



Australian Competition & Consumer Commission

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Our Ref: N30710
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3 March 2004

Mr Peter Macdonald
Chief Executive Officer
James Hardie
Level 3, 22 Pitt St
SYDNEY NSW 2000

Dear Mr Macdonald

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

I refer to the above notification lodged by James Hardie and Coy Pty Ltd (James Hardie) with the then Trade Practices Commission (TPC), predecessor to the Australian Competition and Consumer Commission (the Commission) in February 1995. The notified conduct relates 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.

The Commission 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.

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.

Letters have been sent to interested parties seeking submissions to assist the Commission in its review of the notification. For your information I have attached a copy of this letter and a list of parties to whom the letter was sent. I would also invite you to respond to queries raised by the Commission in the letter and any other information you believe to be relevant to the review.

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 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:

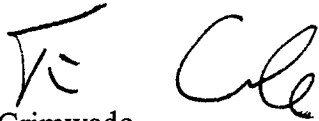
The General Manager
Adjudication Branch
Australian Competition & Consumer Commission
PO Box 1199
Dickson ACT 2602

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

The closing date for submissions is 26 March 2004.

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

Yours sincerely



Tim Grimwade
General Manager
Adjudication Branch

GUIDELINES FOR CONFIDENTIALITY CLAIMS

The process whereby the Commission assesses applications for authorisation is very public, transparent and consultative. The *Trade Practices Act 1974* (the Act) requires the Commission to maintain a public register in respect of authorisation applications.

Applicants and interested parties can request that a submission, or a part of a submission, be excluded from the public register.

The Commission is required under the Act to exclude from the public register upon request details of:

- (i) secret formulae or processes;
- (ii) the cash consideration offered for the acquisition of shares in the capital of a body corporate or assets of a person; or
- (iii) the current manufacturing, producing or marketing costs of goods or services.

The Commission also has the discretion, under s89 of the Act, to exclude material from the public register if it is satisfied that it is desirable to do so, either by reason of the confidential nature of the material or for any other reason. The Commission expects that a party claiming confidentiality on these grounds will present a case for its treatment in this manner.

Under Regulation 24 of the *Trade Practices Regulations*, when a request for confidentiality is made to the Commission:

- (a) where the request is that a whole document be excluded, the words “**Restriction of Publication Claimed**” should appear in red writing near the top of each page; and
- (b) where the request is that part of a document be excluded, the words “**Restriction of Publication of Part Claimed**” should appear in red near the top of the first page of each document, and the part for which confidentiality is claimed should also be marked in red. A submission of more than 5 pages should also include a description of the whereabouts of the parts for which confidentiality is claimed.

However, even if a document does not meet these technical requirements, the Commission may still grant confidentiality where, in the Commission's view, it is desirable to do so.

If the Commission denies a confidentiality request, the requesting party may ask that the material be returned. As a matter of practice, the Commission will specify a period (usually 14 days) in which they can request the return of such material. Upon response, the Commission will return the original material and destroy all associated copies. The Commission will not consider this material when reaching its decision.

If the Commission does not receive a response within the specified period, the original material will be placed on the public register.

Information or documents granted confidentiality may be used by the Commission pursuant to its powers generally under the *Trade Practices Act*.