

28 May 2014

Mr David Rees

Former Director of Airfoam Wall Insulation Limited (in liquidation) and Airfoam New Zealand Limited

PO Box 81028

Whenuapai

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New Zealand

Dear Mr Rees

Fair Trading Act 1986: Warning

The Commerce Commission has been investigating the marketing of Airfoam wall insulation by Airfoam Wall Insulation Limited (in liquidation) and Airfoam New Zealand Limited (together "Airfoam") under the Fair Trading Act. We have also investigated whether you, in your capacity as Director of Airfoam at the relevant time, may also be liable for any breaches of the Fair Trading Act by Airfoam. We have now completed our investigation and are writing to alert you to our concerns.

In summary, the Commission considers that:

- certain representations made in the marketing materials about the standard and quality of Airfoam wall insulation are likely to have been misleading, in breach of s 13(a) of the Fair Trading Act;
- the failure to disclose the requirement to attain building consent when installing Airfoam wall insulation product is likely to have breached s9 of the Fair Trading Act; and
- you are likely to be personally liable for the above breaches of the Fair Trading Act because you assisted Airfoam to breach the Act.

The investigation

Issues considered during the investigation

During our investigation, the Commission considered four issues. They were:

- whether the Airfoam insulation had a thermal insulation value of R 2.9/100mm as represented;
- whether Airfoam insulation is suitable for brick veneer housing as represented;

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- whether Airfoam insulation is hydrophobic as represented; and
- whether Airfoam completed installations without disclosing the need for the home owner to obtain building consent.

We have also considered whether you personally have engaged in conduct that breaches the Act, including by aiding and abetting Airfoam to breach the Act.

The relevant law

Section 9 of the Act prohibits conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 13(a) of the Act prohibits the making of false or misleading representations that goods are of a particular kind and/ or quality.

Section 66 of the Crimes Act provides that any person who aids or abets any other person in the commission of an offence will also commit the offence.

Airfoam's response

Airfoam responded to the Commission's enquiries disputing the allegations made against them. In summary, Airfoam stated that:

- it has never made an explicit representation that its product has a particular in-situ or installed R value, it is impossible to determine an accurate in-situ R value and Airfoam's promotion of the R value was in line with industry practice;
- the testing that was provided to the Commission regarding the suitability of Airfoam for brick veneer installations was flawed and there are no known cases of Airfoam installations leading to systematic water bridging from the back of the cladding to the wall wrap position;
- it accepts its insulation was capable of absorbing water given time. However, Airfoam believed the test results provided to the Commission were flawed in that they failed to follow standardised testing and they failed to replicate in-situ performance; and
- in relation to the building consent requirement, it did not make any positive statements that Airfoam did not require building consent. Also that, as franchisor, they don't deal directly with customers and the franchisees were advised of the change to the building code prior to it coming into effect.

The Commission's view

In this case, the Commission's view is that Airfoam and your conduct is likely to have breached the Fair Trading Act. We have reached this view because the evidence we have shows:

- Airfoam represented that its insulation has a thermal insulation value of R 2.9/100mm. We are satisfied that customers were of the belief that the installed thermal insulation value of Airfoam would be R 2.9/100mm. Tests show that this was not the case.
- Airfoam insulation is capable of absorbing water over time and is therefore not hydrophobic; and
- that customers were not advised of the need to attain building consent. We believe that both Airfoam and yourself knew that franchisees were completing work without attaining building consent and, once the franchisees were advised of the building consent requirements, they believed that Airfoam and yourself were working with building consultants and local/ regional Councils to develop a streamlined application process. The Airfoam website also did not initially disclose the need to obtain building consent.

We also considered whether the Airfoam product was suitable for brick veneer houses. The information the Commission has is inconclusive on this point. As a result, we will take no further action on this issue.

While we will not be taking any further action against Airfoam or yourself at this time, we will take this warning into account if you engage in similar conduct in the future. We may also draw this warning to the attention of a court in any subsequent proceedings brought by the Commission against you.

This warning letter is public information and will be published on our website. We may also make public comment about our investigations and conclusions, including issuing a media release or making comment to media.

We recommend that you seek legal advice and encourage you to regularly review your compliance procedures and policies.

The Commission's role

The Commission is responsible for enforcing and promoting compliance with a number of laws that promote competition in New Zealand, including the Fair Trading Act. The Act prohibits false and misleading behaviour by businesses in the promotion and sale of goods and services.

Penalties for breaching the Fair Trading Act

Only the courts can decide if there has actually been a breach of the Fair Trading Act. The court can impose penalties where it finds the law has been broken. A company that breaches the Fair Trading Act can be fined up to \$200,000 and an individual up to \$60,000 per offence.

You should be aware that our decision to issue this warning letter does not prevent any other person or entity from taking private action through the courts.

Further information

We have published a series of fact sheets and other resources to help businesses comply with the Fair Trading Act and the other legislation we enforce. These are available on our website at www.comcom.govt.nz. We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the Act.

You can also view the Fair Trading Act and other legislation at www.legislation.co.nz.

Thank you for your assistance with this investigation. Please contact Wiremu Lourie on (04) 924-3652 or by email at wiremu.lourie@comcom.govt.nz if you have any questions about this letter.

Yours sincerely



Stuart Wallace
Manager
Consumer Investigations
Commerce Commission