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Tim Grimwade
General Manager – Adjudication Branch
Australian Competition & Consumer Commission
Level 7, 123 Pitt St
Sydney NSW 2000

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Dear Mr Grimwade

JAMES HARDIE NOTIFICATION - N30710

We refer to Notification N30710 lodged with the Commission by James Hardie & Coy Pty Limited on 13 February 1995 (**Notification**).

CSR Limited requests that the Commission re-consider the Notification and issue a notice to James Hardie & Coy Pty Limited (now Amaca Pty Limited) under s 93(3) of the Trade Practices Act 1974 (Cth) that it is satisfied that the conduct, the subject of the Notification, has or would have the purpose or would be likely to have the effect of substantially lessening competition and that in all the circumstances it is not likely to result in a benefit to the public.

A submission in support of this request is set out in Attachment A.

Yours sincerely

Chris Bertuch
General Counsel

ATTACHMENT A

1. Background

James Hardie Australia Pty Ltd manufactures building products in Australia including a full line of fibre cement building products, trading as James Hardie Building Products (**James Hardie**). James Hardie is the largest fibre cement manufacturer in Australia and the world.

Prior to about 2001, the James Hardie business was undertaken by a company known as James Hardie & Coy Pty Limited (**James Hardie & Coy**). James Hardie & Coy is now known as Amaca Pty Limited and is a wholly owned subsidiary of the Medical Research & Compensation Foundation (**MRCF**).

MRCF was established in February 2001 to compensate people injured by asbestos from former group companies, including Amaca Pty Limited. The presentation on the James Hardie website responding to the New South Wales Government recent special commission of inquiry states that MRCF was vested with the shares of Amaca as part of the assets to meet future claims relating to asbestos. The presentation also states that MRCF is an independent, non-profit organisation with its own board and management and that the parent company had and has no liability for Amaca before or after MRCF establishment or before or after the restructure of the corporate group that took place in September 2001. When it was transferred to MRCF James Hardie & Coy ceased to have any relationship with James Hardie or any function in the operation of the James Hardie business.

In September 2001 James Hardie undertook a corporate restructure to achieve more efficient repatriation of earnings (see presentation on website). In the course of that restructure the group's remaining operating assets were transferred from James Hardie Industries Limited to a line of companies under a Dutch company James Hardie NV and a new Dutch holding company, James Hardie Industries NV.

James Hardie & Coy no longer manufactures or supplies building products or trades under the James Hardie name. However, James Hardie & Coy (now known as Amaca), continues to be the person giving notice under Notification N30710.

CSR Building Products Limited manufactures certain fibre cement products in Australia, trading as CSR Gyprock Fibre Cement (**CSR**). Fibre cement products have a number of external and internal building applications, particularly in the residential building sector.

Fibre cement is a durable low maintenance building product containing cellulose fibre, cement and ground sand. Fibre cement product applications include internal lining, flooring external lining (residential), external lining (non-residential) columns and special applications.

The primary distribution channel for fibre cement products is through hardware and timber distributors, distributing approximately 60% of fibre cement products (excluding pipes) to builders, contractors and DIY customers. The next largest channel is the plasterboard channel (encompassing sales to plasterboard specialists who act as subcontractors to major builders and purchase plasterboard and fibre cement direct) which is a result of the preference of plasterboard contractors to purchase plasterboard and fibre cement together in order to resupply their customers with both products. In order to attract customers, hardware stores, timber yards and plasterboard distributors generally require access to the full range of fibre cement products.

Domestic producers of fibre cement products are James Hardie (~ 66% of total domestic sales), CSR (~ 17% of domestic sales) and Buckeridge Group of Companies (BGC) (~ 14% of domestic sales) with imports of fibre cement products making up ~ 3% of domestic sales. However, James Hardie is a monopoly producer of certain fibre cement products, including weatherboard used for external lining, columns used primarily for external decorative purposes and certain specialty products.

Under existing manufacturing capabilities, CSR cannot manufacture these fibre cement products. It is not practicable for CSR to establish capacity for all of these products for a number of reasons including that it is not financially viable, the market is not large enough to sustain increased production capacity. In any event, such a manufacturing capability could not be set up in a competitive timescale.

As a result, it is necessary for CSR to obtain supply of certain fibre cement products from James Hardie distributors to ensure that CSR is able to supply its customers with a full range of fibre cement products. The fibre cement products acquired from James Hardie distributors by CSR include fibre cement columns, weatherboard and certain specialty products.

2. James Hardie & Coy Notification

On 13 February 1995 James Hardie & Coy lodged a notification with the then Trade Practices Commission (**TPC**) in relation to proposed exclusive dealing conduct. The notification was placed on the public register by the TPC as Notification N30710 (**Notification**).

The conduct proposed in the Notification related to James Hardie & Coy supplying or refusing to supply internal lining fibre cement building products to CSR on condition or for the reason that CSR would not resupply or agree not to resupply fibre cement building products to distributors/resellers in the eastern states, being states where CSR was in the process of establishing competitive fibre cement building products manufacturing facilities.

After considering submissions made by James Hardie & Coy and CSR Limited, the TPC issued a Draft Notice dated 19 April 1995 (**Draft Notice**). In the Draft Notice, the TPC proposed to issue a notice under s 93(3) of the Trade Practices Act 1974 (Cth) (the **Act**) that it was satisfied that the conduct, the subject of the Notification, has or would have the purpose or would be likely to have the effect of substantially lessening competition and that it is not likely to result in a benefit to the public. In reaching this conclusion the TPC made the following key findings:

- the relevant markets for assessing the Notification were:
 - (i) the distribution level of the internal lining board market in at least Sydney and Melbourne; and
 - (ii) the manufacturing level of the fibre cement market; and
- withdrawing supply would have a significant effect on CSR aligned distributors and that this, in turn, would impact CSR's ability to compete with James Hardie & Coy at a manufacturing level.

In response, on 5 May 1995, James Hardie & Coy entered into a Deed Poll clarifying that it would not in the future attempt to prevent supply of fibre cement products to CSR from any third party nor discriminate against any distributors aligned with CSR (**Deed Poll**). The Deed Poll, which was limited to two years, also indicated James Hardie & Coy's willingness to give an undertaking to the TPA under s 87B of the Act in similar terms.

On 19 May 1995, James Hardie & Coy gave an undertaking to the TPC under s 87B of the Act in an attempt to meet the TPC's concerns in relation to the Notification (**s 87B undertaking**). The s 87B undertaking, which came into effect on 19 May 1995 for a period of two years, provided that while James Hardie & Coy intended to cease supply of fibre cement products to CSR directly, James Hardie & Coy would not attempt to prevent supply of fibre cement products to CSR from any third party or discriminate against any third party aligned with CSR.

Upon accepting the s 87B undertaking from James Hardie & Coy, the TPC issued a statement that it would not issue a notice in accordance with the Draft Notice and that the James Hardie & Coy Notification would be allowed to stand. In doing so, the TPC made it clear that the decision to allow the Notification to stand was based on the existence of the s 87B undertaking and James Hardie & Coy's assurance that it never intended to and was unlikely to disrupt third parties supplying to CSR owned distributors or CSR.

In its statement, the TPC made the following comments:

“...The Commission has accepted that James Hardie [& Coy] is unlikely to disrupt third parties supplying to CSR owned distributors and it has also accepted that it is unlikely that it ever intended to do so. Consequently, if the conduct is unlikely to have had the effect of substantially lessening competition at the distribution level and the manufacturing level, it is difficult to argue that its purpose was to substantially lessen competition at the manufacturing level.

“James Hardie [& Coy] has been able to supply information and advance arguments that suggest that its decision to discontinue supply to CSR was motivated by a purpose other than the purpose to substantially lessen competition. Consequently the Commission cannot be satisfied that James Hardie [& Coy]'s conduct in deciding to discontinue supply to CSR owned distributors has or would have the purpose of substantially lessening competition.”

Further, the TPC stated that:

“the Commission can at any time re-consider the conduct and will look to do so if James Hardie acts in a manner contrary to the s 87B undertaking provided.”

No evidence was provided or submissions made as to the public benefits arising from the notified conduct. Submissions were only made as to the basis upon which the notified conduct would not give rise to a substantial lessening of competition and the Commission required the s 87B undertaking as to future conduct to be satisfied that this was the case.

3. James Hardie Conduct

Since the TPC decision in 1995 in relation to the Notification, CSR was able to obtain supply of James Hardie fibre cement products and associated accessories from distributors of James Hardie product. The distributors that CSR sourced product from are typically small and independent distributors.

However, on or about 16 December 2003 James Hardie issued letters to distributors of James Hardie building products, providing notification of changes to supply arrangements (**Distributor Letters**). An example of the Distributor Letters is attached to this submission. The Distributor Letters stated that as of 1 January 2004, James Hardie distributors must not:

- re-sell James Hardie products to other distributors without written authorisation from James Hardie; or
- re-sell James Hardie products to manufacturers who compete with James Hardie.

The Distributor Letters also state that a failure to comply with these requirements would result in the termination or voiding of any written agreements between the distributor and James Hardie and closure of the distributors trading account with James Hardie (**James Hardie Conduct**).

While the James Hardie Conduct related to all James Hardie fibre cement products, the effect of the James Hardie Conduct is to prevent CSR from obtaining fibre cement products in relation to which James Hardie is a monopoly producer, such as fibre cement weatherboard, columns and certain specialty products. The introductory paragraphs of the Distributor Letters refer to these products as 'differentiated products' and refer to the need to protect James Hardie's interests in relation to these products.

Having received the Distributor Letters, the distributors that CSR has been sourcing James Hardie products from have advised CSR that they will cease supplying CSR and have ceased supplying CSR.

4. Conduct is likely to result in a substantial lessening of competition

The James Hardie Conduct is likely to have the effect of substantially lessening competition in the market(s) in which fibre cement products are manufactured and distributed.

The effect and, without other evidence, only possible purpose of the James Hardie Conduct is to prevent or hinder distributors of CSR product from providing a full range of fibre cement products and thereby to:

- substantially reduce the ability of CSR distributors to compete with James Hardie distributors;
- deter distributors of CSR product from distributing CSR product.; and
- thereby hinder CSR as a manufacturer competing with James Hardie fibre cement products.

Each of these was apprehended by the TPC in its Draft Notice as being the purpose or likely effect of the notified conduct.

As was the case in the Notification, the James Hardie Conduct most relevantly relates to a restriction on the supply of products for which James Hardie is a monopoly producer.

Distributors of fibre cement products must be able to provide a full range of fibre cement products to customers. This is, in part, because a significant proportion of distributors, particularly the large hardware chains, do not stock product from more than one supplier. The commercial reasons for distributors not stocking fibre cement products from multiple suppliers

include warehouse and space capacities, equipment requirements, increased overhead costs associated with administration and the financial impact on rebate practices.

The result will be that these distributors are forced to switch to obtaining a full range of fibre cement products from James Hardie. This pressure to switch to obtaining supply from James Hardie is likely to decrease demand for fibre cement products produced by James Hardie's competitors. Not only will James Hardie's position as the dominant manufacturer of fibre cement products be entrenched, it is likely to be enhanced, as James Hardie's competitors lose customers and manufacturing volume, with the consequential loss of economies of scale in their plants. Consequently, the James Hardie Conduct will have an immediate effect on the ability of James Hardie's competitors to compete in the market(s) in which fibre cement products are manufactured and distributed.

5. Conclusion

The conduct that is the subject of the Notification relates to a restriction on the supply of James Hardie products by James Hardie & Coy to CSR directly. As the James Hardie Conduct is engaged in by a person other than the notifying party and relates to different conduct, ie the supply of fibre cement products to James Hardie competitors by third party distributors, it does not fall within the protection conferred by the Notification.

However, the James Hardie Conduct is relevant to the Notification in that the ability of CSR to source James Hardie fibre cement products from third parties was a key factor in the TPC's finding that the conduct the subject of the Notification would not and was never intended to, substantially lessen competition. As a result, the James Hardie Conduct invalidates the basis upon which the Commission allowed the conduct that is the subject of the Notification to remain on the register.

CSR submits on the following grounds that the protection conferred by the Notification should be withdrawn:

- (a) the protected refusal to supply CSR directly without unimpeded access to indirect supply as required by the Deed Poll and the s 87B undertaking has the purpose and/or likely effect of substantially lessening competition in the market(s) in which fibre cement products are manufactured and distributed;
- (b) in all the circumstances now known the notified conduct is not likely to result in a benefit to the public, and James Hardie has never sought to submit that it would result in such a benefit;

- (c) in view of the James Hardie Conduct the Commission can no longer and could not in the future accept that James Hardie is unlikely to disrupt third parties supplying to CSR;
- (d) as James Hardie has no relevant relationship with James Hardie & Coy (and James Hardie & Coy has no continuing activity in the manufacture and sale of fibre cement building products) James Hardie is not in any event entitled to rely on the Notification and the Notification is redundant; and
- (e) allowing the James Hardie & Coy Notification to remain in the circumstances where the notifying company has no continuing activity in the manufacture and sale of fibre cement building products, does not engage in the notified conduct and only exists as an asset to meet asbestos claims, causes at the least confusion and at worst is a misuse of the protection conferred by the Notification.

In these circumstances, CSR requests that the Commission re-consider the Notification and issue a notice under s 93(3) of the Act.

Dated: 3 March, 2004



Chris Bertuch
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