



**Australian
Competition &
Consumer
Commission**

Our Ref: C2006/71
Contact Officer: Hew Atkin
Contact Number: (02) 6243 1235

PO Box 1199
Dickson ACT 2602
470 Northbourne Ave
Dickson ACT 2602
ph (02) 6243 1111
fax (02) 6243 1199
www.accc.gov.au

7 March 2006

Ms Fiona Crosbie
Partner
Allens Arthur Robinson
Level 17, Chifley Tower
2 Chifley Square
Sydney NSW 2000

By facsimile: (02) 9230 5333

Dear Ms Crosbie

Exclusive dealing notification N31496 – James Hardie Australia Pty Ltd

Thank you for the further information provided in your letter of 9 February 2006 regarding exclusive dealing notification N31496 lodged by James Hardie Australia Pty Ltd (James Hardie) in respect of a proposed new distribution policy for fibre cement products (the proposed distribution policy).

As you are aware the ACCC is currently assessing the notification in accordance with the test contained in section 93(3) of the *Trade Practices Act 1974* (the Act).

Under the test the ACCC must consider whether the proposed distribution policy would have the purpose or is likely to have the effect of substantially lessening competition within the meaning of section 47 of the Act.

Further, the ACCC must consider whether, in all the circumstances, the proposed distribution policy is likely to result in a benefit to the public and whether that benefit is likely to outweigh the detriment to the public constituted by any lessening of competition that is likely to arise from the proposed distribution policy.

The ACCC has received a number of submissions from interested parties in response to the notification. I understand that you have obtained copies of the submissions that have been placed on the ACCC's website. If you wish to be provided with a hard copy of these submissions please let me know.



As you are aware the submissions raise a number of concerns with the proposed distribution policy, particularly in relation to its purpose and the likely effect on competition. The ACCC understands that James Hardie intends to respond to some of the issues raised by interested parties and the ACCC encourages James Hardie to do so.

The ACCC has also identified a number of areas where it would appreciate some further information and documents from James Hardie. Attached to this letter is a Schedule which sets out the additional information and documents that the ACCC requests James Hardie to provide.

The ACCC understands that James Hardie has issued letters advising distributors that the proposed distribution policy will come into effect on 1 April 2006. The ACCC is conscious of the proposed start date and is conducting its assessment as expeditiously as possible. However, given the significant issues raised by the notification and the additional information and documents identified in the Schedule as being necessary for the ACCC's consideration of the notification, the ACCC requests that James Hardie not give effect to the proposed distribution policy until the ACCC has completed its assessment of the notification.

It would be appreciated if you could advise whether James Hardie intends to delay giving effect to its proposed policy until the ACCC has completed its assessment of the notification. I would be grateful of a response on this issue by **14 March 2006**.

It would also be appreciated if James Hardie could provide the additional documents and information identified in the Schedule by **23 March 2006**. In responding, please advise of any confidentiality claims.

This letter will be placed on the ACCC's public register.

Should you wish to discuss any other aspect of this matter, please do not hesitate to contact Hew Atkin on (02) 6243 1235 or Joanne Palisi on (02) 6243 1323.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Scott Gregson', with a large, sweeping flourish above the name.

Scott Gregson
General Manager
Adjudication Branch

SCHEDULE

Documents requested

The ACCC requests that James Hardie Australia Pty Ltd (James Hardie) provide:

1. documents from 1 January 2005 onwards referring to, considering or discussing the proposed distribution policy, including the development and implementation of that policy whether in final form or otherwise;
2. any other documents from 1 January 2005 onwards considered and/or relied upon in the development of the proposed distribution policy and;
3. documents from 1 January 2005 onwards referring to, considering or discussing the supply of James Hardie fibre cement products to:
 - fibre cement manufactures that compete with James Hardie and;
 - distributors who have an exclusive arrangement to acquire fibre cement products from fibre cement manufacturers that compete with James Hardie.

In this schedule:

'documents' means any documents in the possession, power or control of James Hardie Australia Pty Ltd and are defined to include, but are not limited to:

correspondence, memoranda, minutes, notes, reports, facsimile transmissions, emails, diary entries, and any drafts thereof; whether in hard copy or electronic form.

'proposed distribution policy' means the policy the subject of notification N31496 whereby James Hardie will require that:

- a) its distributors agree not to on-sell James Hardie's products, other than Artista Columns and Accessories, to:
 - i) fibre cement manufacturers
 - ii) distributors owned by, or franchisees of fibre cement manufacturers and
 - iii) distributors who have an exclusive arrangement to acquire fibre cement products from fibre cement manufacturers that compete with James Hardie and
- b) those of its distributors seeking to purchase the new technology differentiated products agree:
 - i) to acquire 100% of their fibre cement products from James Hardie and
 - ii) not to on-sell James Hardies' new technology differentiated products to other distributors

unless James Hardie gives prior written consent to do otherwise.

SCHEDULE

Information requested

1. Please provide an explanation of how James Hardie intends to ensure compliance with the proposed distribution policy.
2. Part (a)(iii) of the proposed distribution policy provides that distributors must agree not to on-sell to other distributors who have an 'exclusive arrangement' with fibre cement manufacturers that compete with James Hardie. Please provide clarification of what is meant by 'exclusive arrangement' with respect to the proposed distribution policy and how James Hardie will determine which distributors have an 'exclusive arrangement' with competing fibre cement manufacturers.
3. Please provide an explanation of how purchasers of fibre cement products may obtain a rebate or discount from James Hardie, and how James Hardie decides which purchasers are entitled to such an offer.
4. What proportion of James Hardie distributors receive a rebate or a discount as referred to in question 3 above?
5. Please provide details of James Hardie's marketing plan for the new technology differentiated products, and who is being targeted under this marketing plan.
6. Please indicate the locations of James Hardie's manufacturing plants in which the new technology differentiated products are manufactured.

Please provide the documents and information identified in this Schedule by **23 March 2006**.