ROYAL COMMISSION INTO THE HOME INSULATION PROGRAM
SUBMISSIONS IN REPLY ON BEHALF OF THE COMMONWEALTH

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1. In considering the submissions filed it is important to first record that the Commission takes place in a context where two coronial inquests have been conducted in relation to the four deaths connected with the Home Insulation Program (**HIP** or **program**). While the circumstances of each death varied in significant respects, in all cases the engagement of employers and contractors with the safety of their employees and sub-contractors was in blatant disregard of common law obligations and State and Territory occupational health and safety (**OH&S**) laws.

2. Accordingly, to the extent that the Commission is focussed on the conduct of the Commonwealth, it is not seeking to identify factors which directly caused the deaths, but on process and policy matters which might have produced a different outcome if they had been approached differently.[1]

3. Two important questions which appear to arise from the evidence are as follows:

    3.1. If the program had been structured differently would it have attracted fewer employers and contractors who failed to take issues concerning their employees' safety seriously? and

    3.2. Why were foil products (which were installed by stapling them to ceiling joists) initially included in the program and why did they remain in the program after the death of Matthew Fuller?

4. In addition to these general remarks, there are some submissions put to which the Commonwealth considers it appropriate to respond.

Submission in reply to submissions on behalf of pre-existing insulation businesses (the PEIB Submissions)

5. The recommendations sought by the PEIB are at paragraphs 130 and 135 of the PEIB submissions.

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[1] The Terms of Reference do not contemplate an inquiry into the direct causes of the deaths. The actions of employers and contractors which directly caused the deaths were, appropriately, not the subject of the public hearings. But the absence of detailed consideration of those direct causes is not a proper basis to treat the Commonwealth's acts and omissions as, themselves, direct causes.

6. What is sought by PEIB is a recommendation that the Commonwealth pay compensation to both pre-existing and new entrant businesses,[2] and without proof of any legal liability on the part of the Commonwealth[3] – although it is, somewhat inconsistently, also suggested that the Commonwealth be obliged to assess any claim in accordance with the law.[4] The PEIB submit that, to be entitled to compensation, the only threshold that must be satisfied is that it is 'reasonably arguable' that the business suffered loss materially contributed to by the Commonwealth in implementing the HIP or terminating the HIP. It is difficult to imagine that there is any business which participated in the HIP that would not be entitled to compensation if the recommendation, as proposed, were accepted. This would likely include the businesses that engaged in miscreant conduct, such as non-compliance with OH&S laws, and fraud. This should be sufficient to reject the formulation proposed.

7. Further, the formulation is self-evidently problematic. If the threshold of 'reasonably arguable' applies to (i) whether a loss was sustained; (ii) whether it was materially contributed to by the Commonwealth; and/or (iii) the quantum of the claimed loss, then it entails the extraordinary possibility (indeed likelihood) that large numbers of claimants may be better off financially than if they had no involvement with the HIP at all.

8. The compensation recommendation sought should be rejected. Any assessment of claims for payment of compensation to claimant businesses should be based on existing mechanisms. This has a number of desirable consequences: (i) those schemes operate consistently with the Commonwealth's financial accountability framework,[5] which requires efficient and effective use of public moneys; (ii) it will avoid industry claimants being treated differently from other persons and entities who allege the incurring of loss as a result of Commonwealth actions which do not attract legal

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2 The new entrant businesses were clearly excluded from the express Terms of Reference of the Commission by the definition of pre-existing insulation business. If it was a party's intention to seek recommendations concerning other businesses, the Commonwealth ought to have been given notice of that intention at the start of the public hearings so that the Commission could make a decision on whether to expand its inquiry by reference to other more general terms of reference. This was not done and the narrow scope of the Commission's inquiry appears to have been accepted by those representing the industry. See T 676 at 15, 24 March 2014 and T 3168 at 10, 14 April 2014 for discussion regarding the definition of pre-existing insulation business.

3 Paragraphs 19, 130(1) and 135(1) of the PEIB Submissions.

4 Paragraphs 130(2)a. and 135(2)a of the PEIB Submissions.

5 In accordance with Reg 9 of the *Financial Management and Accountability Regulations 1997*, which permits a *Financial Management and Accountability Act 1997* (**FMA Act**) agency to make a payment of money only if satisfied that the proposed expenditure is in accordance with the policies of the Commonwealth. The *Public Governance, Performance and Accountability Act 2013,* which replaces the FMA Act, is due to commence on 1 July 2014.

liability; and (iii) assessing claims under existing schemes will ensure matters beyond the scope of the Commission's inquiry can be considered.

9. The basis on which the recommendation is sought also warrants a response and a more detailed analysis of the PEIB Submissions is set out below. A significant number of matters adverse to the Commonwealth are raised in the PEIB Submissions. Not all are addressed here. The Commission should not proceed on the basis that a failure to respond to a submission signifies an acceptance that it is correct.

10. The compensation recommendations are effectively sought by the PEIB on two bases.

    10.1. The first is that the Commonwealth made representations to industry which resulted in detrimental reliance on the part of businesses, which reliance caused loss when the scheme was closed.[6]

    10.2. The second is that the Commonwealth failed to design or implement a scheme which prevented the comprehensive industry malfeasance which led to the deaths and to termination of the scheme.[7]

11. In relation to the first issue, civil law remedies adequately protect any businesses that can prove that the Commonwealth made representations which actually resulted in detrimental reliance, which was reasonably undertaken.

12. In relation to the second issue, the Commonwealth notes:

    12.1. the extensive input of the insulation industry into the design of the scheme (which ultimately, in large part, reflected such input); and

    12.2. the evidence of widespread and wilful failure of members of the industry to adopt appropriate standards concerning safety and supervision.

Representations allegedly made

13. The PEIB Submissions rely on evidence which is sourced from the recollections of various witnesses, many of whom cannot be regarded as disinterested. Some witnesses gave evidence of representations which were allegedly made at specific meetings. However, as a general rule neither the Commission nor the PEIB sought to fully test the reliability of that evidence (for example by adducing evidence from the persons who allegedly made the representations, and adducing other potentially

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6 Paragraphs 16-20 and Part B of the PEIB Submissions.

7 Paragraphs 20(5), Part C generally but in particular paragraphs 60, 67, 81, 82, 88, 91 and 98 of the PEIB Submissions.

relevant evidence). To the extent Commonwealth officials gave evidence relevant to the making of the alleged representations, that evidence was not supportive of the evidence relied upon by the PEIB – and those Commonwealth officials were not seriously challenged about their evidence.

14. This has particular significance because the contemporaneous minutes of various industry meetings taken by Commonwealth officials do not lend any substantial support to the allegations that specific representations were made. Often the reverse is true. While a number of witnesses have criticised those minutes, those criticisms are themselves open to question.[8] Further, when the minutes are compared with other contemporaneous notes (taken by people such as Matt Levey) they have not been shown to be inaccurate in material respects.

15. In relation to the specific representations alleged at paragraph 29 of the PEIB Submissions, the Commonwealth says as follows.

16. There is evidence that on 18 February 2009 Mr Andrew Wilson from the Department of Prime Minister and Cabinet (**PM&C**) advised the meeting that $2.7 billion had been allocated to be spent within 2.5 years.[9] However, that statement is descriptive only (as opposed to a commitment). It was made at a point in time when the regional brokerage model was the preferred model, and how and in what way individual firms could participate was unknown.

17. Whether any representation was made on 20 March 2009 (of the kind described by Mr Rashleigh in his statement) is highly contestable. There is no record of it in the detailed notes Matt Levey took in relation to the meeting,[10] nor is there any statement of that kind recorded in the Minutes of the 20 March 2009 meeting.[11] The Commonwealth cannot identify any witness who gave a similar account.

18. There was no meeting of 28 March 2009 at which the statements attributed to Minister Garrett in paragraph 29 c of the PEIB Submissions could have been made.

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8 Evidence of Mr Kevin Herbert, T 2000-2003, 4 April 2014; evidence of Mr Warrick Batt, T 2995-3003, 15 April 2014; evidence of Mr Malcolm Richards, T 5088-5093, 19 May 2014.

9 See minutes of meeting of 18 February 2009 (AGS.002.017.0161).

10 Statement of Matt Levey (STA.001.003.0001), paragraphs 121-135.

11 AGS.002.028.2189.

19. A representation by Minister Garrett was made to industry attendees at a meeting of 29 June 2009. The representation appears to have been in words to the following effect – 'my commitment is to a program to insulate 2.9 million homes. There will be no commitment over and above that but this commitment will be met hopefully by the current program termination date'.[12]

20. The meeting Kevin Herbert referred to in his oral evidence appears to have taken place on 7 August 2009 and not 29 August 2009. There is no record of the Minister making any material representation about the scheme's longevity at that meeting, either in the notes of Matt Levey,[13] or in the Meeting Summary.[14]

21. On 12 October 2009 Mr Forbes, in response to a question from Mr Skelton, advised that, given the rate of uptake, funds may be used up before mid-2011.[15] Mr Forbes, as Chair of the meeting, also responded to a statement from Mr Zuzul that "it is imperative to know when the program will end". The response indicated that there was an issue with the longevity of the program, as it was capped and likely to be finished before the original timeframe.[16]

22. On 3 February 2010 at an Industry Meeting Minister Garrett said words to the effect that the Government's commitment was to see the program achieve the target of 1.9 million homes insulated. In response to a request from participants for 90 days' notice of changes the Minister said words to the effect of 'safety is a huge concern to me, particularly in the second half of last year. I will not give you a 90-day notice guarantee. I will make immediate changes, if required again. …Will reserve our rights, as governments do to make changes at the appropriate time and in the appropriate way.'[17]

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12 This formulation represents a combination of the words recorded in the minutes of the meeting of 29 June 2009 (AGS.002.017.1238) and the notes of Mr Levey – see the statement of Mr Levey, paragraph 226.

13 Statement of Mr Levey, paragraphs 257-262.

14 AGS.002.012.1212.

15 Extracted from meeting minutes dated 12 October 2009, AGS.002.017.1260.

16 Extracted from meeting minutes dated 12 October 2009, AGS.002.017.1260. Further, it is not correct to say, as the PEIB Submissions do, that the Minutes corroborate Mr Zuzul's version. They confirm that Mr Zuzul asked the question and a response was given. The person who answered the question and the terms of the response recorded are significantly different to the response recalled by Mr Zuzul. Mr Levey also records a meeting between Mr Zuzul and Mr Garrett around December 2009 where Mr Zuzul puts to Mr Garrett that he asked a direct question on 12 October as to whether there would be any changes to the program and that the Minister's response was that 'it would run through unchanged until the money ran out'. The Minister responded 'I will check that because I am always careful not to give incorrect impressions' – see statement of Mr Levey, paragraph 447.

17 Statement of Mr Levey, paragraph 449.

23. Any understanding of the representations should also be considered in the context of the official Guidelines which stated that 'the Australian Government reserves the right to change the amount of the assistance provided or any other aspect of these early installation guidelines'.[18] This advice was repeated in subsequent versions of the HIP Guidelines.[19]

24. The representations recorded are fewer and in more muted and qualified terms than claimed in the PEIB Submissions. The Commonwealth submits that the representations were truthful when the statements were made and reflected the Commonwealth's intentions at the time.

Reliance

25. Given the number of businesses claiming compensation, the Commission is not in a position to make findings on questions of reliance.

26. Whether any particular business relied on a representation was an issue which the Commission regarded as a matter more appropriately dealt with in civil proceedings rather than by the Royal Commission, and on that basis thorough examination of the issue was not pursued by the Commonwealth in the public hearings.[20]

27. When evidence of reliance on representations was tested, it could not be regarded as self-evidently persuasive.

28. For example, Mr Gregory Rashleigh claims to have relied on representations made on 20 March 2009. Other evidence, however, suggests the claimed representations were not made. Under cross examination Mr Rashleigh conceded that he made financial commitments before he even knew whether he could participate in the HIP after 1 July 2009.[21] On the available evidence it is far from clear that he relied on any statements by the Commonwealth before making commitments.

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18 Version 1 of the Early Installation Guidelines, p 4, AGS.002.010.1953; and Version 2 of the Guidelines, p 8, AGS.002.008.0887.

19 Version 3 of the Guidelines, p 12, AGS.002.032.0718, Version 4 of the Guidelines, p 12, AGS.002.028.1684, Version 5 of the Guidelines, p 13, AGS.002.028.2037.

20 Evidence of Mr Rashleigh, T 2258-2261, evidence of Mr Andrew Arblaster, T 3085-3086, evidence of Mr Matthew Hannam, T 3123 and evidence of Mr Batt, T 3013-3014.

21 Evidence of Mr Rashleigh, T 2258 at 33 – T 2260 at 1.

Knowledge of reliance

29. The Commonwealth accepts that in broad terms it was aware that industry was responding to the announced program and expanding its capacity. The Commonwealth does not accept, however, that it was aware of all particular investments made in reliance on statements by the Minister about the duration of the HIP.

Detriment

30. The Commonwealth accepts that many businesses were holding stock at the time of the sudden closure of the scheme. It also accepts that many businesses made investments in the expectation that the scheme would continue beyond February 2010.

31. However, those facts are not sufficient to justify the recommendations sought by the PEIB.

32. For instance, it is reasonably clear that the program always had the potential to be changed – for example, in the face of the public policy and political pressures - and any investments undertaken were necessarily subject to that knowledge. In fact, this was made clear to industry when the level of subsidy was reduced from $1600 to $1200 on 1 November 2009.[22] No one disputes the Commonwealth was entitled to make that change. That change had profound effects on certain sectors of the industry.

33. There was no binding undertaking from the Commonwealth that it would continue funding the installation of insulation in homes. Rather, the industry was always aware that the program would end, and should have been aware that it might end prematurely (for any number of reasons).

34. Any investment based on the HIP necessarily running for a two and a half year period was always a very significant and predictable business risk.

Deficiencies in implementation

35. The PEIB Submissions spend a significant amount of time pointing out deficiencies in the design and implementation of the scheme. What the submissions fail to acknowledge is the very close involvement of industry in the design of the scheme and

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[22] See comments of Mr Jim Liaskos as recorded in the statement of Mr Levey at paragraph 448.

that it advocated in favour of many of the design features which contributed to the difficulties faced by the scheme.

36. In particular there was industry support for all of the following aspects of the scheme:

    36.1. Abandonment of the brokerage model in favour of a direct purchase supplier neutral model;[23]

    36.2. One day's training was sufficient for an installer – crucially, this view was promoted by industry prior to the announcement of the scheme, a time when a more realistic assessment might have led to modification of the scheme;[24]

    36.3. Abandonment of the two quotes system – a requirement which diminished householder engagement in the process and facilitated telemarketing and door-to-door suppliers relying on large volumes of unskilled labour;[25]

    36.4. The accommodation of apprentice style training[26] in the supervision requirements - which industry then abused by treating the supervision obligation as amounting to nothing more than collecting the paperwork;

    36.5. Broadening of the trade competencies to trades which had little knowledge or direct experience of roof spaces;[27]

    36.6. The inclusion of the widest range of products including foil.[28]

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23 See email from PM&C regarding result of 18 February 2009 industry consultation (AGS.002.008.3585 – annexure AF to statement of Mr Mike Mrdak (STA.001.009.0001)) and minutes of 18 February 2009 industry consultation meeting which record industry opposition to single phone call option (AGS.002.023.0926 at page AGS.002.023.0931).

24 Statement of Ms Natalie Horvat (STA.001.095.0131) at paragraphs 33 and 34 and statement of Chris Johnston (STA.001.093.0001) at paragraph 41. See also statement of Mr Dennis D'Arcy (STA.001.001.0001) at paragraph 2.16. Documents also show that evidence of Mr David Haslett (at paragraph 12 of his statement, STA.001.087.0001) is quite mistaken to the extent that it suggests that ICANZ ever suggested that the scheme could not be delivered on the scale proposed – see letter from ICANZ to Ms Beth Riordan of DEWHA, which does not mention Mr Haslett's alleged concern (AGS.002.010.0776), even though the letter directly addresses supply. See also minutes of 18 February 2009 industry consultation meetings AGS.002.023.0926 (and separate record email from PM&C AGS.002.008.3585), which ICANZ participants were given opportunity to comment on and failed to do so.

25 See minutes of industry consultation meeting on 20 March 2009 (AGS.002.028.2182), minutes of industry consultation meeting on 18 February 2009 (AGS.002.023.0926 at page 6), email attached to statement of Ms Horvat (STA.001.095.0102), evidence of Mr Keeffe, T 1429 at 39 to T 1430 at 17 and submissions from Australian Cellulose Insulation Manufacturers Association entitled Key Policy Changes Sought to the Post 1 July 2009 Installation Guidelines dated 7 May 2009 at page 3 (AGS.002.018.1007) (refers to alternative two quote system including homeowner self-assessment, rather than abandonment of system).

26 Evidence of Mr Neil Gow, T 3894; Energy Efficient Homes Package Training Workshop, 'Workshop summary', 8 May 2009, p 2, AGS.002.040.0396

27 Energy Efficient Homes Package Training Workshop, 'Workshop summary', 8 May 2009, p 2, AGS.002.040.0396.

28 See minutes of industry consultation meeting on 18 February 2009, and minutes of technical workshop on 3 April 2009 (AGS.002.018.0167), including informal minutes dated 3 April 2009 at AGS.002.029.0929, and email attached to statement of Ms Horvat (STA.0001.095.0102).

37. Ultimately the collapse of the scheme was, to a significant extent, a product of industry malfeasance and the failure of industry participants to (i) discharge duties owed to employees or contractors, (ii) comply with health and safety legislation, and (iii) comply with the competency and other requirements imposed by the Commonwealth.

Submission in reply to submissions made by the State of Queensland

38. In responding to the submissions from Queensland the Commonwealth is not seeking to deflect criticism of the Commonwealth for failing to engage with the States more effectively. The Commonwealth accepts that in circumstances where it took the view that the HIP carried with it occupational, health and safety risks, and that the States, as the level of government with capacity and legal responsibility for dealing with those risks, were best placed to manage and limit those risks, it needed to do more to engage with them.

39. It is however important to note that Queensland failed to engage effectively with the Commonwealth even though it had available to it important and relevant information. For example, there were a number of electric shocks which occurred in Queensland prior to the launch of the HIP, and prior to the death of Matthew Fuller of which the ESO were aware.[29] Had the States and Territories (and agencies thereof, particularly Queensland) effectively understood and communicated (to the Commonwealth) the magnitude of the implications and risks for discharge of their statutory responsibilities, the Commonwealth is likely to have given greater priority to ensuring that (i) they were engaged and (ii) proper attention was given to the adequacy of the assumption that State regulatory regimes could deal with the emerging risks. Indeed, Mr Leverton accepted that, quite apart from engagement with the Commonwealth, ESO could and should have done significantly more in the immediate aftermath of the electric shocks and electrocutions.[30]

Date: 16 June 2014

Tom Howe QC

Damien O'Donovan

Counsel for the Commonwealth

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29 Evidence of Mr Antony Leverton, T 5108 at 30-30, 19.05.14.

30 Evidence of Mr Leverton, T 3999 at 18-45, 07.05.14.