

ROYAL COMMISSION INTO THE HOME INSULATION PROGRAM

Royal Commissions Act 1902 (Cth)

SUBMISSIONS ON BEHALF OF THE HONOURABLE KEVIN RUDD

1 INTRODUCTION

- 1.1 The Commonwealth Government, of which Mr Rudd was Prime Minister, decided through the Cabinet process to establish the Home Insulation Program in 2009.
- 1.2 In particular, the Strategic Planning and Budget Committee of the Cabinet (**Cabinet Committee**) decided on 28 January 2009 to establish the Home Insulation Program and this was announced publicly on 3 February 2009.
- 1.3 Over twelve months later, on 19 February 2010, the Cabinet Committee resolved to terminate the Home Insulation Program and establish instead the Home Renewable Energy Bonus Scheme (**HREBS**) to begin in June 2010. It also decided to establish the Foil Insulation Safety Program (**FISP**) at the same meeting.
- 1.4 The Home Insulation Program was formed as part of a package of wider measures, known as the Nation Building and Jobs Plan, which were taken by the Commonwealth Government to stimulate the economy in the face of the most serious global financial and economic collapse since The Great Depression.
- 1.5 The Government, including public service officials, had been working on Government-funded ceiling insulation programs as an energy efficient measure for nearly a year before the February 2009 announcement. In May 2008, Minister Garrett announced a rebate of \$500 to landlords to install insulation in rental properties. Furthermore, the Wilkins review commissioned by the Commonwealth, had recommended in July 2008 that Home Insulation Programs be included in any overall national strategy on energy efficiency. The Commonwealth Government then in consultation with the Governments of the States and Territories through the Council of Australian Governments (**COAG**) had been developing policies throughout 2008 for the National Energy Efficiency Strategy. When policies for this Strategy were proposed in September 2008, it included initiatives to provide rebates to homeowners for the installation

of ceiling insulation. Further policy development continued at departmental level in late 2008.

- 1.6 Following the announcement of phase one of the insulation program in February 2009, ministers also allocated public servants a further five months to design final guidelines for the full program in its expanded form from July 2009. Therefore for a period of 12 to 18 months before the Home Insulation Program became fully operational, officials were working on the concept and design of various forms of government-funded insulation programs, including its final form. This lengthy process of officials-level deliberation underlines the fact that the insulation program was not invented over a weekend.
- 1.7 Further, when ceiling insulation was included in the Nation Building and Jobs Plan, it – and all other measures – was expressly supported by COAG on 5 February 2009 in a joint communiqué and formal National Partnership Agreement signed by each of the Premiers and Chief Ministers on behalf of each jurisdiction. This was an important formal engagement with the States and Territories because the successful implementation of the Plan depended not only on the cooperation of the States and Territories but also on the existence and active enforcement of their respective statutory regimes including workplace, health and safety and consumer fraud. Through the formal inter-governmental agreement, the States and Territories also therefore accepted any implementation and compliance obligations flowing to their jurisdictions.
- 1.8 What, if anything, State and Territory Governments then did in response to these responsibilities, given the volume of project work flowing to their jurisdictions from the implementation of the Nation Building and Jobs Plan, including the Home Insulation Program, is not known. This would have included the capacity and actions of the workplace health and safety systems and inspectorate. What is known is that the prosecutions subsequently taken against employers, concerning the young men tragically killed were pursued under the relevant laws of the States and Territories, which in these matters constituted the relevant legal jurisdiction.
- 1.9 In this context, the Queensland Coroner found:¹

“Workplace safety is primarily a State Government responsibility. Despite the HIP being publicly announced, advertised and rolled out, and at least two attempts being made by Commonwealth agencies to initiate a joint approach to managing the safety issues

¹ Queensland Coroner’s Report of the Inquest into the deaths of Matthew James FULLER, Rueben Kelly BARNES and Mitchell Scott SWEENEY 4 July 2013 (**‘Queensland Coroner’s Report’**); Document 19, 14 October 2012; pages 65 to 71.

thrown up by the program, little action was taken by WH&SQ² or the ESO³ to anticipate and respond to the increased risk of harm.”⁴

2 THE ROLE OF THE PRIME MINISTER

- 2.1 Practically all of the then Prime Minister’s engagement with the Home Insulation Program was through the Cabinet process. For this reason, Mr Rudd made full reference to the relevant Cabinet documents of the period in his statement to the Royal Commission, or at least those documents provided to him for inspection by the Commonwealth. For this reason, Mr Rudd also requested the full release of these documents to the public, so that the families, together with the Commission, could be fully appraised of the decision making process concerning the Home Insulation Program.
- 2.2 In virtually every sense relevant to the Terms of Reference therefore, the Prime Minister’s involvement in the design, development, implementation, modification and termination of the Home Insulation Program was restricted to his participation in such decisions of the Cabinet Committee and the full Cabinet as might have touched on those matters. Unsurprisingly, only matters of broad policy were considered at Cabinet level, and that remained the position until February 2010 when the Cabinet Committee resolved to terminate the Program. Throughout this process, the Cabinet Committee and the full Cabinet acted in accordance with the advice and recommendation of the departments and responsible Ministers. Detailed design and implementation work, as is normally the case with government programs, was primarily the responsibility of departments. Importantly in light of the focus given to this issue during the Commission hearings, the launch date for Phase 2 of the Home Insulation Program may be traced back to the departmental work undertaken in 2008 for the National Energy Efficiency Strategy and, in its expanded and prospectively revised form, was the subject of specific advice from the departments to the Executive in the first half of 2009 of a staged commencement process from both February and July 2009. Had Cabinet been advised of the need for a postponement of the launch date for Phase 2 of 1 July 2009, because of concern for the safety of householders or installers, it would have been granted immediately.
- 2.3 Outside the Cabinet room, in addition to the normal implementation role of the responsible Minister and his department, Mr Rudd was careful to ensure that further layers of oversight were introduced for the Nation Building and Jobs Plan, including the Home Insulation Program, to deal

² Workplace Health and Safety Queensland.

³ Electrical Safety Office Queensland.

⁴ Queensland Coroner’s Report, above, page 73.

with any implementation problems. These included the creation of a new office – that of the Commonwealth Coordinator-General – as well as the specific appointment and deployment of Parliamentary Secretary (and later, Minister) Arbib to oversee its implementation.

- 2.4 There is not the slightest evidence that the Cabinet Committee, the full Cabinet or the Chair of both – the Prime Minister – ever received any advice, warnings or other information about safety risks for their decision, distinct from the Minister and Department’s management of any risks, until they were fully briefed in February 2010, having themselves formed a high level public service task force to independently review the program from top to bottom.⁵ Furthermore, once briefed, the Cabinet Committee acted swiftly to terminate the Program. Indeed, far from being appraised about any safety concerns for Cabinet decision, the departmental advice and reporting was consistently, uniformly positive and to the effect that the Program was “on track”. The Cabinet Committee did receive reports about the implementation of the program and various recommendations for improved compliance which Cabinet and the Prime Minister accepted, and which matters are addressed below.⁶

3 FAIRNESS, AND CABINET SECRECY

- 3.1 The Terms of Reference rendered it impossible for Mr Rudd to describe his involvement, and thus for the Commissioner to report on the Prime Minister’s involvement, without describing material before, considerations of and discussions at meetings of Cabinet, and Cabinet Committees. As argued on behalf of Mr Rudd, this unprecedented position probably constituted exceptional circumstances of the kind contemplated, in very general terms, by the majority of the High Court in *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 618.2.
- 3.2 Nonetheless, at this late if not final stage of the Commission’s proceedings, it is apparent that there were no exceptional circumstances to justify the purported exercise of executive authority, supposedly given force of law by reason of the *Royal Commissions Act 1902* (Cth), so as to compel the giving of evidence contrary to Cabinet secrecy. Political decision-making by the Commonwealth Cabinet leading directly or indirectly to industrial enterprises is ordinary, rather than exceptional. The engagement of occupational health and safety laws governing the manner such enterprises are to be carried on is also ordinary – indeed, it goes without saying. Unfortunately, given human failings, the experience of imperfect observance of the standards required by those occupational health and safety laws is also ordinary. In short, the policy

⁵ See sections 8.9 - 8.10 and 12.1 below.

⁶ See sections 7-10 and 12.1 below.

of the law supporting the rule of Cabinet secrecy cannot be shown in this case to admit of any sensible exception so as to abrogate that secrecy to investigate these Cabinet decisions.

- 3.3 The decision, and continued insistence, of the Executive Government to frame this Commission's Terms of Reference as it did, assuming they had the effect of abrogating Cabinet secrecy, is to be deprecated.
- 3.4 However, once that step was taken, ordinary fairness required Mr Rudd to be able to give evidence about his involvement as he did, and for all other interested parties – and the public as well – to be informed of that evidence.
- 3.5 On the other hand, it is not presently possible for Mr Rudd and those advising him to know what if any allegations are intended to be made in this Commission against him. If an ordinary canon of fairness were observed, the fact that nothing adverse concerning his responsibilities as Prime Minister was put to him so as to provide him with an opportunity to answer it, during cross-examination, should suffice to conclude now that there are no allegations of any significance to be made against Mr Rudd. It would be contrary to the requirements of procedural fairness binding this Commission were any other approach to be taken in relation to Mr Rudd.

4 TERMS OF REFERENCE

- 4.1 The Terms of Reference require the Commissioner to consider whether “appropriate identification, assessment or management, by the Australian Government, of workplace health and safety and other risks relating to” the Home Insulation Program could have avoided the deaths of Matthew Fuller, Rueben Barnes, Mitchell Sweeney and Marcus Wilson and whether action should have been taken accordingly.⁷ To that end, the Commissioner is authorised to consider the “processes by which the Australian Government made decisions about the establishment and implementation of the Program, and the bases of those decisions, including how workplace health and safety and other risks relating to the Program were identified, assessed and managed”.⁸ In particular, the Commissioner is required to inquire into:
- whether the “Australian Government was given, or sought, any advice, warnings or recommendations by or from industry representatives, regulatory authorities or other agencies of the Commonwealth, a State or a Territory during the establishment and implementation of the Program, and what action the Australian

⁷ Terms of Reference (d) and (e).

⁸ Terms of Reference (a).

Government took in response to any such advice, warnings or recommendations”;⁹ and

- whether, in establishing or implementing the Program, the Australian Government failed to have sufficient regard to workplace health and safety or other risks relating to the Program, failed to have sufficient regard to advice, warnings or recommendations or failed to deal adequately with the risks, advice, warnings or recommendations and, if so, why sufficient regard was not had to the risks, advice, warnings or recommendations, or why they were not dealt with adequately.¹⁰

4.2 The evidence establishes that the identification, assessment and management of workplace health and safety and other risks associated with the Program were matters which were considered at the level of the Ministerial department, with the assistance of external consultants. To the extent those processes were productive of information from industry or elsewhere to the effect that what was being devised, developed, implemented or modified carried inherent and avoidable risks to the health and safety of the installers, that information did not come to the attention of the Prime Minister until February 2010 and, when it did, the Program was immediately shut down. Indeed, on each occasion between August 2009 and February 2010 that Minister Garrett recommended changes relating to the Program, the Prime Minister and the Cabinet accepted those recommendations based on departmental advice.¹¹

4.3 The tragic deaths of Matthew Fuller, Rueben Barnes and Mitchell Sweeney occurred in circumstances where their employers failed to discharge their long-established and equally well-known statutory obligations to ensure the workplace health and safety of their employees. In each case, the relevant failures were of the most fundamental kind, as the convictions entered in the subsequent prosecutions confirm.¹²

5 GOVERNMENT PROCESSES

5.1 The decision to establish the Nation Building and Jobs Plan – and, therefore, the Home Insulation Program – was made by the Cabinet Committee and through it the Cabinet. It contained the four most senior Ministers in the Commonwealth Government and was one of a number

⁹ Terms of Reference (b).

¹⁰ Terms of Reference (c).

¹¹ One exception contained in the Prime Minister’s letter of 29 October 2009, based on departmental advice, required a two week delay for the announcement to take effect to enable industry adjustment.

¹² Queensland Coroner’s Report, above, pages 75-77.

of Cabinet Committees reporting to the full Cabinet.¹³ It is also likely that the Cabinet Committee recommended its decisions to the full Cabinet for final endorsement.¹⁴ The normal practice was for all Ministers in the Cabinet Committee to fully participate in the Committee's deliberations, usually with active participation from officials. The normal role of the Prime Minister in these deliberations was to summarise the Cabinet discussion, and then ask if there was any dissent before a particular departmental recommendation was adopted. Had safety risks been raised in any of these meetings recommending or requiring the postponement, amendment or abandonment of the program, neither the Prime Minister nor his Cabinet colleagues would have proceeded without acting accordingly.

5.2 The principle of collective responsibility for such decisions remains an important one for our system of government.¹⁵ As such, once Cabinet decisions are made, they become the collective decisions of government as a whole, including each of its ministers.¹⁶ Further, as deliberative bodies, Cabinet and its committees are presumed to act in the public interest.¹⁷ The public interest is not one homogenous undivided concept. It will often be multi-faceted and the Cabinet must consider and evaluate the relative weight of competing facets before reaching a final conclusion as to where the public interest resides.¹⁸ No other mechanism exists in the Australian system of public administration to determine the public interest. This has been the case since the inception of responsible government in Australia.

5.3 Meeting the unprecedented challenges posed by the Global Financial Crisis was self-evidently a high level economic public interest for the preservation of the Australian financial system, preventing a deep national recession and avoiding mass unemployment. The advice from Treasury in mid-October 2008 was, relevantly and in effect, that “in the absence of significant fiscal stimulus, Australia faced an inevitable recession, with rapidly rising unemployment, between 8 and 9 per cent, resulting in hundreds of thousands of Australians losing their jobs”.¹⁹ After initial stimulus measures were implemented, by the end of the December 2008 Quarter the Global Recession had deepened to such an extent that, as the then Prime Minister recalled, there was “a palpable sense of unfolding economic crisis across the Government, the business

¹³ For example, the National Security Committee of Cabinet.

¹⁴ Statement of Mr Rudd dated 14 May 2014; Paragraph 21.

¹⁵ Statement of Mr Rudd; Paragraph 55(a).

¹⁶ *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 615 per Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ.

¹⁷ *Commonwealth v John Fairfax & Sons* [1980] HCA 44 at [26] per Mason J.

¹⁸ *McKinnon v Secretary Department of Treasury* (2005) 145 FCR 70 at [12] per Tamberlin J.

¹⁹ Statement of Mr Rudd; Paragraph 12.

community and the country”.²⁰ The \$42 billion Nation Building and Jobs Plan was the Government’s further attempt to counteract the extreme effects of the Crisis and, in this, it may be observed that the Government succeeded. Nonetheless, by the time the Plan was announced on 3 February 2009, nearly every major economy was in recession and the IMF had forecast zero growth for the forthcoming year.²¹

- 5.4 Without such stimulus measures, industries throughout Australia were at risk of severe contraction with the consequent loss of money by then existing businesses and major loss of jobs.
- 5.5 Each element of the Nation Building and Jobs Plan was devised and developed at departmental level²² and then put to the Cabinet Committee on the basis of submissions, recommendations and briefings from the departments.
- 5.6 Attendance at Cabinet Committee meetings for this purpose were not only the four senior Ministers, but also the senior staff and most senior public servants from the respective Departments. It was usual practice for relevant line Ministers, Parliamentary Secretaries and officials to attend Cabinet Committee meetings for the relevant agenda items. All those at the table, including officials, had speaking rights and all decisions were taken on the basis of consensus.²³ In all, upwards of 30 individuals attended these Cabinet Committee meetings.²⁴
- 5.7 In January 2009 the Cabinet Committee considered various matters relating to the Nation Building and Jobs Plan. On 28 January 2009, the Cabinet Committee considered public service submissions from the Department of Prime Minister and Cabinet (**PMC**) recommending the Energy Efficient Homes Program including the Home Insulation Program.²⁵
- 5.8 As earlier submitted, Government funding of home insulation as an energy efficiency measure was not a new idea. A rebate scheme for landlords had been announced or in existence since May 2008 and, notably, was administered by the Department of Environment, Water, Heritage and Arts (**DEWHA**).²⁶ Nor was the 1 July launch date for Phase 2 of the Home Insulation Program the product of whim. When the policies for the National Energy Efficiency Strategy were proposed in September 2008, it was intended that the Strategy would be developed

²⁰ Statement of Mr Rudd; Paragraph 14.
²¹ Statement of Mr Rudd; Paragraph 16.
²² Statement of Mr Rudd; Paragraph 15.
²³ Statement of Mr Rudd; Paragraph 22.
²⁴ Statement of Mr Rudd; Paragraph 11.
²⁵ Statement of Mr Rudd; Paragraph 50(a).
²⁶ Statement of Mr Rudd; Paragraphs 10 and 27.

and fully implemented by June 2009.²⁷ Mr Rudd believed that “the 1 July date has its origins in that”.²⁸

- 5.9 Furthermore, departments at their request were given a further 5 months from end January 2009 to 1 July 2009 to develop the final program including its guidelines. The Cabinet Committee was advised that a Home Insulation Program could reduce greenhouse gas emissions by 1.65 tonnes of CO₂ equivalent per household or 3.7 million tonnes of CO₂, and that 9,800 jobs could be created.²⁹
- 5.10 The Cabinet Committee resolved to agree to an interim program (Phase 1) from the announcement date to 1 July 2009, with the details to be settled between PMC and DEWHA.³⁰ The decision was based on PMC briefing papers of 27 January 2009 and 28 January 2009. The Cabinet Committee directed officials to meet with industry prior to the finalisation of the Home Insulation Program and to examine whether delivery targets could be met.³¹ It was further agreed that the final design was to be settled between the Treasurer, Finance Minister, Minister Garrett and the Prime Minister prior to any announcement.³²
- 5.11 The PMC papers did not provide any briefing about risks relating to workplace health and safety or product standards. They did, however, report the views of the Insulation Council of Australia and New Zealand in relation to training i.e., that no specialist skills were required for installation of insulation, that the training of new installers would take one day and that a course in training notes were already available.³³ The Cabinet papers canvassed alternative two and five year roll out options, without recommending either. They did not present options on the roll out date of 1 July 2009.
- 5.12 In dealing with overall risk assessment for the Program, the PMC papers indicated that DEWHA would have the central policy function located in the Department to integrate all components of the Program, including co-ordinating delivery as well as reporting, monitoring and review.³⁴ This was in line with the Administrative Arrangements Order of 25 January 2008, covering the whole of Government, which lists “energy efficiency, greenhouse gas abatement and community and household climate action as matters of responsibility for DEWHA”.³⁵

²⁷

Ibid.

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P-4808 (Mr Rudd).

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Statement of Mr Rudd; Paragraph 21.

³⁰

Statement of Mr Rudd; Paragraph 50(a).

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Statement of Mr Rudd; Paragraphs 25 and 50(a).

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Statement of Mr Rudd; Paragraph 50(a).

³³

Statement of Mr Rudd; Paragraph 50(b).

³⁴

Statement of Mr Rudd; Paragraph 50(c).

³⁵

Statement of Mr Rudd; Paragraph 26.

- 5.13 Following the decision of the Cabinet Committee, the Premiers and Chief Ministers “endorsed the Commonwealth’s Energy Efficiency Homes Package to modernize Australian homes, resulting in the installation of ceiling insulation in up to an additional 2.7 million Australian homes” at a meeting of COAG held on 5 February 2009.³⁶

6 MANAGEMENT AND OVERSIGHT

- 6.1 The Portfolio Minister responsible for the Home Insulation Program was the Minister for DEWHA, Minister Garrett. The Government appointed a new secretary of Minister Garrett’s Department, Robyn Kruk, to assist the Minister in his portfolio.³⁷ In 2009, DEWHA was a substantial Department with approximately 3500 public service staff.
- 6.2 To assist with the implementation of such a large undertaking requiring, as the Nation Building and Jobs Plan did, high-level coordination between the various Commonwealth agencies as well as the States and Territories, the Prime Minister decided to introduce additional layers of oversight.
- 6.3 Borrowing from his previous experience in Queensland, and after seeking advice from the Secretary of PMC, he established the Office of Commonwealth Coordinator-General and appointed Mr Mrdak to that role.³⁸ He also appointed Senator Arbib to the new position of Parliamentary Secretary for Government Service Delivery and, in June 2009, he promoted him to the position of Minister with the same portfolio responsibility with the added responsibility for employment services.³⁹ In this role, the Parliamentary Secretary oversaw the work of relevant officials within PMC which in total had approximately 600 staff in 2009. In the Prime Minister’s Letter of Appointment of Senator Arbib to this position, it stated “You will be responsible for oversight of the implementation of the Plan.” It also said “You will work closely with the Commonwealth Coordinator General, Mr Mike Mrdak, on these matters.”⁴⁰ Senator Arbib also received a Letter of Appointment by the Deputy Prime Minister stating “As Parliamentary Secretaries are sworn to administer departments, powers vested in ‘the Minister’, under the portfolio legislation are available to a Parliamentary Secretary in the portfolio. Such of these powers as are exercised by you as Parliamentary Secretary should be expressed as exercised in your own right as Parliamentary Secretary, rather than on behalf of the Prime Minister”.

³⁶ Statement of Mr Rudd; Paragraph 25.

³⁷ Statement of Mr Rudd; Paragraph 38.

³⁸ Statement of Mr Rudd; Paragraph 33.

³⁹ Statement of Mr Rudd; Paragraph 34.

⁴⁰ Statement of Mr Rudd; Paragraph 35.

6.4 Mr Rudd “underlined these responsibilities a number of times in conversation with Senator Arbib at the time of his appointment when (he) emphasised that (Senator Arbib’s) major responsibility was to keep abreast of the detail of the delivery process of the stimulus program where things could go wrong”.⁴¹ When giving evidence, Mr Rudd was asked whether he had any discussions with Senator Arbib about his expectations in this role. He said:

“I think what I believe I reflected to him in a conversation at some stage early in the process was that I was relieved that he would be in position, because I wanted a set of eyes focused on implementation difficulties across the entire Nation Building and Jobs Plan of which home insulation was one part, in fairness to Senator Arbib. And secondly, that – as I’ve also stated clearly, I think, in my statement – that he was also to raise public awareness of these programs, as well as community or business uptake of government programs was an equal part of our concern in terms of giving effect to the stimulus strategy.

On individual conversations with him, my recollection is that I would have said something like – this is a paraphrase, it’s quite a while ago, “You need to watch this very carefully, so that things can be nipped in the bud, if there’s a problem. And equally that you must be out there promoting the program.” And so I think both those functions are reflected in his letter of appointment. My own sense at the time was – well, we’ve got a first class public servant in situ, in Mike Mrdak. We have an energetic young Minister in situ and that will help the normal processes of public administration which pre-exist this to monitor the delivery.”⁴²

6.5 The process of the Government’s administration, reporting and decision making thereby established included a number of levels of supervision and support for Ministers in the implementation of the overall stimulus program and its various component parts including the Home Insulation Program. Senator Arbib and Mr Mrdak supported Minister Garrett as the portfolio Minister. They managed the issues at Departmental level and coordinated with other departments and other governments, State and Territory.⁴³

6.6 Mr Rudd had this to say regarding these structures and reporting lines:

“As for my own perspective, both as Chair, and as a member of the Cabinet Committee, together with my Cabinet colleagues, I accepted the departmental recommendations on the establishment of the program, its design, its implementation arrangements and its timetable. I believed at the time that we had done what we could with oversight arrangements: a departmental secretary under Minister Garrett with what we believed to be strong State-based departmental head with program implementation experience; the specific responsibilities of the Coordinator-General; the specific responsibilities of Parliamentary Secretary (and later Minister) Arbib for checking implementation; periodic reports to the Cabinet Committee from these three persons; periodic Government-wide reporting to Cabinet on any Government (stimulus or non-

⁴¹ Ibid.

⁴² P-4817 (Mr Rudd).

⁴³ Statement of Mr Rudd; Paragraph 50(d).

stimulus) programs in difficulty; together with our over-riding belief that the formal inspectorate powers of the various State and Territory occupational health and safety agencies would also be enforced in the normal way to uphold the laws of the States and Territories; and finally that employers would abide by those laws in a responsible manner. These were the various layers of oversight that were in place for the scheme.”⁴⁴

- 6.7 Minister Garrett, Senator Arbib and Mr Mrdak, would report from time to time to the Cabinet Committee to update it on progress as well as any problems in implementation.⁴⁵ The PMC would also produce periodic “traffic light” reports to the Cabinet Committee as well as the whole Cabinet on the overall implementation of all Government programs, both stimulus and non-stimulus related.⁴⁶ These reports were intended “to act as an early warning system across the whole of Government for any program running into major problems”.⁴⁷ At no time until March 2010 did any of these reports indicate that the Home Insulation Program was other than “on track”.⁴⁸ The Secretary of PMC, Mr Moran, would also report to Mr Rudd although it does not appear that the Home Insulation Program was raised in any of those briefings throughout 2009.⁴⁹
- 6.8 As already submitted, the design and implementation of the Home Insulation Program was carried out at departmental level within DEWHA assisted by the Coordinator-General and officials in PMC before being put to the Cabinet Committee for decision.⁵⁰ The “safety dimensions” of the Program were a part of public service due diligence procedures, before moving to the implementation phase. This included a formal Independent Risk Assessment Report from an external professional firm. The implementation responsibilities would have then been allocated to the relevant agencies to execute within the framework of the existing Commonwealth, State and Territory laws.⁵¹
- 6.9 At least from the point of view of the Executive, the assumption that the Home Insulation Program would be implemented in a way that minimised as far as possible the risk of harm to householders and installers alike was entirely reasonable. Mr Rudd put it this way:

“For example, today there will be a bunch of workmen at work, today I hope still seeking to complete the government’s commitment, as it then existed, to provide a dual carriageway for the Pacific Highway, all the way from Brisbane to Sydney. With the decision to fund that road for the billions of dollars worth of investment in that road required the decision-maker to say, “And by the way make sure you

⁴⁴ Statement of Mr Rudd; Paragraph 48.

⁴⁵ Statement of Mr Rudd; Paragraph 28.

⁴⁶ Statement of Mr Rudd; Paragraph 29.

⁴⁷ Statement of Mr Rudd; Paragraph 50(l).

⁴⁸ Ibid.

⁴⁹ Statement of Mr Rudd; Paragraph 30; Statement of Mr Moran dated 23 April 2014; Paragraph 39.

⁵⁰ Statement of Mr Rudd; Paragraph 41.

⁵¹ Statement of Mr Rudd; Paragraph 42.

adhere to occupational health and safety,” – I doubt it. It is an assumption and I think a legitimate assumption on the part of decision-makers that these generic workplace health and safety laws, which have been implemented, not for a particular problem, in a particular set of circumstances, but generically, would apply whatever program, whatever project, whatever construction, whatever workplace you’re talking about.”⁵²

7 REPORTING TO CABINET

- 7.1 On 11 June 2009, the Cabinet Committee was advised by the public service that Phase 2 of the Home Insulation Program was scheduled to begin on 1 July 2009.⁵³ The Ministers were advised that public service agencies were working to establish linkages between registered construction training organisations, Local Employment Coordinators and insulation installers in a number of priority regions where unemployment was feared to become greatest and Mr Rudd understood this to include the Department of Education, Employment and Workplace Relations providing training organisations with training material and details of accreditation requirements; the department’s Local Employment Coordinators working to broker trained people into work in the insulation industry; and Job Services Australia (located in the same department) paying for the training of job seekers and providing support for them taking up positions in the installation industry.⁵⁴ The full Cabinet noted these actions at its meeting on 18 June 2009.⁵⁵
- 7.2 On 28 July 2009, the Cabinet Committee noted that arrangements would be put in place for insulation installers to undertake training before they started work, and during employment, as well as support throughout a work placement in addition to moving into further training and apprenticeships on completion of their work under the Energy Efficient Homes Package.⁵⁶ At a meeting on the same day, Mr Rudd advised that a National Partnership Agreement had been signed at COAG with the Premiers and Chief Ministers on the overall Nation Building and Jobs Plan; that the States and Territories had agreed to the appointment of the Commonwealth Coordinator-General; that the Commonwealth and State and Territory Coordinators-General had met every two weeks in teleconference, as well as weekly meetings between Commonwealth Coordinators; that during these meetings, reports would be delivered on the progress of the plan in each jurisdiction, as well as identifying, discussing and resolving critical issues and logistics; and that

⁵² P-4896 (Mr Rudd).

⁵³ Statement of Mr Rudd; Paragraph 50(h).

⁵⁴ Statement of Mr Rudd; Paragraph 50(h).

⁵⁵ Ibid.

⁵⁶ Statement of Mr Rudd; Paragraph 50(i).

Government agencies were working within relevant legislation and standards.⁵⁷ Importantly, the Ministers were advised that:

“(T)he Office of Coordinator-General (OCG) was working with State and Territory Coordinators-General and Commonwealth agencies to develop an overall Program Assurance Framework to confirm and review program assurance and probity; that this platform would be developed to provide risk frameworks in relation to governance and systems, including program and project management and reporting requirements; and that a National Program Assurance Reviewer would be appointed to conduct a National Program Assurance Review in the second half of 2009 and report to Coordinators-General on best practice and risk identification.”⁵⁸

Mr Mrdak also reported that:

“(A)ll installers on the register for the program were required to hold minimum skills and competencies, and that their work had to comply with Australian standards”.⁵⁹

8 SAFETY RISKS AND WARNINGS

8.1 The Cabinet Committee decision of 28 January 2009 resolved, based on the PMC papers, to accept the Home Insulation Program, the Energy Efficient Homes Package as it was then known, and directed that officials meet with the industry prior to the finalisation of the design of the overall program to ensure that delivery targets could be met.⁶⁰

8.2 Neither the Cabinet Committee nor the full Cabinet, let alone the Prime Minister, was advised at any stage that the delivery target of 1 July 2009 could not be met or that the commencement of Phase 2 should be delayed. No such brief was provided to the critical Cabinet Committee meetings. Nor does Mr Mrdak contend that there were safety risks that warranted consideration of any delay. Had Cabinet been so briefed, they would have acted. They were not so briefed, including the Prime Minister.

8.3 Be that as it may, the 1 July date had been agreed by Cabinet in January 2009 based on departmental advice. To the point, Mr Rudd recalled:

“(T)he implementation timetable was legitimately the basis of advice from professional public servants and their engagement with industry and their engagement with others.”⁶¹

⁵⁷ Statement of Mr Rudd; Paragraph 50(j).

⁵⁸ Ibid.

⁵⁹ Statement of Mr Rudd; Paragraph 50(k).

⁶⁰ Statement of Mr Rudd; Paragraph 50(a).

⁶¹ P-4808 (Mr Rudd).

8.4 Had a delay been requested of Cabinet on safety grounds, Mr Rudd was in no doubt that it would have been granted immediately.⁶² Of course, timing was critical to the economic stimulus objectives of the Nation Building and Jobs Plan – and it was “essential that funds flowed quickly to support jobs and to support local communities”⁶³ – but such considerations could never have overridden concerns for the safety of the installers or householders had they been raised. Mr Rudd put it this way:

“(H)ad any public servant, any Minister advised the Cabinet that there was a safety risk to either workers or to households, then I’m confident in saying the reaction of Ministers would have been to say, “This has to be dealt with.” And if that involved a delay, then that would have been the response. In my review of the documents – and as I said before, I’m not sure that the documents that I’ve been provided with are exactly the same as the documents in your possession concerning my participation in these decision-making processes, in the documents in my possession I’ve been unable to locate a document which says that the Cabinet committee, including myself, either Deputy Prime Minister Gillard, Minister Tanner, Minister Swan, were advised that there was a safety risk if we proceeded with this program in general or against a July 1 commencement.”⁶⁴

8.5 Mr Mrdak in his evidence does not say he had a conversation with Mr Rudd suggesting there be delay in the implementation of the program from that recommended in the original departmental submission in January 2009, which was accepted by the Cabinet Committee. Nor does Mr Mrdak contend in his evidence that in any conversation with the Prime Minister, he warned him that there were safety risks that warranted delay.

8.6 Parliamentary Secretary Arbib in his evidence does not say he had a conversation with Mr Rudd requesting a delay in the implementation of the program or a conversation in which he warned the Prime Minister that there were safety risks that warranted delay.

8.7 If there were safety risks of which departments were aware, the formal mechanism available for such matters were in the Cabinet Submissions prepared for Ministers in either February 2009 or in the latest submission in June 2009 prior to the commencement of the expanded Phase 2 of the program. These were the formal decision points in the Cabinet system authorising the programs to proceed. There were no such warnings.

8.8 In this context, it is relevant that the Secretary of PMC, Mr Moran, says in his evidence that he advised Mr Mrdak “around late February or

⁶² Statement of Mr Rudd; Paragraph 43.

⁶³ Statement of Mr Rudd; Paragraph 18.

⁶⁴ P-4810 (Mr Rudd).

March 2009”, “that roofs could be dangerous places and that we needed to give a high profile to training requirements”. He also recommended that there needed to be discussion with the States about their occupational health and safety responsibilities.⁶⁵ Mr Moran’s views about these matters were not communicated to the Prime Minister or to the Cabinet Committee. Nor does Mr Moran contend that they were.

8.9 From mid-August 2009, Minister Garrett wrote to Mr Rudd on a number of occasions concerning different aspects of the Energy Efficient Homes Package including the Home Insulation Program, and this correspondence was processed departmentally.⁶⁶ Minister Garrett’s 14 August 2009 letter proposed to put into immediate effect a number of measures contributing to compliance, cost and demand management, including increasing the quality of installation inspections, scrutiny of installer training qualifications and increased installer compliance communications. After consideration, the recommendations were agreed by the Cabinet Committee on 17 August 2009. Advice on safety risks recommending the program be suspended or terminated was not addressed in this correspondence.⁶⁷

8.10 To the contrary, when:

- On 27 August 2009, Minister Garrett further wrote to Mr Rudd, he did so on terms that reassured Mr Rudd that he was closely monitoring the Home Insulation Program and promised an update in three months’ time.⁶⁸ The Prime Minister accepted these recommendations in his letter of 4 September 2009 to Minister Garrett.
- on 14 September 2009, the Cabinet Committee received and noted a further edition of the Implementation Report of the Government’s Strategic Policy Plan the National Strategy for Energy Efficiency (including home insulation) it was again recorded with a green light meaning that the program remained “on track”,⁶⁹
- on 30 September 2009, the Cabinet Committee (and then, on 13 October, the full Cabinet) considered a more detailed version of the Government Strategic Plan which presented analyses of each of the Government’s major projects of which the National Strategy for Energy Efficiency was one, under the major risks section of the

⁶⁵ Statement of Mr Moran; Paragraph 32.

⁶⁶ Statement of Mr Rudd; Paragraph 50(m).

⁶⁷ Statement of Mr Rudd; Paragraphs 50(n) to 50(r).

⁶⁸ Document 13.1.

⁶⁹ Statement of Mr Rudd; Paragraph 50(s).

analysis, there were no issues raised in relation to the Home Insulation Program;⁷⁰

- on 22 October 2009, the Cabinet Committee reviewed the next version of the Progress Report on the Government's Strategic Policy Plan, neither Energy Efficiency nor home insulation was listed as a critical issue and the report again noted that the National Energy Efficiency Strategy, of which Home Insulation Program was a part, was "on track" despite Matthew Fuller's death eight days earlier;⁷¹ and
- on 18 January 2010, the Cabinet Committee considered the December 2009 Implementation Report of the Government Strategy Plan, neither Energy Efficiency nor home insulation were listed as critical issues for the attention of the Prime Minister but were indicated as being "on track" despite the loss, by then, of three lives (Matthew Fuller, Rueben Barnes and Marcus Wilson).⁷²

9 FATALITIES

- 9.1 Following Matthew Fuller's death on 14 October 2009, on 28 October Minister Garrett wrote to the Prime Minister (and copied to Ministers Swan, Tanner and Arbib) to advise that he was working urgently with industry and regulators to toughen the compliance regime further, particularly by using the program to drive improvements to industry work practices and reduce unacceptably high occupational health and safety risks.⁷³ The Department of PMC prepared a brief for Mr Rudd to reply in terms agreeing to this course of action, which he confirmed by letter to Minister Garrett on 29 October 2009.⁷⁴
- 9.2 On 30 October 2009, Minister Garrett again wrote to Mr Rudd to outline further changes to the Home Insulation Program concerning electrical and other safety issues and the handling of the de-registration of installers.⁷⁵ Minister Garrett stated that safety for installers and householders remained an absolute priority under the Program and that he would not hesitate to further boost safety standards, compliance measures and training should this be required. Importantly, he stated that, based on recommendations from stakeholders, a new package of measures would be implemented with immediate effect and this would include working with the Queensland Electrical Safety Office, the National Electrical and Communications Association and Master

⁷⁰ Statement of Mr Rudd; Paragraph 50(t).

⁷¹ Statement of Mr Rudd; Paragraph 50(v).

⁷² Statement of Mr Rudd; Paragraph 50(aa).

⁷³ Document 13.2.

⁷⁴ Statement of Mr Rudd; Paragraph 50(u) and see footnote 10 above.

⁷⁵ Document 13.3.

Electricians Australia to roll out a targeted electrical safety program for homes with foil insulation; to disallow the use of metal fasteners in ceiling insulation; to mandate the use of appropriate covers over down lights and other relevant ceiling appliances, as approved and installed in accordance with relevant Australian standards; and to issue new guidelines that would require a pre-installation risk assessment from 1 December 2009. Minister Garrett also advised that his department would strengthen cooperation with State and Territory occupational health and work safe authorities to ensure that installers were operating in a safe working environment, emphasising supervisory obligations and that training materials were being reviewed by training bodies to enhance worker safety. He also emphasised that the Home Insulation Program did not in any way override pre-existing Federal and State regulations concerning safety in the building and insulation sector and he assured the Prime Minister that his department would continue to work closely with industry and regulatory bodies to further strengthen safety aspects of the program. He stated that he believed these measures would also drive improvements to industry work practices and technologies and reduce unacceptably high health and safety risks.⁷⁶

9.3 Two days later (2 November 2009), the Prime Minister responded in terms which agreed with Minister Garrett's new proposed guidelines which incorporated the new safety measures and noted that the proposed changes were being introduced to improve safety following consultation with industry, safety experts and regulators. Minister Garrett then released changes to the Guidelines for the Home Insulation Program effective as of 2 November.⁷⁷

9.4 Following Reuben Barnes and Marcus Wilson' deaths, Minister Garrett issued a further revision of the Guidelines requiring a range of further changes to safety and compliance procedures.⁷⁸

9.5 After Mitchell Sweeney died on 4 February 2010, the Cabinet Committee met on 8 February to commission a Public Service Taskforce made up of PMC, Treasury and Finance to examine the Home Insulation Program, together with the six other programs administered by DEHWA.⁷⁹

10 TERMINATION

10.1 At its meeting on 19 February 2010, the Cabinet Committee considered the findings and recommendations of the Taskforce. The Ministers were

⁷⁶ Statement of Mr Rudd; Paragraph 50(w).

⁷⁷ Statement of Mr Rudd; Paragraph 50(x).

⁷⁸ Statement of Mr Rudd; Paragraph 50(z).

⁷⁹ Statement of Mr Rudd; Paragraph 50(bb).

advised of significant program design risks, notably safety risks, in the Home Insulation Program including the risk presented through the use of foil products.⁸⁰ The Taskforce advised that there was an urgent need for a foil insulation program that dealt with the risk of abuse by electricians as well as the need to exit the overall Program.⁸¹

- 10.2 The Cabinet Committee accepted the Taskforce recommendation to terminate the Home Insulation Program; to fund electrical safety inspections; and to establish instead the HREBS.⁸² Subsequently, the HREBS was established along with the FISP and the Government determined to undertake as many safety checks as were necessary to manage any residual risks from the program and established a Review Office to oversee this work.⁸³ Cabinet agreed with this recommendation.

11 EMPLOYERS

- 11.1 Under the Terms of Reference, the Commissioner was not required to inquire into a particular matter to the extent that he was satisfied that the matter had been sufficiently and appropriately dealt with by, pertinently, the Inquests convened in Queensland and New South Wales as well as other relevant inquiries and proceedings.⁸⁴ Such other proceedings included the various workplace, health and safety prosecutions against the employers that followed the deaths.

- 11.2 Plainly, the Commissioner was satisfied by the findings reached in the Inquests and the prosecutions and decided not to examine the employers further.⁸⁵ As to the Inquests, Counsel Assisting said:

“We have made available in the data room all of the transcript evidence and findings from those inquests. We have identified particular witnesses who gave evidence at the inquest that we intend to call to give evidence here but have indicated that we do not intend to traverse again all of the evidence as to the circumstances in which the four young men were killed. We refer particularly to term of reference L which permits you to take that course;”⁸⁶

and a similar statement was made with respect to the “matters that have already been traversed in the workplace health and safety prosecutions”.⁸⁷

- 11.3 Although none of the employers was called on to give evidence, their failures to comply with the law led to prosecutions for breaches of their

⁸⁰ Statement of Mr Rudd; Paragraph 50(cc).

⁸¹ Ibid.

⁸² Ibid.

⁸³ Statement of Mr Rudd; Paragraphs 50(dd) to 50(gg).

⁸⁴ Terms of Reference (l) to (q).

⁸⁵ P-10 (Counsel Assisting).

⁸⁶ P-8.

⁸⁷ P-8.

statutory obligations and substantial sanctions imposed for those breaches.⁸⁸ These failures were the most direct, proximate cause of each death.

11.4 Further, it is submitted to be important to keep in mind the following Findings made by Coroners:

- Matthew Fuller and Mitchell Sweeney were electrocuted installing foil lined insulation (each due to a metal staple contacting live electrical wiring), whereas Rueben Barnes was electrocuted installing “pink batts” and Marcus Wilson died from hyperthermia, also installing “pink batts”;
- Rueben Barnes likely came into contact with wiring that had been defectively laid during construction of the home and thereby creating a dangerous pre-existing hazard;
- Marcus Wilson died of complications related to hyperthermia after being found collapsed in the roof cavity where outside temperatures were over 40 °C;
- Mitchell Sweeney had completed a Ceiling Installers Program. Matthew Fuller had been booked in to complete a course but it had been postponed;⁸⁹

11.5 As appears from the submissions already made, after Matthew Fuller’s death, Minister Garrett moved to strengthen the safety and compliance regime. According to the Coroner, Rueben Barnes’ death was attributable to a hidden defect in the premises in which he was assigned to work and Marcus Wilson’s death arose from considerations other than those of electrical safety. In the case of Matthew Fuller and Mitchell Sweeney, their deaths were primarily attributable to contraventions of State-based workplace health and safety laws, as the Queensland Coroner recognised.

12 FINDINGS

12.1 In summary, it has been contended in the public domain that the Prime Minister received at least ten direct personal warnings of safety risks about the Program which he ignored including:

⁸⁸ Matthew Fuller’s employer, QHI Installations Proprietary Limited, was fined \$100,000. Reuben Barnes’ employer, Arrow Property Maintenance Proprietary Limited, was fined \$135,000. Mitchell Sweeney’s employer, Titan Insulations Proprietary Limited, was fined \$100,000. See: P-9.

⁸⁹ Queensland Coroner’s Report, above: NSW Coroner’s Report of the Inquest into the death of Marcus Wilson, 4 October 2012.

- Letter from Minister Garrett dated 14 August 2009 – the truth is this letter contained no such warning;
- Letter from Minister Garrett dated 27 August 2009 – the truth is this letter contained no such warning and instead provided reassurance to Mr Rudd that Minister Garrett was closely monitoring the Home Insulation Program and promised an update in three months' time;
- Letter dated 22 October 2009 which noted the Cabinet Committee discussion regarding safety issues – the truth is there was no letter of that date. In the Cabinet Committee meeting of that time, the Ministers reviewed the September Progress Report of the Government Strategic Plan proposed by the public service which noted that the Energy Efficiency Plan of which the Home Insulation Program was the principal part, was in fact “on track”.
- Letter from Minister Garrett dated 28 October 2009 – the truth is Minister Garrett advised he was seeking to reduce unacceptably high occupational health and safety risks by toughening the compliance regime. This advice was accepted by the Cabinet Committee and supported by letter from the Prime Minister dated 29 October 2009 consistent with public service advice;
- Letter from Minister Garrett dated 30 October 2009 – the truth is Minister Garrett outlined further changes to the Program concerning electrical and other safety issues to reduce unacceptably high health and safety risks which advice was accepted by the Prime Minister in his letter dated 2 November 2009;
- Letter dated 19 February 2010 – the truth is there was no such letter. At a Cabinet Committee Meeting on that date, based on the recommendations of a high level public service Taskforce commissioned by Ministers on 8 February, the Cabinet Committee decided to terminate the Program in view of the safety risks advised by the Taskforce;
- Four additional warnings provided by PMC between August 2009 and March 2010 – the truth is no such warnings were provided to the Prime Minister by PMC until the Taskforce Report in February 2010 which he and Ministers specifically commissioned. No such briefings have been presented to Mr Rudd by the Commission. In fact PMC presented multiple whole of government reports over this period of time each advising both the Prime Minister and Cabinet Ministers that the program was “on track”.

- 12.2 No party to the Commission, nor the Commission itself, has contended nor produced evidence that the insulation program was initiated or designed by Mr Rudd, whereas in fact departmental work on insulation programs had begun almost a year earlier in the public service before the insulation program announced in February 2009, and before a further five months was allocated by Ministers to public servants to develop guidelines for the announcement of the full program in July 2009.
- 12.3 On the timetable for implementation of the insulation program, no party to the Commission nor the Commission itself has contended nor produced evidence that Mr Rudd initiated the 1 July 2009 commencement date for the full program, whereas in fact neither the critical Cabinet Committee meetings in January and June 2009 which formally agreed to phase one and phase two of the program, and of which Mr Rudd was part, were advised of alternative dates for commencement on 1 July 2009. Nor were safety grounds ever advanced to Mr Rudd by any person as warranting the delay or suspension of the program before or after 1 July 2009.
- 12.4 No party represented at the Commission nor the Commission itself suggested, and nor could it reasonably or responsibly be suggested based on the evidence presented to the Commission, that the then Prime Minister failed to respond to direct warnings to him personally about safety risks if the Program was implemented or continued, until the Cabinet Committee decision of 19 February 2010. At that time, the Cabinet Committee based on public service advice, decided to terminate the Program.
- 12.5 Nor has any party to the Commission, nor the Commission itself, suggested that the Prime Minister personally failed to take steps to avoid or prevent the tragic deaths of the four young men who lost their lives while working on the program.
- 12.6 Nor has it been contended by any party to the Commission, nor the Commission itself, that the then Prime Minister acted other than within the system of collective Cabinet decision making and departmental and ministerial advice provided to himself and Ministers on which the relevant Cabinet decisions were made.
- 12.7 No Prime Minister, including Mr Rudd, is responsible for enforcing workplace health and safety laws. These are matters for the States and Territories, as reflected in the Queensland Coroners findings, be they matters arising from this program, or any other of the much larger Commonwealth stimulus programs implemented around the nation, or for that matter any Commonwealth program generally. Nor has anyone

before the Commission nor the Commission itself contended that this was Prime Minister Rudd's responsibility.

- 12.8 As for remedial measures taken after the final cancellation of the program, and the later decision not to include home insulation in subsequent energy efficiency programs, final decisions on compensation to firms and employees from the industry and worker funds established for compensation purposes were taken after Mr Rudd left the Prime Ministership in June 2010.
- 12.9 It is submitted that findings to this effect (ie paragraphs 12.1 to 12.8 above) ought to be made by the Commissioner.

Bret Walker

Counsel for Mr Rudd

4 June 2014