gear rattling, being the two normal operating characteristics that have been causally linked to the case run by the Applicant on inadequate torsional damping. No attempt has been made to fix these two characteristics, so all vehicles remain afflicted by this risk.

### Whether the primary judge erred

1. By grounds 3 and 4(b) of the Amended Notice of Cross-Appeal, the respondent contends that:
2. the finding that the respondent had made no attempt to connect the normal operating characteristics to the allegation that all Affected Vehicles were defective due to the root causes of inadequate torsional damping and inadequate heat management, and that it would be procedurally unfair to consider three of the five normal operating characteristics in assessing whether Ford had complied with the statutory guarantee, was an error in law;
3. the primary judge ought to have found that the characteristics of firm gear shifting and a slight shunting sensation were a consequence of inadequate arrangements for damping of torsional vibrations.
4. Ford’s primary response to these grounds is that the primary judge cannot be criticised in circumstances where the arguments now sought to be advanced were not put below, and it was not part of the respondent’s case.
5. There is strong merit in this submission.
6. That is because no such case was pleaded or opened by the respondent. It was not the subject of cross-examination at trial and no finding of the kind now referred to in ground 4(b) was sought by the respondent. Indeed, the respondent branded Ford’s case on the normal operating characteristics as a “distraction” if the primary judge was to accept the case that she (the respondent) was advancing (as opposed to the case that Ford was advancing).
7. In particular, although the respondent’s closing submissions referred to firm gear shifting and the slight shunting sensation in the course of addressing Ford’s case about the normal operating characteristics (as we identify above), the respondent made no submission that these characteristics were *caused* by inadequate arrangements for damping of torsional vibrations. Further, the respondent’s submissions did not link the various references in Dr Greiner’s two reports (including to the general discussion of “Comfort (Noise, Vibration and Harshness)” early in his first report) and other evidence (as the respondent now seeks to do) in support of such a conclusion.
8. On this appeal, the respondent submits that it did advance this case before the primary judge because of the references to [57]–[73] of Dr Greiner’s reply report in the opening submissions and reply submissions. However, the opening submissions and the reply submissions do not contain or develop any argument that the characteristics of firm gear shifting and slight shunting sensation were a consequence of inadequate arrangements for damping of torsional vibrations. References to these paragraphs of Dr Greiner’s expert report in reply would not be sufficient to alert the primary judge (or Ford) that the respondent was advancing such a case.
9. The respondent also submits that the characteristics of firm gear shifting and a slight shunting sensation had been addressed by Dr Greiner, and that the problems described by him and in the Ford US documents “largely corresponded with the types of issues Ford labelled ‘normal operating characteristics’ in these proceedings, but the terms employed to describe the problems/issues varied”. However, even if that is the case, neither Ford nor the primary judge can be criticised for failing to appreciate that correlation if the respondent neither brought it to Ford’s and the primary judge’s attention nor made submissions which referenced that evidence. That is especially the case where such a large volume of documentary evidence was before the Court.
10. Therefore, in these circumstances, the primary judge was correct to say, as he did, that it would be procedurally unfair to “consider these characteristics in assessing whether [Ford] has complied with the statutory guarantee where it was never asked to meet this case at trial”.
11. The second primary argument by Ford is that, when one examines [57]–[73] of Dr Greiner’s second report (which was also emphasised by the respondent on this appeal), that evidence was insufficient to establish, on the balance of probabilities, that the characteristics of firm gear shifting and a slight shunting sensation (being the two normal operating characteristics referred to in ground 4(b)) were a consequence of inadequate arrangements for damping of torsional vibrations.
12. For the following reasons, we accept that argument.
13. Dealing with each issue raised by grounds 3 and 4(b) in turn:
14. the identified paragraphs of Dr Greiner’s report make no reference to heat management;
15. as to the “firm gear shifting under aggressive acceleration”, Dr Greiner’s evidence was that “[sporty vehicles] typically behave in this manner” and that transmission calibration and customer preference are not the only cause of firm gear shifts. While Dr Greiner considered that harsh shifting could be caused by friction variability (relevant to the clutch lining), he did not, as the primary judge correctly stated, explain how harsh gear shifts can result from torsional vibrations in the absence of variability in the friction material;
16. as to the “slight shunting sensation at very low speeds”, Dr Greiner’s evidence rose no higher than an opinion that “[w]hilst shudder will always be a possibility caused by an internal combustion engine”, this can be “effectively mitigated through the use of adequate torsional dampening”. This evidence is not sufficient to prove that the characteristic was *caused* by the alleged Architecture Deficiency.
17. No error has been established.
18. Grounds 3 and 4(b) of the Amended Notice of Cross-Appeal must therefore fail. Because of this, there is no need to address the matters raised by paragraph 2 of Ford’s Notice of Contention in the cross-appeal.

## Ground 5 Amended Notice of Cross-Appeal

1. By this ground of appeal, the respondent contends that:

The learned primary judge erred in law in answering common questions 2, 7 and 8 and at J[510]-[519], [501] (relating to friction material), at J[235] (relating to input shaft seals), at J[413]-[415] (relating to the Original ATIC 91 chips), and at J[13], [528]-[534], [961]-[963] and CQJ [63]-[64], [70] in failing to find that:

(a) Affected Vehicles manufactured with the B8080 clutch lining material, had a propensity to experience all of the issues found to be associated with the B8080 clutch friction material,

(b) Affected Vehicles manufactured with the original input shaft seals had a propensity to experience all of the issues found to be associated with the original input shaft seals,

(c) Affected Vehicles manufactured with the Original ATIC 91 chips and/or (to the extent grounds 10 and 11 below are upheld) the Original ATIC 106 chips, had a propensity to experience all of the issues found to be associated with the use of the Original ATIC 91 chips (and also the issues associated with the Original ATIC 106 chips to the extent grounds 10 and 11 below are upheld),

(d) Affected Vehicles had an unusual propensity for servicing, repair and/or replacement of the dual clutch assembly (or components thereof) in Affected Vehicles to be necessary or desirable earlier, and more often than usual or reasonably expected,

by reason of being manufactured with inadequate arrangements for damping of torsional vibrations and/or heat management (respectively, the Architecture Deficiency – Damping and Architecture Deficiency – Heat), including in the interaction of those architectural arrangements with the componentry.

1. The primary judge found that:
2. the DPS6’s approach to torsional vibrations and heat management “had some impact on the failure of the input shaft seals”: [235] J; see also [534] J;
3. the DPS6’s system for torsional damping “was apt to generate a degree of heat which led to the B8080 clutch lining behaving eccentrically when sufficiently heated”: [532] J; see also [501] J;
4. torsional vibrations accelerated the solder cracking problem associated with the ATIC chips in the TCM: [415] J; see also [533] J.
5. The respondent contends that these findings ought to have led the primary judge to also find that the alleged Architecture Deficiencies gave rise to a “superadded propensity for Affected Vehicles to experience troubling vehicle behaviours, and the superadded propensity for servicing, repair and/or replacement of the dual clutch assembly”, associated with each of the relevant Component Deficiencies.
6. The respondent also submits that the error in the primary judge’s method arises from the unnecessary narrowing of the respondent’s case and is evident at [515]–[518], [235] and [531] J wherein it is suggested that the respondent could only succeed on the Architecture Deficiencies case to the extent it was shown that a problem associated with them was “irremediable” divorced from any remedies Ford developed for the Component Deficiencies or which even *could*,hypothetically, have been developed: see [516] J.

### The case below

1. Ford submits that the respondent’s case before the primary judge was that the Architecture Deficiencies themselves caused “undesirable behaviours independent of the componentry”. So much may be accepted in that the respondent did advance such a case. We refer, in particular, to section 4.5 of the respondent’s closing submissions which related to 2% of the class which only had Architecture Deficiencies without any of the Component Deficiencies.
2. However, the respondent *also* advanced a case below that there was a causal relationship between the Component Deficiencies and the Architecture Deficiencies. That is, the respondent’s architecture case was not merely the residue of problems left over once all the Component Deficiencies in a vehicle were fixed, but also involved the allegation that there was an interaction between the DPS6’s architecture and the propensity of its componentry to fail.
3. As part of the closing submissions, the respondent identified that this was an issue in connection with each of the Component Deficiencies as found by the primary judge, and explained the relationship by reference to the evidence. Further, the respondent did not seek to prove (and did not submit) that the issues to which the DPS6 system for damping torsional vibrations/heat gave rise were irremediable (as opposed to not remedied by Ford).
4. In section 4.4 of its closing submissions, the respondent addressed the Component Deficiencies that are relevant to this appeal.
5. In relation to the input shaft seals, the respondent identified that the only real dispute about this deficiency as being whether it was related to the Architecture Deficiency – Heat, or was wholly self-contained: [256]. In a section dealing with the connection to the Architecture Deficiencies, the respondent also submitted at [284]–[289] that:

Ford Australia seeks to suggest the Input Shaft Seal leaks were an isolated deficiency unrelated to the architecture issues.

The Court should not accept that claim.

As Dr Greiner explained – and it makes complete sense – transmissions are “complex” systems and failures never have just one root cause. Many issues are related root causes of what the customer sees and experiences. Even on Ford’s case this is correct: Ford itself acknowledges that the seals issue had many root causes including manufacturing processes and seal properties.

**However, the fundamental architecture of the DPS6 is also a root cause of the seals issue and consequently the problems customers experienced and continue to experience. Dr Greiner’s evidence is that the reason the seals failed is because of the environment they were put into, viz an excessively hot operating environment with insufficient reduction in torsional vibrations**. There is documentary evidence to support this too…

**As Dr Greiner says, it is the excessive heat issue which sits “behind” the problems with the seals**. As he asked rhetorically, “why would [Ford] have been forced to change the [seal] material to a higher heat resistant material if it’s not a heat related problem?”. There is no good answer for that question coming from Ford Australia.

In fact, Getrag contended in November 2013 that: (a) temperature and energy levels were “much higher” on DPS6 vehicles vs other Getrag customers of the DCT250; (b) seals were not failing in other applications of the DCT250; and (c) Ford was the only customer to use a cardanic clutch system-i.e., “no DMF” (and consequently those customers did not need to rely, as the DPS6 does, on excessive clutch slip to try to dampen torsional vibrations (and which generates excessive heat)). By March 2014, Ford US had accepted Getrag’s analysis that the original seal material was not sufficiently robust for the temperature of the DPS6.

(emphasis added; citations omitted.)

1. In relation to the TCM, the respondent identified one issue as being whether it was related to the Architecture Deficiency – Damping, or was wholly self-contained: [293(b)]. In a section dealing with the connection to the Architecture Deficiencies, the respondent identified that an internal report of Ford, Getrag and Continental “also identifies vehicle vibrations as ‘an accelerator’ of the solder cracking issue” and that “Further detail and the testing that led to that conclusion that vehicle vibrations were an accelerator is contained in slide 49”: [319] and [320]. The respondent submitted that this conclusion was “wholly consistent with Dr Greiner’s view that issues in complex modern transmissions never have just one root cause (T1069.39-41) and that the inadequate management of vehicle vibrations was a contributor to this issue”: [321].
2. In relation to the friction material, the respondent identified one issue as being whether it was related to the Architecture Deficiencies, or was wholly self-contained: [325(b)]. In a section dealing with the connection to the Architecture Deficiencies, the respondent submitted at [362]–[363] that:

Ford Australia seeks to isolate the friction material issue from the architecture issues but they are inherently related.

The chain of reasoning can be simply stated: see Greiner’s powerpoint presentation for the hot-tub, slides 5-12; see further Greiner 1, [311]-[350]; Greiner 2, [77], [176]. In summary: without a mechanical damper solution for torsional vibrations, Ford and its transmission supplier Getrag were forced to use clutch slip excessively to seek to dampen the torsional vibrations. Clutch slip generates heat. Without an adequate heat management system, the clutch lining material is operating in an environment with large temperature variations which include, in heavy traffic or aggressive drive cycles excessive heat. That kind of operating environment causes friction variability and wear. Heat was particularly problematic for the B8080 material’s friction material properties. Wear at high temperatures is problematic for the RCF1o.

(document identifiers omitted.)

1. After referring to the contents of various documents internal to Ford US, the respondent submitted at [374]–[375] that:

Against the overwhelming weight of Ford’s own documentary evidence, the Court will conclude that the shift to RCF1o and B8040 was a band-aid, not a complete fix for the friction material issue and its propensity to cause shudder, performance, durability, reliability, and NVH/comfort issues in the field. The longer-term limitations of RCF1o were well known within Ford, including that it has a poor [friction] characteristic and a propensity to wear at high temperatures. That is shown in Greiner 1, Figure 41 …

Against this background, the Court should have no doubts about the correctness of Dr Greiner’s opinions that Ford has never developed a completely satisfactory fix for the friction material deficiency (see Greiner 1, [433]-[436]; Greiner 2, [147]), and that the Architectural Deficiencies exist and continue to cause Affected Vehicles to have an unacceptable propensity to fail in the field and result in shudder, durability, performance, NVH/comfort and reliability issues of the kind pleaded.

(document identifiers omitted.)

### Whether the primary judge erred

1. In light of the findings made by the primary judge concerning the interaction between architecture and the propensity of componentry to fail as referred to above, we agree that those findings ought to have led the primary judge to find further that the alleged Architecture Deficiencies gave rise to a *superadded* propensity for Affected Vehicles to experience troubling vehicle behaviours, as contended by the respondent in [5(a)]–[5(c)] of the Amended Notice of Cross-Appeal. Such a finding ought to have been made based on the evidence identified in the closing submissions of the respondent irrespective of whether the related Component Deficiency was capable of or was the subject of a fix, or whether the Architecture Deficiency was remediable (which we accept was not the respondent’s case in any event).
2. That is because the Architecture Deficiencies *increased the risk or propensity* of the troubling behaviours occurring. This was a propensity case, which required an assessment of risk by the primary judge. Before any Component Deficiencies were rectified (if they were rectified), the propensity for the troubling issues existed as a consequence of a combination of the Component Deficiencies *as well as* the Architecture Deficiencies. The latter added to the overall risk. Such a finding ought therefore to have been made.
3. However, we are not satisfied that the primary judge erred in making a finding to the effect contended by the respondent in [5(d)] of the Amended Notice of Cross-Appeal. As with grounds 3 and 4 above, there is strong merit in Ford’s submission that no such case was put by the respondent below.
4. The respondent contends that the matters were established by Dr Greiner’s evidence as to typical rates of repair as compared with the excessive rates for the DPS6, and the interaction of the architecture with the componentry.
5. However, on a fair reading of the material advanced below, including the respondent’s submissions, we do not consider that the primary judge was directed to make a finding that the Affected Vehicles had an “unusual propensity” for servicing, repair and/or replacement of certain components, nor do we consider that such a finding ought to have been made.
6. For these reasons, ground 5 of the Amended Notice of Cross-Appeal must be upheld (other than in the case of ground 5(d)).

## Ground 6 Amended Notice of Cross-Appeal

1. By this ground of appeal, the respondent asserted error by the primary judge in failing to find that the supply of the Affected Vehicles did not comply with the guarantee of acceptable quality in s 54 of the ACL by reason of being manufactured with the Architecture Deficiencies, including in the interaction of those architectural arrangements with the componentry.
2. By reason of the respondent’s success on grounds 5(a)–(c) of the Amended Notice of Cross-Appeal, ground 6 should also succeed.

## Grounds 10 and 11 Amended Notice of Cross-Appeal

1. Grounds 10 and 11 of the Amended Notice of Cross-Appeal, as well as paragraph 3 of Ford’s Notice of Contention, relate to the primary judge’s findings concerning the ATIC 106 chip. In essence, the respondent complains that the primary judge ought to have found that the Affected Vehicles failed to comply with the guarantee of acceptable quality within the meaning of s 54 of the ACL when supplied with the original ATIC 106 chips.
2. The first error asserted by the respondent relates to the findingthat there was “no material” which allowed assessment of the existence of any independent risk of solder cracking in respect of the ATIC 106 chips. The respondent submits that there was such evidence, and says that this explains why Ford did not put this fact in issue.
3. The secondasserted error relates to the finding that “the evidence is consistent with the ATIC 106 problem being regarded as minor but with Ford US deciding that since it was going to have to change the entire TCM it might as well take the opportunity to fix a somewhat smaller problem”. The respondent submits that this finding was not available in circumstances where the evidence was not consistent with such a finding and Ford had not made a submission to that effect.
4. By its Notice of Contention, Ford contends that the decision of the primary judge in relation to the ATIC 106 chips should be affirmed because the Affected Vehicles did not fail to comply with the guarantee of acceptable quality when supplied as new.

### Reasons of the primary judge

1. As already observed, and as was common ground at the trial, every Affected Vehicle had four ATIC 106 chips: [331] J. Their function was to control the gears and the introduction of the relevant clutch plate to the drive plate: [328] J.
2. The primary judge at [3] J summarised the respondent’s case as follows, “Ms Capic says that the coefficients of thermal expansion of the PCB and the ATIC 91 and ATIC 106 chips were different and that repeated heating and cooling of the TCM (which is attached to the transmission assembly) created a risk of the solder cracking”.
3. The primary judge expanded upon the impact of the changes of temperature as follows at [336]–[339] J:

The frequent fluctuations in temperature experienced by the transmission are therefore shared with the TCM.

These fluctuations then bring one to the topic of the coefficient of thermal expansion (‘CTE’). This is the rate at which an object expands or contracts with a given change in temperature. If two objects each with a different CTE are bound together then fluctuations in temperature will cause them to expand and contract at different rates and this difference generates a physical force. It is this principle, for example, which underpins the operation of a bimetallic thermostat. In the case of a thermostat the change in temperature is converted into mechanical action which turns off or on a heating element.

What is good engineering in a thermostat, however, is not necessarily good engineering in a PCB. In this case, the PCB had a CTE of 18 (measured in ppm/C˚) whilst the original ATIC 91 chips had a CTE of 6. The ratio of these two coefficients was therefore 3:1 which is to say that the PCB expanded three times as fast as the ATIC 91 chip. **The evidence did not directly disclose what the CTE for the ATIC 106 chips was but it did suggest, in a fairly unspecific way, that the problem was similar. Although some more detail about this might have been helpful it does not matter since the parties both accepted that the CTE problem afflicting the ATIC 106 was similar to that afflicting the ATIC 91. I emphasise, however, that the evidence about this was far from clear.**

In any event, the effect of the differing CTEs in the case of the ATIC 91 chips (and what I will assume was a differing CTE in the case of the ATIC 106 chips) was that over time the repeated heating and cooling of the TCM created a repeated mechanical strain on the solder which affixed the chips to the PCB.

(emphasis added.)

1. Pausing there, the respondent did not submit that there was any evidence which disclosed the CTE for the original ATIC 106 chip.
2. As to the consequences of failure of the ATIC 106 chip, which is relevant to Ford’s Notice of Contention, the primary judge found at [332] J that:

[F]ailure in the ATIC 106 chips is likely to result in only localised dysfunction. For example, if the ATIC 106 controller for the gear shifts on clutch 1 completely failed then this would result only in an inability to change gears to an odd numbered gear. Where the ATIC 106 controlling the odd numbered gears failed in a less than complete way, then varying degrees of dysfunction in gear changes with those gears might be observed. Intermittent dysfunction in an ATIC 106 controlling a clutch would, on the other hand, be likely to result in symptoms associated with instability in that clutch system. But these failures are localised in the particular system controlled by the relevant ATIC 106.

1. The primary judge was of the view that the failure of the ATIC 106 chip may be contrasted with the situation where there was a failure in the ATIC 91 chip, which leads to “potentially more significant disruptions in the driving experience”: [333] J. He continued, “Consistently with that observation, Mr Cruse explained that the driveability impacts of an affected ATIC 91 chip were more significant than those of an affected ATIC 106 chip”. At [348]–[349] J, the primary judge accepted the evidence of Mr Cruse that:

If an ATIC 106 chip is affected, the transmission may not always select gears appropriately or may sometimes ‘miss’ gears. If one ATIC 106 chip loses communication altogether, the transmission will not be able to select the gears controlled by that chip. This could influence the vehicle’s performance – for example, if the transmission cannot select second gear, the running speed may increase inappropriately high (‘rev’) in first gear before shifting into third gear, resulting in a jerking or shuddering sensation.

1. In a separate section of the judgment dealing with risk of failure, the primary judge stated at [351] J that, since this is a case about risks of failure, it was necessary to consider the risks of those difficulties arising. His Honour observed that the position of the two chips is not the same. He stated that while the respondent’s submissions “did belatedly draw a distinction between the consequences of failure in the ATIC 91 and ATIC 106 chips they did not observe that distinction when dealing with the extent of the risks posed”: [353] J.
2. The primary judge referred to the respondent’s reliance upon a long document which “Ford US may have sent to Getrag possibly in February 2015”, being a letter and approximately 650 pages of attachments. The primary judge observed at [355] J that “the topic of discussion [in the document] is the ATIC 91 chip” and that the attack on Getrag “seems to be a war about the ATIC 91 chip and not about the ATIC 106 chip”. This was echoed at [357] J by the statement, “The principal limitation, however, is the one that I have referred to already, namely, that substantially all of the document is about the ATIC 91 chip and is not about the ATIC 106 chip”.
3. The characterisation of the document sent to Getrag is important because it was that document, along with other evidence, which persuaded the primary judge that there was a real risk of failure of the original ATIC 91 chip: [366]–[367] J. We return to this important distinction below.
4. After finding at [368] J that there was a “real risk of the solder cracking on the original ATIC 91 chip [and where] this risk eventuated, it would cause, in turn, the series of steadily worsening symptoms to which I have already referred”, the primary judge stated at [369] J:

I am unable to make a similar finding about the ATIC 106 chips. There is no material which allows me to assess the existence of any independent risk that they posed. As I have said, the Applicant made no submissions about the existence of a risk of failure arising from the ATIC 106 chips. The best that can be said is that there was a sufficient problem for Ford US to think it profit maximising to replace the chips in production and, eventually, for some vehicles on the road. However, I do not think that is sufficient for me to make any sensible assessment of the risk it posed independent of the ATIC 91 chip. The evidence is consistent with the ATIC 106 problem being regarded as minor but with Ford US deciding that since it was going to have to change the entire TCM it might as well take the opportunity to fix a somewhat smaller problem. The situation of the ATIC 106 chips was, in a real sense, overshadowed by that of the ATIC 91 chips and this had the consequence that it is not possible to make a finding about it. No doubt, there is a more detailed story to be told about the ATIC 106 chips but neither party really embarked upon it and it would be inappropriate for me to try and guess about it.

1. At [378] J, the primary judge stated:

The Applicant submitted that the ‘TCM Solder Crack deficiency’ was only resolved once the second round of changes to the ATIC 106 were completed. No doubt this is literally true. However, in circumstances where I am unable to assess the existence of an independent risk posed by the ATIC 106 chips, I am unable to say whether there was a risk in those vehicles which had the new ATIC 91 chips installed but which continued to contain the old ATIC 106 chips. I am prepared to assume there was some desirability of having the new ATIC 106 chips otherwise Ford US would not have bothered changing the chip. However, there is simply no way to assess the existence of any risk of failure where a vehicle had a new ATIC 91 chip but old ATIC 106 chips. Since the Applicant bears the onus of proof on establishing the risk, I find that the risk has not been proven.

1. At [651] J, the primary judge concluded:

For completeness, I have not drawn any independent conclusion about the ATIC 106 chip, so far as it might bear upon the question under s 54. This is a consequence of the fact, as I explained above in Section VIII, that there was insufficient material to support a finding that a real risk of failure existed in relation to the ATIC 106 chip.

### Whether the primary judge erred

1. As to the first asserted error, the respondent submits that the existence of any independent risk of solder cracking in respect of the ATIC 106 chips was not put in issue by Ford at trial, and that Ford did not contend that there was any material distinction in failure rates between the ATIC 106 chip and the ATIC 91 chip, or any material distinction in the deficiencies in both chips or the causes of the respective chip failures.
2. However, irrespective of the approach taken by Ford at trial, the burden of proof remained on the respondent to adduce evidence which demonstrated that there was a risk of failure of the ATIC 106 chip, since this was a case about risks of failure. As can be seen from the reasons extracted above, the primary judge was careful to review and evaluate the evidence which was not, in fact, directed to demonstrating a risk of failure in relation to both the ATIC 91 chip and the ATIC 106 chip. That is, the evidence in relation to the risks of failure of both types of chips was not identical.
3. In circumstances where the majority of the evidence (such as the letter and documents sent to Getrag) was focused upon the ATIC 91 chip, and not the ATIC 106 chip at all, or where there was at least uncertainty as to whether the ATIC 106 chip was being addressed in the evidence (such as in the graphs which appear at [357] and [361] J), there was no error by the primary judge in evaluating the risk concerning the ATIC 91 chip and the ATIC 106 chip separately. Having regard to the evidence, it did not follow that the different types of chips could be treated as having the same risk of failure.
4. Once that is appreciated, the question becomes whether there was sufficient evidence to demonstrate an independent risk of failure of the ATIC 106 chip.
5. The respondent identifies various disparate paragraphs within the evidence of witnesses, and particular pages of lengthy documents tendered at trial, in order to show that there was such evidence.
6. In particular, the respondent relies upon a report dated 12 November 2014 which was provided by Ford US to the National Highway Traffic Safety Administration. That report, which is 426 pages long, contains two tables, one of which was entitled “Suspected ATIC91 Key Word Search – ‘Loss of Motion’ and ‘No Start’ Analysis” and the other entitled “Suspected ATIC91 Key Word Search (‘Loss of Motion’ and ‘No Start’) and ATIC106 Key Word Search ‘Limp Home’”. The tables relate to all countries and concern the “Bivariate Weibull” model, and contained percentages of repair probability over different time periods and distances. Similar tables appear on two later pages of the report, including a table which is described as “Suspected ATIC106 Key Word Search – ‘Limp Home’ Analysis”.
7. No witness was taken to these pages during cross-examination at the trial, and no witness gave any evidence about them.
8. Although Dr Greiner referred to other pages of this report in his first expert report at footnotes 249, 250 and 251, the pages which contain these tables were not referred to by him, and his reports did not contain any analysis of the tables of the kind which is advanced by the respondent on this appeal (particularly at footnote 9 of the respondent’s outline of submissions). Further, having regard to the pages of the report to which we were taken, we are not satisfied that the tables contained in this report can be interpreted in the way in which the respondent contends that they should be interpreted. We do not accept that the primary judge erred in failing to discern that these pages of the report, to which he was not taken in submissions and about which there was no evidence, were sufficient such that his Honour ought to have found that there was an independent risk of failure of the ATIC 106 chip.
9. We were also taken to other evidence by the respondent which was said to demonstrate an independent risk of failure of the ATIC 106 chip. While we accept that there was some evidence concerning the risk of failure of the ATIC 106 chip, we do not agree with the respondent’s submission that there was sufficient material before the primary judge which allowed the existence of any independent risk of solder cracking in respect of the ATIC 106 chips to be assessed.
10. That is because:
11. the particular paragraphs of the first report of Dr Greiner either addressed both the ATIC 91 chip and the ATIC 106 chip, or related to the revised ATIC 106 chip;
12. the particular paragraphs of the affidavit of Mr Kwasniewicz addressed the general issues around the solder crack issues, investigations and the solutions; and
13. the extracts of the Task Force Report either relate to the ATIC 91 chip or do not provide any cogent evidence concerning the existence of the risk of solder cracking in respect of the ATIC 106 chips.
14. For these reasons, the respondent has not established the first asserted error.
15. As to the second asserted error, being the observation by the primary judge that “the evidence is consistent with the ATIC 106 problem being regarded as minor but with Ford US deciding that since it was going to have to change the entire TCM it might as well take the opportunity to fix a somewhat smaller problem”, we agree with Ford’s submission that this observation was not material to the ultimate findings of the primary judge, being to the effect that the respondent had failed to discharge its burden of proof in relation to the risk of failure of the ATIC 106 chip.
16. It follows that grounds 10 and 11 of the Amended Notice of Cross-Appeal must fail.
17. As these grounds have failed, it is not necessary to determine the issue raised by paragraph 3 of Ford’s Notice of Contention in the cross-appeal. However, it is relevant to note that, as the evidence concerning the ATIC 106 chips was insufficient (which Ford endorses), we cannot, as Ford presses us to do, assess the likelihood of the risk manifesting as part of the analysis of whether there has been compliance with the statutory guarantee. As a result, paragraph 3 of Ford’s Notice of Contention fails for the same reasons that grounds 10 and 11 of the Amended Notice of Cross-Appeal fails.

# Appeal on damages

## Section 271 Australian Consumer Law

1. Section 271(1) of the ACL provides that:

**271 Action for damages against manufacturer of goods**

(1) If:

(a) the guarantee under section 54 applies to a supply of goods to a consumer; and

(b) the guarantee is not complied with;

an affected person in relation to the goods may, by action against the manufacturer of the goods, recover damages from the manufacturer.

1. Section 271(6) of the ACLprovides that:

(6) If an affected person in relation to goods has, in accordance with an express warranty given or made by the manufacturer of the goods, required the manufacturer to remedy a failure to comply with a guarantee referred to in subsection (1), (3) or (5):

(a) by repairing the goods; or

(b) by replacing the goods with goods of an identical type;

then, despite that subsection, the affected person is not entitled to commence an action under that subsection to recover damages of a kind referred to in section 272(1)(a) unless the manufacturer has refused or failed to remedy the failure, or has failed to remedy the failure within a reasonable time.

1. The primary judge’s interpretation and application of these provisions was the subject of attack by both Ford and the respondent.

### Whether s 271(1) gives rise to separate causes of action

1. This issue arises pursuant to grounds 8 and 9 of the Amended Notice of Cross-Appeal.
2. At [5] J, the primary judge observed that, for each risk which was found to have been established, Ms Capic had “a separate cause of action under ACL s 271(1) entitling her to claim damages from [Ford] under s 272”. This finding as to the construction of s 271(1) of the ACL is repeated with associated reasons at [745]–[752] J as follows:

…[There is a] question of whether s 271(1) confers a separate cause of action for each problem sufficient to constitute non-compliance with the guarantee (for convenience each such problem is described below as a ‘fault’). For example, if a particular vehicle suffers from the two normal operating characteristics and a TCM with a real risk of developing solder cracks (in this Section, a ‘faulty TCM’), does the group member have one cause of action under s 271(1) or does he or she have two?

This question is of significance because of the defence afforded by s 271(6). If there is but one cause of action regardless of the number of faults then the repair defence under s 271(6) becomes conceptually problematic. To stay with the example of the vehicle which suffered on supply (the relevant time these questions are to be addressed) from the two normal operating characteristics and a faulty TCM: what happens if the TCM is replaced within a reasonable time but the two normal operating characteristics remain unremediated?

If there is but one cause of action for a failure to comply with the guarantee in s 54 then at the time of supply when the cause of action accrued the vehicle suffered from two faults: the two normal operating characteristics and the faulty TCM. On the basis of that single cause of action, damages would be available for reduction in value under s 272(1)(a) and other damages under s 272(1)(b). In effect, the single cause of action gives rise to two separate heads of damages.

On this view, the fact that a faulty TCM was subsequently replaced within a reasonable time would not give rise to a defence under s 271(6). This would be because the act of repair did not result in the vehicle being of acceptable quality. Even after the replacement of the faulty TCM it would remain blighted by the two normal operating characteristics.

On the other hand, if each fault gives rise to a separate cause of action then a different result follows. In that situation, the group member has an entitlement to sue for reduction in value damages under s 272(1)(a) and other damages under s 272(1)(b) in relation to the two normal operating characteristics. However, he or she has a separate cause of action for the same heads of damages arising from the faulty TCM. However, where the TCM has been replaced by the manufacturer within a reasonable time, then s 271(6) will operate to provide the manufacturer with a defence to a claim for reduction in value damages under s 272(1)(a) in relation to the TCM.

These then are the two competing interpretations of Division 2 of Part 5-4 vying for the field. I prefer the second reading. I read s 54 as establishing a single norm. That norm may be breached in more than one way. A vehicle may have several things wrong with it each of which is sufficient to mean that it is not of acceptable quality. **Each time the norm is breached s 271(1) confers a separate cause of action. In terms of s 271(1) this is because each time the norm is breached ‘the guarantee is not complied with’.** That expression is neutral on how many factual matters underpin the failure, that is to say, it is consistent with either of the interpretations I have outlined.

However, I prefer the second interpretation for two reasons. First, it avoids the anomalous availability of reduction in value damages in relation to a fault that has been repaired within a reasonable time in a case where another fault exists and has not been. Secondly, s 271(6) refers to the failure of the manufacturer ‘to remedy *a*failure to comply with the guarantee’ (my emphasis) and therefore appears to recognise that there may be more than one such failure.

**Consequently, I conclude that each fault constitutes a failure to comply with the statutory guarantee and gives rise to a separate cause of action.** This means that the issues which arise under s 271(6) are live in relation to the input shaft seals, clutch lining and TCM even though all of the Affected Vehicles also fail to comply with the statutory guarantee because of the two normal operating characteristics.

(emphasis added.)

1. As noted by the primary judge at [745] J, this issue was not addressed by the parties before him.
2. By grounds 8 and 9 of the Amended Notice of Cross-Appeal, the respondent challenges the primary judge’s finding that each deficiency (or “fault” as described in [745] J) – namely the input shaft seal, B8080 clutch lining, ATIC 91 chip and inadequate torsional damping – was sufficient on its own to constitute non-compliance with the statutory guarantee and a separate cause of action under s 271(1) of the ACL.
3. The respondent submits that this was an error because in circumstances where multiple reasons give rise to s 54 non-compliance, and those reasons interrelate with each other, share commonalities in their consequences for consumers, and are related to a functionally distinct or self-contained part of the vehicle, the primary judge should have treated each fault as giving rise to the same, single failure to comply with the statutory guarantee.
4. For the following reasons, we accept that the primary judge’s construction of s 271(1) of the ACL, and the finding challenged by these grounds of the Amended Notice of Cross-Appeal, were erroneous. We therefore uphold grounds 8 and 9 of the Amended Notice of Cross-Appeal.
5. Firstly, in our respectful view, the primary judge’s approach misconstrued s 271(1) by treating instances of the guarantee of acceptable quality being “not complied with” as comprising merely the underlying fault (or root cause). However, s 54(2) requires “acceptable quality” to be assessed from the perspective of a reasonable consumer fully acquainted with the state and condition of the goods.
6. In this case, the state and condition of the vehicle with which the reasonable consumer is to be acquainted for the purposes of s 54(2) included not only the underlying mechanical issues (such as the faulty clutch lining), but the adverse consequences that these faults had a propensity to cause. It was the risk of adverse consequences such as shudder or rattling noises or loss of power in the vehicles that had these underlying faults that a reasonable consumer would regard as not meeting the standard of acceptable quality.
7. The fact that these underlying faults all affected a functionally distinct self-contained part of the vehicle – the DPS6 transmission – and gave rise to the same, or overlapping, risks of adverse consequences meant that, from a reasonable consumer’s perspective, there was in substance only one failure to comply with the guarantee.
8. Contrary to Ford’s submissions, it did not matter that the various consequences had more than one root cause. If two root causes have a propensity for the same or overlapping consequences for consumers, the reasonable consumer is likely to view this as one failure to comply with the statutory guarantee. Likewise, if there are two faults that cause the gearbox to malfunction in interrelated or overlapping ways, there is one failure from the reasonable consumer’s perspective: a faulty gearbox. Fixing only one of those faults under warranty does not change this perception.
9. Secondly, treating faults that are interrelated, overlapping in consequences, or that relate to a self-contained part of the vehicle as a single failure avoids absurdity. This is because if “faults” like those which arose in this case are treated as separate failures and separate causes of action, each would give rise to a separate, claimable reduction in value under s 272(1)(a). Such a construction is unlikely to be the intention of Parliament because it invites double recovery. Such a construction would also be unduly complicated – an incongruous result for legislation which is designed to protect the rights of consumers.
10. Thirdly, treating interrelated faults as a single failure does not entail the anomalous concern identified by the primary judge at [751] J that reduction in value damages could be available for unrelated faults in cases when one fault has been repaired and another fault exists.
11. That is because, if a vehicle has two unrelated faults, being ones which each give rise to entirely separate unrelated adverse consequences, there would be two failures to comply with the guarantee. So much may be accepted. That there may be more than one fault is recognised by the terms of s 271(6) itself in that it refers to a failure “to remedy *a* failure to comply with a guarantee” (emphasis added). Repairing such a distinct fault within a reasonable time would engage s 271(6) and preclude reduction in value damages resulting from that fault.
12. In contrast, when the faults are interrelated, have overlapping consequences, or relate to a self-contained part of a vehicle (as in this case), the repair of one fault but the failure to repair other faults does not preclude recovery of reduction in value damages. The vehicle is still not of acceptable quality.
13. This does not lead to an unjust outcome, as Ford submits, because the legislative intention of s 271(6) is to prevent the recovery of reduction in value damages only when a complete repair is provided within a reasonable time, not when the problem is only partially fixed. Treating interrelated or overlapping faults as separate failures would defeat this intention, because it would allow partial repairs to remove part of the consumer’s entitlement to damages.
14. This conclusion is consistent with the reasoning of the Full Court in the recent decision of *Toyota*. That case was also a representative proceeding and concerned the supply between 1 October 2015 and 23 April 2020 of 264,170 Toyota motor vehicles to consumers in Australia with a defective diesel exhaust after-treatment system (**DPF system**). One of the claims made in that case was that the relevant vehicles as supplied were not of “acceptable quality” and therefore failed to comply with the consumer guarantee in s 54 of the ACL. The DPF system was found to have a design defect which “comprised both mechanical defects and defective control logic and associated software calibrations” and which caused the vehicle to have a propensity to suffer one or more of a number of consequences. The Court observed at [57] that:

…complex goods such as motor vehicles are manufactured from innumerable components. It is conceptually flawed, and would render s 54 essentially inoperative in respect of most consumer goods, if a failure of a component could not as a matter of construction be regarded as a defect in the vehicle. The question has to be approached by asking whether the defect is such as to cause the relevant goods to be of an unacceptable quality within the meaning of s 54. It cannot be directed at the level of individual components which were not supplied separately or individually but rather form an inherent part of the goods as a whole.

1. Ford submits that the primary judge’s construction avoids the risk of the limitation period in s 273 working an injustice. It submits that, on Ms Capic’s construction, time would start running on the day that the consumer first became aware of the first problem and that, if the consumer took no action within the three year period (because, for example, the symptoms were not that serious), but another more serious problem with “overlapping” symptoms later arose, the consumer would be barred from obtaining relief in respect of either.
2. However, the limitation period in s 273 does not run from when an affected person is first aware of “the first problem” (i.e. the symptoms). It runs from when the person is aware, or ought reasonably to have been aware, that the statutory guarantee has not been complied with. If the symptoms noticed initially are “not that serious”, the affected person probably would not be aware of non-compliance with s 54, and so time would not start to run. By contrast, if the symptoms were “serious”, time would start running. This is reasonable and does not work an injustice, because the consumer should be aware that the statutory guarantee has not been complied with at that point in time.
3. Finally, Ford complains that what Ms Capic seeks to do by these grounds is re-enliven a “symptomology” case that the primary judge had ruled was not available on her pleading: *Capic v Ford Motor Company (No 3)* [2017] FCA 771. Ford contends that, by these grounds, Ms Capic now submits that compliance with the guarantee in this proceeding is to be analysed by reference to symptomology which amounts to an attempt to re-frame her case on a basis rejected by the primary judge.
4. We do not accept this complaint. Ms Capic’s claim is not based on symptoms actually exhibited, but rather the deficiencies in the DPS6 transmission that had a propensity to cause a range of overlapping consequences for consumers. The point which Ms Capic makes is that whether or not these matters amount to a failure to comply with s 54 must be assessed at the level of the reasonable consumer’s informed perception at the point of supply and that, when assessed at that level, the various deficiencies constitute a single failure, because this is the way it would be viewed by the reasonable consumer. For these reasons, we do not agree that Ms Capic has sought to re-enliven a “symptomology” case or re-frame her case on a basis expressly rejected by the primary judge.
5. It follows, in our respectful view, that the primary judge ought to have found that, where an Affected Vehicle was affected at the time of the relevant supply by one or more of the deficiencies as found by the primary judge in answer to question 2(a), that circumstance gave rise to a single failure to comply with the guarantee of acceptable quality in s 54(1) of the ACL and a single cause of action in respect of that failure pursuant to s 271(1) of the ACL.
6. We therefore uphold grounds 8 and 9 of the Amended Notice of Cross-Appeal.

### Whether s 271(6) is engaged when failure to repair within reasonable time

1. This issue arises pursuant to ground 4 of the Amended Notice of Appeal.
2. At [697] J, the primary judge identified that one of the issues between the parties was “whether delay in effecting repairs prevents s 271(6) operating”. At [724], [730] and [734] J, the primary judge answered the question in this way:

[T]he provision does not say anything about late repairs or replacements. Rather, it removes a consumer’s cause of action if, having required the manufacturer under its express warranty to make the goods of acceptable quality, the manufacturer does so within a reasonable time. The Respondent referred to this timing requirement as a species of constructive failure to repair which I think is a sound description of its operation. If a manufacturer who has been required to remedy non-compliance with the guarantee of acceptable quality, fails to do so within a reasonable time then it is treated as if it had not done so at all: s 271(6) will not be engaged. In that circumstance, the use of the concept of a lately performed repair is not especially helpful and runs the risk of obscuring the statutory question.

…

…What is said [in s 271(6)] is that ‘the manufacturer has refused or failed to remedy the failure or has failed to remedy the failure within a reasonable time’. What this means in English is that ‘the manufacturer has not remedied the failure within a reasonable time’.

…

In effect, the whole of the section after the word ‘unless’ just means ‘unless the manufacturer has failed to remedy the non-compliance with the guarantee of acceptable quality within a reasonable time’.

1. Ford contends that this construction was erroneous because the primary judge disregarded most of the words “unless the manufacturer has refused or failed to remedy the failure, or has failed to remedy the failure within a reasonable time” as “otiose”, and held that s 271(6) was not engaged where the manufacturer remedied the non-compliance but had not done so within a reasonable time.
2. Ford submits that the phrase is not otiose; it refers to three separate scenarios: (i) refusal to remedy (where the manufacturer refuses to offer a repair or replacement); (ii) failure to remedy (where the manufacturer attempts to effect a repair, but fails to do so); and (iii) failure to remedy within a reasonable time (where a reasonable time has elapsed, but the manufacturer has still failed to effectively repair or provide a replacement). That is, Ford construes the third situation“has failed to remedy the failure within a reasonable time” as merely defining how long an affected person must wait for a repair before bringing a s 272(1)(a) claim when none has been provided, but submits that a consumer cannot bring a claim for damages after a repair has, in fact, been effected.
3. However, the plain words of s 271(6) indicate that the bar to bringing a s 272(1)(a) claim after making a request for a remedy is lifted in three distinct situations. Firstly, if the manufacturer says it will not remedy the non-compliance (i.e. “refused”). Secondly, if the manufacturer has not remedied the non-compliance, or tried and failed (i.e. “failed”). Thirdly, if a remedy was provided, but not within a reasonable time (i.e. “failed to remedy the failure within a reasonable time”).
4. Thus, a claim can be made even if a repair has been effected, but the repair has not been undertaken within a reasonable time. To construe the provision otherwise would be to equate, at the time an action is commenced, a failure to repair within a reasonable time with a failure to repair simpliciter, and thus leave the words “or has failed to remedy the failure within a reasonable time” with no work to do. The task of a court construing a statutory provision is to strive to give meaning to every word of the provision: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [71] (McHugh, Gummow, Kirby and Hayne JJ).
5. For these reasons, ground 4 of the Amended Notice of Appeal fails.

## Section 272 Australian Consumer Law

1. This aspect of the appeal concerns an attack by Ford upon the primary judge’s assessment of damages payable to Ms Capic through grounds 5, 6, 7 and 8 of the Amended Notice of Appeal.
2. The assessment was made by the primary judge by reference to s 272 of the ACL, which relevantly provides that:

**272 Damages that may be recovered by action against manufacturers of goods**

(1) In an action for damages under this Division, an affected person in relation to goods is entitled to recover damages for:

(a) any reduction in the value of the goods, resulting from the failure to comply with the guarantee to which the action relates, below whichever of the following prices is lower:

(i) the price paid or payable by the consumer for the goods;

(ii) the average retail price of the goods at the time of supply; and

(b) any loss or damage suffered by the affected person because of the failure to comply with the guarantee to which the action relates if it was reasonably foreseeable that the affected person would suffer such loss or damage as a result of such a failure.

1. Ford complains about the primary judge’s construction of s 272 (by ground 5) and the consequent errors by the primary judge through the application of s 272 so construed when assessing the quantum of Ms Capic’s loss and damage (by ground 8). The essence of these complaints concerns the failure by the primary judge to find that events subsequent to the supply of the vehicle were capable of bearing on the proper assessment of reduction in value for the purposes of assessing damages under s 272(1)(a) and that, in the case of Ms Capic’s vehicle, the primary judge failed to take into account the fact of particular repairs to Ms Capic’s vehicle which had been effected at no cost to her, the value of Ms Capic’s vehicle at the time of trial, and her use of the vehicle up to the time of trial.
2. By grounds 6 and 7, Ford contends that the primary judge erred in finding that Ms Capic had established the fact of loss or damage, and in holding that her vehicle was worth 30% less than its fair market value at the time of purchase, despite having found there was “no useful evidence” as to that matter.
3. After five hearing days of this appeal had occurred, the decision of the Full Court in *Toyota* was delivered on 27 March 2023. We heard oral submissions from the parties about the impact of that decision on these grounds of appeal on 28 March 2023.

### Reasons of the primary judge

1. The primary judge stated the following in relation to Ms Capic’s vehicle at [674] J:

…In light of the conclusions above it follows that Ms Capic’s vehicle was supplied to her in breach of s 54 for four reasons. It contains a DPS6 the normal operating characteristics of which made it prone to a slight shudder and rattling, it contained the original input shaft seals, it contained a B8080 clutch and it contained a TCM fitted with an original ATIC 91 chip. As Mr Pike SC for the Applicant put it, it was a lemon.

1. After identifying the purchase price of Ms Capic’s vehicle at [877] J (of $22,736.36, about which there is no challenge), rejecting the valuation evidence adduced by the parties as it was based on assumptions which had not been established or which “[did] not match the facts” (amongst other reasons), and expressing the view that there was no useful valuation evidence as a consequence, the primary judge stated at [883]–[890] J:

Be that as it may, I am quite satisfied that Ms Capic’s vehicle was worth less at the time of its acquisition than she paid for it. Mr Vasilakis gave evidence to this effect which was not contradicted but in any event it is to my mind obvious. How should the reduction in value damages be assessed? It is trite that ‘mere difficulty in estimating damages does not relieve a court from the responsibility of estimating them’ and ‘[w]here precise evidence is not available the court must do the best it can’: *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 83 per Mason CJ and Dawson J, citing *Fink v Fink* (1946) 74 CLR 127 at 143 per Dixon and McTiernan JJ; *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 at 411-412 per Dixon and Fullagar JJ; *Chaplin v Hicks* [1911] 2 KB 786 at 792 per Vaughan Williams LJ; *Jones v Schiffmann* (1971) 124 CLR 303 at 308 per Menzies J.

The process of assessing what the value of a chattel was 9 years in the past when the defects it suffered from are risks not actualities is inherently impressionistic. That the risks came to pass is, so it seems to me, not to the point. If it were otherwise the value at the date of acquisition would be conceptually tied to contingent future events and hence theoretically unknowable. The fact that the vehicle’s input shaft seals did fail does not, therefore, matter. But for the same reason, the fact that the Respondent replaced them does not matter either for neither bears upon the risk of failure which existed at the date of the acquisition. The risks of the three proven component failures Ms Capic faced on 24 December 2012 were not altered in their extent when they came to pass just as a person who wins the lottery cannot be said to have had a 100% chance of winning. They had the same chance as everyone else: the outcome of a probabilistic event does not affect the original probability.

Identical remarks may be made about the TCM. In the case of the clutch lining the same analysis flows albeit with a slight twist. That the risk came off that the clutch lining would behave erratically is irrelevant to the value at the time of its acquisition for the reasons just given. It is thus also irrelevant that it was *not* successfully repaired (whereas in the case of the TCM and input shafts seals what is irrelevant is that they *were* repaired).

In a sense, the Applicant makes this very submission on behalf of group members when she submits that group members with vehicles which have never displayed any symptoms are equally entitled to recover. The Applicant’s position on this issue is an inevitable corollary of running the case on the basis of a risk of symptoms rather than actual symptoms.

Ms Capic’s vehicle came with a real risk that:

(a) the input shaft seals would fail resulting in oil contamination of the clutch plate surface in turn causing wet clutch shudder;

(b) the solder connecting the ATIC 91 chip to the PCB in the TCM would progressively crack giving rise to an increasing array of problems starting with loss of power for a few milliseconds (which might be imperceptible or experienced as a brief shuddering sensation) and ending with a total loss of motive power for a period of seconds;

(c) the clutch lining material would exhibit negative damping causing it to behave unpredictably resulting in self-excited shudder and geometric misalignment in the clutch components would cause forced-excited shudder; and

(d) torsional vibrations would be transmitted from the crankshaft through the drivetrain resulting in gear rattling and a slight shudder at low speeds.

I assess the risk of (d) as high since the Respondent described it as a normal operating characteristic but I would also describe the occurrence of the risk as not as dramatic as (a) to (c).

I disregard the offer made by Jefferson Ford on 10 February 2016 to purchase the vehicle for $10,000. Whilst it appears that Ms Capic told the dealer the problems she had with the vehicle, again, this invites the wrong question which is about the value of a chattel attended by risks of failure at the date of purchase rather than the value of the chattel given the occurrence of the risks or some of them.

Taking these matters into account, I have concluded that Ms Capic’s vehicle was worth 30% less than its fair market value without any defect on the day that she purchased it. I accept that its fair market value on 24 December 2012 without defects was the amount she paid for it, $22,736.36 and I assess her reduction in value damages at $6,820.91. This is the amount which, if tendered to her on 24 December 2012, would have put her in the position she would have been in if the guarantee of acceptable quality had been complied with at least in a balance sheet sense (ie expectation damages). I will order pursuant to s 51A(1)(a) of the FCA Act that there be interest up to judgment on that sum from 24 December 2012 at 4% above the official cash rate published by the Reserve Bank of Australia, calculated monthly but without compounding.

### Whether the primary judge erred

1. For the following reasons, and contrary to the submissions of Ford, grounds 6 and 7 must fail.
2. In *Toyota*, the Full Court observed at [306]–[307]:

In the present case there was detailed evidence in the form of the report from the referee as to the nature of the defect and its consequences. Further, the consequences were likely to arise in relatively common driving conditions. Therefore, the defect was one which was likely to manifest for many buyers. These aspects of the findings by the primary judge were not in issue on the appeal. **Further, the nature of a motor vehicle and its utility to a consumer are matters of ordinary everyday understanding. It is not necessary for the Court to receive evidence as to the nature of the use to which vehicles of the kind the subject of the present claims might be put by a consumer. On the basis of the findings as to the defect and its consequences, the Court can form a view as to an appropriate percentage reduction in utility as viewed by a reasonable consumer.**

As we noted at the outset of these reasons, the primary judge made detailed findings concerning the defect and its consequences. Some of those were more technical in nature. Others concerned the practical consequences for the owner of the vehicle. **In our view, it is appropriate to have regard to the way the matters the subject of those findings would be viewed by a reasonable purchaser of a motor vehicle in order to form a view as to the extent of the effect upon the utility of the vehicle over its useful life**…

(emphasis added.)

1. At [311], the Full Court continued:

Accordingly, even in the absence of expert evidence, the Court is able to reach a view as to the extent of the reduction in value based upon a close consideration of the evidence as to the nature of the defect. In effect, this is substantially what was done by the primary judge…

1. Those observations are apposite to this case. We will adopt the same approach when analysing the approach taken by the primary judge.
2. Accordingly, notwithstanding that the expert evidence adduced by the parties was not accepted by the primary judge as being of assistance to the valuation of Ms Capic’s vehicle, we consider that his Honour remained able to make a finding that Ms Capic had established the *fact* of loss or damage by reason of the findings made by him concerning her vehicle (particularly that it was a “lemon”) coupled with his earlier detailed analysis and conclusions about the defects in the Affected Vehicles. Further, in these circumstances the primary judge was able to reach a view as to the extent of the reduction in value based upon his findings as to the nature of the defects in her vehicle. Thus, no error has been shown and grounds 6 and 7 must fail.
3. Having regard to this conclusion, it is not necessary to address paragraph 3(b) of Ms Capic’s Notice of Contention.
4. We turn then to grounds 5 and 8 of the Amended Notice of Appeal.
5. The decision of *Toyota* made several critical findings concerning the proper interpretation of s 272 of the ACL which are pertinent to (and answer the questions raised by) these remaining grounds of appeal. Contrary to the submissions advanced by Ms Capic, these findings pertain to the manner in which s 272 should be construed irrespective of the facts which were before the Full Court in *Toyota* and the extent to which those facts might differ from the facts of this case.
6. Relevantly to this appeal, the reasoning of the Full Court was as follows:
7. the text and structure of s 272(1)(a) indicate that, at least generally, the point in time for assessing damages for any reduction in the value of the goods is the time of supply: [98];
8. however, the statutory language should not be seen as requiring an assessment as at the time of purchase irrespective of the particular circumstances (though in most cases that will be the appropriate approach): [100];
9. the assessment of whether or not an applicant has suffered loss or damage resulting from a failure to comply with the consumer guarantee may require, depending on the circumstances of the case, a departure from the time of supply or an adjustment to avoid over-compensation: [99];
10. the overarching consideration is that the amount of compensation for any reduction in value be appropriate: [99];
11. in the case of a claim against a manufacturer, assessment of reduction in value damages may still be undertaken by reference to the price paid (or the average retail price) at the time of supply, but taking into account subsequent events if considered appropriate: [100];
12. it is necessary to ensure that there is no over-compensation given the circumstances known at the time of trial: [131];
13. the statutory guarantee is applied to what may be described as consumer goods which, in most instances, will be goods that are acquired to be utilised or consumed. Therefore, in most instances, the intrinsic value of consumer goods to a retail buyer will lie in their utility over their useful life rather than the price at which they may be on-sold: [110]–[111], [127];
14. to assess the quantum of any damages, it will usually be necessary to focus upon the price that would have been paid if the consumer had known of the defect when purchasing the goods, which requires identification of the component of the price actually paid that could be said to be attributable to the loss in utility arising from the defect: [118], [127].
15. As to the last point, the Full Court considered that such an assessment requires consideration of:
16. the availability of replacement or repair as a means of remedying the defect and restoring the value of the consumer goods in the hands of the buyer: [118];
17. where repair is not possible (or the cost of any repair means that, as a matter of commercial reality, there is no repair), the nature of the defect and the magnitude or significance of its effect upon the utility of the goods in the hands of the consumer: [148]–[150];
18. where the repair was not available at the time of trial, reasonable expectations of the consumer as to the availability and timing of any such repair; that is, an assessment as at the time of purchase as to the period of time for which the defect was expected to affect the vehicle (before a repair could be found and carried out on the vehicle), whether the repair would be at no cost to the consumer, and any use to which the goods may be put despite the defect (though compromised by the consequences of the defects): [122], [123], [127] and [128]. In factoring in the possibility of the availability of a fix, two types of uncertainty that existed at the time of purchase should be taken into account: firstly, uncertainty as to whether there would be a fix; and, secondly, even if a fix became available, uncertainty as to how long it might take for the fix to be designed, tested, and made available: [128];
19. where the repair was available at the time of trial, or the uncertainties referred to above had been resolved, the known information as to the availability, cost and timing of a fix at the time of trial: [127], [129]–[130]. In reaching a conclusion as to the reduction in value, the court should also have regard to any use to which the goods were put despite the defect: [127]. As to this:
	1. where the repair would wholly reinstate the utility of the goods, the cost of repair may be a measure of the reduction in the value of the goods that resulted from the defect. This is because it is a measure of what is required in order to restore the utility of the goods: [146];
	2. if the repair will only partially reinstate utility, then it may be necessary to allow an amount for repair costs and, in addition, assess the residual reduction in value associated with the ongoing diminished utility: [147].
20. That position –that subsequent events may be relevant to the measure of damages – is consistent with the recent decision of *Dwyer v Volkswagen Group Australia Pty Ltd* [2023] NSWCA 211 (Gleeson JA, with whom Leeming and White JJA agreed), where the New South Wales Court of Appeal held such events may “illuminate or indicate or reflect the true value at the time of supply”: see [230], [234].
21. Mr Gleeson SC who appeared for Ms Capic submitted that the reasoning in *Toyota* should not be followed by this Full Court. However, for the reasons which follow, we are not persuaded that we should refrain from following a decision of another Full Court, notwithstanding the timing of delivery of the decision in *Toyota*.
22. In *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v* ***FAK19*** (2021) 287 FCR 181; [2021] FCAFC 153, Allsop CJ (with whom Kerr and Mortimer JJ agreed) observed at [18] that:

The caution that the Court should exercise before departing from earlier Full Court authority should be reflected in how parties approach the task of appellate advocacy and in how Full Courts approach calls and attempts to re-agitate questions of law (especially statutory construction), decided by earlier Full Courts. This is so especially in the exercise of migration jurisdiction as replete with cases, replete with the same or similar provisions being applied in case after case, and with one litigant in one Ministerial form or another in every case. **Parties should expect that a Full Court will demand submissions on matters such as why it should be *convinced* of error in the earlier decision, why it should exercise the power to depart when that power should be exercised cautiously, sparingly and with great care, why consistency and predictability of principle should give way, and why, if the matter is one of statutory construction, the error is clear or patent**, **not merely a difference of view as to meaning, or why it has produced unintended and perhaps irrational consequences**.

(emphasis added; citations omitted.)

1. *FAK19* was applied in ***Tapiki*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 408 ALR 503; [2023] FCAFC 10 at [11]–[12] (Perry, Derrington and Thawley JJ). In *Tapiki*, the Full Court was required to construe a particular provision of the *Migration Act 1958* (Cth). The hearing took place on 16 August 2022 and judgment was reserved. On 25 November 2022, a differently constituted Full Court heard an appeal which involved the same question of statutory construction. That Full Court delivered its decision in *Pearson v Minister for Home Affairs* (2022) 295 FCR 177; [2022] FCAFC 203 on 22 December 2022, being prior to delivery of the decision in *Tapiki*. The Full Court in *Tapiki* considered itself required to follow the decision in *Pearson*, regardless of the timing of delivery of *Pearson*, by reference to the observations of Allsop CJ in *FAK19.*
2. We consider that it is appropriate to adopt the same approach in this appeal.
3. That is because the findings in *Toyota* which are relevant to this appeal concern statutory construction. The errors asserted to exist in the reasons of *Toyota* are not clear or patent, and nor are we convinced that the construction adopted by the Full Court in *Toyota* is erroneous. In this regard, we are mindful that any decision to depart from the decision of another Full Court should be exercised cautiously, sparingly and with great care.
4. Applying the construction adopted in *Toyota* to this case, it follows that:
5. ground 5 should be upheld, as the primary judge ought to have held that subsequent events were capable of bearing on the proper assessment of reduction in value damages;
6. grounds 8(a) and 8(c) should be upheld because, when assessing the damages payable to Ms Capic, the primary judge did not take into account the facts known at the time of trial (being the repairs) and the use by Ms Capic of her vehicle up until the time of trial;
7. ground 8(b) should be upheld because (applying the reasoning in *Toyota*), evidence as to the value of the vehicle at the time of trial was relevant information which would have enabled the primary judge to ensure that Ms Capic was not over-compensated.
8. The question then becomes, what order should be made as a consequence? In our view, the appropriate order is to remit the question of Ms Capic’s damages for re-determination by the primary judge on the basis of the evidence already before his Honour. We appreciate that this might leave the primary judge with some imponderables. However, we do not think that it would be conducive to the just and efficient determination of Ms Capic’s claim to damages to permit the parties to effectively re-litigate that question at this stage of the proceeding.
9. As we have noted, in this case, unlike the position in *Toyota*, the primary judge did not embark upon an assessment of damages under s 272(1)(a) of the ACL on an aggregate basis. Indeed, the primary judge made that plain at [36] and [849] J and at [6] CQJ. It follows that there can be no question of a remitter in connection with the assessment of damages in relation to the group.

# Appeal on pre-judgment interest

1. This was a complaint by Ms Capic about the failure by the primary judge to award pre-judgment interest on the damages awards for excess amounts of GST, stamp duty and financing costs (grounds 14 and 15 of the Amended Notice of Cross-Appeal).
2. Ford accepted that Ms Capic was entitled to pre-judgment interest on these amounts. We agree. However, the amount of such interest is a matter that can be determined by the primary judge, and awarded, on remittal following the assessment of the damages payable to Ms Capic under s 272 of the ACL.

# Disposition

1. We will allow the appeal brought by Ford in relation to grounds 5 and 8 of the Amended Notice of Appeal.
2. We will allow the cross-appeal brought by the respondent in relation to grounds 1, 2, 5(a) to (c), 6, 8, 9, 14 and 15 of the Amended Notice of Cross-Appeal.
3. We will invite the parties to provide an agreed form of orders within 14 days, including a draft of agreed answers to the common questions, having regard to the findings made. We will also invite the parties to reach agreement on the appropriate costs order.
4. In the absence of agreement, the parties will be directed to provide to the Full Court with a form of orders (other than costs), and answers to the common questions, which they propose, to be accompanied by written submissions not exceeding five pages.
5. As to the question of costs, the parties will be directed to provide written submissions on the question of costs (not exceeding three pages) if agreement cannot be reached.

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| I certify that the preceding three hundred and twenty-four (324) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Yates, Beach and Downes. |

Associate:

Dated: 14 November 2023