



# Express law

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## **Commonwealth of Australia not liable for economic loss arising from its administration of the Home Insulation Program**

**In *Roo-Roofing Pty Ltd v Commonwealth of Australia* [2019] VSC 331 the Supreme Court of Victoria held that the Commonwealth was not liable for economic losses claimed to have been suffered by members of the insulation industry as a result of the Commonwealth's conduct of the Home Insulation Program (HIP). Significantly, the Court held that the Commonwealth in its conduct of the HIP did not owe the plaintiffs a duty to take reasonable care to avoid inflicting pure economic loss on the plaintiffs. The Court held that the Commonwealth's conduct involved the exercise of 'core policy-making' functions by way of a fiscal stimulus program. Imposition of any duty of care owed to a particular part of the community was inconsistent with the Commonwealth's exercise of its policy functions in the national interest.**

### ***Background***

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Under the HIP the Commonwealth funded the installation of ceiling insulation in Australian homes. The Australian government rolled out the HIP as part of the Australian government's program of stimulus of the Australian economy in response to the global financial crisis of 2008.

In February 2009, the government announced that the HIP would be in place until 31 December 2011 or until such earlier date when the funds allocated to the HIP were spent. The Commonwealth terminated the HIP on 19 February 2010.

Members of the insulation industry, such as manufacturers, suppliers and installers, allegedly suffered economic loss consequential to the Commonwealth's conduct of the HIP. They brought a class action against the Commonwealth, claiming damages for alleged negligence, negligent misrepresentation, misleading and deceptive conduct, and breach of contract.

Justice John Dixon of the Supreme Court of Victoria heard the trial of the class action over April, May and June 2018.

On 31 May 2019 Dixon J dismissed each cause of action and entered judgment in favour of the Commonwealth. His Honour provided detailed reasons that run to 490 pages which are available online at <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2019/331.html>.

## ***Negligence***

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### **No duty of care**

Dixon J rejected the plaintiffs' claim that the Commonwealth owed them a duty to take reasonable care in the design, implementation and administration of the HIP to avoid inflicting pure economic loss.

Dixon J found that 'a significant feature' of the Commonwealth's conduct in designing and implementing the HIP was the exercise of executive power under s 61 of the Constitution; more specifically, the power that the High Court upheld in *Pape v Commissioner of Taxation* (2009) 238 CLR 1 to expend public moneys for the purposes of avoiding or mitigating the large-scale adverse effects of the global financial crisis. As a result, Dixon J found that there was no duty of care, because the alleged duty would unacceptably impose liability with respect to the Commonwealth's exercise of 'core policy-making functions'. Decisions at a policy level, which in the case of the HIP involved the national interest, could not properly be made by preferring the interests of specific sections of the community and therefore the alleged duty could not exist.

Dixon J also found that there was another supervening policy reason to deny the existence of a duty of care. Dixon J found that the obligations of public servants under the *Public Service Act 1999* (Cth), including to be accountable to the Australian community under the law and within the framework of ministerial responsibility, and to give frank and fearless advice to ministers, are 'not consistent with, and are diminished by, a duty of care to avoid inflicting economic loss on members of the Insulation Industry'.

Dixon J also considered other relevant 'salient features' and found that there was no foreseeability, no control, no vulnerability and no knowledge on the part of the Commonwealth. All of these factors weighed against the imposition of a duty of care.

### **Breach**

Despite finding that the Commonwealth did not owe a duty of care, his Honour held that if a duty of care had existed, the Commonwealth would have breached that duty of care in that it failed to exclude the use of reflective foil laminate products in response to the knowledge it acquired concerning the safety risks that would be posed by the use of that product in the HIP. Further, the Commonwealth failed to implement or properly institute procedures to monitor and manage the risks associated with the use of reflective foil laminates in the HIP.

### **Causation**

Dixon J found that the plaintiffs failed to establish that they had in fact suffered any loss as a result of the Commonwealth's conduct of the HIP. The plaintiffs' evidence did not establish any viable counterfactuals, ie what would have happened if the Commonwealth had acted in accordance with the alleged standards of a reasonably competent government administration. The plaintiffs had merely pointed to a number of possible outcomes which were 'advanced as a theory' rather than proved by evidence.

## **Public servant witnesses are not ‘in the Commonwealth’s camp’**

Dixon J rejected the plaintiffs’ submission that the Court should make any adverse evidentiary inferences on the basis that the Commonwealth did not adduce evidence from certain current and former public servants. He said that there was no reason that the plaintiffs could not themselves have called the public servant witnesses, stating that public servants would ‘adhere to model litigant principles and would be unlikely to express the bias or unfriendliness assumed in the description that a witness is “in the camp” of a particular party’.

### ***Negligent misrepresentation***

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Dixon J found that the alleged misrepresentations, to the effect that the ‘HIP will run for the full term, or until the money runs out’, were not made. Furthermore, Dixon J found that the Commonwealth did not owe a duty to exercise reasonable care in making those statements, which were only a statement of current government policy, not a statement as to what the Commonwealth’s policy would be in the future. His Honour found that it was not reasonable for the plaintiffs to ‘wilfully and blindly’ rely on the statements when it is a ‘well understood commercial risk’ that government policies are inherently susceptible to change.

### ***Misleading and deceptive conduct under the Trade Practices Act 1974 (Cth) (TPA Act)***

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Dixon J agreed with the Commonwealth’s submission that the TPA Act was not engaged because the Commonwealth was neither ‘carrying on a business’ nor ‘engaged in trade or commerce’.

Dixon J found that any representations that the Commonwealth made concerning the HIP were ‘not statements that bore a commercial character. Rather, they were of a purely governmental nature.’

### ***Breach of contract***

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Dixon J rejected the plaintiffs’ claim that there was a ‘global’ contract with a fixed term to continue payments to installers until 31 December 2011.

### ***Implications***

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The decision helpfully makes clear that:

- The well-established principle that governmental ‘policy’ functions do not attract a duty of care extends to the Commonwealth’s exercise of executive as well as statutory functions and powers.
- Governmental ‘policy’ functions that do not attract a duty of care can encompass ‘operational’ matters where overall the governmental conduct is directed at a policy objective such as a fiscal stimulus program.

AGS acted for the Commonwealth.

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