

RESTRICTION OF PUBLICATION OF PART CLAIMED
(see pages 3, 4, 5, 6, 7 and 8 and Attachments B and C)

**CN95/1 - NOTIFICATION BY JAMES HARDIE INDUSTRIES LIMITED
UNDER SECTION 93(1) OF THE TRADE PRACTICES ACT 1974**

**THIRD SUBMISSION BY JAMES HARDIE INDUSTRIES LIMITED
TO THE TRADE PRACTICES COMMISSION**

A. INTRODUCTION

The purpose of this submission is to develop and give emphasis to the significant matters raised in James Hardie's submission of 11 April 1995 (the "second submission") and in our interview with the Commission's staff on Thursday, 27 April 1995.

Section B deals with matters of substance. Section C deals with particular problems James Hardie has with the Commission's draft determination. Section D sets out James Hardie's response to CSR's second submission of 18 April 1995. Both Section C and D only deal with these matters to the extent they are not addressed in Section B.

B. FURTHER SUBMISSIONS

(i) The Market for Fibre Cement and its Close Substitutes

CSR maintains that for present purposes there are two relevant markets, namely:

- (a) a fibre^scement market at the manufacturing level; and
- (b) an internal lining boards market at the distribution trade level.

These descriptions of the relevant markets appear to have been accepted by the Commission.

James Hardie believes that CSR's view of the relevant markets, particularly the market at the manufacturing level, is flawed and urges the Commission to have regard to the following matters:

- (a) James Hardie's fibre cement products have close substitutes across a range of applications. Those substitutes are described in James Hardie's second submission.
- (b) New fixing systems and new technologies, which are recognised in new building standards and codes, have had the effect of increasing the range of substitutable products in the various market segments in which fibre cement products compete. So, for example, Australian Standard 3740 and Amendment No. 7 of the Building Code of Australia (copies of which were provided to the Commission during the interview with James Hardie on 27 April 1995) recognise the many products which can be used in wet areas, including cement render, fibre cement sheets, decorated thermosetting laminated sheet and water-resistant plasterboard.
- (c) The characterisation of the "product" market at the manufacturing level as fibre cement alone:
 - (i) excludes altogether both actual and possible substitutes for fibre cement;
 - (ii) gives too much emphasis to the physical composition of a particular type of product and too little weight to the uses and applications of fibre cement and its close substitutes;
 - (iii) ignores the fact that the product sold to a distributor is sold in the same form as it is sold to end-users, that is to say, it is not transformed or improved at different functional levels.

(ii) Cessation of Supply

James Hardie took its decision to cease supply of fibre cement products to CSR in the eastern States after deliberations over an extended period of six months. During its deliberations James Hardie had no belief or expectation that its action would dissuade CSR from continuing with its plans to establish a fibre cement manufacturing plant at Wetherill Park. James Hardie accepted then, as it accepts now, that the manufacture of fibre cement products by CSR is an inevitability. James Hardie also believes that the marketplace will see the entry of a third Australian based manufacturer as desirable in the building materials markets. James Hardie also had no expectation during its deliberations, and it has no expectation now, that CSR would be unable to source fibre cement products from other sources before commencing manufacture and marketing of these products itself.

(iii) Alternative Supply

Applicants become distributors of James Hardie fibre cement products if they meet the relevant criteria. Distributors are appointed as resellers and as such can sell to whomever they choose.

Appointments of James Hardie distributors are non-exclusive and James Hardie seeks to ensure that its distributors compete effectively with other similar suppliers of James Hardie products within that customer's geographic area and market segment. In this way suppliers are given every incentive to make whatever sales they can to whichever customers they choose.

To overcome any remaining concerns that following cessation of direct supply to CSR James Hardie will make some attempt to interfere with third party supply to CSR, James Hardie has executed a deed poll, a copy of which is Attachment "A".

Specialist lining centres owned by CSR, Boral and Pioneer account for no more than of sales of internal lining products and a much lower percentage of James Hardie's total sales. By way of example, James Hardie's "Villaboard" is sold and marketed through a range of

distributors (see Attachment "B", a confidential document). Other distributors account for of sales of Villaboard. James Hardie is confident CSR will be able to obtain fibre cement products not only from its own badged outlets, but also from established wholesalers and general stockists.

James Hardie also believes that CSR will not be materially affected by the price at which it will acquire fibre cement products if it cannot obtain those products direct from James Hardie. Until CSR opens its new fibre cement plant, in all likelihood within the next 12 months, it will be able to obtain fibre cement products from any number of resellers and existing distributors in all geographical areas willing to sell large volumes of product in quantities which should secure their rebates from James Hardie and at prices low enough to cover their administrative costs. The fact that CSR is itself a financially strong and secure company means any such sales are free of credit risk. Overall, James Hardie estimates the margin will be approximately 2%, a cost burden on CSR of approximately \$14,000 per month based on their current sales. Attachment "C", a confidential document, sets out further details of the likely price settings for Villaboard on the secondary market.

(iv) Likelihood of CSR Commencing Manufacture

Since CSR announced that it will commence manufacture of fibre cement building products James Hardie has had no belief other than that CSR would continue with its plans to develop a manufacturing plant at Wetherill Park and that it would shortly be in a position to sell fibre cement products. The factors which James Hardie is aware of, and which support its belief, are as follows:

- CSR's public announcement on 27 September 1994 and subsequent press statements
- Detailed plans provided in the Environmental Impact Statement accompanying CSR's Development Application for the Wetherill Park site

- Financial resources of CSR (market capitalisation as at 16 March 1995 - \$4.3 billion; 93/94 net profit - \$225.2 million)
- Substantial earthworks being completed at Wetherill Park site
- Appointment of a national marketing manager who is actively developing a market and customers for CSR fibre cement products
- Extensive program of market research to launch CSR's proposed range of fibre cement products
- Commercial imperatives (ie, the manufacture of plant and equipment of the kind required would already be subject to binding contract on CSR)
- Negotiation of supply contracts and orders placed on suppliers of raw materials
- Market perceptions (ie, having announced its intended manufacture of fibre cement products CSR would not lightly alter its course)

(v) Negotiations with CSR, Boral, Pioneer and Others

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(vi) James Hardie's Purpose

Given the matters referred to above under the headings "Alternative Supply" and "Likelihood of CSR Commencing Manufacture", it is clear that James Hardie had no expectation that CSR would be materially hindered in the run up to the day on which it was in a position to market fibre cement products. James Hardie did not expect that CSR could be persuaded not to continue with its plans for a fibre cement manufacturing plant.

James Hardie was concerned to preserve the integrity of its Distribution Policy and Procedures. In addition to supply of product, official distributors of James Hardie products are entitled to support of various kinds. A confidential extract from James Hardie's Distribution Policy and Procedure setting out the benefits provided to distributors was given to the Commission by James Hardie on 27 April 1995. Those benefits fall under the headings Sales Generation, Promotional Support, Staff Training, Financial Support and Customer Service. James Hardie did not wish to continue to provide benefits of this kind to a distributor which was actively preparing to compete with it - to do so would be inconsistent with its Policy and unfair to other distributors. Although these benefits are beneficial to distributors they are by no means essential to the successful selling of James Hardie's fibre cement products.

Those same Distribution Policy and Procedures set out Appointment Criteria for distributors. Sub-paragraph (j) requires that there be a spirit of cooperation between the company and the appointed distributor. Where a distributor is determined to commence manufacture of a product in competition with James Hardie's fibre cement product, James Hardie is unable to see how that spirit of cooperation could continue. Its concerns in this regard have been confirmed by the conduct of CSR in removing James Hardie's advertising material from at least one of its outlets.

Given CSR's announced intention not to sell fibre cement products in Western Australia, James Hardie had and has for the time being no such concerns in Western Australia.

C. SPECIFIC PROBLEMS WITH DRAFT NOTICE

To a large extent, James Hardie's objections to particular assertions and statements of fact were addressed at the meeting with the Commission's staff on 27 April 1995. In this section several other objections are set out and relevant supporting material is supplied. All references are to the paragraph numbers in the Draft Notice:

- 2.6 Attached is a diagram which more accurately describes the internal lining boards market (Attachment "D").
- 2.7 The Commission does not have sufficient material before it to make any assumption or draw any conclusion about overcapacity in the market for internal lining products.
- 5.14 These figures relate only to a segment of the internal lining boards market and should not be accepted.
- 5.15 This assertion suggests the Commission is minded to protect the position of a particular competitor and has given too little weight to the effect on competition in the market as a whole.
- 5.18 James Hardie's objections to this paragraph are dealt with in more detail in Section B. However, some of the more egregious errors deserve attention:
- (a) The withdrawal of direct supply fibre cement from James Hardie to CSR will in any way affect CSR badged outlets (see Attachment "A" to this submission). Those outlets will continue to be supplied on the same terms and no restrictions will be made on such outlets resupplying product.

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- (b) CSR-owned outlets will be able to secure supply from established wholesalers and a range of resellers (see Attachment "C" to this submission). It follows that the effect on its competitive position will be minimal.
- (c) The suggestion that CSR's ability to compete in the plasterboard segment of the market will be affected by its inability to source fibre cement from James Hardie cannot be supported when one has regard to:
- (i) the volume of CSR's plasterboard sales and the number, type and range of outlets through which plasterboard is distributed; and
 - (ii) the fact that CSR-owned outlets account for only of James Hardie's sales and, even taking into account matching sales of plasterboard, plasterboard sales are unlikely to be much affected.

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5.22 James Hardie did not, as the Commission asserts, approach CSR only after CSR announced it would be opening a fibre cement plant.

D. COMMENTS ON THE SECOND SUBMISSION BY CSR LIMITED DATED 18 APRIL 1995

Page 1, paragraph 2: Contrary to the assertion by CSR that James Hardie had sought to "broaden" the relevant markets and minimise the importance of its products in those markets, James Hardie's submission alone sought to identify the relevant markets by reference to close substitutes. We do not understand it to be a criticism of this approach that it is "traditional" and expect the Commission will consider the available substitutes to fibre cement in its final determination.

Page 1, paragraph 3: James Hardie believes that the Commission is entitled and should in fact take into account supply substitution possibilities. Contrary to the assertion made by CSR, James Hardie did not ignore demand substitution and in fact addressed in some detail the issue of demand substitution in its second submission. James Hardie also invited the Commission to consider supply substitution. James Hardie's approach is supported by authority.

Page 1, paragraph 4: James Hardie has information that the Buckeridge Group of Companies has sought out customers in Western Australia, South Australia, Victoria and overseas. The fact that James Hardie has no information as regards Buckeridge's intentions in other States of Australia, such as New South Wales, does not exclude the possibility that the market is national in character. Clearly, the Buckeridge Group of Companies believes that it can economically transport product to the eastern States, and one could reasonably assume that it will eventually consider supplying the whole Australian market.

Page 1, paragraph 5: CSR misrepresents James Hardie's submission in claiming that James Hardie only transports fibre cement products for special applications from the eastern States to Western Australia. The West Australian plant does in fact produce a range of fibre cement products, some of which are sent to other States and exported to overseas markets such as New Zealand. James Hardie seeks only to maximise output from and efficiencies at all its plants. It does not regard transport costs as so prohibitive as to prevent it manufacturing in one State and distributing to all other Australian States.

Page 1, paragraph 7: The fact that there may have been health fears associated with asbestos has no relevance at all to the analysis of the relevant market or markets in which asbestos cement sheets and, more recently, fibre cement products compete. The fact is that the Commission was prepared to accept that there was a market for building cladding products. The Commission also referred to the introduction of wood pulp cellulose to asbestos sheeting,

foreshadowing the introduction of fibre cement (see paragraph 28). It concluded (at paragraph 32):

"The Commission is satisfied that a high degree of substitutability exists between A.C. products and other building materials and hence the relevant products cannot be limited to A.C. products only but also include substitutes".

It did not determine there was a discrete asbestos cement market. James Hardie submits that if the same approach were taken in this inquiry, no separate fibre cement market could be identified.

CSR has made unsupported assertions that fibre cement products have created new market positions and new market considerations for the products now produced by James Hardie.

Page 2, paragraph 1: No support is given for the proposition that there are separate fibre cement markets at the manufacturing level and distinct internal lining boards markets at the distribution/trade level.

Page 2, paragraph 4: James Hardie strongly disputes the claim that it will be able to influence in any way CSR's capacity to support fibre cement products from an independent distributor. James Hardie imposes no conditions on resale and is indifferent to the price paid by end users and the destination of its products.

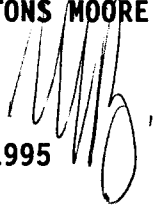
Page 2, paragraph 5: James Hardie believes strongly that it should not be required to supply CSR direct when CSR is actively preparing to compete against it and has already demonstrated that it is not prepared to support sales of James Hardie's fibre cement products. James Hardie reasonably apprehends that its concerns in this regard can only increase as the date approaches for the commissioning of CSR's fibre cement plant.

Page 3, paragraph 1: James Hardie was uniquely placed to provide useful input to the process of environmental assessment associated with CSR's planned manufacturing facility at Wetherill Park. It was advised by its engineering consultants that the Environmental Impact

Statement produced by CSR did not comply with the formal requirements of the Environmental Planning and Assessment Act and the Regulations to that Act. It was James Hardie's consultant's advice that until CSR produced a document which met the requirements of the Environmental Assessment Act and Regulations it should not go into detail as to its deficiencies on merit grounds. In the result, the Minister for Planning approved the application notwithstanding its technical deficiencies. James Hardie had an opportunity to present its concerns on the grounds of merit to the Land and Environment Court through the appeal process, but it chose not to do so and did not proceed with an appeal.

MIDDLETONS MOORE & BEVINS

5 May 1995

A handwritten signature in black ink, appearing to be 'MMB', is written over the date '5 May 1995'.

DEED POLL

THIS DEED POLL is made the *5th* day of May 1995 by:

JAMES HARDIE & COY PTY LIMITED (ACN 000 035 512) of level 9, 65 York Street, Sydney in the State of New South Wales.

Whereas:

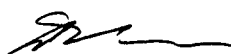
- A. James Hardie & Coy Pty Limited gave to the Trade Practices Commission a notice on 13 February 1995 under section 93(1) of the Trade Practices Act 1974.
- B. The Trade Practices Commission made certain enquiries and on 19 April 1995 published a draft notice under section 93(3) of the Trade Practices Act 1974.
- C. The Trade Practices Commission indicated in its draft notice that, amongst other things, it had concerns about the ability of CSR Limited to source fibre cement products from alternative suppliers to James Hardie and Coy Pty Limited in the period prior to CSR Limited commencing production of fibre cement products itself.
- D. The Trade Practices Commission also indicated concerns about future supply by James Hardie & Coy Pty Limited to outlets aligned with but not owned by CSR Limited.
- E. James Hardie & Coy Pty Limited has stated that it is not its intention nor will it in the future attempt to prevent supply of fibre cement products to CSR Limited from any third party neither will it discriminate against outlets aligned with CSR Limited and it now gives those undertakings in solemn form.

This Deed Witnesses:

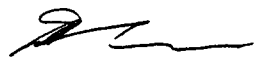
- 1. Until the earlier of two (2) years from the date of this deed and the day on which the Trade Practices Commission gives a notice under section 93(3) of the Trade Practices Act 1974 James Hardie & Coy Pty Limited will not:

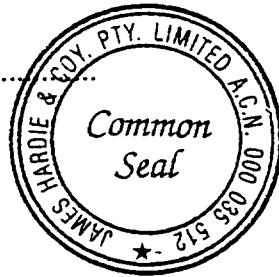



- (a) prevent, limit or restrict supply of fibre cement products to any third party for the reason that that third party does or intends to supply CSR Limited with fibre cement products;
 - (b) induce any third party to prevent, limit or restrict supply of fibre cement products to CSR Limited or to any other third party who does or intends to supply CSR Limited with fibre cement products;
 - (c) make it known to any third party that any adverse consequences of any kind will follow for that third party if it supplies fibre cement products to CSR Limited; nor
 - (d) treat any outlet currently being supplied by it and aligned with but not owned by CSR Limited in a way materially different to other outlets of the same distributor category or similar purchase requirements in relation to the supply of fibre cement products.
2. The covenant made in paragraph 1 above will take effect according to its terms. The Trade Practices Commission may also accept the covenant provided in paragraph 1 as an undertaking given by a person for the purposes of section 87B of the Trade Practices Act 1974 and the covenant given in paragraph 1 will, in addition to its effect as a deed poll, be enforceable according to the terms of section 87B of the Trade Practices Act 1974.
3. Whether or not the Trade Practices Commission accepts the covenant made in paragraph 1 as an undertaking for the purposes of section 87B of the Trade Practices Act 1974, within the period in which the covenant in paragraph 1 is binding upon James Hardie & Coy Pty Limited it will, if requested to do so by the Trade Practices Commission, write to those customers who are or would be potential third party suppliers of fibre cement products to CSR Limited informing those customers of the general effect of the matters contained in sub paragraphs (a) to (c) of paragraph 1 of this deed.
4. In this deed:
 - (a) the day on which the Trade Practices Commission gives a notice under section 93(3) of the Trade Practices Act 1974 has the extended meaning given in section 93(9) of that Act; and
 - (b) "third party" means a party not related to James Hardie & Coy Pty Limited within the meaning of section 50 of the Corporations Law.
5. Nothing in this deed nor in the operation of paragraph 2 prevents James Hardie & Coy Pty Limited from giving effect in the ordinary course of its business to credit risk assessments and to its Distribution Policy and Procedures dated July 1993 as amended from time to time.



The common seal of)
James Hardie & Coy Pty Limited)
was affixed in accordance with its)
Articles of Association)


.....
Secretary




.....
Director

ATTACHMENT "B"

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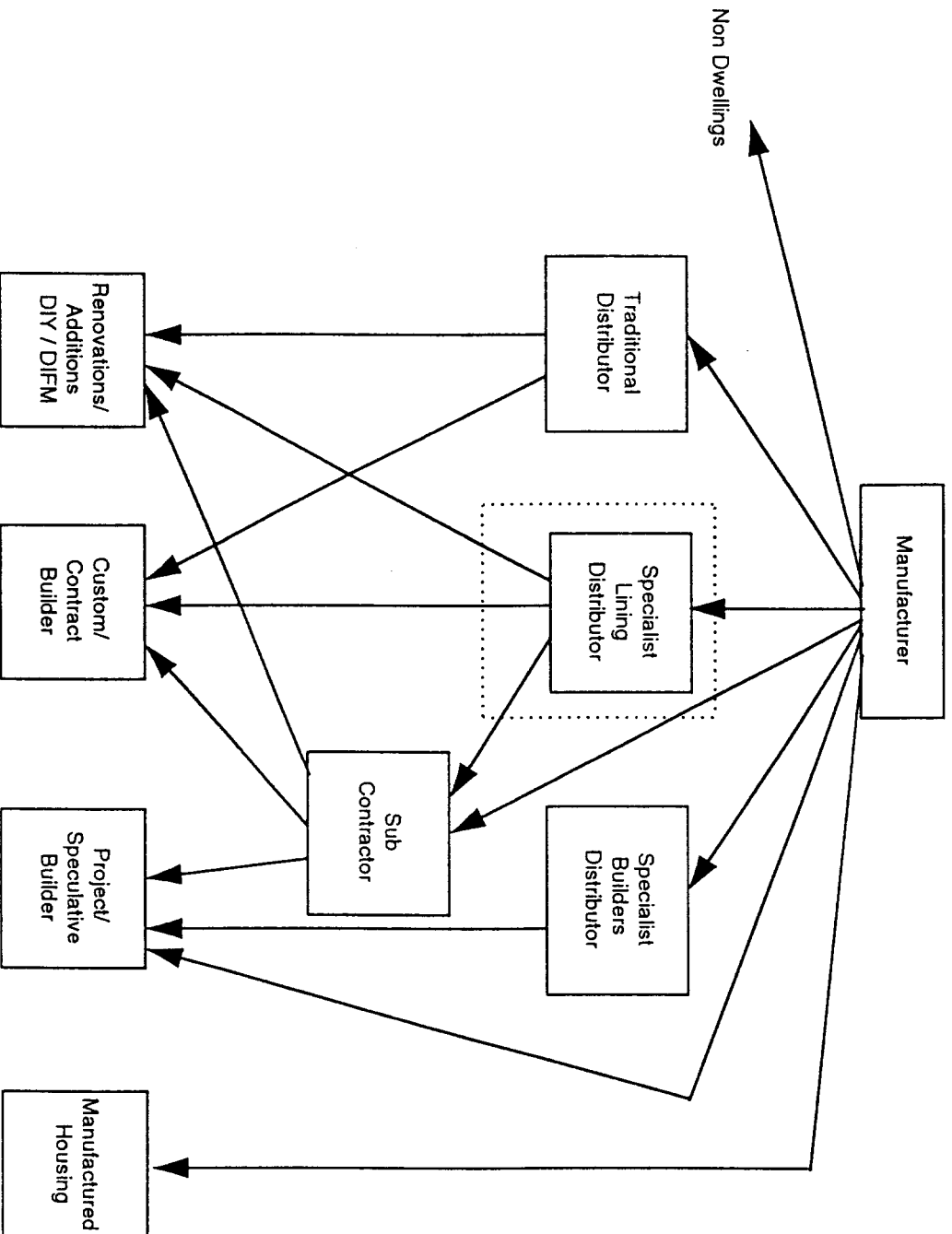
ATTACHMENT C

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Internal Lining Market



Wall & Ceiling Lining Materials in Total Building - 1992, BIS Shrapnel

	'000m ²	%
Plasterboard	78516.3	69
Bricks	12020.6	10
Fibre Cement	8864.3	8
Other	15071.1	13
	114472.3	100