

Dixon

PROCESSED

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE

MAJOR TORTS LIST

No. 03382 of 2015

BETWEEN

ROO-ROOFING PTY LTD (ACN 092 934 676 131 182 093)

First Plaintiff

MATSUH PTY LTD (ACN 105 461 818)

Second Plaintiff

– and –

THE COMMONWEALTH OF AUSTRALIA

Defendant

**FURTHER AMENDED STATEMENT OF CLAIM**

Filed pursuant to the Orders made by the Honourable Justice T Forrest dated  
10 June 2016, and further amended pursuant to the Orders made by the  
Honourable Justice J Dixon on 23 February 2017

---

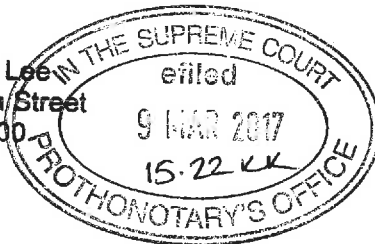
**Date of document:**

**Filed on behalf of:**

The Plaintiffs

**Prepared by:**

Septimus Jones & Lee  
Level 5, 99 William Street  
Melbourne VIC 3000



Tel: 03 9613 6555  
Fax: 03 9613 6500  
Solicitor's Code: 193

**as agents for**

ACA Lawyers  
Level 3, 44 Martin Place  
Sydney NSW 2000

Tel: 02 9216 9898  
Fax: 02 9216 9850  
Ref: ACA104

---

## CONTENTS

A.	PARTIES – PLAINTIFFS AND GROUP MEMBERS.....	4
A1	The Plaintiffs .....	4
A2	Group Members.....	5
B.	PARTIES – THE COMMONWEALTH.....	9
B1	Commonwealth Departments and Ministers.....	9
B2	Commonwealth responsibility for Commonwealth Departments and Ministers .....	13
B3	Commonwealth business.....	14
C.	DEVELOPMENT OF THE HIP .....	17
C.1	The Announcement of the HIP.....	17
C.3	Further development of the HIP.....	24
C.4	The specification of businesses eligible to participate in the HIP.....	28
D.	COMMENCEMENT OF THE HIP AND SUBSEQUENT EVENTS.....	29
D.1	The commencement of the HIP .....	29
D.2	Events after the commencement of the HIP .....	29
D.3	The Termination of the HIP .....	31
E.	CLAIM IN CONTRACT .....	32
F.	CLAIM IN NEGLIGENCE.....	39
F1	Duty of care.....	39
F2	Breach of duty.....	44
F3	Causation, loss and damage.....	53
G.	NEGLIGENT MISREPRESENTATION.....	56
G1	The Representations .....	56
G2	Causation .....	56
G3	The true position.....	57
G4	Duties .....	58
G5	Negligent misstatement.....	61
G6	Loss and damage.....	62

H.	MISLEADING AND DECEPTIVE CONDUCT.....	63
J.	UNCONSCIONABLE CONDUCT (SUBGROUP ONLY).....	64
K.	COMMON QUESTIONS.....	67

## RELIEF CLAIMED

1. Damages at common law.
2. Further or in the alternative, damages pursuant to section 82 of the *Trade Practices Act 1974* (Cth).
3. Further or in the alternative, an order under section 87 of the *Trade Practices Act 1974* (Cth) that compensates the pre-existing Owners, pre-existing Installers, pre-existing Manufacturers and pre-existing Suppliers Businesses in whole for the loss or damage they suffered by the defendant's conduct.
- ~~4. In relation to the Subgroup Proceeding, the Plaintiffs and the pre-existing Businesses seek:
  - ~~(a) damages pursuant to section 82 of the Trade Practices Act 1974 (Cth);~~
  - ~~(b) further or in the alternative, an order under section 87 of the Trade Practices Act 1974 (Cth) that compensates the pre-existing in whole for the loss or damage they suffered by the defendant's conduct.~~~~
4. Interest pursuant to section 58 and/or section 60 *Supreme Court Act 1986* (Vic.).
5. Costs.

## PLEADINGS AND PARTICULARS

### A. PARTIES – PLAINTIFFS AND GROUP MEMBERS

#### A1 The Plaintiffs

##### 1A. The first plaintiff:

(a) \_\_\_\_\_ is and was at all material times a corporation incorporated in Queensland pursuant to the *Corporations Act 2001* (Cth);

(b) \_\_\_\_\_ carried on business as:

(i) \_\_\_\_\_ a roofing contractor for homes in Australia; and

(ii) an installer of roofing insulation in homes in Australia (as part of its business as a roofing contractor).

1B. The ~~second first~~ plaintiff ~~is and was at all material times~~:

- (a) is and was at all material times a corporation incorporated in Queensland pursuant to the *Corporations Act 2001* (Cth);
- (b) carried ~~carrying-on~~ business under the name Cellulose Insulation Manufacturing Co as a manufacturer of insulation for use, including for retrofit installation in homes in Australia.

## **A2 Group Members**

1. The first plaintiff and second plaintiff (**Plaintiffs**) commence the proceeding set out in all paragraphs of this Amended Writ and Further Amended Statement of Claim ~~except paragraphs 61-74~~ as a group proceeding pursuant to Part 4A *Supreme Court Act 1986* (Vic):

- (a) on their own behaves behalf; and
- (b) on behalf of group members falling within one or more of the descriptions in (c) to (f) below (together Insulation Industry), being persons who, at material times, either:

(i) carried on business in Australia; and/or

(ii) were incorporated in, citizen of or resident in Australia;

~~(c)(b)~~ on behalf of the group of other persons (**Owners**) who:

- (i) owned or partly owned a business directly or indirectly in their capacity as one or more of shareholder or unitholder, or as a beneficial owner, of shares or units or who guaranteed some or all of the debts and obligations of such businesses being an Installer business, a Manufacturer business and/or a Supplier business that installed, manufactured and/or supplied insulation in a home or homes in Australia:

A. between sometime after 3 February 2009 and 19 February 2010; and

- B. pursuant to the terms of the Homeowners Insulation Program (~~HIP~~) (which was renamed the Home Insulation Program around 2 September 2009) (HIP);
- (ii) being either:
- A. Owners who owned or partly owned a business that installed, manufactured or supplied insulation in or for a home or homes in Australia on or before 3 February 2009 (pre-existing Owners); or
- B. Owners who owned or partly owned a business that commenced installing, manufacturing or supplying insulation in or for a home or homes in Australia on or after 3 February 2009 (new Owners);
- (iii) suffered loss as a result of the ~~defendant's~~ early termination of the HIP on 19 February 2010; and
- (iv) remain or become legally entitled to commence and maintain a claim against the defendant in respect of that loss;
- (d)(e) on behalf of the group of other persons (Installers Operators) who:
- (i) operated a business that installed insulation in a home or homes in Australia:
- A. between sometime after 3 February 2009 and 19 February 2010; and
- B. pursuant to the terms of HIP;
- (ii) being either:
- A. pre-existing Installers who operated such a business prior to 3 February 2009 (pre-existing Installers);
- B. new Installers who operated such a business after 3 February 2009 (new Installers);

**Particulars**

- (a) There were approximately 250 pre-existing Installers represented for the most part by the following industry associations:
- (i) Insulation Council of Australia and New Zealand (ICANZ);
  - (ii) Australian Foil Insulation Manufacturers' Association (AFIMA);
  - (iii) Insulation Manufacturers Association of Australian (IMAA);
  - (iv) Australian Cellulose Insulation Manufacturers Association (ACIMA);
  - (v) Polyester Insulation Manufacturers Association of Australia (PIMAA);
  - (vi) Australian Foil Insulation Association (AFIA).
- (b) There were 10,834 Installers listed on the Installer Provider Register, of whom 7,541 Installers submitted one or more claims for payment under the HIP (The Auditor General Report No. 12 2010-2011 Performance Audit, Home Insulation Program, Australian National Audit Office Report dated 15 October 2010 (ANAO Audit), [5.9], page 105).
- (c) Between 5 and 15 December 2009, Installers were required to log on to accept revised terms and conditions. 7,386 Installers did so, the remaining 2,827 either declined or did not respond and so were deregistered (ANAO Audit, [5.29], page 113).
- (iii) suffered loss as a result of the defendant's early termination of the HIP on 19 February 2010;

(iv) remain or become legally entitled to commence and maintain a claim against the Commonwealth in respect of that loss;

~~(e)~~(d) on behalf of the group of other persons (**Manufacturers**) who:

(i) operated a business that manufactured insulation or insulation products for retrofit installation in a home or homes in Australia between sometime after 3 February 2009 and 19 February 2010; and

(ii) being either:

A. pre-existing Manufacturers who operated such a business prior to 3 February 2009 (pre-existing Manufacturers);

B. new Manufacturers who operated such a business after 3 February 2009 (new Manufacturers);

(iii) suffered loss as a result of the ~~defendant's~~ early termination of the HIP on 19 February 2010;

(iv) remain or become legally entitled to commence and maintain a claim against the Commonwealth in respect of that loss;

~~(f)~~(e) on behalf of the group of other persons (**Suppliers**) who:

(i) operated a business that supplied as a retailer or wholesaler and/or distributor of insulation or insulation products for use in retrofit installation in a home or homes in Australia between sometime after 3 February 2009 and 19 February 2010; and

(ii) being either:

A. pre-existing Suppliers who operated such a business prior to 3 February 2009 (pre-existing Suppliers);

B. new Suppliers who operated such a business after 3 February 2009 (new Suppliers);

(iii) suffered loss as a result of the ~~defendant's~~ early termination of the HIP in 19 February 2010.



2. ~~[There is no paragraph 2] The plaintiff Plaintiffs commence the proceeding set out in paragraphs 61-71 62-72 to of this Writ as a group proceeding pursuant to Part 4A Supreme Court Act 1986 (Vic.):~~

~~(a) on its their own behalf; and~~

~~(b) on behalf of those Owners who owned or partly owned a business that installed insulation in a home or homes in Australia on or before 3 February 2009 (pre-existing Owners).~~

3. ~~[There is no paragraph 3] The plaintiff Plaintiffs commences the proceeding set out in paragraphs 61-71 62-72 of this Writ as a group proceeding pursuant to Part 4A Supreme Court Act 1986 (Vic.):~~

~~(a) on its their own behalf; and~~

~~(b) on behalf of those Operators who operated a business that installed insulation in a home or homes in Australia on or before 3 February 2009 (pre-existing Operators).~~

## **B. PARTIES – THE COMMONWEALTH**

### **B1 Commonwealth Departments and Ministers**

3A. At all material times from:

(a) January 2009, the Department of Prime Minister and Cabinet (PMC):

(i) developed the proposal for the HIP;

(ii) co-opted other officers from other departments for this purpose and work in relation to the HIP, including officers of Department of Environment, Water Heritage and the Arts (DEWHA) now called the Department of the Environment;

(iii) in the early stages of the HIP in particular:

A. directed the HIP; and

B. imposed short timeframes for the HIP, despite recommendations for a 5 year roll-out.

- (b) 21 January 2009, the defendant (the Commonwealth), through the DEWHA:
- (i) was responsible for developing the initial design of the HIP;
  - (ii) was responsible for developing the first HIP model, being the initial means by which the HIP would be delivered;
  - (iii) was the Department with primary responsibility for the administration of the HIP;
  - (iv) was responsible from 4 February 2009 for publishing and providing information relating to the HIP to the Insulation Industry.
- (c) 21 January 2009, the Minister for the Environment, Water Heritage and the Arts (the Minister for the Environment):
- (i) had the direction and control of; and
  - (ii) was responsible for the operations of DEWHA.
- (d) 2 February 2009, the Office of the Coordinator-General (OCG), an office representing the Commonwealth:
- (i) had an oversight role and responsibility to co-ordinate the delivery of the HIP;
  - (ii) had responsibility to set up reporting and monitoring systems for the roll-out of the HIP;
  - (iii) was to be a co-ordinating mechanism for the HIP across the Commonwealth and with the States and Territories;
  - (iv) reported in relation to the HIP:
    - (1) from 2 February 2009, to the Prime Minister, initially weekly and, thereafter, less frequently,
    - (2) to the Strategic Priorities and Budget Committee (SPBC) of Cabinet, the members of which comprised the Prime

Minister, the Deputy Prime Minister Gillard, Ministers Swan and Tanner, and

- (3) from early March 2009, to Senator Arbib, Parliamentary Secretary Assisting the Prime Minister on Service Delivery (Service Delivery Parliamentary Secretary);
- (v) from 18 February 2009, was responsible for working with DEWHA and the Department of Education, Employment and Workplace Relations (DEEWR) on the requirements for training as part of the HIP;
- (vi) devised the new HIP model, being the adopted delivery model for the HIP;
- (vii) had responsibility:
  - A. to clear blockages when they arose to deal with co-ordination, legislative or program issues that arose;
  - B. for the provision of support to DEWHA in relation to the HIP;
- (viii) built a website for the HIP;
- (ix) worked within the PMC in relation to strategic communications concerning the HIP;
- (e) the Prime Minister of Australia:
  - (i) to whom the OCG reported;
  - (ii) had the direction and control of and was responsible for the operations of PMC;
  - (iii) had control of the HIP in an overall governmental sense;
  - (iv) together with the Deputy Prime Minister, the Minister for the Environment and/or Parliamentary Secretary Arbib:
    - A. all had direct and close involvement in the HIP;

- B. whilst the Minister for the Environment, had formal control over the HIP.
- (f) 8 April 2009, subject to the matters in (e), the whole of government oversight for the Commonwealth of the HIP resided with a Project Control Group (PCG):
- (i) comprised of representatives from PMC and OCG, DEWHA, DEEWR, Medicare, the ATO, Everything Infrastructure (project management consultants) and Minter Ellison Consulting (risk advisors);
  - (ii) the terms of reference for which included:
    - A. provision of oversight and strategic direction to the HIP and to ensure high standards of governance are met;
    - B. to provide oversight and strategic direction in managing risks;
  - (iii) which group "was the primary governance mechanism" within the Commonwealth Government for the HIP:
    - A. where key decisions were made regarding the HIP;
    - B. where the views of PMC were given primacy over DEWHA;
    - C. which met weekly from April to November 2009 and was provided, at each meeting, with an updated risk register;
    - D. which had responsibility for monitoring the HIP program risks, including in the areas of fire and safety, quality risk and internal capacity risk;
- (g) 1 July 2009, pursuant to an agreement between DEWHA and Medicare Australia, Medicare Australia was responsible for:
- (i) registering installers; and
  - (ii) processing payments to installers (as above) involved in the delivery of the HIP.

**B2 Commonwealth responsibility for Commonwealth Departments and Ministers**

**3B. At all material times:**

- (a) the Prime Minister, the DEWHA Minister and each Minister of State and the Service Delivery Parliamentary Secretary (together the Commonwealth Ministers) acted in right of the Commonwealth when:
  - (i) administering the HIP; or
  - (ii) publishing or providing information in relation to it to the Insulation Industry;
- (b) the knowledge of Commonwealth Ministers was the knowledge of the Commonwealth.

**3C. At all material times:**

- (a) officers, employees and agents of the Commonwealth Ministers, PMC, DEWHA, the OCG and the PCG acted for and on behalf of the Commonwealth in:
  - (i) administering the HIP; or
  - (ii) publishing or providing information in relation to it to the Insulation Industry;
- (b) the knowledge of PMC, DEWHA, OCG and of the PCG, acting by their respective:
  - (i) officers;
  - (ii) agents acting within their authority; and
  - (iii) employees acting in the course of their employment;

in relation to the HIP was knowledge of the Commonwealth.

**B3 Commonwealth business**

**3D. From 3 February 2009, the Commonwealth engaged by the HIP in carrying on a business of retro-fitting home insulation to homes constructed across Australia prior to 2003 (the business).**

**Particulars**

- (a) Prior to 3 February 2009, the Commonwealth engaged in planning and acts designed to prepare to carry on the HIP business.
- (b) On 3 February 2009, the Announcement and the Fact sheet, referred to in paragraph 5 below, launched the HIP business.
- (c) On 3 February 2009, the Commonwealth embarked upon a course of conduct anticipated to occur over a 2.5 year period which involved the Commonwealth participation and involvement in:
  - (i) phase 1, pending full implementation of the HIP:
    - A. establishing a system of registration of pre-existing Installers; and
    - B. agreeing to fund and funding the retro-fitting of insulation to homes constructed across Australia prior to 2003 by pre-existing Installers via the interim arrangement of the payment of rebates to householders (Report of the Royal Commission into the Home Insulation Program dated 29 August 2014 (RC) 6.6.16);
  - (ii) phase 2, from 1 July 2009, entering into direct contracts with eligible registered Installers for the provision by those Installers of insulation to be retro-fitted to homes constructed prior to 2003 with direct payment being made for the provision of those services by the Commonwealth to installers in each individual case, anticipated to be up to 2.7 to 2.9 million homes (RC 2.2.5.1 and FLE.002.001.0108, 25) to be retro-fitted with insulation over 2.5 years;

- (iii) the HIP terms for participation which provided that unless an installer was registered, that installer had no right or ability to participate in the HIP.
- (d) From 3 February 2009, the Commonwealth:
  - (i) designed and implemented systems for the registration of Installers;
  - (ii) designed and implemented payment systems and protocols to pay Installers under the HIP;
  - (iii) specified the required standard of insulation required in order to meet the HIP criteria;
  - (iv) paid Installers, on a repetitive basis, through until 19 February 2010 as each individual home insulation was carried out by such Installers, initially, in phase 1 in the interim by the provision of rebates to households pending the introduction of phase 2, from which time, it paid Installers direct;
  - (v) arranged for and funded the installation of HIP eligible houses in the same way as a private citizen or trader would carry on such a business;
  - (vi) established and maintained a website for promotion of the HIP and for interaction with it by Installers and householders;
  - (vii) from time to time until the HIP was terminated, revised and modified its requirements, informing Installers by "Installer Advices", emails, SMS and on its website.
- (e) The conduct by the Commonwealth of the HIP:
  - (i) involved individual contracts between the Commonwealth and 7,541 individual Installers of 10,834 registered Installers;
  - (ii) in respect of which changes were communicated through:
    - A. "Installer Advice", emails; and

B. Ministerial media releases by the Commonwealth Ministers:

to the insulation industry (ANAO Audit, [3.44], pages 76 to 77);

(iii) was implemented when fully operational in phase 2 including via an Installer Provider Register which Register:

A. opened on 9 June 2009;

B. publicly launched on 29 June 2009;

C. specified that, unless registered Installers could not participate in the HIP and, if registered, they could.

3E. From 3 February 2009, the business:

(a) was a demand driven business;

(b) was a commercial enterprise delivered by the Commonwealth.

**Particulars**

(a) As to the demand driven business, see the ANAO Audit [4.35], p.93

(b) On 5 February 2009, COAG recorded agreement of the States and Territories to involvement in the HIP (RC 7.1.11 to 7.1.15). However, the States were not involved in delivery of the HIP when implemented (RC 7.1.4).

(c) The intent of the original design of the HIP, the first HIP model, as developed by DEWHA that the States and Territories be involved in the delivery of the HIP was never acted upon or implemented. Instead, the HIP was directly delivered by the Commonwealth via phase 1 and then phase 2 of the HIP implementing the new HIP model.

3F. The course of conduct referred to in paragraphs 3D and 3E above constituted the carrying on of a business by the Commonwealth, as provided for in section 2A (1) of the Trade Practices Act 1974 (Cth).



## C DEVELOPMENT OF THE HIP

### C.1 The Announcement of the HIP

4. The HIP was a part of the Commonwealth's ~~defendant's~~ 'Nation Building Economic Stimulus Plan' by which the Commonwealth ~~defendant~~, in the midst of an economic downturn, encouraged businesses to create jobs in industries including in the installation of insulation, manufacture of insulation products, the supply of insulation products and thereby to stimulate the economy.
5. On 3 February 2009, the Commonwealth ~~defendant~~ made a public announcement (**Announcement**) that, from 1 July 2009 and for a time-limited period of two and a half years, it would provide funds of \$1,600 per home under the HIP to fund the installation of ceiling insulation in ~~an~~ a minimum of 2.2 million eligible Australian homes (**Eligible Home**).

#### **Particulars**

- (a) *The Honourable Kevin Rudd, who was then Prime Minister of Australia, the Honourable Wayne Swan, who was then Deputy Prime Minister and Treasurer, and the Honourable Peter Garrett, who was then Minister for the Environment (each being "Commonwealth Ministers") made the announcement in a joint media release entitled 'Energy efficient homes – ceiling insulation in 2.7 million homes' dated 3 February 2009. The joint media release also announced an interim arrangement from 3 February 2009 until 30 June 2009 "Phase 1".*
- (b) *Fact sheet entitled "Nation Building Economic Stimulus Plan – Energy Efficient Homes Package" issued by DEWHA ~~the Department of Environment, Water, heritage and the Arts (Department of the Environment)~~;*
- (c) *The conditions of eligibility for an Eligible Home included:*
  - (i) *that the home did not have ceiling insulation or had ceiling insulation of negligible effectiveness;*
  - (ii) *the home was built prior to 2003, prior to the introduction of more rigorous insulation standards in Australia.*

5A. On 6 February 2009, a member of the Insulation Industry informed the Commonwealth that the existing Australian insulation industry would not be able to cope with supply in a two and a half year program due to lack of manufacturing capacity.

**Particulars**

Mr Ruz (director of ICANZ, and an employee of Fletcher Insulation) informed Ms Brunoro (of DEWHA) and Ms Horvat (of the Prime Minister's office) of this in a telephone call: RC at [7.3.13].

6. On 18 February 2009, the Commonwealth defendant held an 'Industry Consultation Meeting' with representatives from the Insulation Industry representing Installers, Manufacturers and Suppliers at which the Commonwealth defendant gave an undertaking that the Commonwealth defendant would fund the installation of ceiling insulation on the terms outlined in paragraph 5 until the earlier of the following dates:

- (a) 31 December 2011; or
- (b) the funds that the Commonwealth defendant had allocated to the HIP had run out.

**Particulars**

(a) The meeting (minutes: AGS.002.023.0926):

- (i) took place at Old Parliament House in Canberra;
- (ii) was chaired by Mr Kevin Keefe, Assistant Secretary of DEWHA the Department of Environment;
- (iii) was attended by representatives of:
  - A. DEWHA the Department of the Environment;
  - B. PMC the Department of the Prime Minister and Cabinet;
  - C. OCG the Office of the Coordinator General;

- D. *the Insulation Council of Australia and New Zealand;*
- E. *the Insulation Manufacturers' Association of Australia;*
- F. *the Polyester Insulation Manufacturers' Association;*
- G. *the Australian Cellulose Insulation Manufacturers' Association;*
- H. *the Aluminium Foil Insulation Association;*
- I. *AGI Insulation;*
- J. *Fletcher Insulation;*
- K. *CSR Performance Systems;*
- L. *Master Builders Australia; and*
- M. *Housing Industry Association;*

(iv) *was attended by representatives of the Insulation Industry who had been invited by DEWHA to attend in that capacity. See, for example, emails between Herbert, of ACIMA, and Riordan, of DEWHA, 5 February 2009, 12 February 2009, 17 February 2009 and the 18 February 2009 agenda) and communications between Ruz, representing ICANZ and representatives of PMC between early January 2009 and 18 February 2009 (RC 7.3.12 to 7.3.15):*

(v) *was not attended by any representative of electricians or electrical trades such as Master Electricians Australia as no such representative was invited by the Commonwealth to participate (RC 7.3.3 to 7.3.6, 9.2.3).*

(b) *The undertaking was given orally.*

~~The conditions of eligibility for an Eligible Home included That the home did not have ceiling insulation or had ceiling insulation of negligible effectiveness.~~

7. ~~[There is no paragraph 7] At all material times the Department of the Environment was the department with primary responsibility for the administration of the HIP.~~
8. From time to time after 18 February 2009 DEHWA the Department of the Environment when administering the HIP repeated and/or gave an undertaking that the defendant would fund the installation of ceiling insulation until the earlier of the following dates:
- (a) 31 December 2011; or
  - (b) the funds that the defendant had allocated to the HIP had run out.

#### **Particulars**

This occurred on:

- (a) 18 February 2009, and paragraph 6 is repeated;
- (b) 26 February 2009: HIP Program Guidelines Version 1.0;
- (c) 27 March 2009: HIP Program Guidelines Version 1.1;
- (d) 1 June 2009: HIP Program Guidelines Version 2.0;
- (e) 29 June 2009: "Installer Advices" emailed by the Department to the Insulation Industry from 29 June 2009
- (f) 1 September 2009: HIP Program Guidelines Version 3;
- (g) 2 November 2009: HIP Program Guidelines Version 4.0;
- (h) 1 December 2009: HIP Program Guidelines Version 5.0.

HIP Program Guidelines:

- (i) ~~Version 1.0 dated 26 February 2009;~~

- ~~(ii) — Version 1.1. dated 27 March 2009;~~
- ~~(iii) — Version 2 dated 1 June 2009;~~
- ~~(iv) — Version 3 dated 1 September 2009;~~
- ~~(v) — Version 4.0 dated 2 November 2009; and~~
- ~~(vi) — Version 5.0 dated 1 December 2009;~~

*"Installer Advices" emailed by the Department to the Insulation Industry from 29 June 2009*

8A. On and from 18 and 19 February 2009, the Commonwealth knew that:

- (a) there was an electrical safety risk associated with the HIP;
- (b) in New Zealand, the use of metal staples in a home insulation program had resulted in the death of installers;
- (c) based upon both the New Zealand experience and the prior experience in Australia, there was a serious safety and fire risk associated with the HIP.

#### **Particulars**

(a) The knowledge was the knowledge of employees of DEWHA. The report of the Royal Commission is referred to and relied upon at paragraphs 7.3.7 to 7.3.10, 7.3.17 to 7.3.23, 7.4, 7.5.2 to 7.5.5, 7.5.8, 7.5.10 and 7.5.11, 7.5.13 to 7.5.21 and 7.12.190.

(b) By way of example:

- (i) DEWHA was expressly warned of the New Zealand experience at the 18 February 2009 Industry Consultation meeting and again by email on 19 February 2009 from Mr Ruz (AGS.002.017.1602, 1);
- (ii) E E Oz issued such a warning on 27 February 2009 by email to DEWHA (RC 9.27, AGS.002.023.3186.2);

- (iii) on 9 March 2009, the Commonwealth was warned of the risk of fire by the National Electrical and Communications Association by letter to the Minister for the Environment (RC 9.1.7 and 9.1.8, QIC.006.001.1652, 1 to 2);
- (iv) on 3 April 2009, DEWHA was again put on notice of such risk (RC 9.2.17 and see ANAO Audit at [4.59], page 101).

- 9. ~~[There is no paragraph 9] -At all material times, employees, officers and agents of the defendant's Ministers and the Department of the Environment acted for and on behalf of the defendant in administering the HIP.~~
- 10. ~~[There is no paragraph 10] -From time to time after 2 February 2009 the Minister for the Environment and Parliamentary Secretary gave undertakings to the effect that the defendant would fund the installation of ceiling insulation until the earlier of the following dates:
  - (a) ~~31 December 2011; or~~
  - (b) ~~the funds that the defendant had allocated to the HIP had run out.~~~~

**Particulars**

- (a) ~~media release by the Minister for the Environment on 12 May 2009;~~
  - (b) ~~media release by the Minister for the Environment on 20 June 2009; and~~
  - (c) ~~media release by the Minister for the Environment and Parliamentary Secretary Mark Arbib on 2 July 2009.~~
- 11. ~~[There is no paragraph 11] -At all material times the Prime Minister of Australia, the Deputy Prime Minister, the Minister for the Environment and/or Parliamentary Secretary Arbib when providing information in relation to the HIP or administering the HIP, acted in right of the defendant.~~
  - 12. On 20 March 2009, the Commonwealth defendant held a 'National Industry Consultation Meeting' with representatives from the Insulation Industry representing Installers, Manufacturers and Suppliers at which the Minister for the Environment:

- (a) was asked by a representative of the insulation industry how long the Commonwealth defendant would provide the funds under the HIP; and
- (b) ~~the Minister for the Environment~~ stated words to the effect that the HIP 'will run for the full term or until the money runs out. You can take my word for that.'

### ***Particulars***

*The meeting (minutes CTH.001.0123.0060):*

- (i) took place at Old Parliament House in Canberra;
- (ii) was attended by representatives of:
- A. DEWHA ~~the Department of the Environment~~;
  - B. the Department of Education, Employment and Workplace Relations;
  - C. PMC ~~the Department of the Prime Minister and Cabinet~~;
  - D. the Department of Innovation, Industry, Science and Research;
  - E. the Insulation Council of Australia and New Zealand;
  - F. the Insulation Manufacturers' Association of Australia;
  - G. the Aluminium Foil Insulation Association;
  - H. the Polyester Insulation Manufacturers' Association;
  - I. the Australian Cellulose Insulation Manufacturers' Association;
  - J. Fletcher Insulation;

- K. *AGI Insulation;*
- L. *CSR Performance Systems;*
- M. *Insulation Corp; and*
- N. *Master Builders Australia.*

12A. From time to time, after 20 March 2009 the Minister for the Environment and the Services Delivery Parliamentary Secretary repeated the undertaking in the terms or to the effect pleaded in paragraph 12 above.

#### **Particulars**

*This occurred on:*

- (a) 12 May 2009: media release by the Minister for the Environment on 12 May 2009;*
- (b) 29 June 2009: media release by the Minister for the Environment, and at a meeting in Brisbane with representatives from the Insulation Industry including Owners, Installers, Manufacturers and Suppliers at which he made oral statements to this effect in answer to a question "will the program go full term?"; and*
- (c) 2 July 2009: media release by the Minister for the Environment and the Services Delivery Parliamentary Secretary;*
- (d) 3 February 2010, at a meeting in Brisbane with representatives from the Insulation Industry including Owners, Installers, Manufacturers and Suppliers at which the Minister for the Environment made oral statements repeated the government's commitment and gave a guarantee that the program would continue.*

#### **C.3 Further development of the HIP**

12B. On 31 March 2009, a meeting took place between the Service Delivery Parliamentary Secretary, his advisers, representatives of DEWHA, OCG and PMC, at and shortly after which a new "business model" for the delivery of the HIP (New HIP Model) was agreed upon and adopted.



### Particulars

- (a) the Commonwealth abandoned the previously proposed regional brokerage "business model" for the HIP (First HIP Model), which involved large and experienced firms in the insulation industry being engaged to effect installations, or to sub-contract others to do so, by contracts which made provision, inter alia, for supervision of installers, the training of them, mechanisms for occupational health and safety and general performance of the work (RC 7.12.135):
- (b) the New HIP Model facilitated direct delivery between the Installer and the householder, which:
- a. was a demand driven direct engagement model (RC 7.12.139):
  - b. gave ability to households to choose their own installer (AGS.002.016.0705):
  - c. involved DEWHA having responsibility:
    - (1) for determining Installer eligibility (AGS.002.016.0705) and for the information aspects of the HIP and having responsibility for compliance and audit functions;
    - (2) changes to Installer competencies (RC 7.12.122 and Chapter 8):
  - d. required multiple employers meeting their own responsibilities to ensure that their workforce was well trained (RC 7.12.136):
  - e. involved Medicare establishing an Installer registration and payment system and functionality (see briefing note to Garrett, 13 April 2009, RC 7.12.107, AGS.002.016.705):
  - f. did not require supervisors with formal skills and experience - such requirement not being introduced until 12 February 2010 (Hawke, 3).

12C. Prior to 31 March 2009, the First HIP Model had been the basis upon which the Commonwealth was proceeding and was the model to which risk assessment had been directed;

12D. The new HIP Model was approved by the Minister for the Environment on the premise that it was a model supported by a "comprehensive risk assessment", however:

- (a) the Commonwealth had conducted no risk assessment at all of the New HIP Model;
- (b) there was no testing of risk management strategies for the New HIP Model involving insulation industry consultation; and
- (c) such risk assessment as was undertaken excluded any consideration of the risk of installer safety.

#### Particulars

- (a) As to the premise upon which the Minister gave his approval, see RC 7.11.84 and AGS.002.005.0719, 1.
- (b) The risk of installer injury under the HIP was known to senior officers in DEWHA (RC 7.11.41) but the risk of installer injury was removed from the risk register on or after 27 March 2009 because DEWHA considered that the risk of workplace health and safety lay with the employer, the States and Territories (RC 7.11.50). When the delivery model changed from one which involved the States to the New HIP Model, there was no reinstatement of this risk on the risk register.
- (c) The reference in the risk register on 31 March 2009 to safety did not incorporate installer injury (RC 7.11.68, 7.12.130 and 131).
- (d) The assessment undertaken of the First HIP Model excluded any consideration of the risk of installer injury, even as part of "safety" (RC 7.11.68, 7.11.73 and 7.11.88 to 95). The same applied with the internal risk assessment of the new HIP Model carried on 14 May 2009 (RC 7.12.153 to 7.12.155 and 7.12.159).

- (e) The risk of death or injury to installers was identified on 3 April 2009 but "it was, thereafter, effectively ignored on the basis it was not part of the Commonwealth's responsibility to ensure compliance with workplace health and safety laws of each State and Territory" (RC 7.11.22, 7.11.43).
- (f) In the "milestone review" carried out of the risk registry in June 2009, the risk to personal safety was still not identified as a risk (RC 7.12.174).
- (g) The risk of installer injury, that an installer may be injured or killed, was within DEWHA's knowledge well before October 2009 (RC 7.12.190).

12E. Having resolved to discard the First HIP Model which involved large experienced firms in the insulation industry, in favour of the New HIP Model, a demand driven direct engagement delivery model, on or about 8 May 2009, the Commonwealth:

- (a) determined to remove the requirement of training of persons inexperienced in the installation of insulation (Training Requirement) and instead only required that they be "supervised";
- (b) did not specify the nature or type of "supervision" in any formal documentation for the HIP and otherwise required an installer to have obtained an Occupational Health and Safety "White Card" in order to be eligible to participate in the HIP.

#### Particulars

- (a) The removal of the Training Requirement:
  - (i) was contrary to the unanimous view of industry that installers ought to be required and required to meet minimum training standards for installation (RC 8.2.1, AGS.002.008.0502, 1 and RC 8.6.2);
  - (ii) was contrary to the views of DEWHA (for example, RC 8.3.4, 30 April 2009 minute, AGS.002.016.0529, 2).
- (b) The nature of the "supervision" required was not specified in any formal documentation for the HIP (RC 8.9.3 and 8.14.1.10) such

as the "Guidelines, Installer Advices" or the "Terms and Conditions for Registration" (RC 8.1.14.1.3).

(c) The removal of the Training Requirement for inexperienced persons:

(i) was imprudent (RC 8.14.1.4); and

(ii) brought with it an almost inevitable risk that young and inexperienced installers would be exposed to the real risk of injury (RC 8.14.1.7).

#### **C.4 The specification of businesses eligible to participate in the HIP**

13. ~~In a document entitled the 'Program Guidelines' dated 1 June 2009, and issued by the defendant, the defendant DEWHA stated that, under the HIP:~~

- (a) A business was eligible to participate in the HIP if it was registered on the Installer Provider Register (**Eligible Business**);
- (b) In consideration for an Eligible Business installing ceiling insulation in Eligible Homes between sometime after 3 February 2009 and 31 December 2011, the ~~defendant~~ Commonwealth would pay the Eligible Business a sum for each home in which insulation was installed;
- (c) The maximum sum that was payable for the installation of insulation in each home was \$1,600; and
- (d) The Plaintiffs and each ~~Group Member~~ Installer had the right to fix the sum that was payable for the installation of insulation in each home.

#### **Particulars**

The "Energy Efficient Homes Package Homeowner Insulation Program – Program Guidelines (version 2.0) (CTH.001.0284.0033)

14. ~~[There is no paragraph 14] – On 29 June 2009, the Minister for the Environment, on behalf of the defendant, chaired a meeting with representatives from the insulation industry including Owners, Operators, Manufacturers and Suppliers at which the Minister for the Environment:~~

- ~~(a) was asked 'Will the Program go full term?'~~
- ~~(b) and in response the Minister for the Environment stated words to the effect that the HIP 'is going to run for the full term or until the money runs out.'~~

***Particulars***

*The meeting took place in Brisbane.*

**D COMMENCEMENT OF THE HIP AND SUBSEQUENT EVENTS**

**D.1 The commencement of the HIP**

15. On 1 July 2009 Phase 2 of the HIP commenced, from which time each Eligible Business was entitled to \$1,600.00, and, from 2 November 2009, \$1,200.00, payable by the ~~defendant~~ Commonwealth, for each home in Australia in which insulation was installed.

**Particulars**

- (a) Phase 1 was the early installation phase from 3 February 2009 to 30 June 2009. Phase 2 was the main program from 1 July 2009. In both Phase 1 and 2, the sum of \$1,600 was the maximum payable by the Commonwealth for insulation under the HIP.*
- (b) On 2 November 2009, \$1,600 maximum per installation, was reduced to \$1,200 per installation except that installers could, until 30 November 2009, claim a further \$400 if certain criteria were met.*

**D.2 Events after the commencement of the HIP**

16. On 14 October 2009 Matthew Fuller, a roof installer aged 25 years, was killed when electrocuted while installing insulation using a metal staple to secure roll-out foil in a home in Australia as part of the HIP (RC 12.2).
17. On 18 November 2009 Rueben Barnes, a roof installer aged 16 years was killed when electrocuted while installing insulation in a home in Australia as part of the HIP (RC 12.3).

18. On 21 November 2009 Marcus Wilson, a roof installer aged 19 years, was killed while installing insulation in a home in Australia as part of the HIP (RC 12.6).

**Particulars**

Marcus Wilson died from heat exposure, complications of hyperthermia suffered during installation of top-up cellulose insulation on a very hot day.

19. ~~[There is no paragraph 19] On 3 February 2010, the Minister for the Environment, on behalf of the defendant, chaired a meeting with representatives from the insulation industry including Owners, Operators, Manufacturers and Suppliers at which the Minister for the Environment:~~
- (a) ~~repeated the government's commitment to achieving the target of installing insulation in 1.0 million Australian homes, which had been a goal of the program from the outset; and / or in the alternative,~~
- (b) ~~gave a guarantee that the program would continue as per the government's original goals for the program. He commented that the program was introduced as part of the government's response to the global financial crisis.~~

**Particulars**

~~The meeting took place in Brisbane.~~

20. On 4 February 2010 Mitchell Sweeney, a roof installer aged 22 years, was killed when electrocuted when installing insulation using a metal staple to secure roll-out foil in a home in Australia as part of the HIP.

20A. In the case of:

- (a) each of Matthew Fuller, Rueben Barnes and Mitchell Sweeney, the training and supervision with which they had been provided was deficient with respect to safety;
- (b) Marcus Wilson, the training and supervision with which he was provided was inadequate;

- (c) in each case, such lack of training and supervision contributed materially to their deaths.

**Particulars**

The findings of the Queensland State Coroner are relied upon in respect of each of Matthew Fuller, Rueben Barnes and Mitchell Sweeney (QIC.001.001.0001, 58 to 74, see RC 12.5.2). In the case of Marcus Wilson, the training was inadequate as was the priority afforded health and safety by Pride Buildings Pty Ltd, a registered installer to whom Marcus Wilson's employer was contracted (see RC 12.6.4 to 12.6.9 and 12.6.21).

- 20B. In addition to the four installer deaths, there were a very large number of fire incidents associated with insulation installed under the HIP.

**Particulars**

Prior to the HIP, there were approximately 80 fire incidents per year associated with the installation of insulation to existing dwellings (ANAO Audit, [3.5] page 65). There were 207 fire incidents associated with insulation installed under the HIP as at 19 August 2010 (ANAO Audit, [8.43], page 168).

**D.3 The Termination of the HIP**

21. On 19 February 2010 the defendant Commonwealth announced the early termination of the HIP to take effect from 5pm, 19 February 2010.

**Particulars**

A copy of the announcement is STA.001.079.0001

22. On 19 February 2010 the Minister for the Environment announced that the HIP was to be replaced with a household Renewable Energy Bonus Scheme (REBS) which would come into operation on 1 June 2010.

**Particulars**

*Media release issued by the Minister for the Environment, "Significant changes to Commonwealth environmental programs (AGS.002.017.1602)*

23. On 22 April 2010 the Minister Assisting the Minister for Climate Change and Energy Efficiency, Mr Greg Combet, announced that the ~~defendant~~ Commonwealth would not proceed with REBS.

**E. CLAIM IN CONTRACT**

24. By its conduct pleaded above at paragraphs 4-3D to 159 above, the Commonwealth ~~defendant~~ indicated to all pre-existing Installers ~~Eligible Businesses~~, that from 3 February 2009 and to all new and pre-existing Installers from 1 July 2009 that it was willing to enter into a contract with any Eligible Business ~~such Installers~~ on the following terms (~~defendant's~~ **Commonwealth's Offer**):

- (a) in consideration for the Eligible Business Installer installing ceiling insulation in Eligible Homes between sometime after 3 February 2009 and up to 31 December 2011, the Commonwealth would pay the Installer a sum for each home in which insulation was installed.
- (b) the ~~defendant~~ Commonwealth had the right to fix the maximum sum that was payable by it for the installation of insulation in each home (**Maximum Sum**).

**Particulars**

- i. On 6 February 2009 the Commonwealth estimated the cost of installation of ceiling insulation in an average sized house at \$1200 on 6 February 2009 ( see the Nation Building and Jobs Plan Bills – Interim Digest 6/2/09, p13).
- ii. From 3 February 2009 until 1 November 2009, the Commonwealth set the maximum sum at \$1,600 per house. Effective from midnight on Sunday 1 November 2009 the



maximum sum was set at \$1200 per house.

iii. In phase 1, as an interim arrangement, payment was made by the Commonwealth to Installers via a rebate to eligible householders (see e.g. 3/2/09 Media release) (CTH.025.0001.0273). In phase 2, from 1 July 2009, the commencement date of the HIP (see the HIP Program Guidelines Version 1.0 issued 26/2/09 (CTH.025.0001.0001) payment was made by the Commonwealth direct to installers.

- (c) the First Plaintiff and each Group Member that was a pre-existing Installer an Eligible Business or who became a new Installer had the right to fix the sum that was payable for the installation of insulation in each home.
- (d) the term of the contract was fixed until the earlier of the following dates (Expiration Date):
- (i) 31 December 2011; or
  - (ii) the funds that the Respondent Commonwealth had allocated to the HIP to fund insulation of a minimum of 2.2 million Australian homes built prior to 2003 had ran out.

#### **Particulars**

- (i) As to (i), the Plaintiffs refer by way of example to the 3 February 2009 Media Release by the Prime Minister; (CTH.025.0001.0273) to the Applicant Information Booklet published by DEWHA in February 2009; and to the HIP Program Guidelines publications including Version 1 published on 26 February 2009 (CTH.001.0187.0017), Version 3 dated 1 September 2009 and Version 5 dated 1 December 2013 (CTH.021.0002.0094).
- (ii) As to (ii), the 3 February 2009 announcement, which referred to 2.2 million homes and also to the sum of \$2.7 billion is referred to and relied upon as is the 6 February 2009 cost estimate by the Commonwealth at an average of \$1,200 per house – i.e. 2.2 million by \$1,200 equals \$2.64 billion. In February 2009 the Commonwealth allocated \$2.7 billion of funds to the HIP with an

initial cap of \$1600 per home. The Plaintiffs refer by way of example to the statement by Mr. Wilson from the OCG to the Industry Consultation Meeting on 18 February 2009 as recorded in the minutes of the Meeting, DAR.002.001.0263 at 0266.

(iii) On 3 February 2009 the Commonwealth referred to ceiling insulation in 2.7m homes – the Plaintiffs refer to the media Release by the Prime Minister (CTH.025.0001.0273) confirmed by DEWHA as recorded in the minutes of the 18 February 2009 Industry Consultation Meeting (CTH.001.0708.8141). On 12 May 2009 the Minister for the Environment said that the program would install ceiling insulation in 2.9m homes; the reference to 2.9m homes was repeated in the 14 May 2009 DEWHA publication titled "Nation Building – Conditions for inclusion on the Installer Provider Register".

(iv) On 1 November 2009 the Commonwealth revised the funds allocated to \$2.45bn coinciding with a reduction in the cap to \$1200 per home. The Plaintiffs refer by way of example to Installer Advice number 13 (CTH.025.0001.0001) in which DEWHA advised that the maximum had been capped at \$1200 per home, that funding had been capped at \$2.45bn and that the program would conclude when funds were fully expended or on 31 December 2011, whichever occurs first.

(e) that, in order to qualify to accept the Commonwealth's Offer:

(i) in each of phase 1 and phase 2 installers were required to agree to the terms and conditions of registration and were required to be registered on the Installer Provider Register established and maintained by the Commonwealth;

(ii) in phase 1, installers were required to be pre-existing Installers who were registered;

(iii) in phase 2 (from 1 July 2009) each participating Installer was required to adhere to the following terms and conditions:

A. comply with the program guidelines and all relevant laws and

regulations;

- B. comply with the relevant skills, experience and training competencies specified by the Commonwealth including that employees hold an Occupational Health and Safety "White Card" (ANAO Audit, [8], page 22, [1.8], page 47 and [5.5], page 104);
- C. install insulation in accordance with Australian Standard AS 3999-1992 Thermal insulation of dwellings and specified Building Codes and with a specified R-value outlined in the guidelines for the program;
- D. keep full and accurate records in relation to all aspects of the program;
- E. ensure that a "Work Order" in the form supplied by the Commonwealth is completed and signed by the householder and that all information submitted to the Commonwealth is consistent with such Work order;
- F. maintain workers' compensation insurance, public liability insurance and property damage insurance, in each case with a limit of liability per occurrence or event of not less than \$10m;
- G. Indemnify the Commonwealth to the extent of any cost, loss, liability or injury caused by the negligent, unlawful or wilful act or omission, or the use of faulty or unsuitable materials by the Installer or its employees, officers, subcontractors, agents or volunteers in relation to installation of ceiling insulation or a breach of the terms and conditions.

#### **Particulars**

The terms and conditions of phase 2 were in writing. The Plaintiffs refer to the 14 May 2009 DEWHA publication titled "Nation Building – Conditions for inclusion on the Installer Provider Register".

Installers were provided, on registration, with a "Welcome Kit", user identification and password to access the online claims system.

Installers who were registered were listed on the Installer Provider Register maintained for phase 2 by Medicare Australia and available on DEWHA's website (ANAO Audit, [5.6], page 105).

The Program Guidelines dated 1 June 2009 are (CTH.001.0284.0033). For each completed installation, households and tenants were required to sign a work order form issued to installers under the HIP. Each work order form had its own unique work order number which installers were required to provide to Medicare Australia as part of their claim for payment (ANAO Audit, [6.34], page 126).

To obtain payment in response to an online claim (87.8 percent of claims), installers were required to log into the online claims system and to enter 20 mandatory fields of information (ANAO Audit, [6.4] and [6.5], page 116).

25. The Commonwealth intended to be contractually bound to the terms of the ~~defendant's~~ Commonwealth's Offer with each of the ~~Eligible Businesses~~ Installers who accepted the offer.

#### **Particulars**

As to the intention of the Commonwealth, such intention is to be inferred from:

- (a) the fact that the Commonwealth carried on the business as pleaded in paragraphs 3D and 3E;
- (b) the giving of the undertakings pleaded in paragraphs 6 and 12;
- (c) the repetition of those undertakings, as pleaded in paragraphs 8 and 12A;
- (d) the meetings and statements made at those meetings to Insulation Industry representatives as referred to in paragraphs 8 and 12;
- (e) the close link and alignment between the making and content of such undertakings and statements and the actions taken at

about the time of each such undertaking by DEWHA, PMC and PCG consistent with and designed to give effect to such undertakings and statements:

- (f) the system of registration of Installers;
- (g) the requirement for Installers to agree to and to be bound by the terms and conditions in 24 (e) above;
- (h) the publication and dissemination by the Commonwealth to Installers of the HIP Program Guidelines and "Installer Advices";  
and
- (i) the establishment and maintenance of the payment system and functionality by Medibank designed to meet on-line payment obligations to installers which the Commonwealth agreed to perform.

26. By registering on the Installer Provider Register, each of the First Plaintiffs and ~~the Owners or further or in the alternative, each of the Operators~~ Installers:

- (a) accepted the ~~defendant's~~ Commonwealth's Offer; and
- (b) created a contract (Contract) between the Commonwealth and each of the First Plaintiff and the Installers.:
  - (i) ~~each of the Plaintiffs and the Owners;~~
  - (ii) ~~further or in the alternative, each of the Operators that operated the business that each of the Plaintiffs and Owners owned or partly owned.~~

27. Between sometime after 3 February 2009 and 19 February 2010:

- (a) the First Plaintiffs and ~~Owners and the Operators~~ the Installers performed the Contract by installing insulation in homes in Australia;
- (b) the ~~defendant~~ Commonwealth performed the Contract by paying each of the First Plaintiffs and the ~~Owners and/or the Operators~~ Installers a sum of up to \$1,600 (for installations between 3 February 2009 and 2 November 2009) and up to \$1,200 (for installations between

2 November 2009 and 19 February 2010) for each home in which insulation was installed.

**Particulars**

(a) In phase 1, payments were made directly to the householder following installation and after householder eligibility was assessed by DEWHA. Under phase 1, 73,005 payments were made at a cost of \$103.1 million (ANAO Audit, [6], page 21, [2.20], page 63).

(b) In phase 2, 1.16 million payments were made at a cost to the Commonwealth of \$1.45 billion (ANAO Audit, [32], page 29).

28. On 19 February 2010, and by its conduct pleaded at paragraph 21 or in the alternative, paragraphs 21-23 above, the ~~defendant~~ Commonwealth evidenced an intention no longer to be bound by, and thereby repudiated, the Contract.
29. On or around 19 February 2010, each of the First Plaintiffs and the Owners Installers accepted the ~~defendant's~~ Commonwealth's repudiation of the Contract.
30. ~~[There is no paragraph 30] As a result of the defendant's repudiation of the Contract, each of the Plaintiffs and Owners has suffered loss and~~

**Particulars**

- ~~(i) — Loss of the investment made in the business.~~
- ~~(ii) — Costs thrown away.~~
- ~~(iii) — Loss to the value of the business.~~
- ~~(iv) — Loss of the return on the profits from the business.~~
- ~~(v) — Loss arising out of the administration or the winding up of the entities that operated the business referred to in paragraph 1(b)(i), including accountancy fees, legal fees and insolvency practitioner fees.~~
- ~~(vi) — Consequential losses.~~

31. As a result of the ~~defendant's~~ Commonwealth's repudiation of the Contract, each of the First Plaintiffs and ~~the Installers-Operators~~ has suffered loss and damage.

***Particulars***

- (i) *Loss of profits.*
- (ii) *Loss on value of stock, storage, leasing and on-costs.*
- (iii) *Loss arising out of the leasing and/or purchase of capital equipment to be used in the manufacture or installation of insulation.*
- (iv) *Loss arising out of the termination of contracts of employment with employees.*

**F. CLAIM IN NEGLIGENCE**

**F1 Duty of care**

32. The ~~defendant~~ Commonwealth had a duty to take reasonable care in the administration and delivery of the HIP, which was a duty it owed:
- (a) to the Plaintiffs and Owners;
  - (b) further or in the alternative, the First Plaintiff and ~~Operators~~ Installers;
  - (c) further or in the alternative, the Second Plaintiff and Manufacturers;
  - (d) further or in the alternative, the Plaintiffs and Suppliers.
33. The ~~defendant~~ Commonwealth's duty to the Plaintiffs and the Owners arose by reason of the following:
- (a) in implementing the HIP, the ~~defendant~~ Commonwealth was interfering with, and intending to interfere with, the existing market for the goods and services which were supplied by the businesses:
    - (i) which the Plaintiffs and Owners owned;

- (ii) further or in the alternative, whose operations the Plaintiffs and Owners financed;
  - (iii) further or in the alternative, whose operations were financed by third parties upon the personal guarantees or other security of the Plaintiffs and Owners;
- (b) when the ~~defendant~~ Commonwealth made the Announcement and/or provided the information contained in media releases, Program Guidelines and statements as outlined above in paragraphs 5, 6, 8, 10, 12 and 12A-14 and ~~19 above of this Writ~~, the ~~defendant~~ Commonwealth knew or ought to have known that the Plaintiffs and Owners would be induced to invest in and expand their businesses;

**Particulars**

- a. Of about 8.2 million homes in Australian in 2008, 61.5 percent or 5.06 million had some form of insulation installed. 1.58 million homes were entirely without insulation and the occupants of the remainder (1.59 million) did not know whether their home was insulated (RC 4.3.2 and KJM.002.001.6074, 21). Accordingly, the HIP, if successful, would have effectively exhausted the supply of houses available for retro-fit installation and, thereby, decimated, if not destroyed, the pre-existing installation businesses (RC 4.3.5).
  - b. In 2008, between 65,000 and 70,000 retro-fitted insulation installations took place in Australia per year on average (RC 4.3.1, STA.001.043.001).
  - c. As at 2009, the industry consisted of around 200 to 250 businesses and there were 33 manufacturing businesses that were members of identified insulation industry organisations (RC 4.5.1 and 4.5.3). At the beginning of 2009, DEWHA estimated there were about 70,000 retro-fitted insulation installations taking place on average per year (transcript, 1 April 2014, at 1523, and RC 4.5.1). The objective of the HIP was to increase the rate of insulation installation 15 fold.
- (c) the ~~defendant~~ Commonwealth made the Announcement and/or provided the information contained in media releases, Program Guidelines and



statements as outlined above in paragraphs 5, 6, 8, ~~40~~, 12, and 12A above ~~-14 and -19 of this Writ~~ with the intention of inducing the Plaintiffs and Owners to invest in and expand their businesses;

- (d) the ~~defendant~~ Commonwealth could not have administered the HIP had the Plaintiffs and Owners not invested in and expanded their businesses;
- (e) It was reasonably foreseeable that:
  - (i) the Plaintiffs and Owners would act in reliance on the Announcement and/or the information contained in media releases, Program Guidelines and statements as outlined above in paragraphs 5, 6, 8, ~~40~~, 12 and 12A ~~-14 and -19~~;
  - (ii) the Announcement and the information contained in media releases, Program Guidelines and statements as outlined above in paragraphs 5, 6, 8, ~~40~~, 12 and 12A ~~-14 and -19~~, if retracted, would cause the Plaintiffs and Owners economic loss.

34. The ~~defendant~~ Commonwealth's duty to the First Plaintiff and the ~~Operators~~ Installers arose by reason of the following:

- (a) In implementing the HIP, the ~~defendant~~ Commonwealth was interfering with, and intending to interfere with, the existing market for the goods and services that the First Plaintiff and the ~~Operators~~ Installers supplied;
- (b) When the ~~defendant~~ Commonwealth made the Announcement and/or provided the information contained in media releases, Program Guidelines and statements as outlined above in paragraphs 5, 6, 8, ~~40~~ 12 and 12A above ~~-14 and -19 of this Writ~~, the ~~defendant~~ Commonwealth knew or ought to have known that the HIP would (if it was fully implemented) extinguish most of the market for the goods and services that the First Plaintiff and the ~~Operators~~ Installers supplied;
- (c) The ~~defendant~~ Commonwealth made the Announcement and/or provided the information contained in media releases, Program Guidelines and statements as outlined above in paragraphs 5, 6, 8, ~~40~~, 12 and 12A above ~~-14 and -19 of this Writ~~ in order to encourage the First Plaintiff and ~~Operators~~ Installers to expand their businesses;

- (d) It was reasonably foreseeable that:
  - (i) the First Plaintiffs and ~~Operators-Installers~~ would act in reliance on the Announcement and/or the information contained in media releases, Program Guidelines and statements as outlined above in paragraphs 5, 6, 8, 40, 12 and 12A-14 and ~~19~~;
  - (ii) the Announcement and the information contained in media releases, Program Guidelines and statements as outlined above in paragraphs 5, 6, 8, 40, 12 and 12A-14 and ~~19~~ if retracted, would cause the First Plaintiffs and ~~Operators-Installers~~ economic loss.

35. The defendant Commonwealth's duty to the Second Plaintiffs and the Manufacturers arose by reason of the following:

- (a) in implementing the HIP, the ~~defendant~~ Commonwealth was interfering with, and intending to interfere with, the existing market for the goods and services which were supplied by the manufacturing businesses:
  - (i) which the Second Plaintiffs and ~~m~~Manufacturers owned;
  - (ii) further or in the alternative, whose operations the Second Plaintiffs and ~~m~~Manufacturers financed;
- (b) when the ~~defendant~~ Commonwealth made the Announcement and/or provided the information contained in media releases, Program Guidelines and statements as outlined above in paragraphs 5, 6, 8, 40, 12 and 12A-14 and ~~19~~, the ~~defendant~~ Commonwealth knew or ought to have known that the Plaintiffs and Manufacturers would be induced to invest in the manufacturing of ceiling insulation products and expand their businesses;
- (c) the ~~defendant~~ Commonwealth made the Announcement and/or provided the information contained in media releases, Program Guidelines and statements as outlined above in paragraphs 5, 6, 8, 40, 12 and 12A-14 and ~~19~~ with the intention of inducing the Second Plaintiffs and Manufacturers to invest in the manufacturing of ceiling insulation products and expand their businesses;

- (d) the ~~defendant~~ Commonwealth could not have administered the HIP had the Second Plaintiffs and Manufacturers not invested in the manufacturing of ceiling insulation products and expanded their businesses;
- (e) it was reasonably foreseeable that:
  - (i) the Second Plaintiffs and Manufacturers would act in reliance on the Announcement and/or the information contained in media releases, Program Guidelines and statements as outlined above in paragraphs 5, 6, 8, ~~10~~, 12 and 12A-14 and 19;
  - (ii) the Announcement and the information contained in media releases, Program Guidelines and statements as outlined above in paragraphs 5, 6, 8, ~~10~~, 12 and 12A-14 and 19, if retracted, would cause the Second Plaintiffs and Manufacturers economic loss.

36. The ~~defendant~~ Commonwealth's duty to the Plaintiffs and the Suppliers arose by reason of the following:

- (a) in implementing the HIP, the ~~defendant~~ Commonwealth was interfering with, and intending to interfere with, the existing market for the goods and services which were supplied by the businesses:
  - (i) which the Plaintiffs and Suppliers owned;
  - (ii) further or in the alternative, whose operations the Plaintiffs and Suppliers financed;
- (b) when the ~~defendant~~ Commonwealth made the Announcement and/or provided the information contained in media releases, Program Guidelines and statements as outlined above in paragraphs 5, 6, 8, ~~10~~, 12 and 12A-14 and 19, the ~~defendant~~ Commonwealth knew or ought to have known that the Plaintiffs and Suppliers would be induced to invest in the supply of ceiling insulation products and expand their businesses;
- (c) The ~~defendant~~ Commonwealth made the Announcement and/or provided the information contained in media releases, Program Guidelines and statements as outlined above in paragraphs 5, 6, 8, ~~10~~,

12 ~~and 12A-14 and 19~~ with the intention of inducing the Plaintiffs and Suppliers to invest in the supply of ceiling insulation products and expand their businesses;

- (d) the ~~defendant~~ Commonwealth could not have administered the HIP had the Plaintiffs and Suppliers not invested in the supply of ceiling insulation products and expanded their businesses;
- (e) it was reasonably foreseeable that:
  - (i) the Plaintiffs and Suppliers would act in reliance on the Announcement and/or the information contained in media releases, Program Guidelines and statements as outlined above in paragraphs 5, 6, 8, ~~10~~, 12 ~~and 12A-14 and 19~~;
  - (ii) the Announcement, and the information contained in media releases, Program Guidelines and statements as outlined above in paragraphs 5, 6, 8, ~~10~~, 12 ~~and 12A-14 and 19~~ if retracted, would cause the Plaintiffs and Suppliers economic loss.

36A. At all material times, the Plaintiffs and the Insulation Industry (comprising Owners, Installers, Manufacturers and/or Suppliers) were vulnerable in that they could not protect themselves from the Commonwealth's want of reasonable care in the design and administration of the HIP, including in the making of statements and dissemination of information about the HIP.

## **F2 Breach of duty**

37. The ~~defendant~~ Commonwealth breached the duty it owed the Plaintiffs, the Owners and/or ~~Operators~~ Installers and/or Manufacturers and/or Suppliers by negligently designing and/or administering the HIP by:

- (a) Failing to institute or properly institute administrative procedures to identify the risks associated with the HIP;

### **Particulars**

- (a) The final program design for phase 2 was to be settled by 4 named Ministers. In fact, that never occurred (RC 7.1.5) and

Cabinet never considered or approved the final design of the phase 2 program (RC 7.12.178).

- (b) The HIP was not well organised, rather, it would not be unfair to describe the process embarked upon by DEWHA as "chaotic" (RC 9.2.20.6).
  - (c) Although a project manager (Leake) was employed to manage the project, she had no clear role and did not actually provide strategic management services, despite being paid to do so (RC 7.12.202 to 203 and 7.12.220).
  - (d) DEWHA was inexperienced with the delivery model of the kind that OCG devised and advanced, being the New HIP Model. The novelty of the New HIP Model to DEWHA was a very appreciable risk to the successful delivery and completion of the HIP (RC 7.12.137).
  - (e) As reported by the Australian National Audit Office, phase 2 failed to be successfully implemented due to:
    - (i) very tight timeframe for delivery;
    - (ii) an under-estimation of key program risks;
    - (iii) under resourcing of program administration (ANAO Audit, [50] to [52], page 34);
    - (iv) delayed introduction of an effectively compliance and audit program and inadequate governance arrangements and advice to the Minister for Environment (ANAO Audit, [41], page 32 and [57] to [60], page 36).
- (b) Failing to acquire or properly acquire knowledge about the risks associated with the HIP.

### Particulars

- (a) The original guideline (vi) required that insulation products to be installed comply with AS 3999, 1992 itself an outdated standard as DEWHA was informed at the 18 February 2009 industry consultation meeting. The original draft guideline, as at 12 March 2009, would have meant that RFL was an ineligible product for the HIP. However, prior to implementation of phase 2, the insulation product eligibility criteria were broadened to cover products such as RFL which was not eligible for AS 3999 products (RC 7.6.14).
- (b) No reasonable satisfaction could have been held that RFL sheet installed under the HIP met the R value specified in the guidelines (RC 9.3.22). The use of RFL finds no support in any regulatory document (RC 9.3.18).
- (c) Such warnings in relation to technical deficiencies of RFL (over and above safety issues) were not heeded (RC 7.7.7, 7.7.8).
- (d) RFL sheeting poses risks to installers that other forms of batts do not – such risks are listed by the Royal Commission at RC 9.3.45. The risks are such that RFL should never have been permitted as a product to be included in eligible installation (RC 9.5).
- (e) The Commonwealth was warned of but took no steps to identify or manage electrical risks:
  - (i) the Commonwealth failed to involve any representatives of electrical industry or to obtain advice from electricians as to the risks;
  - (ii) although no electrician was involved in industry consultations conducted by DEWHA, DEWHA was expressly warned, on 19 February 2009, that the use of foil and staples could lead to death (RC 7.3.18 to 23), as had been the New Zealand experience (RC 7.4);

- (iii) DEEWR knew of but "inexplicably" did not liaise with its New Zealand counterparts and draw upon their experience (RC 7.5.2 to 7.5.5, 7.5.8, 7.5.10 to 13 and 7.5.14 to 7.5.21):
  - (iv) electrical risk in relation to the New Zealand experience was raised with DEWHA on 18 February 2009 (RC 7.3.7 to 7.3.10). DEWHA did not investigate, which was a "serious oversight" (RC 7.3.17):
  - (v) on 27 February 2009, an email from EE – Aus to DEEWR warned of this risk (RC 9.27, AGS.002.023.3186, 2 (y)):
  - (vi) on 9 March 2009, the National Electrical and Communications Association warned, by letter to the Minister for the Environment, of the risk of electrical fire (RC 9.1.7 and 8, QIC.006.001.1652, 1 to 2):
  - (vii) Plevey, of EE – Aus, on 25 March 2009, informed the Commonwealth of a risk which might arise from an installer working in a ceiling space coming into contact with wiring and the risks of disturbing cables, all risks material and inherent in the HIP (RC 9.2.6 to 9.2.12).
  - (viii) in July 2009, Mr Chick warned that RFL foil should never have been permitted to be used. Its use should have ceased at that time, in July 2009, or at the very latest, it should have been banned immediately after the first fatality on 14 October 2009 (RC 9.3.2 and 9.3.3)
- (f) The Commonwealth risk register and risk assessment process excluded any consideration of the risk of installer safety.

#### Particulars

The particulars to paragraph 12D are referred to and relied upon.

- (c) Failing to act or properly act in response to the knowledge it acquired that injuries or deaths of installers was a primary risk of the HIP.

**Particulars**

(a) ~~The defendant Commonwealth~~ had knowledge:

- (i) of the risk of electrocution of installers that the HIP entailed by reason of the statement of Mr Ruz at the meeting on 18 February 2009 pleaded above at paragraph 6 of this Writ;
- (ii) on 19 February 2009 Mr Ruz sent an email to Ms Brunoro and Ms Marconi of ~~the Department of the Environment~~ DEWHA in which he drew the Department's attention to the typical practice of stapling reflective foil to roof timbers and noted that three contractors in New Zealand doing this type of work had been electrocuted.
- (iii) on 27 February 2009 Mr Plevy of the ElectroComms and Energy Utilities Industry Skills Council informed Mr. Paul of ~~the Department of the Environment~~ DEWHA that disturbing electrical wiring in older buildings may present a hazard to installers involved in the HIP.
- (iv) participants at the Technical Advisory Group Workshop conducted by ~~the Department of the Environment~~ DEWHA in Canberra on 3 April 2009 noted that the HIP poses a high likelihood of catastrophic consequences being death or serious injury.
- (v) On 23 March 2009 ~~the Department of the Environment~~ DEWHA identified and noted during the course of a risk identification workshop that injury to installers was a significant risk with the HIP.
- (vi) Of the risk of injury to installers & installations of poor quality, through completion by ~~the Department of the Environment~~ DEWHA of the Initial Risk List as part of the



*document "Outcomes of the Risk Identification Workshop held on 23 March 2009: Insulation Components under the Energy Efficient Homes Package" prepared by the Department on 25 March 2009.*

- (vii) On 9 April 2009 Ms Margaret Coaldrake (Minter Ellison) produced a "Risk Register" regarding the HIP which was commissioned by Department of the Environment and which identified 19 "Extreme High Level Risks" including the risks of inadequate training mechanisms, inadequate quality and compliance of installation, and industry impact.*
- (viii) On 9 April 2009 the Project Control Group finalised a separate "Risk Register and Management Plan" which identified risks involved with the HIP and strategies for mitigating those risks which were rated either "incomplete", "weak", "adequate" or "strong".*
- (ix) of the risk of death to installers or others by reason of the knowledge of Ms Riordan, Mr Keefe and Mr Kimber acquired by early May 2009;*
- (x) of the risks of the HIP by reason of its receipt of the risk management plan emailed from Ms Kent to Mr Hoitink on 13 May 2009;*
- (xi) of the safety risks associated with the use of roll out metal foil by reason of the knowledge of the policy officers of the HIP policy team acquired before 1 July 2009;*
- (xii) that the HIP entailed the risks associated with the program's use of unskilled labour;*
- (xiii) that the HIP entailed the risks associated with the use of labour in ceiling spaces, where are not safe places of work for untrained workers;*

- (xiv) *the risk of installer injury or death could lead to early termination of the HIP.*
- (b) *The fact that eligibility was restricted to dwellings built prior to 2003 (ANAO Audit, [3.4], page 65) meant that it was inherently more likely that electrical wiring was old and to a lesser standard that currently required.*
- (c) *The program particularly targeted lower skilled workers in the housing and construction industry (ANAO Audit, [3.4], page 65).*
- (d) *Safety and fire risks were identified problems with retro-fitting insulation prior to the introduction of the HIP with 80 fire incidents per year being associated with insulation in existing dwellings (ANAO Audit, [3.5], page 65).*
- (e) *In April 2009, DEWHA developed a risk assessment which identified the very tight timeframes to "develop" and deliver the program in a properly controlled way and extreme risk (ANAO Audit, [3] to [27], page 71).*
- (f) *Fire and safety risks were identified, as was the internal capacity risk – the risk that DEWHA would not have sufficient resources (skills, experience or funds) to deliver the program in a properly controlled manner (ANAO Audit, [3] to [28], page 72).*
- (g) *As at March 2010, of 13,888 roof inspection conducted, around 29 percent had identified installations with some level of deficiency (ANAO Audit, [22], page 26 and [35], page 31, RC 7.36).*
- (d) Failing to implement or properly institute procedures to monitor and manage the risks associated with the HIP;

### **Particulars**

- (i) *Failing to provide to every person engaged by an Installer Eligible Business to install insulation received training in the safe practices associated with:*
  - A. *installing insulation;*
  - B. *working in a roof space;*
  - C. *working with electricity;*
  
- (ii) *Failing to require and to enforce the requirement that every person engaged by an Installer Eligible Business to install insulation receive training in the safe practices associated with:*
  - A. *installing insulation;*
  - B. *working in a roof space;*
  - C. *working with electricity.*
  
- (iii) *Failing to define or properly define the nature and extent of supervision of installers who were installing insulation as part of the HIP. The matters referred to in paragraph 12E and the particulars thereto are relied upon:*
  
- (iv) *Failing to require and to enforce the requirement that every person engaged by an Installer Eligible Business to supervise the installation of insulation remain onsite while the insulation was installed;*
  
- (v) *Failing to institute or properly institute an administrative procedure to monitor the workplace safety of the workers engaged by the Installers Eligible Businesses;*
  
- (vi) *Failing to institute or properly institute an administrative procedure to monitor the workplace practices of the Eligible Businesses;*
  
- (vii) *Failing to ensure in a timely manner that the Installers Eligible Businesses conducted hazard and risk checks of a roof space;*

- (viii) Failing to institute or properly institute in a timely manner, an audit compliance program of ~~Installers Eligible Businesses~~;
- (ix) Failing to properly design the HIP.
- (x) Flawed assumptions by DEWHA weakened the design of the program, including the assumed role of householders to monitor the quality of installations, often in the absence of any co-payment. The level of risks in installing insulation in ceiling spaces by inexperienced and often untrained installers and voluntary compliance by installers with program guidelines concerning training, supervision and installation standards meant heightened and unacceptable risks (ANAO Audit, [3.35] to [3.40], pages 74 to 75);
- (xi) Initial minimum competency standards for installers were advised so as to be more stringent, reflecting the fact that the original standard were simply inadequate (ANAO Audit, [5.10] to [5.15] ff, pages 107 to 108);
- (xii) The standard that was applied, AS 3999, 1992, was 12 years past its review date and did not represent current international minimum standards (Herbert, M and R statement, 16 and 17 and 41 and 5 February 2009 and 12 February 2009 emails to Riordan);
- (xiii) In November 2005, "quality, safety, potential fraud and internal capacity for risks were all identified as extreme risks – 5 months after the roll-out of phase 2" (ANAO Audit, [4.57], page 10 and 12 February 2009 and 5 February 2009 emails to Riordan);
- (xiv) If more stringent registration and training requirements had been in place from the start of the program, many of the subsequent quality and safety problems may have been averted (ANAO Audit, [5.31], page 114);
- (e) Failing to implement or properly implement procedures to inform the ~~Installers Eligible Businesses~~ and/or the workers engaged by the ~~Installers Eligible Businesses~~ of the risks associated with the HIP;

- (f) Failing to ensure that the relevant State and Territory agency:
  - (i) was aware of the risks associated with the HIP;
  - (ii) was aware of the ~~defendant's~~ Commonwealth's reliance on the agency for the monitoring of the 'Installers' Eligible Businesses compliance with Occupational Health and Safety requirements;
  - (iii) monitored the Installers' Eligible Businesses compliance with Occupational Health and Safety requirements;
  - (iv) reported to the ~~defendant~~ Commonwealth the Installers' Eligible Businesses' compliance with Occupational Health and Safety requirements.

**F3 Causation, loss and damage**

- 38. The ~~defendant~~ Commonwealth's early termination of the HIP without warning to the Plaintiffs and/or the Insulation Industry (comprising the Owners, the Operators-Installers, the Manufacturers and/or the Suppliers), was a result of the ~~defendant~~ Commonwealth's negligence in the administration of the HIP (as pleaded in paragraph 37 above).
- 39. As a result of the ~~defendant~~ Commonwealth's negligence and the early termination of the HIP without warning to the First Plaintiffs and/or the Insulation Industry (comprising the Owners, the Operators-Installers, the Manufacturers and/or the Suppliers), each of the First Plaintiffs and the Owners has suffered loss and damage.

***Particulars***

- (a) *Loss of investments made in the business.*
- (b) *Costs thrown away.*
- (c) *Loss to the value of the business.*
- (d) *Loss of the return on the profits from the business.*
- (e) *Consequential losses.*

(f) ~~Loss arising out of the administration or the winding-up of the entities that operated the business referred to in paragraph 1(b)(i), including accountancy fees, legal fees and insolvency practitioner fees.~~

40. As a result of the ~~defendant~~ Commonwealth's negligence and the early termination of the HIP without warning to the First Plaintiffs and/or the Insulation Industry (comprising the Owners, the ~~Operators-Installers~~, the Manufacturers and/or the Suppliers), each of the First Plaintiffs and the ~~Operators-Installers~~ has suffered loss and damage.

**Particulars**

- (a) *Loss of profits.*
- (b) *Loss of investments made in the business.*
- (c) *Loss on value of stock, storage, leasing and on-costs.*
- (d) *Loss arising out of the leasing and /or purchase of capital equipment to be used in the ~~manufacture~~ or installation of insulation.*
- (e) *Loss arising out of the termination of contracts of employment with employees.*

41. As a result of the ~~defendant~~ Commonwealth's negligence and the early termination of the HIP without warning to the Second Plaintiffs and/or the Insulation Industry (comprising the Owners, the ~~Operators-Installers~~, the Manufacturers and/or the Suppliers), each of the Second Plaintiffs and the Manufacturers has suffered loss and damage.

**Particulars**

- (a) *Loss of profits.*
- (b) *Loss of the value of stock, storage, leasing and on-costs.*
- (c) *Loss arising out of the leasing and/or purchase of capital equipment to be used in the ~~manufacture~~ or installation of insulation.*
- (d) *Loss arising out of the termination of contracts of employment with employees.*

- (e) *Loss of the investments made in the business.*
- (f) *Loss to the value of the business.*
- (g) *Loss of the return on the profits from the business.*
- (h) *Consequential losses.*
- ~~(i) *Loss arising out of the administration or the winding-up of the entities that operated the business referred to in paragraph 1(a)(i), including accountancy fees, legal fees and insolvency practitioner fees.*~~

42. As a result of the defendant Commonwealth's negligence and the early termination of the HIP without warning to the Plaintiffs, the Owners, the Operators Installers, the Manufacturers and/or the Suppliers, each of the Plaintiffs and the Suppliers has suffered loss and damage.

#### *Particulars*

- (a) *Loss of profits.*
- (b) *Loss of the value of stock, storage, leasing and on-costs.*
- (c) *Loss arising out of the leasing and/or purchase of capital equipment to be used in the supply of insulation.*
- (d) *Loss arising out of the termination of contracts of employment with employees.*
- (e) *Loss of the investments made in the business.*
- (f) *Loss to the value of the business.*
- (g) *Loss of the return on the profits from the business.*
- (h) *Consequential losses.*
- ~~(i) *Loss arising out of the administration or the winding-up of the entities that operated the business referred to in paragraph 1(a)(i), including accountancy fees, legal fees and insolvency practitioner fees.*~~

## **G. NEGLIGENT MISREPRESENTATION**

### **G1 The Representations**

43. By engaging in the conduct pleaded above at paragraphs 5, 6, 8, ~~10~~, 12 and ~~12A -14 and 19~~ of this Writ, the ~~defendant~~ Commonwealth represented (expressly and/or impliedly) to the Plaintiffs and the Owners and/or Operators Installers and/or Manufacturers and/or Suppliers that the ~~defendant~~ Commonwealth would not reconsider their decision to operate the HIP until the Expiration Date (**the Representations**).
44. The ~~defendant~~ Commonwealth made the Representations in order to encourage the Plaintiffs and/or the Owners and/or the ~~Operators~~ Installers and/or the Manufacturers and/or the Suppliers to invest, or to continue investments in the Plaintiffs and/or Owners and/or the ~~Operators~~ Installers and/or the Manufacturers and/or the Suppliers.

### **G2 Causation**

45. Between 3 February 2009 and 19 February 2010, the Plaintiffs and the Owners and the ~~Operators~~ Installers and the Manufacturers and the Suppliers acted in reliance on one or more of the Representations by investing in the Plaintiffs and/or the Owners and/or the ~~Operators~~ Installers and/or the Manufacturers and/or the Suppliers respectively and expanding their businesses.
46. Between 3 February 2009 and 19 February 2010, the Plaintiffs and/or the Owners and/or the ~~Operators~~ Installers and/or the Manufacturers and/or the Suppliers acted in reliance on one or more of the Representations by investing and expanding their businesses by:
- (a) employing staff;
  - (b) placing orders from suppliers for stock;
  - (c) placing orders for supply of materials;
  - (d) arranging lines of credit to finance the activities of the Plaintiffs and/or the Owners and/or ~~Operators~~ Installers and/or Manufacturers and/or the Suppliers;



- (e) making capital purchases;
  - (f) not making distributions of profit to the Owner of the business.
47. At all material times from the date that the Commonwealth made the Representations, the Commonwealth:
- (a) knew, or ought to have known, that many ~~Eligible Businesses~~ Installers were acting in reliance on one or more of the Representations by making investments and expanding their businesses;
  - (b) knew, or ought to have known, that Manufacturers of ceiling insulation materials were acting in reliance on one or more of the Representations by making investments and expanding their businesses;
  - (c) knew, or ought to have known, that Suppliers of ceiling insulation materials were acting in reliance on one or more of the Representations by making investments and expanding their businesses;
  - (d) intended that the Representations would induce the ~~Eligible Businesses~~ Installers and/or the Manufacturers and/or the Suppliers to expand their businesses.

**G3 The true position**

48. By at least April 2009, the ~~defendant~~ Commonwealth knew or ought to have known that the ~~defendant~~ Commonwealth had reason to reconsider its decision to operate the HIP until the Expiration Date, given that:
- (a) the HIP entailed the following risks:
    - (i) the risk of personal injury to those persons who installed insulation without adequate training and/or supervision;
    - (ii) the risk of damage to the property in which insulation was installed if it was installed by persons without adequate training and/or supervision;
  - (b) ~~the Risk Register that Minter Ellison Consulting authored informed the Respondent in or around April 2009~~ the Commonwealth had been

informed that the HIP entailed risks that, in the event they materialised, could result in the 'early termination' of the HIP.

**Particulars**

- (a) The Risk Register that Minter Ellison Consulting authored informed the Commonwealth of certain risks that, in the event they materialised, could result in the 'early termination' of the HIP
- (b) Particulars (a) and (d) to paragraph 12D are repeated.

**G4 Duties**

49. The ~~defendant~~ Commonwealth owed to:

- (a) the Plaintiffs and the Owners; and, further or in the alternative,
- (b) to the First Plaintiffs and the ~~Operators~~ Installers, and further or in the alternative,
- (c) to the Second Plaintiffs and the Manufacturers; and further or in the alternative,
- (d) to the Plaintiffs and the Suppliers,

a duty to take reasonable care:

- (e) in making the Representations;
- (f) further or in the alternative, to correct the Representations as soon as ~~defendant~~ Commonwealth:
  - (i) became aware that the Representations were false;
  - (ii) further or in the alternative, had reason to question the likely accuracy of the Representations.

50. The ~~defendant~~ Commonwealth's duty to the ~~plaintiff~~ Plaintiffs and the Owners and/or the ~~Operators~~ Installers and/or the Manufacturers and/or the Suppliers arose by reason of the following facts:

- (a) the ~~defendant~~ Commonwealth made the Representations in order to encourage the ~~plaintiff~~ Plaintiffs and Owners to invest, or to continue investments, in the ~~Operator~~ Installers and/or the Manufacturers and/or the Suppliers of the business;
  - (b) it was reasonably foreseeable that:
    - (i) the ~~plaintiff~~ Plaintiffs and Owners would act in reliance on one or more of the Representations;
    - (ii) the Representations, if false, would cause the ~~plaintiff~~ Plaintiffs and Owners economic loss;
  - (c) the Representations concerned matters of which only the ~~defendant~~ Commonwealth had knowledge.
51. The ~~defendant~~ Commonwealth's duty to the ~~plaintiff~~ Plaintiffs and the ~~Operators~~ Installers arose by reason of the following facts:
- (a) the ~~defendant~~ Commonwealth made the Representations in order to encourage the ~~plaintiff~~ Plaintiffs and ~~Operators~~ Installers to expand their businesses;
  - (b) it was reasonably foreseeable that:
    - (i) the ~~plaintiff~~ Plaintiffs and ~~Operators~~ Installers would act in reliance on one or more of the Representations;
    - (ii) the Representations, if false, would cause the ~~plaintiff~~ Plaintiffs and ~~Operators~~ Installers economic loss;
  - (c) the Representations concerned matters of which only the ~~defendant~~ Commonwealth had knowledge.
52. The ~~defendant~~ Commonwealth's duty to the ~~plaintiff~~ Plaintiffs and the Manufacturers arose by reason of the following facts:
- (a) the ~~defendant~~ Commonwealth made the Representations in order to encourage the Second Plaintiffs and the Manufacturers to invest and expand their businesses

- (i) it was reasonably foreseeable that the ~~plaintiff~~ Plaintiffs and the Manufacturers would act in reliance on one or more of the Representations
  - (ii) the Representations, if false, would cause the ~~plaintiff~~ Plaintiffs and the Manufactures to economic loss;
- (b) the Representations concerned matters of which on the ~~defendant~~ Commonwealth had knowledge.
53. The ~~defendant~~ Commonwealth's duty to the ~~plaintiff~~ Plaintiffs and the Suppliers arose by reason of the following facts:
- (a) the ~~defendant~~ Commonwealth made the Representations in order to encourage the Second Plaintiffs and the Manufacturers to invest and expand their businesses
    - (i) it was reasonably foreseeable that the Second Plaintiffs and the Manufacturers would act in reliance on one or more of the Representations
    - (ii) the Representations, if false, would cause the Second Plaintiffs and the Manufactures to economic loss;
  - (b) the Representations concerned matters of which the ~~defendant~~ Commonwealth had knowledge.
54. With respect to the ~~Ppre-existing~~ Installers, Manufacturers and Suppliers Businesses, the ~~defendant~~ Commonwealth's duty also arose by reason of the following additional facts:
- (c) When the ~~defendant~~ Commonwealth made the Representations, the ~~defendant~~ Commonwealth knew or ought to have known that the HIP would (if it was fully implemented) extinguish most of the retrofit housing market for the goods and services that the ~~plaintiff~~ Plaintiffs and the ~~Ppre-existing~~ Installers, Manufacturers and Suppliers Businesses supplied through those ~~Operators~~ Installers that operated their businesses;
  - (d) In implementing the HIP, the ~~defendant~~ Commonwealth was interfering with the existing market for the goods and services that the ~~plaintiff~~

Plaintiffs and the Pre-existing Installers, Manufacturers and Suppliers Businesses supplied through those ~~Operators~~ Installers that operated their businesses.

**G5 Negligent misstatement**

55. The defendant Commonwealth made the Representations negligently.

***Particulars***

- (a) *The defendant Commonwealth had no proper basis to make the Representations given that, at the time the ~~defendant~~ Commonwealth made the Representations:*
- (i) *In the alternative to paragraph 25 4 of this Writ, the ~~defendant~~ Commonwealth did not intend that, in the event that an Eligible Business accepted the ~~defendant~~ Commonwealth's Offer, the defendant Commonwealth would be contractually bound to the terms of that Offer with any of the Eligible Businesses who accepted the offer;*
- (ii) *the ~~defendant~~ Commonwealth did not consider itself legally or even morally bound:*
- A. *to implement the HIP until the Expiration Date;*
- B. *further or in the alternative, to act in accordance with any of the Representations;*
- (iii) *the ~~defendant~~ Commonwealth considered itself at liberty to reconsider its decision to operate the HIP until the Expiration Date:*
- A. *at any point in time;*
- B. *further or in the alternative, for any reason.*
- (b) *The ~~defendant~~ Commonwealth failed to take care to ensure that it had a proper basis to make the Representations by:*
- (i) *failing to conduct any risk assessment of the HIP before the defendant Commonwealth reached a decision, and made the*

*Representations in relation to its decision, about the Expiration Date of the HIP;*

*(ii) further or in the alternative, failing to consult with any representatives from the insulation industry about the effects on the insulation industry and its members of the ~~defendant~~ Commonwealth reconsidering its decision to operate the HIP until the Expiration Date before the ~~defendant~~ Commonwealth reached a decision, and made the Representations in relation to its decision, about the Expiration Date of the HIP;*

*(iii) failing to ensure, before it made the Representations, that the ~~defendant~~ Commonwealth considered itself bound, legally or morally:*

*A. to implement the HIP until the Expiration Date;*

*B. further or in the alternative, to act in accordance with any of the Representations;*

*(c) the matters pleaded in paragraph 48 of this ~~Writ~~ are repeated.*

56. Further or in the alternative, the ~~defendant~~ Commonwealth negligently failed to correct the Representations as soon practicable after the ~~defendant~~ Commonwealth:

(a) became aware that the Representations were false;

(b) had reason to question the accuracy of the Representations.

#### **G6 Loss and damage**

57. As a result of their acting in reliance on the Representations, the Plaintiffs and/or the Owners and/or Installers and/or the Manufacturers and/or the Suppliers suffered detriment.

#### ***Particulars***

*The Particulars contained at paragraphs 30-31, 40-41 of this ~~Writ~~ are repeated.*

**H. MISLEADING AND DECEPTIVE CONDUCT**

58. By reason of the matters pleaded in paragraphs 43-48 of this Writ Further Amended Statement of Claim, the defendant Commonwealth engaged in conduct that was misleading and deceptive for the purposes of section 52 of the *Trade Practices Act 1974* (Cth).

59. In the premises, the defendant Commonwealth made the Representations:

(a) in trade or commerce for the purposes of s 52 of the Trade Practices Act 1974 (Cth);

(b) in the course of carrying on the business.

**Particulars**

*The Representations concerned the 'trade or commerce' of the Eligible Businesses Installers, including the 'trade or commerce' of the Plaintiffs and the Owners and/or the First Plaintiffs and the Operators Installers and/or the Second Plaintiffs and the Manufacturers and/or the Plaintiffs and/or the Suppliers.*

59A. The Representations made by the Commonwealth were representations with respect to future matters made by the Commonwealth in the absence of reasonable grounds.

60. As a result of the matters pleaded in paragraph 58 of this Writ, each of the Plaintiffs and Owners and/or Installers and/or the Manufacturers and/or the Suppliers has suffered loss and damage.

**Particulars**

*The Particulars contained at paragraphs 30-31 & 40-41 of this Writ are repeated.*

61. [There is no paragraph 61] ~~As a result of the matters pleaded in paragraph of this Writ, each of the Plaintiffs and Pre-existing Operators has suffered loss and damage.~~

**Particulars**

~~(d) — Loss of profits.~~

~~(e) — Loss on value of stock, storage, leasing and on costs.~~

~~(f) Loss arising out of the leasing and/or purchase of capital equipment to be used in the manufacture or installation of insulation.~~

~~(g) — Loss arising out of the termination of contracts of employment with employees.~~

~~(h) — Consequential losses.~~

### **UNCONSCIONABLE CONDUCT**

~~62.—[There is no paragraph 62] In the alternative to paragraph 25 of this Writ, at no material time did the defendant intend that, in the event that an Eligible Business accepted the defendant's Offer, the defendant would be contractually bound to the terms of that Offer with any of the Eligible Business who accepted the offer.~~

~~63.—[There is no paragraph 63] Had the defendant implemented the HIP for its full term, the HIP would have extinguished most of the market for the goods and services that the Plaintiffs and the pre-existing Operators supplied.~~

#### ***Particulars***

~~The defendant intended that, by the operation of the HIP, the Eligible Businesses would insulate all or nearly all of the 2.7 million homes that had no or little ceiling insulation as at 3 February 2000.~~

~~64.—[There is no paragraph 64] By 18 February 2000, the Writ knew or ought to have known of the matters pleaded above at paragraph 63 of this Writ.~~

~~65.—[There is no paragraph 65] By reason of the matters pleaded above at paragraphs 62-63 of this Writ:~~

~~(a) — the Plaintiffs and the pre-existing Owners were at a special disability in deciding whether to invest in the expansion of their Operator businesses;~~

~~(b) — the Plaintiffs and the pre-existing Operators were at a special disability in deciding whether:~~



- ~~(i) to install insulation pursuant to the terms of the defendant's Offer;~~
- ~~(ii) to expand their businesses in order to install insulation pursuant to the terms of the HIP.~~

~~66.—[There is no paragraph 66] By reason of the matters pleaded above at paragraph 64 of this Writ, the defendant knew or ought to have known that:~~

- ~~(a) the Plaintiffs and the pre-existing Owners were at a special disability in deciding whether to invest in the expansion of their Operator businesses;~~
- ~~(b) the Plaintiffs and the pre-existing Owners were at a special disability in deciding whether to invest in the expansion of their Operator businesses~~
- ~~(c) the Plaintiffs and the pre-existing Operators were at a special disability in deciding whether:
  - ~~(i) to install insulation pursuant to the terms of the defendant's Offer;~~
  - ~~(ii) to expand their businesses in order to install insulation pursuant to the terms of the HIP.~~~~

~~67.—[There is no paragraph 67] In the premises, it was unconscionable for the defendant:~~

- ~~(a) to exercise its legal right to terminate the HIP on 10 February 2010 before the Expiration Date;~~
- ~~(b) further or in the alternative, to make the Representations and thereby to encourage:
  - ~~(i) the Plaintiffs and the Owners to invest in the expansion of their Operator businesses~~
  - ~~(ii) the Plaintiffs and the Operators to expand their businesses in order to install insulation pursuant to the terms of the HIP;~~~~

~~68.—[There is no paragraph 68] At all material times, the defendant was 'a person not being a corporation' for the purposes of section 6(2)(h) of the Trade Practices Act 1974 (Cth).~~

69.—~~[There is no paragraph 69] In the premises, the defendant engaged in conduct that was unconscionable for the purposes of section 51AAA of the Trade Practices Act 1974 (Cth) by:~~

- ~~(a) — terminating the HIP on 19 February 2010 before the Expiration Date;~~
- ~~(b) — further or in the alternative, making the Representations and thereby encouraging:
  - ~~(i) — the Plaintiffs and the Owners to invest in the expansion of their Operator businesses;~~
  - ~~(ii) — the Plaintiffs and the Operators to expand their businesses in order to install insulation pursuant to the terms of the HIP~~~~

70.—~~[There is no paragraph 70] The conduct pleaded in paragraph 69 of this Writ was conduct:~~

- ~~(a) — 'in trade or commerce' for the purposes of section 51AA(1) of the Trade Practices Act 1974 (Cth);~~

***Particulars***

~~The conduct concerned the 'trade or commerce' of the Plaintiffs and the Owners and/or the Plaintiffs and the Operators.~~

71.—~~[There is no paragraph 71] As a result of the matters pleaded in paragraph 67(a) and (b)(i) of this Writ, each of the Plaintiffs and pre-existing Owners has suffered loss and damage.~~

***Particulars***

- ~~(a) — Loss of the investment made in the business.~~
- ~~(b) — Loss to the value of the business.~~
- ~~(c) — Loss of the return on the profits from the business.~~
- ~~(d) — Loss arising out of the administration or the winding-up of the entities that operated the business referred to in paragraph 1(c)(i) 1(b)(i), including accountancy fees, legal fees and insolvency practitioner fees.~~

72. ~~[There is no paragraph 72] As a result of the matters pleaded in:~~

~~(a) paragraphs 66 (a) and (b) of this Writ, each of the Plaintiffs and pre-existing Operators~~

~~has suffered loss and damage.~~

***Particulars***

~~(a) Loss of profits.~~

~~(b) Loss on value of stock, storage, leasing and on costs.~~

~~(c) Loss arising out of the leasing and/or purchase of capital equipment to be used in the manufacture or installation of insulation.~~

~~(d) Loss arising out of the termination of contracts of employment with employees.~~

~~(e) Consequential losses.~~

**J. COMMON QUESTIONS**

73. The questions of law or fact common to the claims of the Plaintiffs and Owners are:

(a) Whether the defendant Commonwealth engaged in the conduct pleaded at paragraphs 4 to 15 and 21 5-20 of this Further Amended Statement of Claim Writ.

(b) Whether the defendant Commonwealth and either the Plaintiffs and the Owners, or the Plaintiffs and the Operators-Installers entered into a contract on the terms pleaded at paragraphs 24 to 27 34 of this Further Amended Statement of Claim Writ.

(c) Whether the defendant Commonwealth's early termination of the HIP constituted a breach of that contract.

(d) Whether the defendant Commonwealth owed a duty to take reasonable care in the administration of the HIP, being a duty owed to:

(i) the Plaintiffs and the Owners;

- (ii) further or in the alternative, the Plaintiffs and the Installers Operators;
  - (iii) further or in the alternative, the Plaintiffs and the Manufacturers;
  - (iv) further or in the alternative, the Plaintiffs and the Suppliers.
- (e) Whether the ~~defendant~~ Commonwealth breached that duty in its design and/or administration and early termination of the HIP.
- (f) Whether the ~~defendant~~ Commonwealth impliedly represented to:
- (i) the Plaintiffs and the Owners;
  - (ii) further or in the alternative, the Plaintiffs and the Installers Operators;
  - (iii) further or in the alternative, the Plaintiffs and the Manufacturers;
  - (iv) further or in the alternative, the Plaintiffs and the Suppliers;
- that the ~~defendant~~ Commonwealth would not reconsider its decision to operate the HIP until the Expiration Date.
- (g) Whether those Representations were negligently made.
- (h) Whether, by the conduct pleaded in paragraphs 57 to 60 ~~58-72~~ of this Further Amended Statement of Claim Writ, the ~~—defendant~~ Commonwealth engaged:
- (i) in trade or commerce; and
  - (ii) in misleading and deceptive conduct.
- (i) Whether the Plaintiffs and/or Owners and/or Installers and/or Manufacturers and/or the Suppliers Operators suffered loss or damage by reason of the ~~—defendant~~ Commonwealth's:
- (i) Breach of contract;
  - (ii) Negligence;

- (iii) Negligent misrepresentation; or
- (iv) Misleading and deceptive conduct.

74. ~~The questions of law or fact common to the claims of the Plaintiffs, pre-existing Owners and Operators are:~~

- ~~(a) Whether, by the conduct pleaded at paragraphs 62-72 of this Writ, the defendant engaged:~~
  - ~~(i) in trade or commerce;~~
  - ~~(ii) in unconscionable conduct;~~
- ~~(b) Whether the Plaintiffs, pre-existing Owners and Operators suffered loss or damage by reason of the defendant's unconscionable conduct.~~

Dated the 9 March 2017

J DELANY QC  
W.A.D. EDWARDS



.....  
Steven Lewis  
Principal  
ACA Lawyers  
Solicitor for the Plaintiffs

1. Place of trial:

Melbourne

2. Mode of trial:

Judge alone

3. This writ was filed by:

Septimus Jones & Lee  
as agents for ACA Lawyers

4. The address of the plaintiffs is:

23 Dunbar Street,  
MT GRAVETT EAST QLD

5. The address for service of the plaintiffs is:

c/- Septimus Jones & Lee  
Level 5, 99 William Street  
MELBOURNE VIC 3000  
PO Box 258  
Collins Street West VIC 8007  
DX 186 Victoria

6. The address of the defendant is:

Attorney General's Department  
Robert Garran Offices  
3-5 National Circuit  
BARTON ACT 2600

**SCHEDULE OF PARTIES**

No. 03382 of 2015

BETWEEN

**ROO-ROOFING PTY LTD (ACN ~~002 931 676~~ 131 182 093)**

First Plaintiff

**MATSUH PTY LTD (ACN 105 461 818)**

Second Plaintiff

– and –

**THE COMMONWEALTH OF AUSTRALIA**

Defendant

Dated: 9 March 2017

