Group A type?

PROCESSED

IN THE SUPREME COURT OF VICTORIA **No: SCI 03382 of 2015**
AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST

BETWEEN:

ROO-ROOFING PTY LTD *First Plaintiff*

MATSUSH PTY LTD *Second Plaintiff*

and

THE COMMONWEALTH OF AUSTRALIA *Defendant*

DEFENCE TO THE SECOND FURTHER AMENDED STATEMENT OF CLAIM DATED 6 DECEMBER 2017 ~~9 MARCH 2017~~

Filed pursuant to the orders made by Dixon J on 1 December 2017

Date of Document: ~~4 May 2017~~ 19 December 2017
Filed on behalf of: Defendant

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For the avoidance of doubt, in this Defence the Defendant does not plead to the particulars attached to each subparagraph of the Second Further Amended Statement of Claim dated 6 December 2017 ~~March 2017~~ unless specific reference is made to an alleged particular in this Defence.

To the allegations made in the Second Further Amended Statement of Claim dated 6 December 2017 ~~9 March 2017~~, the Defendant says the following:

1A. It admits the allegations in paragraph 1A.

1B. It admits the allegations in paragraph 1B.

1. It admits that the first plaintiff and the second plaintiff have purported to commence the proceeding as a group proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) on their own behalves and on behalf of group members including Owners (as that term is defined and used in the Second Further Amended Statement of Claim), but otherwise denies the allegations in paragraph 1, and says further that in so far as it is alleged at paragraph 1(c) that the Owners are persons who:

    (i) directly or indirectly owned or partly owned the business of an Installer and /or Manufacturer and / or Supplier, in their capacity as shareholder or unitholder or as a beneficial owner of shares or units; and/ or

    (ii) guaranteed some or all of the debts and obligations of the business of an Installer and /or Manufacturer and / or Supplier

    the alleged losses of those Owners are the same losses allegedly suffered by the corporate entities who were the Installers, Manufacturers or Suppliers, and such losses are not recoverable by the Owners (hereafter referred to as 'reflective losses').

2. There is no paragraph 2.

3. There is no paragraph 3.

3A. It:

(a) admits that a Cabinet sub-committee made a decision, which was announced on 3 February 2009. The decision of the Cabinet sub-committee was to adopt as Australian Government policy the Nation Building and Jobs Plan, which incorporated:

    a. the Building the Education Revolution program;
    b. a one-off tax bonus to low and middle income families, workers and students;
    c. public and community housing for Defence Force personnel;
    d. small business temporary tax breaks;

e. funding for local community infrastructure; and

f. the Energy Efficient Homes Program (**EEHP**), which in turn comprised:

   i. the Homeowner Insulation Program;

   ii. the Low Emissions Assistance Plan for Renters (**LEAPR**); and

   iii. the Solar Hot Water Rebate Program.

PARTICULARS

a. On 3 February 2009, a media release titled '$42 Billion Nation Building and Jobs Plan' was published (**Nation Building and Jobs Plan media release**).

b. The Nation Building and Jobs Plan media release stated that the Nation Building and Jobs Plan was a 'step in the Government's response to the severe global recession' and that it would 'support up to 90,000 jobs in 2008-09 and 2009-2010'.

c. It further stated that the initiatives in the Nation Building and Jobs Plan would 'provide a boost to economic growth of around ½ per cent of GDP in 2008-2009 and around ¾ per cent to 1 per cent of GDP in 2009-2010'.

d. The media release stated that '[b]y investing in jobs and long term economic growth the Plan strikes the right balance between immediate support for jobs now, and delivering the long term investments needed to strengthen future economic growth'.

e. The Nation Building and Jobs Plan media release advised that the world was 'caught in the worst economic crisis since the Second World War, a crisis that has delivered recessions in the United States, the United Kingdom, Japan and the Eurozone' and that the IMF was 'forecasting advanced economies to contract by 2 % collectively in 2009' and that 'the global recession has already pushed the Budget into deficit, even before policy action is taken' and '[d]ecisive action is now required to strengthen the Australian economy in these circumstances…'.

f. On 3 February 2009, a media release titled 'Energy Efficient Homes – Ceiling Insulation in 2.7 Million Homes' (the **EEHP media release**) was also published.

g. The EEHP media release recited the dual purposes for which the EEHP was established, namely 'to support jobs and set Australia up for a low carbon future....'; and to 'support the jobs of tradespeople and workers employed in the manufacturing, distribution and installation of ceiling insulation during a severe global recession'.

h. The EEHP media release said that: '...the Energy Efficient Homes investment delivers on the Government's commitment in the Carbon Pollution Reduction Scheme White Paper to ensure all households receive support to take practical action to reduce energy use and save on energy bills'.

i. The EEHP media release also stated that:

i. for a period of two and a half years from 1 July 2009, provision of funds of up to $1600 per home to fund the installation of ceiling insulation in owner occupied homes without ceiling insulation;

ii. an increase in the subsidy to landlords who install insulation in rental properties under the LEAPR to $1000 from that date; and

iii. that from 3 February 2009, eligible owner occupiers who installed ceiling insulation in their homes between that date and 30 June 2009 would be able to seek re-imbursement of up to $1600 from the Defendant for the installation.

j. The Defendant otherwise relies on the full terms of the EHHP media release.

(b) admits that the Defendant was responsible for the design and administration of each of the Early Installation Homeowner Insulation Program, the Homeowner Insulation Program and the Home Insulation Program (unless specified otherwise, together the three programs are referred to in this Defence as **the HIP**);

(c) admits that the Cabinet sub-committee decided that the Homeowner Insulation Program would run for a period of two and a half years;

(d) but otherwise:

(i) denies the allegations in subparagraph 3A(a),

(ii) admits the allegations in subparagraph 3A(b);

(iii) admits that:

a. the Minister for the Environment, Water, Heritage and the Arts (**Minister for the Environment**) was appointed by the Governor General pursuant to s 64 of the Constitution to administer the Department of the Environment, Water, Heritage and the Arts (**DEWHA**); and

b. pursuant to s 57 of the *Public Service Act 1999* (Cth) (as it stood at all relevant times prior to its amendment with effect from 1 July 2013), the Secretary under the Minister for the Environment was responsible for managing DEWHA,

but otherwise denies the allegations in subparagraph 3A(c);

(iv) admits the allegations in subparagraphs 3A(d)(i), 3A(d)(ii), 3A(d)(iv), 3A(d)(v) and 3A(d)(vii)B, and admits that the Office of the Co-ordinator General (**OCG**) had a role including:

a. an oversight role and responsibility to coordinate the delivery of the Nation Building and Jobs Plan, which included supporting departments to deliver programs for which they were responsible in relation to the HIP, including DEWHA;

b. co-ordinating communications in relation to the Nation Building and Jobs Plan, including the HIP, between the Commonwealth and States and Territories;

c. responsibility to clear blockages when they arose and to deal with coordination, legislative or program issues that could not be addressed by a particular portfolio agency or Department;

d. with assistance from the Department of Education, Employment and Workplace Relations, to build a website for the Nation Building and Jobs Plan which listed all the individual projects which formed part of the stimulus package, including the HIP; and

e. working with the Prime Minister's office and relevant program Minister's offices in relation to the strategic communications for the Nation Building and Jobs Plan, including the HIP,

but otherwise denies the allegations in subparagraph 3A(d);

(v) admits that:

a. the Prime Minister was appointed by the Governor General pursuant to s 64 of the Constitution;

b. pursuant to s 57 of the *Public Service Act 1999* (Cth) (as it stood at all relevant times prior to its amendment with effect from 1 July 2013), the Secretary under the Prime Minister was responsible for managing the Department of the Prime Minster and Cabinet (**PMC**); and

c. the Prime Minister was the chair of the Cabinet;

but otherwise denies the allegations in subparagraph 3A(e);

(vi) denies the allegations in subparagraph 3A(f)(iii)B, but otherwise admits the allegations in subparagraph 3A(f); and

(vii) admits the allegations in subparagraph 3A(g).

3B. It:

(a) admits the allegations in subparagraph 3B(a); and

(b) denies the allegations in subparagraph 3B(b), and says further that in the absence of any specific material fact which it is alleged that Commonwealth Ministers (as defined in the Second Further Amended Statement of Claim) knew, the Defendant does not know and cannot admit the knowledge of any Commonwealth Minister at any particular time was knowledge imputed by operation of the general law to the Commonwealth.

3C. It:

(a) admits the allegations in subparagraph 3C(a);

(b) denies the allegations in subparagraph 3C(b), and says further that in the absence of any specific material fact which it is alleged that the officers, employees and agents of the Commonwealth Ministers (as defined in the Second Further Amended Statement of Claim), PMC, DEWHA, the OCG and the Project Control Group (**PCG**) knew, the Defendant does not know and cannot admit whether the knowledge of any officers, employees and agents of PMC, DEWHA, the OCG and the PCG at any particular time was knowledge imputed by operation of the general law to the Commonwealth.

3D. It denies the allegations in paragraph 3D, and says further that by implementing the HIP the Commonwealth was not engaged in 'carrying on a business' within the meaning of s 2A of the *Trade Practices Act*, or at all, and says further that:

(a) the HIP was an administrative scheme, implemented by the Defendant in reliance on the executive power;

(b) the powers exercised by the Defendant in order to establish and operate the HIP were exercised in the national interest and by reference to macro-economic and other policies;

(c) the Defendant's establishment, administration and funding of the HIP involved the performance of governmental functions only;

(d) the HIP was only one component of the Nation Building and Jobs Plan, which was implemented by the Defendant in pursuance of 2 policy goals, namely:

a. the economic goal of creating fiscal stimulus to combat the effects of a global recession, and

b. the social or environmental goal of reducing energy use;

(e) the Defendant did not at any time carry on the business of installing home insulation;

(f) the Defendant did not buy or sell insulation products or insulation installation services;

(g) the Defendant did not earn revenue or make profit in respect of the installation of insulation;

(h) the Defendant did not engage in a commercial enterprise with respect to the installation of insulation;

(i) the design and implementation of the HIP bore no similarity with the commerce or trade which a private citizen or trader might undertake.

3E. It denies the allegations in paragraph 3E.

3F. It denies the allegations in paragraph 3F and refers to and repeats paragraph 3D above.

4. It admits the allegations in paragraph 4, and refers to and repeats subparagraph 3A(a) and paragraph 3D above.

5. It denies the allegations in paragraph 5 and refers to and repeats paragraph 3A(a) above.

5A. It denies the allegations in paragraph 5A.

6. It admits that an industry consultation meeting was held on 18 February 2009, but otherwise denies the allegations in paragraph 6. Further or in the alternative, if any statement as to the length of time the HIP was to run was made (which is denied), any such statement reiterated the Australian Government Policy as set out in the EEHP media release.

7. There is no paragraph 7.

8. It admits that officers of DEHWA from time to time stated or repeated the details of the Australian Government Policy referred to as the HIP contained in the EEHP Media Release, and from time to time conveyed the information contained in the Guidelines applicable to the HIP as amended from time to time, but otherwise denies the allegations in paragraph 8, and says further that each iteration of the HIP Guidelines expressly stated, in effect, that the Commonwealth reserved the right to change the amount of the subsidy or any other part of the HIP.

8A. It:

(a) admits that the Defendant knew that there may be an electrical safety and fire risk associated with the installation of insulation in homes otherwise than in compliance with Australian Standards, but otherwise denies the allegations in subparagraph 8A(a);

(b) admits that from about 18 February 2009, the Defendant knew of reports of 3 deaths in New Zealand associated with the installation of insulation pursuant to a government subsidy scheme, but otherwise denies the allegations in subparagraph 8A(b); and

(c) denies the allegations in subparagraph 8A(c).

9. There is no paragraph 9.

10. There is no paragraph 10.

11. There is no paragraph 11.

12. It admits that a National Industry Consultation Meeting was held on 20 March 2009, but otherwise denies the allegations in paragraph 12.

12A. It admits that there was a media release published on each of 12 May 2009, 29 June 2009 and 2 July 2009 and that a meeting was held on 3 February 2010, but otherwise denies the allegations in paragraph 12A and relies on the full terms of the relevant media releases.

12B. It admits the allegations in paragraph 12B.

12C. It admits the allegations in paragraph 12C.

12D. It denies the allegations in paragraph 12D.

12E. It admits that on or about 8 May 2009, the Defendant decided:

(a) not to adopt a regional broker model for the HIP, and adopted a model pursuant to which homeowners would engage directly with installers of their choice; and

(b) to require installers to hold a current occupational health and safety 'white card' and to be supervised by a person who was a qualified tradesperson, had insulation specific training from a registered training organisation or had at least 2 years' experience in installing ceiling insulation

but otherwise denies the allegations in paragraph 12E.

13. It denies the allegations in paragraph 13 and says further that:

(a) During the period of operation of the HIP and the LEAPR, the Defendant announced a number of changes to Australian Government policy which were published in successive versions of Guidelines and other publications which contained requirements in relation to eligibility for participation in the HIP and the LEAPR;

(b) On 26 February 2009, the Defendant released publications titled the Homeowner Insulation Program Early Installation Guidelines and the LEAPR Early Installation Guidelines;

(c) On 27 March 2009, the Defendant released version 1.1 of the Early Installation Guidelines for the Homeowner Insulation Program and version 1.1 of the Early Insulation Guidelines for the LEAPR. These replaced the previous version of the Guidelines; and

(d) On 4 June 2009, the Defendant released version 1.2 of the Early Installation Guidelines for the Homeowner Insulation Program and version 1.2 of the Early Insulation Guidelines for the LEAPR. These replaced the previous version of the Guidelines.

PARTICULARS

a. Under each version of the Early Installation Guidelines of the Homeowner Insulation Program as set out in paragraphs 13(b), (c) and (d) above, owner-occupier homeowners who were eligible under the Guidelines were able to arrange installation of insulation in their homes and claim a reimbursement from the Australian Government of up to $1600; and

b. Under each version of the Early Installation Guidelines of the LEAPR landlords/tenants who were eligible under the Guidelines were able to arrange installation of insulation in their homes and claim a reimbursement from the Australian Government of up to $1000.

(e) Each version of the Early Installation Guidelines for the Homeowner Insulation Program and each version of the Early Installation Guidelines for the LEAPR contained statements to the following effect:

i. The Australian Government reserves the right to change the rebate amount or any other aspect of the installation guidelines; and

ii. The Australian Government accepts no liability for any loss, damage or costs incurred as a result of, or arising from, the installation of a ceiling

insulation which has been subject to the assistance offered under the Homeowner Insulation Program or the LEAPR, or its process.

(f) To qualify for reimbursement under the early installation phase of the Homeowner Insulation Program:

i. the homeowner was required to:

a. arrange for the installation of the insulation to be undertaken by the owner or employee of a registered business with an Australian Business Number operating in the installation of thermal insulation;

b. submit a reimbursement form attaching a copy of the tax invoice for the installation and a copy of 2 quotes which met the requirements of the Guidelines; and

c. arrange for the installer to complete and sign the Installer technical compliance section of the reimbursement application form, and

ii. the insulation was required to have been installed to specified Australian Insulation Installation Standards and comply with specified Insulation Product Standards.

(g) To qualify for reimbursement under the early installation phase of the LEAPR:

i. the landlord/tenant was required to:

a. arrange for the installation of the insulation to be done by an installer authorised under the Guidelines;

b. submit a reimbursement form attaching a copy of the tax invoice for the installation and a copy of 2 quotes which met the requirements of the Guidelines; and

c. arrange for the installer to complete and sign the Installer technical compliance section of the reimbursement application form, and

ii. the insulation was required to have been installed to specified Australian Insulation Installation Standards and comply with specified Insulation Product Standards.

(h) On 1 June 2009, the Defendant released Program Guidelines for the Homeowner Insulation Program (**Version 2 of the Homeowner Insulation Program Guidelines**) for insulation installed between 1 July 2009 and 31 December 2011 and Program Guidelines for the LEAPR (**Version 2 of the LEAPR Guidelines**) for insulation installed between 1 July 2009 and 30 June 2011. These Program Guidelines replaced the Early Installation Guidelines.

(i) Version 2 of the Homeowner Insulation Program Guidelines provided, amongst other things that under the Homeowner Insulation Program:

(i) householders would only be eligible for assistance up to $1600;
(ii) the householder and the installer were responsible for entering into a contractual arrangement for the installation of ceiling insulation noting that the Commonwealth would only pay the installer on behalf of an eligible Householder for the cost of the installation up to $1600;
(iii) the householder was responsible for any costs in excess of $1600 or the total cost if they were not eligible under the program;
(iv) the householder should be satisfied with the work done before they signed the Work Order Form;
(v) to be eligible for assistance the insulation must be installed by an installer or an individual who is working for or contracted by an installer registered on the Installer Provider Register;
(vi) the installer must comply with all relevant laws in installing ceiling insulation (which included relevant state and territory occupational health and safety laws), including any licencing requirements; and
(vii) the insulation was required to comply with specified Australian Insulation Installation Standards and comply with specified Australian Product Standards.

(j) Version 2 of the Homeowner Insulation Program Guidelines contained statements to the following effect:

i. The Australian Government reserved the right to change the amount of the assistance provided or any other aspect of the Guidelines;

ii. The Australian Government did not endorse any installer on the Installer Provider Register or their work; and

iii. The Australian Government did not accept liability for any loss, damage, injury or cost incurred as a result of or relating to, the installation of ceiling insulation or the installation process.

(k) Version 2 of the LEAPR Guidelines provided, amongst other things, that under the LEAPR:

i. landlords and tenants would only be eligible for assistance up to $1000 per house;

ii. the landlord or tenant and the installer were responsible for entering into a contractual arrangement for the installation of ceiling insulation noting that the Commonwealth would only pay the installer on behalf of an eligible landlord or tenant for the cost of the installation up to $1000;

iii. the landlord or tenant was responsible for any costs in excess of $1000 or the total cost if they were not eligible under the program;

iv. the landlord or tenant should be satisfied with the work done before they signed the Work Order Form;

v. to be eligible for assistance the insulation must be installed by an installer or an individual who is working for or contracted by an installer registered on the Installer Provider Register;

vi. the installer must comply with all relevant laws in installing ceiling insulation (which included relevant state and territory occupational health and safety laws), including any licencing requirements; and

vii. the insulation must comply with specified Australian Insulation Installation Standards and comply with specified Australian Product Standards.

(l) Version 2 of the LEAPR Guidelines contained statements to the following effect:

i. The Australian Government reserved the right to change the amount of the assistance provided or any other aspect of the Guidelines;

ii. The Australian Government did not endorse any installer on the Installer Provider Register or their work; and

iii. The Australian Government did not accept liability for any loss, damage, injury or cost incurred as a result of or relating to, the installation of ceiling insulation or the installation process.

(m) On 1 September 2009, the Defendant published the Seventh Insulation Installer Advice, in which the Defendant announced policy changes to its EEHP policy including:

i. the LEAPR ceased being Australian Government Policy on 31 August 2009 and was wound up;

ii. the Homeowner Insulation Program was expanded to include houses which were not owner/occupied and it was renamed the Home Insulation Program;

iii. a cap on the funding of $2.7 billion was introduced; and

iv. the HIP would run until 31 December 2011 or until funds had been fully allocated.

(n) On 1 September 2009, the Defendant also released Program Guidelines for the HIP **(Version 3 of the HIP Guidelines)** for insulation installed between 1 September 2009 and 31 December 2011 or until funds had been fully allocated. These Program Guidelines replaced Version 2 of the Homeowner Insulation Program Guidelines.

(o) Version 3 of the HIP Guidelines provided, amongst other things, that under the HIP:

i. householders were eligible for assistance up to $1600;

ii. the householder and the installer were responsible for entering into a contractual arrangement for the installation of ceiling insulation, noting that the Commonwealth would only pay the installer on behalf of an eligible householder for the cost of the installation up to $1600;

iii. the householder would be responsible for any costs in excess of $1600 or the total cost if they were not eligible under the program;

iv. the householder should be satisfied with the work done before they signed the Work Order Form;

v. to be eligible for assistance the insulation must be installed by an installer or an individual who is working for or contracted by an installer registered on the Installer Provider Register;

vi. the installer must comply with all relevant laws in installing ceiling insulation (which included relevant state and territory occupational health and safety laws), including any licencing requirements; and

vii. the insulation must comply with specified Australian Insulation Installation Standards and must comply with specified Australian Product Standards.

(p) Version 3 of the HIP Guidelines contained statements to the following effect:

i. The Australian Government reserved the right to change the amount of the assistance provided or any other aspect of the guidelines;

ii. The Australian Government did not endorse any installer on the Installer Provider Register or their work; and

iii. The Australian Government did not accept liability for any loss, damage, injury or cost incurred as a result of or relating to, the installation of ceiling insulation or the installation process.

(q) On 1 November 2009, the Defendant published the Thirteenth Insulation Installer Advice, in which it announced changes to the HIP including:

i. The maximum subsidy payable under the HIP was reduced from $1600 per home to $1200 per home;

ii. The cap on the funding for the HIP was reduced from $2.7 billion to $2.45 billion;

iii. A requirement that an appropriate covering be placed over down lights and other ceiling appliances as a key safety fire protection measure;

iv. A requirement that insulation was to be installed without the use of metal staples or other metal fasteners to fasten insulation products as an electrical safety measure;

v. From 1 December householders would be required to obtain 2 genuine quotes; and

vi. From 1 December 2009 insulation was not to be installed before a risk assessment had been completed by the Installer.

(r) On 2 November 2009, the Defendant released new Program Guidelines for the HIP (**Version 4 of the HIP Guidelines**) for insulation installed between 2 November 2009 and 31 December 2011 or until funds had been fully allocated. These Program Guidelines replaced Version 3 of the HIP Guidelines.

(s) Version 4 of the HIP Guidelines provided, amongst other things, that under the HIP:

i. householders were eligible for assistance up to $1200;

ii. the householder and the installer were responsible for entering into a contractual arrangement for the installation of ceiling insulation noting that the Commonwealth would only pay the installer on behalf of an eligible householder for the cost of the installation up to $1200;

iii. the householder would be responsible for any costs in excess of $1200 or the total cost if they were not eligible under the HIP;

iv. the householder should be satisfied with the work done before they signed the Work Order Form;

v. to be eligible for assistance the insulation must be installed by an installer or an individual who is working for or contracted by an installer registered on the Installer Provider Register;

vi. the installer must comply with all relevant laws in installing ceiling insulation (which included relevant state and territory occupational health and safety laws), including any licencing requirements, the Program Guidelines and Terms and Conditions of Registration;

vii. the insulation must comply with specified Australian Insulation Installation Standards and must comply with specified Australian Product Standards;

viii. appropriate covering was required to be placed over down lights and other ceiling appliances;

ix. insulation was to be installed without the use of metal staples or other metal fasteners to fasten insulation products;

x. a householder would be required to obtain 2 genuine quotes for any installation of insulation occurring after 1 December 2009; and

xi. installers would be required to conduct a risk assessment before installing any insulation after 1 December 2009.

(t) Version 4 of the Homeowner Insulation Program Guidelines contained statements to the following effect:

i. the Australian Government reserved the right to change the amount of the assistance provided or any other aspect of the guidelines;

ii. the Australian Government did not endorse any installer on the Installer Provider Register or their work; and

iii. the Australian Government did not accept liability for any loss, damage, injury or cost incurred as a result of or relating to, the installation of ceiling insulation or the installation process.

(u) On 1 December 2009, the Defendant released new Program Guidelines for the HIP (**Version 5 of the HIP Guidelines**) for insulation installed between 1 December 2009 and 31 December 2011, or until funds had been fully allocated. These Guidelines replaced Version 4 of the HIP Guidelines.

(v) Version 5 of the HIP Guidelines provided, amongst other things, that under the HIP:

i. householders were eligible for assistance up to $1200;

ii. the householder and the installer were responsible for entering into a contractual arrangement for the installation of ceiling insulation noting that the Commonwealth would only pay the installer on

behalf of an eligible householder for the cost of the installation up to $1200;

iii. the householder would be responsible for any costs in excess of $1200 or the total cost if they are were eligible under the HIP;

iv. the householder should be satisfied with the work done before they signed the Work Order Form;

v. the insulation must be installed by an installer or an individual who is working for or contracted by an installer registered on the Installer Provider Register;

vi. the installer must comply with their obligations under relevant occupational health and safety laws and all other laws and regulations in the relevant state or territory;

vii. the insulation must comply with specified Australian Insulation Installation Standards and must comply with specified Australian Product Standards;

viii. appropriate covering was required to be placed over down lights and other ceiling appliances;

ix. insulation was to be installed without the use of metal staples or other metal fasteners to fasten insulation products;

x. householders were required to obtain 2 genuine quotes; and

xi. insulation was not to be installed before a risk assessment has been completed by the Installer.

(w) Version 5 of the HIP Guidelines contained the following statements:

i. the Australian Government reserved the right to change the amount of the assistance provided or any other aspect of the guidelines at any time;

ii. the Australian Government did not endorse any installer on the installer Provider Register or their work; and

iii. the Australian Government did not accept liability for any loss, damage, injury or cost incurred as a result of or relating to, the installation of ceiling insulation or the installation process.

14. There is no paragraph 14.

15. It admits that changes were made to Homeowners Insulation Program and the HIP during the period in which those programs were in operation, including (but not limited to) a reduction from $1600 to $1200 in the maximum amount payable by the Defendant with respect to eligible installation of insulation, and otherwise it admits the allegations in paragraph 15, and refers to and repeats paragraph 13 above.

16. It admits the allegations in paragraph 16 and says further that:

(a) As at 14 October 2009, Matthew Fuller was employed by QHI Installations Pty Ltd;

(b) QHI Installations Pty Ltd was a subcontractor to Vision and Network Australia Pty Ltd;

(c) On and from 7 September 2009, Vision and Network Australia Pty Ltd was a registered installer under the HIP;

(d) The Queensland Coroner found that the cause of Matthew Fuller's death on 14 October 2009 was electrocution while installing insulation;

(e) The Queensland Coroner found that the training and induction provided to Matthew Fuller by his employer, QHI Installations Pty Ltd, was inadequate;

(f) On 4 February 2011, QHI Installations Pty Ltd was found to have contravened s 27 of the *Electrical Safety Act 2002* (Qld) by failing to conduct its business in a manner that was electrically safe, and a fine of $100,000 was imposed;

(g) 15 February 2010, Vision and Network Australia Pty Ltd voluntarily deregistered from the HIP;

(h) Vision and Network Australia Pty Ltd was paid $2,760,650.34 for installation of insulation under the HIP; and

(i) Both QHI and Vision and Network Australia Pty Ltd are now deregistered companies, but the Owners (as defined in the Second Further Amended

Statement of Claim) of those deregistered companies are Group Members in these proceedings.

17. It admits the allegations in paragraph 17 and says further that:

(a) As at 18 November 2009, Rueben Barnes was employed by Arrow Property Maintenance Pty Ltd;

(b) On and from 9 June 2009, Arrow Property Maintenance Pty Ltd was a registered installer under the HIP;

(c) The Queensland Coroner found that the cause of Rueben Barnes's death on 18 November 2009 was electrocution while installing insulation;

(d) The Queensland Coroner found that the training and induction provided to Rueben Barnes by his employer, Arrow Property Maintenance Pty Ltd, was deficient;

(e) On 17 September 2010, Arrow Property Maintenance Pty Ltd was found to have contravened s 27 of the *Electrical Safety Act* 2002 (Qld) and to have contravened s 24 of the *Workplace Health and Safety Act* (Qld). The Industrial Court fined Arrow Property Maintenance $135,000 for the contraventions;

(f) On 8 December 2009, Arrow Property Maintenance was deregistered under the HIP;

(g) Arrow Property Maintenance Pty Ltd was paid $111,553.60 for installation of insulation under the HIP; and

(h) Arrow Property Maintenance Pty Ltd is now a deregistered company, but the Owners (as defined in the Second Further Amended Statement of Claim) of deregistered companies are Group Members in these proceedings.

18. It admits the allegations in paragraph 18 and says further:

(a) From 2 November 2009, pursuant to Version 4 of the HIP Guidelines, installation of insulation was required to be without the use of metal staples or other metal fasteners to attach insulation products;

(b) On 21 November 2009, Marcus Wilson was engaged to perform work for Pride Buildings NSW Pty Ltd;

(c) On and from 19 June 2009, Pride Buildings NSW Pty Ltd was a registered installer under the HIP;

(d) The Deputy Coroner of New South Wales found that the cause of Marcus Wilson's death on 21 November 2009 was hyperthermia;

(e) The New South Wales Deputy Coroner found that the training provided to Marcus Wilson by Pride Buildings NSW Pty Ltd was inadequate and that there was no company policy in relation to dealing with excessive heat or breaks;

(f) On 4 December 2009, Pride Buildings NSW Pty Ltd was deregistered under the HIP; and

(g) Pride Buildings NSW Pty Ltd is now a deregistered company, but the Owners (as defined in the Second Further Amended Statement of Claim) of deregistered companies are Group Members in these proceedings.

19. There is no paragraph 19.

20. It admits the allegations in paragraph 20 and says further:

(a) From 2 November 2009, pursuant to Version 4 of the HIP Guidelines, installation of insulation was required to be without the use of metal staples or other metal fasteners to attach insulation products;

(b) As at 4 February 2010, Mitchell Sweeney worked as a contractor for Titan Insulation Pty Ltd;

(c) On and from 18 September 2009 Titan Insulation Pty Ltd was a registered installer under the HIP;

(d) The Queensland Coroner found that the cause of Mitchell Sweeney's death on 4 February 2010 was electrocution while installing insulation;

(e) The Queensland Coroner found that the training provided to Mitchell Sweeney in relation to electrical safety when installing reflective foil laminate by his employer, Titan Insulation Pty Ltd, was deficient;

(f) On 30 August 2011, Titan Insulation Pty Ltd was convicted of breaching s 27 of the *Electrical Safety Act* 2002 (Qld);

(g) On 4 February 2010, Titan Insulation Pty Ltd was deregistered as an installer under the HIP;

(h) Titan Insulation Pty Ltd was paid $651,600 for installation of insulation under the HIP; and

(i) Titan Insulation Pty Ltd is now a deregistered company, but the Owners (as defined in the Second Further Amended Statement of Claim) of deregistered companies are Group Members in these proceedings.

20A. It admits the allegations in paragraph 20A, and says further that:

(a) coronial findings have been made that lack of training and supervision provided by the employers of each of Matthew Fuller, Rueben Barnes, Mitchell Sweeney and Marcus Wilson contributed materially to their deaths; and

(b) each of QHI Installations Pty Ltd, Arrow Property Maintenance, Pride Buildings NSW Pty Ltd and Titan Insulation Pty Ltd were subject at all times to obligations imposed by relevant State occupational health and safety laws in Queensland and New South Wales including the *Electrical Safety Act* 2002 (Qld), the *Workplace Health and Safety Act 1995* (Qld) and the *Occupational Health and Safety Act 2000* (NSW) and at all times owed a duty of care at common law to all persons employed by them or engaged to perform work for them.

20B. It admits that there were 224 fire incidents associated with the insulation installed during the period the HIP was in operation but says further that the fire incident rate per 100,000 households per year did not increase during the period of operation of the HIP, and otherwise denies the allegations in paragraph 20B.

21. It admits that on or around 19 February 2010, Cabinet decided that the HIP would no longer be Australian Government Policy and that on 19 February 2010 it was announced by the Defendant that the HIP was no longer Australian Government Policy, but otherwise denies the allegations in paragraph 21.

22. It:

(a) admits that on 19 February 2010 the Minister for the Environment announced that the HIP, and other government programs, were to be replaced with a household Renewable Energy Bonus Scheme (**REBS**);

(b) says that the announcement also stated:

i. it was intended that the insulation component of the REBS will come into operation by 1 June 2010;

ii. the Government would be commissioning an external assessment of the proposed scheme;

iii. the assessment would consider whether the arrangements and planned timelines proposed for the scheme's implementation are sufficient to meet the Government's expectations of safety; and

iv. workers will have immediate access to assistance under the government's Compact for Retrenched Workers, and

(c) otherwise denies the allegations in paragraph 22.

23. It says that 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 the insulation component of the REBS, and otherwise denies the allegations in paragraph 23.

CLAIM IN CONTRACT

24. It denies the allegations in paragraph 24, and says further that, under the terms of the HIP:

(a) the householder and the installer would contract for the provision of installation of insulation services;

(b) the maximum amount payable by the Defendant with respect to any particular eligible instance of installation of home insulation was fixed under the Guidelines in force from time to time;

(c) if the cost of the installation of insulation with respect to any particular eligible instance of installation of home insulation exceeded the maximum amount payable by the Defendant then the homeowner was required to pay the balance;

(d) from 1 July 2009 in order to be eligible to participate in the HIP an installer was required to be registered on the Installer Provider Register;

(e) from 1 July 2009 a registered installer who complied with the requirements of the HIP was entitled to submit a Work Order Form and request for payment with respect to each home in which it had installed insulation in accordance with the requirements of the HIP, including all applicable laws and regulations, and any published Guidelines in force from time to time;

(f) from 1 July 2009 on receipt of a work order form which evidenced compliance with the requirements of the HIP, the Defendant would pay the installer a sum with respect to each eligible instance of installation of home insulation; and

(g) the Commonwealth had the right to unilaterally alter any aspect of the HIP, including the maximum sum payable to installers with respect to each installation.

25. It denies the allegations in paragraph 25.

26. It denies the allegations in paragraph 26, and says in the alternative that if there was a contract of any kind entered into between the Defendant and the Eligible Businesses, that contract had the following terms:

(a) an offer of a unilateral contract to pay the level of subsidy published in the HIP Guidelines from time to time;

(b) the offer was capable of acceptance by an installer completing an installation of insulation in accordance with the Guidelines as in force from time to time;

(c) upon acceptance, the Defendant was liable to pay to the installer the cost of installing the insulation or the maximum amount of subsidy published in the then extant Guidelines (whichever was the lesser); and

(d) the Defendant was free to alter any or all of the terms of the offer or withdraw the offer at any time.

27. It admits that pursuant to the terms of the HIP, the Defendant paid registered installers who submitted Work Order Forms and requests for payment of an amount up to the maximum amount fixed from time to time for each eligible instance of installation of insulation, but it otherwise denies the allegations in paragraph 27.

28. It denies the allegations in paragraph 28.

29. It denies the allegations in paragraph 29.

30. There is no paragraph 30.

31. It denies the allegations in paragraph 31.

CLAIM IN NEGLIGENCE

No duty of care

32. It denies the allegations in paragraph 32 and says further that:

(a) the Defendant owed no duty to take reasonable care to avoid economic harm to any of the Plaintiffs, Owners, Installers, Manufacturers or Suppliers in the design and/or implementation and/or administration ~~and delivery~~ of the HIP;

(b) no duty of care to take reasonable care to avoid economic harm to the Plaintiffs, Owners, Installers, Manufacturers or Suppliers in the design and/or implementation and/or administration ~~and delivery~~ of the HIP was owed by the Defendant because the imposition of such a duty would have:

(i) constrained the Australian government in the exercise of its powers to make policy in the national interest, and

(ii) required the Australian government to act in favour of the economic interests of one group in the community, rather than in accordance with what it determined to be in the national interest;

(c) the merits of the adoption (or change or abandonment) of current government policy is a non justiciable matter;

(d) the imposition of a duty of care on the Defendant would create incoherence in the law because it would have had the result of requiring the Defendant to continue to implement and fund a government policy in circumstances where Cabinet had determined that it was necessary in the national interest to change or abandon that government policy;

(e) it would create incoherence in the law if a duty of care were imposed on the Defendant to take reasonable care to avoid economic harm to the Plaintiffs, Owners, Installers, Manufacturers or Suppliers in the design and/or implementation and/or administration ~~and delivery~~ of the HIP in circumstances where the Defendant did not owe a duty of care in the

design, implementation or administration of the HIP to others, such as homeowners who had insulation installed in their property during the HIP or employees of businesses who performed the work of installing insulation during the HIP; and

(f) if a duty to take reasonable care to avoid economic harm was owed by the Defendant to any class of persons in the design and/or implementation and/or administration ~~and delivery~~ of the HIP, such duty of care could not have been owed to the Owners who, as defined in the Second Further Amended Statement of Claim, are a remote and indeterminate class of persons.

33. It denies that the Defendant owed a duty to take reasonable care to avoid economic harm to the Plaintiffs and Owners in designing and/or implementing and/or administering the HIP and says further:

(a) it admits that the objects of the HIP included fiscal stimulus in the national interest, by means including encouragement of investment in the insulation industry, but otherwise denies the allegations in paragraph 33;

(b) it denies that the matters alleged in subparagraph 33(a) are relevant to the question whether the Defendant owed a duty to take reasonable care to avoid economic harm to the Plaintiffs and the Owners, and says further that even if the alleged interference with the existing market were relevant, it could only be relevant to the circumstances of the Owners who owned installation businesses prior to 3 February 2009 (namely, the pre existing Owners as defined in the Second Further Amended Statement of Claim);

(c) it denies the allegations in subparagraph 33(b), and says further that in respect of any announcements or statements made in relation to the HIP prior to 31 March 2009, the Defendant did not know and could not have known that the Plaintiffs and the Owners would be induced to invest in and expand their businesses, as no decision or announcement had been made in relation to the model of HIP which would be adopted, nor in relation to which installation businesses would be eligible to participate;

(d) it denies the allegations in subparagraph 33(c), and says further that in respect of any announcements or statements made in relation to the HIP prior to 31 March 2009, the Defendant did not intend and could not have known that the Plaintiffs and the Owners would be induced to invest in and expand their businesses, as no decision or announcement had been made in relation to the model of HIP which would be adopted, nor in relation to which installation businesses would be eligible to participate;

(e) it admits that unless a significant number of installation businesses participated in the HIP, the Defendant would have been unlikely to achieve its goal of fiscal stimulus, but otherwise denies the allegations in subparagraph 33(d);

(f) it denies the allegation in subparagraph 33(e)(i), and says further that in all the circumstances, it was neither reasonably foreseeable, nor reasonable, that the Plaintiffs and the Owners would act in reliance on the Announcement and /or the information contained in media releases, Program Guidelines and the statements in paragraphs 5, 8, 12 and 12A in making investment decisions in circumstances where the Plaintiffs and the Owners:

(i) knew that the HIP was government policy, and therefore subject to change;

(ii) were informed by the Guidelines in force from time to time that the Defendant reserved the right to change the amount of subsidy under the HIP and any other aspect of the HIP; and

(iii) knew that the Defendant had in fact changed many elements of the HIP during the period of its operation;

(g) it denies the allegations in subparagraph 33(e)(ii), and says further that while it was reasonably foreseeable that a decision to change government policy and terminate the HIP may have had the effect that the Plaintiffs and some Owners may not realise all the profits they had previously hoped to

realise, any such change in expectations was the result of a change in government policy; and

(h) it says further that any losses which were suffered by Owners which were no more than reflective losses which are not recoverable for the reasons pleaded at paragraph 1 of this Defence above.

34. It denies that the Defendant owed a duty to take reasonable care to avoid economic harm to the First Plaintiff and the Installers in designing and/or implementing and/or administering the HIP and says further:

(a) it admits that the objects of the HIP included fiscal stimulus in the national interest, by means including encouragement of investment in the insulation industry, but otherwise denies the allegations in paragraph 34;

(b) it denies that the matters alleged in subparagraph 34(a) are relevant to the question whether the Defendant owed a duty to take reasonable care to avoid economic harm to the First Plaintiff and the Installers, and says further that even if the alleged interference with the existing market were relevant, it could only be relevant to the circumstances of the Plaintiffs and Installers who operated insulation installation businesses prior to 3 February 2009 (namely, the pre-existing Installers as defined in the Second Further Amended Statement of Claim);

(c) it denies the allegations in subparagraph 34(b), and says further that in respect of any announcements or statements made in relation to the HIP prior to 31 March 2009, the Defendant did not know and could not have known that the First Plaintiff and the Installers would be induced to invest in and expand their businesses, as no decision or announcement had been made in relation to the model of HIP which would be adopted, nor in relation to which installation businesses would be eligible to participate;

(d) it denies the allegations in subparagraph 34(c), and says further that in respect of any announcements or statements made in relation to the HIP prior to 31 March 2009, the Defendant did not intend and could not have known that the First Plaintiff and the Installers would be induced to invest

in and expand their businesses, as no decision or announcement had been made in relation to the model of HIP which would be adopted, nor in relation to which installation businesses would be eligible to participate;

(e) it denies the allegation in subparagraph 34(d)(i), and says further that in all the circumstances, it was neither reasonably foreseeable, nor reasonable, that the First Plaintiff and the Installers would act in reliance on the Announcement and /or the information contained in media releases, Program Guidelines and the statements in paragraphs 5, 8, 12 and 12A in making investment decisions in circumstances where the First Plaintiff and the Owners:

(i) knew that the HIP was government policy, and therefore subject to change;

(ii) were informed in the Guidelines in force from time to time that the Defendant reserved the right to change the amount of subsidy under the HIP and any other aspect of the HIP; and

(iii) knew that the Defendant had in fact changed many elements of the HIP during the period of its operation; and

(f) it denies the allegations in subparagraph 34(d)(ii), and says further that while it was reasonably foreseeable that a decision to change government policy and terminate the HIP may have had the effect that some Installers may not realise all the profits they had previously hoped to realise, any such change in expectations was the result of a change in government policy.

35. It denies that the Defendant owed a duty to take reasonable care to avoid economic harm to the Second Plaintiff and the Manufacturers in designing and/or implementing and/or administering the HIP and says further:

(a) it admits that the objects of the HIP included fiscal stimulus in the national interest, by means including encouragement of investment in the insulation industry, but otherwise denies the allegations in paragraph 35;

(b) it denies that the matters alleged in subparagraph 35(a) are relevant to the question whether the Defendant owed a duty to take reasonable care to avoid economic harm to the First Plaintiff and the Manufacturers, and says further that even if the alleged interference with the existing market were relevant, it could only be relevant to the circumstances of the Plaintiffs and Manufacturers who manufactured insulation goods or owned or financed manufacturing businesses prior to 3 February 2009;

(c) it denies the allegations in subparagraph 35(b), and says further that in respect of any announcements or statements made in relation to the HIP prior to 31 March 2009, the Defendant did not know and could not have known that the Second Plaintiff and the Manufacturers would be induced to invest in and expand their businesses, as no decision or announcement had been made in relation to the model of HIP which would be adopted, nor in relation to which installation businesses would be eligible to participate;

(d) it denies the allegations in subparagraph 35(c), and says further that in respect of any announcements or statements made in relation to the HIP prior to 31 March 2009, the Defendant did not intend and could not have known that the Second Plaintiff and the Manufacturers would be induced to invest in and expand their businesses, as no decision or announcement had been made in relation to the model of HIP which would be adopted, nor in relation to which installation businesses would be eligible to participate;

(e) it denies the allegations in subparagraph 35(d);

(f) it denies the allegation in subparagraph 33(e)(i), and says further that in all the circumstances, it was neither reasonably foreseeable, nor reasonable, that the Second Plaintiff and the Manufacturers would act in reliance on the Announcement and /or the information contained in media releases, Program Guidelines and the statements in paragraphs 5, 8, 12 and 12A in making investment decisions in circumstances where the Second Plaintiff and the Manufacturers:

(i) knew that the HIP was government policy, and therefore subject to change;

(ii) were informed in the Guidelines in force from time to time that the Defendant reserved the right to change the amount of subsidy under the HIP and any other aspect of the HIP; and

(iii) knew that the Defendant had in fact changed many elements of the HIP during the period of its operation; and

(g) it denies the allegations in subparagraph 35(e)(ii), and says further that while it was reasonably foreseeable that a decision to change government policy and terminate the HIP may have had the effect that some Manufacturers may not realise all the profits they had previously hoped to realise, any such change in expectations was the result of a change in government policy.

36. It denies that the Defendant owed a duty to take reasonable care to avoid economic harm to the Plaintiffs and the Suppliers in designing and/or implementing and/or administering the HIP, and says further:

(a) it admits that the objects of the HIP included fiscal stimulus in the national interest, by means including encouragement of investment in the insulation industry, but otherwise denies the allegations in paragraph 36;

(b) it denies that the matters alleged in subparagraph 36(a) are relevant to the question whether the Defendant owed a duty to take reasonable care to avoid economic harm to the First Plaintiff and the Suppliers, and says further that even if the alleged interference with the existing market were relevant, it could only be relevant to the circumstances of the Plaintiffs and Suppliers who supplied insulation goods or services and / or owned or financed the operations of businesses which supplied insulation goods or services prior to 3 February 2009;

(c) it denies the allegations in subparagraph 36(b), and says further that in respect of any announcements or statements made in relation to the HIP prior to 31 March 2009, the Defendant did not know and could not have

known that the Plaintiffs and the Suppliers would be induced to invest in and expand their businesses, as no decision or announcement had been made in relation to the model of HIP which would be adopted, nor in relation to which installation businesses would be eligible to participate;

(d) it denies the allegations in subparagraph 36(c), and says further that in respect of any announcements or statements made in relation to the HIP prior to 31 March 2009, the Defendant did not intend and could not have known that the Plaintiffs and the Suppliers would be induced to invest in and expand their businesses, as no decision or announcement had been made in relation to the model of HIP which would be adopted, nor in relation to which installation businesses would be eligible to participate;

(e) it denies the allegations in subparagraph 36(d);

(f) it denies the allegation in subparagraph 36(e)(i), and says further that in all the circumstances, it was neither reasonably foreseeable, nor reasonable, that the Plaintiffs and the Suppliers would act in reliance on the Announcement and /or the information contained in media releases, Program Guidelines and the statements in paragraphs 5, 8, 12 and 12A in making investment decisions in circumstances where the Plaintiffs and the Suppliers:

(i) knew that the HIP was government policy, and therefore subject to change;

(ii) were informed in the Guidelines in force from time to time that the Defendant reserved the right to change the amount of subsidy under the HIP and any other aspect of the HIP; and

(iii) knew that the Defendant had in fact changed many elements of the HIP during the period of its operation;

(g) it denies the allegations in subparagraph 36(e)(ii), and says further that while it was reasonably foreseeable that a decision to change government policy and terminate the HIP may have had the effect that some Suppliers may not realise all the profits they had previously hoped to realise, any such

change in expectations was the result of a change in government policy; and

(h) if a duty to take reasonable care to avoid economic harm was owed by the Defendant to any class of persons in the design and/or implementation and/or administration ~~and delivery~~ of the HIP, such duty of care could not have been owed to the Suppliers who, as defined in the Second Further Amended Statement of Claim, are a remote and indeterminate class of persons.

36A. It denies the allegations in paragraph 36A, and says further that the Plaintiffs and the Insulation Industry (comprised of the Owners, Installers, Manufacturers and Suppliers) were not vulnerable to economic harm by reason of any want of reasonable care by the Defendant in the design and/or implementation and administration of the HIP because:

(a) in deciding whether to participate in the HIP and / or in deciding whether to invest in or expand their businesses, the Plaintiffs, Owners, Installers, Manufacturers and Suppliers knew (or ought to have known) that the HIP could be changed or cancelled without notice if government policy changed;

(b) the Plaintiffs and the Owners, Installers, Manufacturers and Suppliers were in a position to obtain, and ought to have obtained, their own independent advice (including banking, legal, investment, financial and insurance advice) with respect to any decision they proposed to take in relation to investment in or expansion of their businesses in response to the announcement of the HIP; and

(c) the Plaintiffs, the Owners, Installers, Manufacturers and Suppliers (other than the pre existing Owners and pre existing Installers as defined in the Second Further Amended Statement of Claim) were not exposed to any risk of loss or harm by reason of the Defendant's design, implementation and administration of the HIP, because they were new entrants to the insulation industry, and not businesses already operating in the insulation industry.

No breach of duty

37. It

(a) admits that it did not institute administrative procedures which identified every risk associated with the installation of insulation under the HIP;

(b) admits that it did not do all that could have been done to acquire knowledge about every risk associated with the installation of insulation under the HIP;

(c) admits that it did not do everything possible, nor did it do so in a timely manner, in response to the knowledge that it acquired in relation to the risk of injuries or deaths associated with the installation of insulation under the HIP;

(d) admits that it did not institute all possible procedures for monitoring and managing all the risks associated with the installation of insulation under the HIP; and

(e) admits that it did not implement all possible procedures to directly inform the Installers and the workers engaged by them of all the risks associated with the installation of insulation under the HIP,

but it otherwise denies the allegations in subparagraphs 37(a) to (f), and says further that if the Defendant owed a duty to take reasonable care to avoid economic harm to the Plaintiffs, Owners, Installers, Manufacturers and Suppliers in the design and/or implementation and /or administration of the HIP (which is denied):

(f) the Defendant was not negligent in failing to take the precautions alleged in subparagraphs 37(a) to (f) inclusive because the matters alleged therein are not precautions which a reasonable government in the position of the Defendant would have taken in all the circumstances, having regard to matters including the social utility of the HIP;

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Wrongs Act 1954 (Vic), s 48 and s 49; *Civil Liability Act* 2003 (Qld), s 9 and s 10; *Civil Liability Act 2002* (NSW), s 5B and s5C; *Civil Liability Act 1936* (SA) s 32; *Civil Liability Act 2002* (WA), s 5B; the *Civil Liability Act 2002* (Tas), s 11 and s 12; and the common law of Australia.

(g) the matters alleged in subparagraphs 37(a) to (f) inclusive are not matters capable of constituting precautions against the risk of economic harm to the Plaintiffs, Owners, Installers, Manufacturers or Suppliers, but rather are precautions which an employer of persons engaged to perform the work of installation of insulation might be required to take in order to discharge the duty of care owed by those employers to their employees;

(h) if the Defendant owed a duty to take reasonable care to avoid economic harm to the Plaintiffs, Owners, Installers, Manufacturers and Suppliers in the design and/or implementation and /or administration of the HIP (which is denied), the standard of care which applied to the Defendant was that which applies to the design and/or implementation and/or administration of a government program which provides funding or subsidy to an activity undertaken for profit by private businesses, and not the standard of care which applies to the businesses which themselves engage in the activity which is funded or subsidised by government;

(i) the matters alleged in subparagraphs 37(a) to (f) inclusive do not constitute a breach of the standard of care which applies to the design and/or implementation and/ or administration of a government program which provides funding or subsidy to an activity undertaken for profit by private businesses; and

(j) it denies the allegations in subparagraph 37(f), and says further that:

(i) the States and Territories possessed the legislative power to regulate occupational health and safety within their respective jurisdictions, and had in place long established and well-known regulatory, compliance and enforcement regimes; and

(ii) at all relevant times, the States and Territories had in force occupational health and safety laws, which:

i. required employers to eliminate or reduce risks to health and safety of employees so far as is reasonably practicable;

ii. imposed a duty on employers to provide and maintain systems of work that are, so far as is reasonably practicable, safe and without risks to health;

iii. imposed a duty on employers to maintain each workplace under the employer's management and control in a condition that is safe and without risks to health; and

iv. imposed a duty on employers to provide such information, instruction, training or supervision to employees as is necessary to enable those persons to perform their work in a way that is safe and without risks to health.

38. It denies the allegations in paragraph 38, and says further that the decision to terminate the HIP was a decision of Cabinet, made for policy reasons in the national interest.

39. It denies the allegations in paragraph 39 and says further that:

(a) the losses of the type the First Plaintiff and the Insulation Industry are alleged to have suffered, were the result of the policy decision made by Cabinet in the national interest to terminate the HIP in February 2010; and

(b) any losses which were suffered by Owners which were no more than reflective losses, are not recoverable for the reasons pleaded at paragraph 1 of this Defence above.

40. It denies the allegations in paragraph 40, and says further that the losses the First Plaintiff and the Installers are alleged to have suffered were the result of the policy decision made by Cabinet in the national interest to terminate the HIP in February 2010 and/or of business or investment decisions made by the First Plaintiff and Installers.

41. It denies the allegations in paragraph 41, and says further that the losses the Second Plaintiff and the Manufacturers are alleged to have suffered were the result of the policy decision made by Cabinet in the national interest to terminate the HIP in February 2010 and/or of business or investment decisions made by the Second Plaintiff and the Manufacturers.

42. It denies the allegations in paragraph 42, and says further that the losses the Plaintiffs and the Suppliers are alleged to have suffered, were the result of the policy decision made by Cabinet in the national interest to terminate the HIP in February 2010 and/or of business or investment decisions made by the Plaintiffs and the Owners, Installers, Manufacturers and / or the Suppliers.

NEGLIGENT MISREPRESENTATION

The Representations

43. It denies the allegations in paragraph 43, and says further that:

(a) nothing which is pleaded at paragraphs 5, 6, 8, 12 or 12A constitutes a representation that the Defendant would not reconsider its decision to operate the HIP until the Expiration Date (as the term is defined in the Second Further Amended Statement of Claim at paragraph 24(d));

(b) in so far as it is alleged in paragraph 43 that the Defendant impliedly represented, by its conduct alleged in paragraphs 5, 6, 8, 12 and 12A, that it would not reconsider its decision to operate the HIP until the Expiration Date, no particulars are supplied in relation to how it is alleged that such an implied representation arose, and the allegation is vague, unclear and incapable of being pleaded to. Under cover of such objection, the Defendant denies that it made any implied representation that it would not reconsider its decision to operate the HIP until the Expiration Date and says that it published express statements to the contrary effect of any alleged implied representation; and

(c) the alleged Representations constituted an announcement of government policy, and the relevant announcement of government policy was not in the

nature of a statement of fact, but rather a true and accurate statement of what constituted then current government policy.

44. It admits that the objects of the HIP included fiscal stimulus in the national interest, by means including encouragement of investment in the insulation industry but otherwise denies the allegations in paragraph 44.

No Causation

45. It denies the allegations in paragraph 45, and says further that the question whether any particular Plaintiff, Owner, Installer, Manufacturer or Supplier acted in reasonable reliance on one or more Representations by investing in their business and expanding their businesses is not a common question within the meaning of Part 4A of the *Supreme Court Act 1986* (Vic).

46. It does not know and therefore does not admit the allegations in paragraph 46.

47. It denies the allegations in paragraph 47, refers to and repeats subparagraphs 34(c), 34(d), 34(e), 35(c), 35(d), 35(f), 36(c), 36(d), 36(f) and paragraph 36A above, and says further that any reliance by the Installers, Manufacturers, Suppliers in the circumstances was not reasonable because it was known to the Installers, Manufacturers and Suppliers or ought to have been known, and it was a well-known fact that the Defendant might change government policy, including by terminating the HIP, at any time in the national interest.

The true position

48. It:

(a) denies the allegations in subparagraph 48(a), and says further that any risk to which persons were exposed in the performance of the work of installing insulation, including any electrical safety risk, was the result of failure by employers in the insulation industry (including the Group Members as defined in paragraph 1 of the Second Further Amended Statement of Claim) to comply with the Australian Standards and the requirements of the occupational health and safety laws in each State and Territory; and

(b) admits the allegations in subparagraph 48(b).

No duty of care

49. It denies the allegations in paragraph 49, and says further that no duty to take reasonable care in announcing, or to correct announcements of, government policy was owed by the Defendant to the Plaintiffs, Owners, Installers, Manufacturers or Suppliers because:

(a) government policy is inherently subject to change, by reason of the fact that government policy changes from time to time in the national interest;

(b) the Plaintiffs, Owners, Installers, Manufacturers and Suppliers were expressly alerted to the possibility of changes in government policy;

(c) the adoption and announcement of government policy is a duty the government is bound to discharge having regard to what it determines to be in the national interest, and not by reference the interests of particular groups in the community;

(d) the Defendant did not (and could not) represent that it would not reconsider its decision to operate the HIP until the Expiration Date, because it could not constrain itself from adopting or changing government policy in the national interest; and

(d) if a duty to take reasonable care in announcing, or to correct announcements of, government policy was owed by the Defendant to any class of persons (which is denied), then no such duty of care could have been owed to the Owners who, as defined in the Second Further Amended Statement of Claim, are a remote and indeterminate class of persons.

50. It:

(a) admits that the objects of the HIP included fiscal stimulus in the national interest, by means including encouragement of investment in the insulation industry, but it otherwise denies the allegations in paragraph 50; and

(b) says further that there could be no reasonable reliance by the Plaintiffs, Owners, Installers, Manufacturers or Suppliers in the circumstances, and refers to and repeats subparagraphs 33(c), 33(d), 33(f), 34(c), 34(d), 34(e), 35(c), 35(d), 35(f), 36(c), 36(d), 36(f) and paragraphs 36A and 47 above.

51. It denies the allegations in paragraph 51, and refers to and repeats paragraph 50 above.

52. It denies the allegations in paragraph 52, and refers to and repeats paragraph 50 above.

53. It denies the allegations in paragraph 53, and refers to and repeats paragraph 50 above.

54. It:

(a) admits that the objects of the HIP included fiscal stimulus in the national interest, by means including encouragement of investment in the insulation industry; and

(b) admits that the Defendant knew that the implementation of the HIP was likely to stimulate demand in the market for retrofit insulation to houses and that this may have the effect of lessening demand in that market for a period of time after the cessation of the HIP

but otherwise denies the allegations in paragraph 54.

No negligent misstatement

55. It denies the allegations in paragraph 55, and says further that if a duty to take care in announcing government policy was owed to the Plaintiffs, Owners, Installers, Manufacturers or Suppliers (which is denied):

(a) the Defendant possessed a proper basis for making the alleged Representations at the time they were made; and

(b) the Representations were statements of government policy at the time, which the Defendant could change at any time in the national interest.

56. It denies the allegations in paragraph 56 and refers to and repeats paragraph 55.

Loss and Damage

57. It denies the allegations in paragraph 57, and says further that:

(a) the question whether any particular Plaintiff, Owner, Installer, Manufacturer or Supplier acted in reliance on one or more of the Representations is not a common question within the meaning of Part 4A of the *Supreme Court Act 1986* (Vic);

(b) any losses which were suffered by Owners which were no more than reflective losses which are not recoverable for the reasons pleaded at paragraph 1 of this Defence above; and

(c) says further that there could be no reasonable reliance by the Plaintiffs, Owners, Installers, Manufacturers or Suppliers in the circumstances, and refers to and repeats subparagraphs 33(c), 33(d), 33(f), 34(c), 34(d), 34(e), 35(c), 35(d), 35(f), 36(c), 36(d), 36(f) and paragraphs 36A and 47 above.

DEFENCES IN RELATION TO BOTH NEGLIGENCE AND NEGLIGENT MISSTATEMENT

Voluntary assumption of obvious risk

57A. The Defendant is not liable in negligence to the Plaintiffs or the Group Members for any loss alleged to have been caused by the alleged negligent design and/or implementation and/or administration of the HIP or the alleged negligent misstatements, because:

(a) the Plaintiffs and the Group Members, in deciding to invest in or expand their businesses in reliance upon the announcement of the HIP, voluntarily assumed the obvious risk, which they knew or ought to have known existed, that the Defendant may change government policy and as a result, may terminate the HIP; and

(b) the Plaintiffs and the Group Members are presumed by reason of the operation of s54(1) of the *Wrongs Act 1954* (Vic) to have been aware of

the risk that the Defendant may change or terminate government policy, and bear the onus of proving that they were not aware.

PARTICULARS

The risk that the Defendant may change or terminate government policy was a risk which was in the circumstances obvious to a reasonable person in the position of the Plaintiffs and the Group Members, it being a risk which was patent and a matter of common knowledge.

Materialisation of an inherent risk

57B. The Defendant is not liable in negligence to the Plaintiffs or group members for any loss alleged to have been caused by the alleged negligent design and/or implementation and/or administration of the HIP or the alleged negligent misstatements because the Defendant's decision in February 2010 to change government policy and terminate the HIP constituted the materialisation of an inherent risk.

PARTICULARS

The risk that the Defendant may decide to change or terminate government policy was an inherent risk, being a risk of something occurring which could not be avoided by the exercise of reasonable care.

DEFENCES IN RELATION TO NEGLIGENCE

No causation

57C. Even if the Defendant owed a duty to take reasonable care to avoid economic harm in the administration, design and/or implementation of the HIP to the Plaintiffs and Group Members (which is denied), and even if the Defendant negligently failed to take reasonable precautions against the risk of economic harm to the Plaintiffs and the Group Members in the administration, design and/or implementation of the HIP (which is denied), any such failure to take reasonable precautions did not cause the loss or damage alleged to have been suffered by the Plaintiffs and Group Members, because the economic harm alleged to have been suffered by the Plaintiffs and group members was the result of the decision of the Defendant to change government policy and end the HIP.

57D. It says:

(a) the acts and omissions of each of QHI Installations Pty Ltd, Arrow Property Maintenance; Titan Insulation Pty Ltd; and Pride Buildings NSW Pty Ltd (together, '**the employers**') were the cause of the deaths of each of Matthew Fuller, Rueben Barnes, Mitchell Sweeney and Marcus Wilson;

PARTICULARS

The Defendant refers to and repeats paragraphs 16 to 20A above.

(b) one of the causes of the decision by the Defendant to change government policy was the deaths of each of Matthew Fuller, Rueben Barnes, Mitchell Sweeney and Marcus Wilson;

(c) the unlawful conduct of the employers was the cause of the deaths of each of Matthew Fuller, Rueben Barnes, Mitchell Sweeney and Marcus Wilson; and

(d) no duty of care arose on the part of the Defendant to prevent the unlawful conduct by the employers.

DEFENCES IN RELATION TO NEGLIGENT MISSTATEMENT

Contributory negligence in respect of negligent misstatement

57E. If, in the alternative to subparagraphs 33(c), 33(d), 33(f), 34(c), 34(d), 34(e), 35(c), 35(d), 35(f), 36(c), 36(d), 36(f) and paragraphs 36A and 47 above, there was reasonable reliance by any of the Plaintiffs or the Group Members (which is denied) on the alleged Representations, then any loss or damage suffered by the Plaintiffs and the Group Members was also in part the result of a failure by the Plaintiffs and Group Members to take reasonable care in making decisions to invest in and expand their businesses, and the damages recoverable by each of them must be reduced to such an extent as the Court thinks just and equitable having regard to the share of the Plaintiffs and the Group Members in responsibility for the damage.

MISLEADING AND DECEPTIVE CONDUCT

58. It denies the allegations in paragraph 58, and says further that:

(a) the provisions of the *Trade Practices Act 1974* (Cth) (**TPA**) do not apply, by reason of the fact that the Defendant was not carrying on a business within the meaning of s 2A of the TPA; and

(b) refers to and repeats paragraph 3D above.

59. It denies the allegations in paragraph 59, and says further that:

(a) the alleged Representations were not made 'in trade or commerce' within the meaning of s 52 of the TPA;

(b) the alleged Representations consisted of announcements of government policy and lacked any commercial character;

(c) the alleged Representations were made in circumstances where there was no trading or commercial relationship between the Defendant and the Plaintiffs and the Group Members; and

(d) even if any aspect of the establishment or conduct of the HIP involved the Defendant in carrying on a business within the meaning of s 2A of the TPA (which is denied), the alleged Representations in paragraphs 5, 6, 8, 12 and 12A do not constitute conduct by the Defendant in the course of carrying on the so called 'HIP business', being merely preparatory to the carrying on of that so called 'HIP business'.

59A. It denies the allegations in paragraph 59A, and says further that:

(a) the alleged Representations were not representations with respect to future matters within the meaning of s 51A of the TPA, because they were statements of current government policy; and

(b) in the alternative, if the alleged Representations were representations with respect to future matters within the meaning of s 51A, the Defendant had

reasonable grounds for making those representations at the time they were made.

60. It denies the allegations in paragraph 60, and says further that any losses which were suffered by Owners which were no more than reflective losses which are not recoverable for the reasons pleaded at paragraph 1 of this Defence above.

61. There are no paragraphs 61 to 72 inclusive.

62. It denies that the Plaintiffs or Group Members are entitled to any of the relief set out in paragraphs 1 to 5 of the section titled 'Relief Claimed' and paragraphs A to E of the section titled 'Prayer for Relief', or at all.

~~**COMMON QUESTIONS**~~

~~63. It denies that the questions pleaded at paragraph 73 of the Further Amended Statement of Claim are all questions of law or fact which are common to the claims of the Group Members within the meaning of s 33H(2)(c) of the *Supreme Court Act 1986* (Vic), or that they are properly expressed as common questions.~~

This Defence was prepared by Rachel Doyle SC, Renee Enbom and Liam Brown of Counsel.

Dated: ~~4 May 2017~~ 19 December 2017

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for and on behalf of the
Australian Government Solicitor