

Form 5A

Rule 5.02
IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST

S ci 2015 03382
No of

BETWEEN

ENVIROFLEX PTY LTD (ACN 092 931 676)

Plaintiff

— and —

THE COMMONWEALTH OF AUSTRALIA

Defendant

WRIT

Date of document:
Filed on behalf of:

30 June 2015
The Plaintiff

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 14, 25 Bligh Street
Sydney NSW 2000

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

TO THE DEFENDANT

TAKE NOTICE that this proceeding has been brought against you by the plaintiff for the claim set out in this writ.

IF YOU INTEND TO DEFEND the proceeding, or if you have a claim against the plaintiff which you wish to have taken into account at the trial, YOU MUST GIVE NOTICE of your intention by filing an appearance within the proper time for appearances stated below.

YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by—

- (a) filing a "Notice of Appearance" in the prothonotary's office, 436 Lonsdale Street, Melbourne, or, where the writ has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and

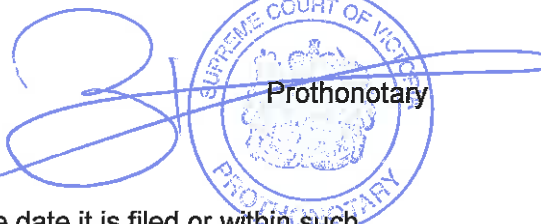
- (b) on the day you file the Notice, serving a copy, sealed by the Court, at the plaintiff's address for service, which is set out at the end of this writ.

IF YOU FAIL to file an appearance within the proper time, the plaintiff may OBTAIN JUDGMENT AGAINST YOU on the claim without further notice.

THE PROPER TIME TO FILE AN APPEARANCE is as follows—

- (a) where you are served with the writ in Victoria, within 10 days after service;
- (b) where you are served with the writ out of Victoria and in another part of Australia, within 21 days after service;
- (c) where you are served with the writ in Papua New Guinea, within 28 days after service;
- (d) where you are served with the writ in New Zealand under Part 2 of the *Trans-Tasman Proceedings Act 2010* of the Commonwealth, within 30 working days (within the meaning of that Act) after service or, if a shorter or longer period has been fixed by the Court under section 13(1)(b) of that Act, the period so fixed;
- (e) in any other case, within 42 days after service of the writ.

FILED: 30/07/15


Prothonotary

The signature is a large, stylized blue ink scribble that overlaps the circular seal of the Prothonotary. The seal is blue and contains the text 'SUPREME COURT OF VICTORIA' at the top and 'PROTHONOTARY' at the bottom, with a central emblem.

THIS WRIT is to be served within one year from the date it is filed or within such further period as the Court orders.

The plaintiff's claim is attached.

**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE**

MAJOR TORTS LIST

No. of

BETWEEN

ENVIROFLEX PTY LTD (ACN 092 931 676)

Plaintiff

– and –

THE COMMONWEALTH OF AUSTRALIA

Defendant

STATEMENT OF CLAIM

Date of document:

30 June 2015

Filed on behalf of:

The Plaintiff

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 14, 25 Bligh Street
Sydney NSW 2000

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

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 Businesses in whole for the loss or damage they suffered by the defendant's conduct.

4. In relation to the Subgroup Proceeding, the plaintiff 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 Businesses in whole for the loss or damage they suffered by the defendant's conduct.
5. Interest pursuant to section 58 and/or section 60 Supreme Court Act 1986 (Vic.).
6. Costs.

PLEADINGS AND PARTICULARS

Parties

1. The plaintiff commences the proceeding set out in all paragraphs of this Writ except paragraphs 61-71 as a group proceeding pursuant to Part 4A Supreme Court Act 1986 (Vic.):
 - (a) on its own behalf; and
 - (b) on behalf of the group of other persons (**Owners**) who:
 - (i) owned or partly owned 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 the Homeowners Insulation Program (**HIP**) (which was renamed the Home Insulation Program around 2 September 2009);
 - (ii) suffered loss as a result of the defendant's early termination of the HIP on 19 February 2010; and

- (c) on behalf of the group of other persons (**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) suffered loss as a result of the defendant's early termination of the HIP on 19 February 2010.

- (d) on behalf of the group of other persons (**Manufacturers**) who:
 - (i) operated a business that manufactured insulation for retrofit installation in a home or homes in Australia between sometime after 3 February 2009 and 19 February 2010; and
 - (ii) suffered loss as a result of the defendant's early termination of the HIP on 19 February 2010.

- (e) on behalf of the group of other persons (**Suppliers**) who:
 - (i) operated a business that supplied insulation for use in retrofit installation in a home or homes in Australia between sometime after 3 February 2009 and 19 February 2010; and
 - (ii) suffered loss as a result of the defendant's early termination of the HIP in 19 February 2010.

Sub-group – pre-existing Owners and pre-existing Operators

2. The plaintiff commences the proceeding set out in paragraphs 61-71 to of this Writ as a group proceeding pursuant to Part 4A Supreme Court Act 1986 (Vic.):
 - (a) on its 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. The plaintiff commences the proceeding set out in paragraphs 61-71 of this Writ as a group proceeding pursuant to Part 4 A Supreme Court Act 1986 (Vic.):
 - (a) on its 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**”).

The Announcement and Negotiation of the HIP

4. The HIP was a part of the defendant’s ‘Nation Building Economic Stimulus Plan’ by which the 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 defendant made a public announcement (the **Announcement**) that, from 1 July 2009 and for 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 eligible Australian home (**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, Water, Heritage and the Arts (**Minister for the Environment**) made the announcement in a joint media release entitled ‘Energy efficient homes – ceiling insulation in 2.7 million homes’ dated 3 February 2009.
- (b) Fact sheet entitled “Nation Building Economic Stimulus Plan – Energy Efficient Homes Package” issued by the Department of Environment, Water, Heritage and the Arts (“**the Environment Department**”).

6. On 18 February 2009, the defendant held an 'Industry Consultation Meeting' with representatives from the insulation industry at which the defendant gave an undertaking that the 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 defendant had allocated to the HIP had run out.

Particulars

- (a) The meeting:
 - (i) took place at Old Parliament House in Canberra;
 - (ii) was chaired by Mr Kevin Keefe, Assistant Secretary of the Department of Environment, Water, Heritage and the Arts (**the Department of Environment**);
 - (iii) was attended by representatives of:
 - A. the Department of Environment;
 - B. the Department of the Prime Minister and Cabinet;
 - C. 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.
- (b) 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. 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 the Department of the Environment when administering the HIP 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

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
- (vi) Version 5.0 dated 1 December 2009

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

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. 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 29 June 2009

(c) media release by the Minister for the Environment and Parliamentary Secretary Mark Arbib on 2 July 2009

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 defendant held a 'National Industry Consultation Meeting' with representatives from the insulation industry at which the Minister for the Environment:
 - (a) was asked by a representative of the insulation industry how long the 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

- (a) The meeting:
 - (i) took place at Old Parliament House in Canberra;
 - (ii) was attended by representatives of:
 - A. the Department of Environment;
 - B. the Department of Education, Employment and Workplace Relations;
 - C. 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.

13. In a document entitled 'Program Guidelines' dated 1 June 2009, and issued by the defendant, the defendant 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 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;
- (d) The plaintiff and each Group Member had the right to fix the sum that was payable for the installation of insulation in each home.

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

- (i) The meeting took place in Brisbane.

15. On 1 July 2009 Phase 2 of the HIP commenced from which time each Eligible Business was entitled to \$1,600.00 payable by the defendant, for each home in Australia in which insulation was installed.
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.
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.
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.
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 1.9 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

- (i) 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.

The Termination of the HIP

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

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

Contract

24. By its conduct pleaded above at paragraphs 4 – 19 of this Writ, the defendant indicated to all Eligible Businesses that it was willing to enter into a contract with any Eligible Business on the following terms (**the defendant’s Offer**):
 - (a) In consideration for the Eligible Business installing ceiling insulation in Eligible Homes between sometime after 3 February 2009 and up to 31 December 2011, the defendant would pay the Eligible Business a sum for each home in which insulation was installed.
 - (b) The defendant had the right to fix the maximum sum that was payable by it for the installation of insulation in each home (**the Maximum Sum**).

Particulars

- (i) From 3 February 2009 and 22 October 2009, the defendant set the maximum sum at \$1,600.

- (ii) On or about 22 October 2009, the defendant set the maximum sum at \$1,200.
- (c) The plaintiff and each Group Member that was an Eligible Business 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 had allocated to the HIP had ran out.

Particulars

- A. The defendant allocated \$2.7 billion of funds to the HIP.
25. The defendant intended to be contractually bound to the terms of the defendant's Offer with each of the Eligible Businesses who accepted the offer.
 26. By registering on the Installer Provider Register, each of the plaintiff and the Owners or further or in the alternative, each of the Operators:
 - (a) accepted the defendant's Offer; and
 - (b) created a contract (**the Contract**) between the defendant and:
 - (i) each of the plaintiff and the Owners;
 - (ii) further or in the alternative, each of the Operators that operated the business that each of the plaintiff and Owners owned or partly owned.
 27. Between sometime after 3 February 2009 and 19 February 2010:
 - (a) the plaintiff and Owners and the Operators performed the Contract by installing insulation in homes in Australia;

- (b) the defendant performed the Contract by paying each of the plaintiff and Owners and/or the Operators 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.
28. On 19 February 2010, and by its conduct pleaded at paragraph 21 or in the alternative, paragraphs 21-23 of this Writ, the defendant evidenced an intention no longer to be bound by, and thereby repudiated, the Contract.
29. On or around 19 February 2010, each of the plaintiff and Owners and/or the Operators accepted the defendant's repudiation of the Contract.
30. As a result of the defendant's repudiation of the Contract, each of the plaintiff and Owners has suffered loss and damage.

Particulars

- (a) Loss of the investment 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) 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.
 - (f) Consequential losses.
31. As a result of the defendant's repudiation of the Contract, each of the plaintiff and 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.

Negligence

- 32. The defendant had a duty to take reasonable care in the administration and delivery of the HIP, which was a duty it owed:
 - (a) to the plaintiff and Owners;
 - (b) further or in the alternative, the plaintiff and Operators;
 - (c) further or in the alternative, the plaintiff and Manufacturers
 - (d) further or in the alternative, the plaintiff and Suppliers.

- 33. The defendant's duty to the plaintiff and the Owners arose by reason of the following:
 - (a) In implementing the HIP, the defendant 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 plaintiff and Owners owned;
 - (ii) further or in the alternative, whose operations the plaintiff 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 plaintiff and Owners;
 - (b) When the defendant 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, 12-14 and 19 of this Writ, the defendant knew or ought to have known that the plaintiff and Owners would be induced to invest in and expand their businesses;
 - (c) The defendant 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, 12-14 and 19 of this Writ with the intention of inducing the plaintiff and Owners to invest in and expand their businesses;
 - (d) The defendant could not have administered the HIP had the plaintiff and Owners not invested in and expanded their businesses;

- (e) It was reasonably foreseeable that:
 - (i) the plaintiff 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, 10, 12-14 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, 12-14 and 19, if retracted, would cause the plaintiff and Owners economic loss.

34. The defendant's duty to the plaintiff and the Operators arose by reason of the following:

- (a) In implementing the HIP, the defendant was interfering with, and intending to interfere with, the existing market for the goods and services that the plaintiff and the Operators supplied;
- (b) When the defendant 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, 12-14 and 19 of this Writ, the defendant 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 plaintiff and the Operators supplied;
- (c) The defendant 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, 12-14 and 19 of this Writ in order to encourage the plaintiff and Operators to expand their businesses;
- (d) It was reasonably foreseeable that:
 - (i) the plaintiff and Operators 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, 12-14 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, 12-14 and 19 if retracted, would cause the plaintiff and Operators economic loss.

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

- (a) In implementing the HIP, the defendant 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 plaintiff and manufacturers owned;
 - (ii) further or in the alternative, whose operations the plaintiff and manufactures financed;
- (b) When the defendant 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, 12-14 and 19 of this Writ, the defendant knew or ought to have known that the plaintiff and Manufacturers would be induced to invest in the manufacturing of ceiling insulation products and expand their businesses;
- (c) The defendant 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, 12-14 and 19 of this Writ with the intention of inducing the plaintiff and Manufacturers to invest in the manufacturing of ceiling insulation products and expand their businesses;
- (d) The defendant could not have administered the HIP had the plaintiff and Manufacturers not invested in the manufacturing of ceiling insulation products and expanded their businesses;
- (e) It was reasonably foreseeable that:
 - (i) the plaintiff 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, 12-14 and 19 of this Writ;
 - (ii) the Announcement and the information contained in media releases, Program Guidelines and statements as outlined above in paragraphs 5, 6, 8, 10, 12-14 and 19, if retracted, would cause the plaintiff and Manufacturers economic loss.

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

- (a) In implementing the HIP, the defendant 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 plaintiff and Suppliers owned;
 - (ii) further or in the alternative, whose operations the plaintiff and Suppliers financed;
- (b) When the defendant 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, 12-14 and 19 of this Writ, the defendant knew or ought to have known that the plaintiff and Suppliers would be induced to invest in the supply of ceiling insulation products and expand their businesses;
- (c) The defendant 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, 12-14 and 19 of this Writ with the intention of inducing the plaintiff and Suppliers to invest in the supply of ceiling insulation products and expand their businesses;
- (d) The defendant could not have administered the HIP had the plaintiff and Suppliers not invested in the supply of ceiling insulation products and expanded their businesses.
- (e) It was reasonably foreseeable that:
 - (i) the plaintiff 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, 12-14 and 19 of this Writ;
 - (ii) the Announcement, and the information contained in media releases, Program Guidelines and statements as outlined above in paragraphs 5, 6, 8, 10, 12-14 and 19 if retracted, would cause the plaintiff and Suppliers economic loss.

37. The defendant breached the duty it owed the plaintiff, the Owners and/or Operators 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;

- (b) Failing to acquire or properly acquire knowledge about the risks associated with the HIP;
- (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

- (i) The defendant had knowledge:
 - A. 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;
 - B. on 19 February 2009 Mr Ruz sent an email to Ms Brunoro and Ms Marconi of the Department 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.
 - C. on 27 February 2009 Mr Plevey of the ElectroComms and Energy Utilities Industry Skills Council informed Mr. Paul of the Department that disturbing electrical wiring in older buildings may present a hazard to installers involved in the HIP.
 - D. participants at the Technical Advisory Group Workshop conducted by the Department in Canberra on 3 April 2009 noted that the HIP poses a high likelihood of catastrophic consequences being death or serious injury.
 - E. On 23 March 2009 the Department identified and noted during the course of a risk identification workshop that injury to installers was a significant risk with the HIP.
 - F. Of the risk of injury to installers & installations of poor quality, through completion by the Department 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.

- G. On 9 April 2009 Ms Margaret Coaldrake (Minter Ellison) produced a “Risk Register” regarding the HIP which was commissioned by DEWHA and which identified 19 “Extreme High Level Risks” including the risks of inadequate training mechanisms, inadequate quality and compliance of installation, and industry impact.
 - H. 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”.
 - I. 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;
 - J. 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;
 - K. 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;
 - L. that the HIP entailed the risks associated with the program’s use of unskilled labour;
 - M. 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;
 - N. the risk of installer injury or death could lead to early termination of the HIP.
- (a) 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 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 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;
 - (iv) Failing to require and to enforce the requirement that every person engaged by an 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 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 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 Eligible Businesses;
 - (ix) Failing to properly design the HIP.
- (b) Failing to implement or properly implement procedures to inform the Eligible Businesses and/or the workers engaged by the Eligible Businesses of the risks associated with the HIP;
- (c) 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 reliance on the agency for the monitoring of the Eligible Businesses' compliance with Occupational Health and Safety requirements;
- (iii) monitored the Eligible Businesses' compliance with Occupational Health and Safety requirements;
- (iv) reported to the defendant the Eligible Businesses' compliance with Occupational Health and Safety requirements.

38. The defendant's early termination of the HIP without warning to the plaintiff, the Owners, the Operators, the Manufacturers and/or the Suppliers, was a result of the defendant's negligence in the administration of the HIP.

39. As a result of the defendant's negligence and the early termination of the HIP without warning to the plaintiff, the Owners, the Operators, the Manufacturers and/or the Suppliers, each of the 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's negligence and the early termination of the HIP without warning to the plaintiff, the Owners, the Operators, the Manufacturers and/or the Suppliers, each of the plaintiff and the Operators 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's negligence and the early termination of the HIP without warning to the plaintiff, the Owners, the Operators, the Manufacturers and/or the Suppliers, each of the plaintiff 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(b)(i), including accountancy fees, legal fees and insolvency practitioner fees.

42. As a result of the defendant's negligence and the early termination of the HIP without warning to the plaintiff, the Owners, the Operators, the Manufacturers and/or the Suppliers, each of the plaintiff 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(b)(i), including accountancy fees, legal fees and insolvency practitioner fees.

Negligent Misrepresentation

- 43. By engaging in the conduct pleaded above at paragraphs 5, 6, 8, 10, 12-14 and 19 of this Writ, the defendant represented (expressly and/or impliedly) to the plaintiff and the Owners that the defendant would not reconsider their decision to operate the HIP until the Expiration Date (**the Representations**).
- 44. The defendant made the Representations in order to encourage the plaintiff and/or the Owners and/or the Operators and/or the Manufacturers and/or the Suppliers to invest, or to continue investments in the plaintiff and/or Owners and/or the Operators and/or the Manufacturers and/or the Suppliers.
- 45. Between 3 February 2009 and 19 February 2010, the plaintiff and the Owners and the Operators and the Manufacturers and the Suppliers acted in reliance on one or more of the Representations by investing in the plaintiff and/or the Owners and/or the Operators and/or the Manufacturers and/or the Suppliers respectively and expanding their businesses.
- 46. Between 3 February 2009 and 19 February 2010, the plaintiff and/or the Owners and/or the Operators 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 plaintiff and/or the Owners and/or Operators 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 defendant made the Representations, the defendant:
- (a) knew, or ought to have known, that many Eligible Businesses 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 and/or the Manufacturers and/or the Suppliers to expand their businesses.
48. By at least April 2009, the defendant knew or ought to have known that the defendant 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 that the HIP entailed risks that, in the event they materialised, could result in the 'early termination' of the HIP.
49. The defendant owed to:
- (a) the plaintiff and the Owners; and, further or in the alternative,
 - (b) to the plaintiff and the Operators, and further or in the alternative,

- (c) to the plaintiff and the Manufacturers; and further or in the alternative,
- (d) to the plaintiff 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 the defendant:
 - (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's duty to the plaintiff and the Owners and/or the Operators and/or the Manufacturers and/or the Suppliers arose by reason of the following facts:

- (a) The defendant made the Representations in order to encourage the plaintiff and Owners to invest, or to continue investments, in the Operator of the business;
- (b) It was reasonably foreseeable that:
 - (i) the plaintiff and Owners would act in reliance on one or more of the Representations;
 - (ii) the Representations, if false, would cause the plaintiff and Owners economic loss;
- (c) The Representations concerned matters of which only the defendant had knowledge.

51. The defendant's duty to the plaintiff and the Operators arose by reason of the following facts:

- (a) The defendant made the Representations in order to encourage the plaintiff and Operators to expand their businesses;
- (b) It was reasonably foreseeable that:
 - (i) the plaintiff and Operators would act in reliance on one or more of the Representations;

- (ii) the Representations, if false, would cause the plaintiff and Operators economic loss;
 - (c) The Representations concerned matters of which only the defendant had knowledge.

- 52. The defendant's duty to the plaintiff and the Manufacturers arose by reason of the following facts:
 - (a) The defendant made the Representations in order to encourage the plaintiff and the Manufacturers to invest and expand their businesses
 - (i) it was reasonably foreseeable that the plaintiff and the Manufacturers would act in reliance on one or more of the Representations
 - (ii) the Representations, if false, would cause the plaintiff and the Manufactures to economic loss;
 - (b) The Representations concerned matters of which on the defendant had knowledge.

- 53. The defendant's duty to the plaintiff and the Suppliers arose by reason of the following facts:
 - (a) The defendant made the Representations in order to encourage the plaintiff and the Manufacturers to invest and expand their businesses
 - (i) it was reasonably foreseeable that the plaintiff and the Manufacturers would act in reliance on one or more of the Representations
 - (ii) the Representations, if false, would cause the plaintiff and the Manufactures to economic loss;
 - (b) The Representations concerned matters of which the defendant had knowledge.

- 54. With respect to the Pre-existing Businesses, the defendant's duty also arose by reason of the following additional facts:

- (a) When the defendant made the Representations, the defendant 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 and the Pre-existing Businesses supplied through those Operators that operated their businesses;
- (b) In implementing the HIP, the defendant was interfering with the existing market for the goods and services that the plaintiff and the Pre-existing Businesses supplied through those Operators that operated their businesses.

55. The defendant made the Representations negligently.

Particulars

- (a) The defendant had no proper basis to make the Representations given that, at the time the defendant made the Representations:
 - (i) In the alternative to paragraph 24 of this Writ, the defendant did not 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 Businesses who accepted the offer;
 - (ii) the defendant 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 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 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 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 reconsidering its decision to operate the HIP until the Expiration Date before the defendant 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 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.

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

- (a) became aware that the Representations were false;
- (b) had reason to question the accuracy of the Representations.

57. As a result of their acting in reliance on the Representations, the plaintiff and/or the Owners 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.

Misleading and Deceptive Conduct

58. By reason of the matters pleaded in paragraphs 43-48 of this Writ, the defendant 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 made the Representations in trade or commerce.

Particulars

- (a) The Representations concerned the 'trade or commerce' of the Eligible Businesses, including the 'trade or commerce' of the plaintiff and the Owners and/or the plaintiff and the Operators and/or the plaintiff and the Manufacturers and/or the plaintiff and/or the Suppliers.
60. As a result of the matters pleaded in paragraph 58 of this Writ, each of the plaintiff and Owners 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. As a result of the matters pleaded in paragraph of this Writ, each of the plaintiff 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.

Subgroup Proceeding: Unconscionable Conduct

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 Businesses who accepted the offer.
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 plaintiff and the pre-existing Operators supplied.

Particulars

- (a) 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 2009.
64. By 18 February 2009, the Writ knew or ought to have known of the matters pleaded above at paragraph 63 of this Writ.
65. By reason of the matters pleaded above at paragraphs 62-63 of this Writ:
- (a) the plaintiff and the pre-existing Owners were at a special disability in deciding whether to invest in the expansion of their Operator businesses;
- (b) the plaintiff 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. By reason of the matters pleaded above at paragraph 64 of this Writ, the defendant knew or ought to have known that:

- (a) the plaintiff and the pre-existing Owners were at a special disability in deciding whether to invest in the expansion of their Operator businesses;
- (b) the plaintiff 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. In the premises, it was unconscionable for the defendant:

- (a) to exercise its legal right to terminate the HIP on 19 February 2010 before the Expiration Date;
- (b) further or in the alternative, to make the Representations and thereby to encourage:
 - (i) the plaintiff and the Owners to invest in the expansion of their Operator businesses;
 - (ii) the plaintiff and the Operators to expand their businesses in order to install insulation pursuant to the terms of the HIP.

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. 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 plaintiff and the Owners to invest in the expansion of their Operator businesses;
 - (ii) the plaintiff and the Operators to expand their businesses in order to install insulation pursuant to the terms of the HIP.

70. The conduct pleaded in paragraph 69 of this Writ was conduct 'in trade or commerce' for the purposes of section 51AA(1) of the *Trade Practices Act 1974* (Cth).

Particulars

- (a) The conduct concerned the 'trade or commerce' of the plaintiff and the Owners and/or the plaintiff and the Operators.
71. As a result of the matters pleaded in paragraph 67(a) and (b) of this Writ, each of the plaintiff 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(b)(i), including accountancy fees, legal fees and insolvency practitioner fees.
72. As a result of the matters pleaded in paragraphs 66(a) and (b) of this Writ, each of the plaintiff 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.

Common Questions

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

- (a) Whether the defendant engaged in the conduct pleaded at paragraphs 5-20 of this Writ;
- (b) Whether the defendant and either the plaintiff and the Owners, or the plaintiff and the Operators entered into a contract on the terms pleaded at paragraphs 24-31 of this Writ;
- (c) Whether the defendant's early termination of the HIP constituted a breach of that contract;
- (d) Whether the defendant owed a duty to take reasonable care in the administration of the HIP, being a duty owed to:
 - (i) the plaintiff and the Owners;
 - (ii) further or in the alternative, the plaintiff and the Operators;
 - (iii) further or in the alternative, the plaintiff and the Manufacturers;
 - (iv) further or in the alternative, the plaintiff and the Suppliers
- (e) Whether the defendant breached that duty in its design and/or administration and early termination of the HIP;
- (f) Whether the defendant impliedly represented to:
 - (i) the plaintiff and the Owners;
 - (ii) further or in the alternative, the plaintiff and the Operators;
 - (iii) further or in the alternative, the plaintiff and the Manufacturers;
 - (iv) further or in the alternative, the plaintiff and the Suppliers
 that the defendant 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 58-72 of this Writ, the defendant engaged:
 - (i) In trade or commerce; and
 - (ii) in misleading and deceptive conduct;
- (i) Whether the plaintiff and/or Owners and/or Operators suffered loss or damage by reason of the defendant'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 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 pre-existing Owners and Operators suffered loss or damage by reason of the defendant's unconscionable conduct.

Dated the 30th day of June 2015



.....
Solicitor for the Plaintiff

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 plaintiff is: 1 Forbes Close, Knoxfield VIC 3180
5. The address for service of the plaintiff 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

BETWEEN

No

of

ENVIROFLEX PTY LTD (ACN 092 931 676)

Plaintiff

— and —

THE COMMONWEALTH OF AUSTRALIA

Defendant



Dated: 30 June 2015