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**ROYAL COMMISSION
INTO THE
HOME INSULATION PROGRAM**

**SUBMISSIONS IN REPLY TO THE
COMMONWEALTH'S SUBMISSIONS
ON BEHALF OF
PRE-EXISTING INSULATION BUSINESSES**

27 June 2014

SUBMISSIONS IN REPLY TO THE COMMONWEALTH'S SUBMISSIONS

PRE-EXISTING INSULATION BUSINESSES

1. The Commonwealth has filed a 9-page submission dated 16 June 2014. Seven (7) of those nine (9) pages are devoted to criticisms of the submissions filed by the Pre-Existing Insulation Businesses (“PEIB”). Given the content of the Commonwealth’s submissions, the PEIB must necessarily correct errors appearing in the Commonwealth’s submissions. In this context the Commission will have noted that the Commonwealth has not sought to explicitly cavil with any of the findings of fact advanced in the PEIB submissions: **Part G – Findings of Fact.**
2. **C’t**h submissions, para. 2: The Commonwealth submitted that the Commission is not seeking to identify factors which directly caused the deaths but is concerned with process and policy matters which might have produced a different outcome if they had been approached differently.
3. The Commission’s Terms of Reference include consideration of the very matters which the Commonwealth says the Commission was not seeking to identify: see **Terms of Reference “c.(i)”, “d.”, “e.” and “f.(i)”.**
4. **C’t**h submissions, ftn. 2: The Commonwealth has submitted that *“the new entrant businesses were clearly excluded from the express Terms of Reference of the Commission by the definition of pre-existing insulation businesses.”*
5. In making that submission the Commonwealth has made no attempt to address the PEIB submission: **PEIB submissions, paragraph 131.**
6. **C’t**h submissions, paras. 6–8; 11: The Commonwealth insists that the recommendation formulation proposed by the PEIB is self-evidently problematic, that any assessment of claims should be based on existing mechanisms which are said to have desirable consequences and that the PEIB compensation recommendation should be rejected.
7. The existing mechanisms have proved wholly and demonstrably undesirable and problematic. So much is patently clear from the evidence before the Commission:

PEIB submissions, paras. 117-125. The Commonwealth has made no attempt to respond to those PEIB submissions. Further, the Commonwealth did not disclose evidence that might conceivably have established that the existing mechanisms were desirable, efficient, effective and/or preferred: **P4024/4-9.** To submit that the existing mechanisms should be adopted only encourages the Commonwealth to mimic its deficient conduct of the past.

8. If by the Commonwealth's submissions it is to be thought that an existing mechanism is to include litigation contested on all issues, then that submission by the Commonwealth must also be rejected. The Commission knows of the devastation financial and personal, wrought on the industry, its contractors, families and employees: **PEIB submissions paras. 100 – 109; 132 – 133.** Given -
- a. the intense focus of this Commission;
 - b. the deficiencies of the Commonwealth's conduct highlighted by the evidence;
 - c. the acknowledgement of responsibility for errors and omissions by senior Commonwealth personnel; and
 - d. the adverse impacts on Businesses,

the unwarranted destructive submission of the Commonwealth is without merit on the evidence, reflects poorly on an entity having obligations as a model litigant and does nothing to remedy a wrong. To say the Commonwealth's submission is 'courageous' or 'bold' would be to give it credence it does not deserve.

The HIP was terminated over 4 years ago. Litigation involving the Commonwealth would undoubtedly be lengthy, complex and costly for the litigants. One need only reflect for a moment on the 'Voyager' litigation – it was finalised through mediation almost 50 years after the events giving rise to those claims and after chronic detrimental impacts on the plaintiffs, draining of Commonwealth funds and legal resources, and ongoing reputational damage to the Commonwealth.

9. Contrary to the Commonwealth's submission, nothing in the PEIB submissions can be read as implying that a home insulation business may be better off financially than if it had no involvement with the HIP. The PEIB submissions make clear that an assessment of the value of any losses is to be in accordance with the law: see **PEIB submissions, para. 130(2)(a).**

10. **C'th submissions, paras. 12; 35-36; 37:** The Commonwealth submitted that “industry” was involved in the design and implementation of the HIP and the collapse of the program was to a significant extent a failure of industry participants and a product of industry malfeasance.
11. The Commonwealth’s submission evidences a remarkable lack of insight into the Commonwealth’s directive and controlling role.
12. Nothing in the Commonwealth’s submission attempts to come to terms with the multiplicity of warnings, counsel and advice provided by industry including Messrs Hannam, Ruz, Haslett and the MBA: e.g. **PEIB submissions, paras. 42(iii); 42(v); 42(xiii); 51, 58(v); 58(viii).**
13. Further, by its repeated, generic references to “industry”, the Commonwealth attempts to trash the reputations of all. As is apparent from the evidence, the Pre-Existing Businesses were but a small part of “industry”: **PEIB submissions, para. 21-25.** The Pre-Existing Businesses did not include members of ICANZ and Mr. Neil Gow (being industry participants which/who have come in for particular criticism at Commonwealth submissions footnotes 24 & 26).
14. **C'th submissions, paras. 13, 14, 16, 33:** The Commonwealth criticises the evidence of “**Representations allegedly made**” on the bases that to the extent that the Commonwealth officials gave evidence relevant to the making of the alleged representations, that such evidence was not supportive of the evidence relied upon by the PEIB and that to such extent that there may have been a representation it was descriptive as opposed to a commitment.
15. The representations have been set out in the **PEIB submissions, paras. 25-38.** Commonwealth personnel were asked about the representations and had ample opportunity to respond: **Garrett**, P4662/1-5; P4662/13-15; P4662/16-20; P4662/20-25; P4662/26-31; P4662/36-41; P4662/44-46; P4663/1-5; P4663/12-15; P4663/38-42; P4663/44-47; P4664/1-2; P4665/44-P4666/1; P4666/40-43; P4667/1-7; P4668/10-17; P4672/46-47; P4673/1-5; P4674/1-7; **Brunoro** – P292/25-P293/5; **Carter** – P425/1-11; P434/46-P436/1-22; **Keefe** – P1585/30-40; **Kimber** – P2654/28-P2655/5; **Levey** – P704/36-37; **Arbib** – P4397/30-32; P4321/26-27; P4396/20. It is now somewhat mystifying to understand how the Commonwealth could have made all the submissions contained in paragraphs 13, 14, 16 and 33.

16. **C'th submissions, para. 17:** The Commonwealth says that it is highly contestable that any representation was made on 20 March 2009 and that the Commonwealth could not identify any witness who gave a similar account.
17. The Commonwealth's incapacity in identifying any witness might have been cured or reduced had it carefully reviewed the evidence including that of Mr Garrett: **Garrett**, P4662/26-31; P4662/36-41; P4662/44-46; P4663/1-5; P4663/12-15; P4663/38-42; **Brunoro**, P292/25-P293/5; **Keefe**, P1585/30-40; **Zuzul**, STA.001.040.002 at [16]-[17].
18. **C'th submission, para. 19** The Commonwealth makes up its own formulation of what Minister Garrett said on 29 June 2009.
19. The PEIB has already submitted in relation to the 29 June 2009 representations: **PEIB submissions, espec. paras. 29(d) & (e)**. Further, the Commonwealth's account is an economical and truncated account of what the Commonwealth was representing at that time: **Energy Efficiency Homes Package, Program Guidelines Version 2.0 – AGS.002.016.0519** (which refers to the guidelines for installations between 1 July 2009 and 31 December 2011); **Herbert**, STA.001.016.001 at [102]-[103]; [106]; **K Herbert**, P1975/39-47; **Batt**, P3017/6-9; **Rashleigh**, STA.001.011.0001 at page 8; **Rashleigh**, P2254/12-14; **Hannam**, STA.001.019.0005 at [24]-[27]; **Zuzul**, STA.001.040.001 at [19]; **Levey**, P704/36-37.
20. **C'th submissions, para. 20:** The Commonwealth calls into question the accuracy of evidence given by Mr. K Herbert because Mr. Herbert said that a meeting took place on 29 August rather than 29 June 2009.
21. Such confusion as there may have been in Mr. Herbert's recollection of the date of a meeting was corrected by Mr. Herbert during his evidence: **Herbert**, P2051/10-24.
22. **C'th submissions, para. 21:** The Commonwealth calls into question whether the representation was made to Mr. Zuzul and others on 12 October 2009.
23. The Commonwealth's submission overlooks, amongst other evidence relevant to that representation, the evidence of Mr. Garrett: **Garrett**, P4668/10-17. That evidence is consistent with Mr. Zuzul's recollection.

24. **C'th submissions, para. 22:** The Commonwealth makes reference to the reservations placed on the Commonwealth's commitment to the HIP such as were given to participants at a meeting on 3 February 2010.
25. If that submission was to have any weight whatsoever it needed to address Minister Garrett's guarantee recorded contemporaneously by Hawker Britton/Knauf: **Dunbar**, STA.001.017.0015; **Garrett**, P4674/1-10.
26. **C'th submissions, para. 25:** The Commonwealth submitted that the Commission is not in a position to make findings on questions of reliance.
27. The Commonwealth's submissions make no effort to address let alone come to terms with submissions already made by the PEIB: **PEIB submissions, paras. 36-37**.
28. **C'th submissions, para. 28:** The Commonwealth criticises Mr. Rashleigh for it is said, that he could not and did not rely on a representation.
29. Once again, this submission is difficult to understand. Mr. Rashleigh was part of a PEIB. He made investment decisions after and as a result of what Minister Garrett had said during the course of the 20 March 2009 meeting: **Rashleigh**, STA.001.011.0004 at [27].
30. **C'th's submissions, para. 19:** Reference is made to a typographical error in the PEIB submissions. The date referred to in para. 29(c) PEIB submissions should be *29 June* rather than 28 March 2009.



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