



**Australian
Competition &
Consumer
Commission**

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Our Ref: C2006/71
Contact Officer: Kelvin Binning
Contact Number: (02) 6243 1351

16 January 2006

«Name»

Dear «Salutation»

Exclusive dealing notification N3149⁶⁴⁵¹ lodged by James Hardie Australia Pty Ltd

I am writing to you to make you aware of and to seek any comments you may wish to provide in relation to a notification lodged by James Hardie Australia Pty Ltd (James Hardie) with the Australian Competition and Consumer Commission (ACCC) on 23 December 2005 (the notification). The notification relates to the supply and re-supply of fibre cement building products manufactured by James Hardie. A copy of the notification is enclosed.

Exclusive dealing

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 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, provide processes allowing immunity from the application of many of its restrictive trade practices provisions to be afforded in certain circumstances.

Under the notification process, immunity is automatically afforded to the notified exclusive dealing conduct. The ACCC may take steps to remove the immunity afforded by a notification of exclusive dealing at any time if it is satisfied that the conduct notified has the purpose or likely effect of substantially lessening competition, and any public benefit will not outweigh the detriment constituted by the lessening of competition.



Notification lodged by James Hardie

The notification lodged by James Hardie concerns conduct contained within its new distribution policy. In particular, under the policy James Hardie will require that:

- (a) its distributors agree not to on-sell James Hardie's products, other than its 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 Hardie's new technology differentiated products to other distributors

unless James Hardie gives prior written consent to do otherwise.

James Hardie has defined 'new technologically differentiated products' to be:

- Linea TM Weatherboard
- Linea TM Trim
- Aqua Tech TM Wet Area Flooring
- Eclipsa TM Eaves Lining
- Ezi Grid [®] Tile Underlay.

Request for submission

To assist the ACCC in its assessment of the notification it would be helpful to obtain your view on the impact on competition and the likely public benefits and public detriments arising from the notification relevant to you. In particular, I invite your response to the following:

1. How many different manufacturers of fibre cement products operate in Australia? What are their relative positions?
2. What substitute products are available for fibre cement products?
3. What substitute products are available for James Hardie's new technologically differentiated products?
4. Do customers generally purchase fibre cement products within their local geographic area or is it economically viable to purchase fibre cement products from a distributor in a different city or a different state?
5. What is the level of fibre cement imports, if any, and to what extent do they compete with products manufactured domestically?

6. Are distributors of fibre cement products generally owned or otherwise aligned with manufacturers?
7. What proportion of distributors stock products from a number of manufacturers? What proportion of distributors stock James Hardie's products and more specifically, James Hardie's new technologically differentiated products?
8. Who are the largest distributors of fibre cement products and where are they located? Do the largest distributors stock products from a number of manufacturers? Do the largest distributors stock James Hardie's products? Do the largest distributors stock James Hardie's new technologically differentiated products?
9. To what extent do distributors on-sell fibre cement products? Do any of the largest distributors engage in on-selling?
10. To what extent do distributors seek to carry the full range of fibre cement products? Are there advantages in stocking a full range?
11. Do distributors generally establish a full range of fibre cements products by acquiring stock from a single manufacturer or from a number of manufacturers?

I also invite you to provide any additional information which you believe to be relevant to the ACCC's assessment of the notification lodged by James Hardie.

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

You may request that information you provide in a submission to the ACCC be treated as confidential and not placed on the public register. The ACCC 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 ACCC'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.

I would be grateful for your response by **Monday, 30 January 2006**.

If you have any questions about the issues raised in this letter please contact Hew Atkin on (02) 6243 1235 or Kelvin Binning on (02) 6243 1351.

A copy of this letter will be placed on the ACCC's public register.

Yours sincerely

Scott Gregson
General Manager
Adjudication Branch

List of interested parties

- Boral
- Buckeridge Group of Companies
- Bunnings Group
- CSP Distributors
- CSR
- Guardian Building Products
- Harding's Hardware
- Housing Industry Association
- Hudson's Building Supplies
- John Danks & Sons
- Lafarge Plasterboard
- Master Builders Association
- Mac's Place
- Mitre 10
- National Building Suppliers Group
- NHS Plasterboard
- Ultimate Building Products
- Wingfield Timber

GUIDELINES FOR CONFIDENTIALITY CLAIMS

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

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

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

- (i) secret formulae or process;
- (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.

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

The ACCC 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 ACCC 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 ACCC:

- (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.

Applicants, as a matter of course, should remove headers claiming "confidential communication" from all Emails and otherwise, unless they have a particular piece of information that they justify to the ACCC deserves exclusion from the public register. If confidentiality is not requested but a header cannot be removed, it should be clearly stated at the beginning of the communication that confidentiality is not requested.

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

If the ACCC 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 ACCC pursuant to its powers generally under the Act.