



Australian Competition & Consumer Commission

PO Box 1199
Dickson ACT 2602
470 Northbourne Ave
Dickson ACT 2602
Australia
Ph (02) 6243 1111
Fax (02) 6243 1199

Our Ref: N30710
Contact Officer: Jason Byrne
Contact Phone: (02) 6243 1279

3 March 2004

«Name»

Dear «Salutation»

Review of Notification of Exclusive Dealing (N30710) – James Hardie and Coy Pty Ltd

I am writing to you to consult you and seek any comments you may wish to provide in relation to a review of the above notification lodged by James Hardie with the then Trade Practices Commission (TPC), predecessor to the Australian Competition and Consumer Commission (the Commission) in February 1995. The notification relates to supply of fibre cement building products.

As you may be aware, the competition provisions of the *Trade Practices Act 1974* (the Act) prohibit certain forms of anti-competitive conduct or arrangements. Section 47 of the Act prohibits conduct known as exclusive dealing, in the main part, where it has the purpose or effect of substantially lessening competition. Generally speaking, exclusive dealing involves one business trading with another, imposing restrictions on the other's freedom to choose with whom, or in what, it deals.

Notification process

While the Act prohibits certain forms of anti-competitive conduct, it does, however, recognise that compliance with the competition provisions of the Act may not always be consistent with the most efficient outcome. It therefore allows immunity to be afforded in relation to some of the competition provisions of the Act in certain circumstances. Generally speaking, immunity will only be afforded where the proposed conduct is likely to be in the public interest.

One way businesses may obtain immunity in relation to conduct that might be at risk of breaching the exclusive dealing provisions of the Act is to lodge a 'notification' with the Commission. Once lodged, immunity for the notified conduct (other than third line forcing) commences automatically.



The Commission may take steps to remove the immunity afforded by a notification of exclusive dealing (other than third line forcing) at any time if it is satisfied that the conduct notified would have the purpose or likely effect of substantially lessening competition and any public benefit would not outweigh the detriment constituted by a lessening of competition.

Exclusive dealing notification lodged by James Hardie (N30710)

James Hardie lodged a notification of exclusive dealing on 13 February 1995. The notified conduct related to James Hardie supplying or refusing to supply fibre cement products to CSR on condition or for the reason that CSR will not re-supply or has not agreed not to re-supply fibre cement products to distributors/re-sellers in any State or Territory in Australia except for Western Australia and the Northern Territory.

At the time the TPC in assessing the notification came to the conclusion that the conduct may have the effect of substantially lessening competition in the market for the manufacturing of fibre cement products and that the conduct would be unlikely to result in a benefit to the public. The TPC therefore issued a draft notice to revoke the notification.

Subsequent to issue of the draft notice James Hardie advised that it was not its intention, nor will it in the future, attempt to prevent the supply of fibre cement products to CSR from any third party or discriminate against outlets aligned with CSR. James Hardie provided an undertaking to that effect for a period of two years (expired in 1997). The TPC accepted the undertaking and the notification was allowed to stand.

I have enclosed a copy of the above mentioned notification.

Review of Notification

The Commission has recently received information relating to James Hardie placing certain conditions on distributors for the re-supply of James Hardie products, namely that 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.

In light of this information, the expiry of the undertaking, and the considerable time that has passed since the Commission considered the conduct that was afforded immunity under the notification, the Commission has decided to review the notification with a view to assessing the effect the conduct may have on competition and whether the public benefit continues to outweigh the public detriment.

Request for submissions

To assist the Commission in its review it would be helpful to obtain your views on the impact on competition and the likely public benefits and public detriments arising from the notification relevant to you.

In particular the Commission is interested in your views on the following issues:

- the market(s) relevant to the assessment of the notification;
- the extent to which these market(s) have changed since 1995;
- the manufacturing and distribution channels/networks in Australia for fibre cement products relevant to you;
- the geographical dimension of the market(s) for the manufacturing and distribution of fibre cement products;
- the level of fibre cement imports, if any, and any advantages/disadvantages they pose in Australia;
- the availability and acceptance in the industry of substitutes for any specific type of fibre cement product(s);
- the extent to which, and the reasons why, distributors seek to carry the full range of fibre cement products; and
- the extent to which recent information received by the Commission in relation to James Hardie's conduct towards distributors is, or is likely to, impact on the public benefit and public detriment arising from the notification.

The Commission asks for submissions to be in writing so they can be made publicly available. They are placed on a public register for this purpose.

You may request that information you provide in a submission to the Commission be treated as confidential and not placed on the public register. The Commission may take into account information for which it grants confidentiality, even if that information is not publicly available. Guidelines for seeking confidentiality are attached for your information. A copy of this letter has been placed on the Commission's public register.

If you wish to lodge a submission please address the submission to:

The General Manager
Adjudication Branch
Australian Competition & Consumer Commission
PO Box 1199
Dickson ACT 2602

Submissions can also be lodged by e-mail to: adjudication@accc.gov.au.

The closing date for submissions is 26 March 2004.

Should you have any questions please contact me on (02) 6243 1049 or Jason Byrne on (02) 6243 1279.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Isabelle Arnaud', written in a cursive style.

Isabelle Arnaud
Director
Adjudication Branch

No	Name	Salutation
1.	Mr Len Buckeridge Chief Executive Officer Buckeridge Group of Companies 6th Floor, 18 Mount St PERTH WA 6000	Mr Buckeridge
2.	Mr Alec Brennan Managing Director CSR Level 1, 9 Help St CHATSWOOD NSW 2067	Mr Brennan
3.	Mr Rod Pearse Chief Executive Officer Boral Level 39 AMP Centre 50 Bridge St SYDNEY NSW 2000	Mr Pearse
4.	Mr Leslie Cadzow Chief Executive Officer Hanson Australia (Holdings) Level 6, 35 Clarence St SYDNEY NSW 2000	Mr Cadzow
5.	Mr Wilhelm Harnisch Chief Executive Officer Master Builders Association Level 3 Construction House 217 Northbourne Avenue TURNER ACT 2612	Mr Harnisch
6.	Mr Peter Davis Managing Director Bunnings 126 Pilbara St WELSHPOOL WA 6106	Mr Davis
7.	Mr Frank Whitford Chief Executive Officer Mitre 10 12 Dansu Court HALLAM VIC 3803	Mr Whitford
8.	Mr Graeme Danks John Danks & Sons 414-426 Lower Dandenong Road BRAESIDE VIC 3195	Mr Danks
9.	Mr Darryl McGrath Mac's Place 3 Oldfield Road 17 Mile Rocks QLD 4073	Mr McGrath
10.	Ms Elizabeth Lynch Guardian Building Products	Ms Lynch

	21 Hollstrom Pl WETHERILL PARK NSW 2164	
11.	The Manager CSP Distributors 15 Strong Avenue THOMASTOWN VIC 3074	Sir/Madam
12.	The Manager NHS Plasterboard 30 Wyong Rd LAMBTON NSW 2299	Sir/Madam
13.	The Manager Harding's Hardware 1485 South Gippsland Hwy CRANBOURNE VIC	Sir/Madam
14.	The Manager Ultimate Building Products 22 Love St BULIMBA QLD 4171	Sir/Madam
15.	The Manager Wingfield Timber 79 Cavan Rd GEPPS CROSS SA 5094	Sir/Madam