



23 December 2005

James Hardie Australia Pty Limited
ABN 12 084 635 558

Mr Scott Gregson
General Manager – Adjudication
Australian Competition and Consumer
Commission
470 Northbourne Avenue
Dickson ACT 2602

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Sydney NSW 2000 Australia

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BY COURIER

Dear Mr Gregson

James Hardie Australia Pty Ltd: Form G Exclusive Dealing Notification

I refer to your discussion with Fiona Crosbie of Allens Arthur Robinson, solicitors for James Hardie Australia Pty Ltd (**James Hardie**) in relation to this matter.

I enclose:

- (a) Form G – Notification of Exclusive Dealing (the **Notification**); and
- (b) a cheque in the amount of \$2,500 in payment of the lodgement fee.

1.1 Confidentiality – paragraph 4.2

James Hardie requests that the Commission treats as confidential the information contained in paragraph 4.2 of Attachment A to the Notification, and that the Commission excludes this information from the public register.

The paragraph discloses the manner in which James Hardie prices five of its most innovative products. This information is highly commercially sensitive.

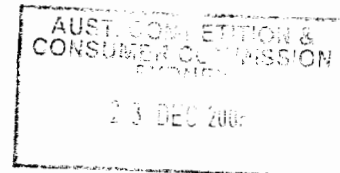
1.2 Launch of Linea™ Weatherboard

The Notification describes a new distribution policy that James Hardie seeks to implement. Part of the policy governs distribution of five innovative new products, developed by James Hardie, the most significant of which is Linea™ Weatherboard. James Hardie has already conducted a limited launch of this product which involved providing appropriate training to certain distributors and end users. James Hardie now wishes to distribute the product more broadly on the basis of the policy described in the Notification.

If you have any questions in relation to the Notification, or the matters set out above, please do not hesitate to call Fiona Crosbie of Allens Arthur Robinson on (02) 9230 4383.

Yours sincerely,

Joanne Marchione
James Hardie Australia Pty Limited
Senior Legal Counsel – Asia Pacific

**FORM G**

Regulation 9

COMMONWEALTH OF AUSTRALIA*Trade Practices Act 1974 - Sub-section 93(1)***EXCLUSIVE DEALING:****NOTIFICATION**

To the Australian Competition & Consumer Commission:

Notice is hereby given, in accordance with sub-section 93(1) of the *Trade Practices Act 1974* of particulars of conduct or of proposed conduct of a kind referred to in sub-section 47(2) of that Act in which the person giving notice engages or proposes to engage.

-
1. (a) **Name of person giving notice:**
James Hardie Australia Pty Ltd
ABN: 12 084 635 558
- (b) **Short description of business carried on by that person:**
Manufacture and sale of fibre cement building products.
- (c) **Address in Australia for service of documents on that person:**
C/- Fiona Crosbie
Allens Arthur Robinson
Level 17, Chifley Tower
2 Chifley Square
Sydney NSW 2000
2. (a) **Description of the goods or services in relation to the supply or acquisition of which this notice relates:**
Products, other than Artista™ Columns and Accessories, manufactured by James Hardie Australia Pty Ltd (*James Hardie*).
- (b) **Description of the conduct or proposed conduct:**
See Attachment A.
3. (a) **Class or classes of persons to which the conduct relates:**
Distributors of James Hardie's products.
- (b) **Number of those persons:**
- (i) At the present time – 210 distributors.
- (ii) Estimate within the next year – The applicant is unable to estimate at this time, however the number will exceed 50.

- (c) Where number of persons stated in item 3(b)(i) is less than 50, their names and addresses:

Not applicable

Name and address of person authorised by the person giving this notice to provide additional information in relation to this notice:

Fiona Crosbie
Allens Arthur Robinson,
Level 17, Chifley Tower
2 Chifley Square
SYDNEY NSW 2000

Dated: 23 December 2005

Signed on behalf of the person giving this notice:

Fiona Crosbie

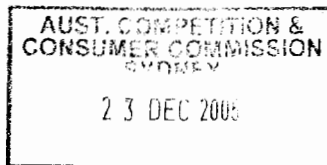
(Signature)

FIONA CROSBIE

PARTNER

ALLENS ARTHUR ROBINSON

Solicitors for James Hardie



N31496

ATTACHMENT A

1. Background

1.1 James Hardie products

James Hardie manufactures fibre cement products for use in the building industry. Unlike its principal competitors, James Hardie only manufactures fibre cement products, not a full range of building products. James Hardie products fall into two broad categories: core products and technology differentiated products.

The great majority of James Hardie sales are from its core products. These products are very similar in appearance and function to many of its competitors' fibre cement and non-fibre cement products. A list of James Hardie's core products is set out in Attachment B.

Technology differentiated products are innovative products based on fibre cement which are specific to James Hardie, in the sense that no other manufacturer makes precisely equivalent fibre cement products. A list of James Hardie's technology differentiated products is set out in Attachment B. It is by these technology differentiated products that James Hardie seeks to distinguish its business from that of its competitors, and thereby drive sales of its core products.

There are 2 aspects to the conduct the subject of this notification and described at paragraph 2.2 below. The first relates to James Hardie's products, other than its Artista™ Columns and Accessories, and the second relates to only five of James Hardie's technology differentiated products: Linea™ Weatherboard, Linea™ Trim, AquaTec™ Wet Area Flooring, Eclipsa™ Eaves Lining and Ezi-Grid® Tile Underlay products (the ***new technology differentiated products***). The following is a brief summary of each of the new technology differentiated products:

- (a) **Linea™ Weatherboard** is a fibre cement weatherboard and fascia product, which, like other fibre cement weatherboards, is lower maintenance and more durable than traditional timber weatherboards, and is fire and termite resistant. Linea™ Weatherboard's innovative and distinguishing feature is that it is thicker than any other fibre cement weatherboard currently on the market, yet easy to work with.
- (b) **Linea™ Trim** is an external window and corner trim made of fibre cement. It is designed to complement Linea™ Weatherboard. This product will be launched in early 2006. Linea™ Trim's innovative and distinguishing feature is that it is 38mm thick, yet easy to work with.
- (c) **Aqua Tec™ Wet Area Flooring** is a structural sheet flooring product developed for wet areas such as bathrooms and laundries. AquaTec has all the benefits of fibre cement flooring, but its innovative and distinguishing feature is that it is easier and therefore cheaper to install than compressed fibre cement such as HardiPanel Compressed Sheet, CSR 'Cemintel Compressed Sheet' or BGC compressed sheet, which can also be used in this application.

- (d) **Eclipsa™ Eaves Lining** is a pre-painted eaves lining sheet with a removable adhesive slipsheet. Its innovative and distinguishing feature is the factory application of the paint and removable slipsheet to the board.
- (e) **Ezi-Grid® Tile Underlay** is a substrate for ceramic tiles laid over existing timber strip, particle board or plywood sheet floors. It has an embossed grid pattern for easy cutting. Its innovative and distinguishing feature is the embossed grid pattern on the face of the board.

1.2 Distribution of James Hardie products

James Hardie is not vertically integrated. Unlike its principal competitors, James Hardie does not own or control a distribution network, nor does it franchise retail outlets.

James Hardie supplies its products to distributors, most of which are retailers who sell the products to end users (builders or the general public). There is a class of distributors which sells products to other distributors, as well as to end-users. James Hardie estimates that this class would account for no more than 5% of total James Hardie sales.

1.3 Principal competitors and their products

James Hardie's principal competitors are CSR and BGC. In Australia, James Hardie is much smaller than CSR and BGC. James Hardie achieves an annual net revenue in Australia of approximately \$200M, and manufactures solely fibre cement products.

In contrast, CSR in its 2005 financial year, had annual revenue from its building materials division in Australia of \$932M (including bricks, tiles, plasterboard and aerated concrete panels).

While BGC is privately owned, it was the largest new home builder in Australia in 2004/5 by a substantial margin, and has an integrated business across building products and services (including cement, steel and plasterboard), commercial construction, contracting, property investment and transportation.

CSR and BGC, manufacture a wide range of fibre cement and non-fibre cement building materials. One important non-fibre cement product they both manufacture is plasterboard (CSR's product is also known as Gyprock). It is the fundamental internal lining product used in building a house. The internal linings of an average house in Australia are 77% plasterboard and 8% fibre cement, with the remainder largely made up of rendered brick¹.

1.4 Distribution of competitor's products

CSR has a vertically integrated distribution channel in that it owns or franchises distributors known as 'Red Sheds'. James Hardie understands that distributors in the CSR channel are essentially limited, either by agreement or as a matter of practice, to selling CSR products. Hence James Hardie is effectively foreclosed from distributing its products through these distributors. CSR also distributes its products through distributors it does not own.

James Hardie understands that BGC has an agreement with the Australian Plasterboard Company (**APC**) pursuant to which APC supplies exclusively BGC products through its

¹ BIS Shrapnel Report "Building Materials and Fittings in Australia 2001 – 2004"

network of franchisees in NSW. In WA, BGC sells its products direct to consumers through its building companies.

CSR and BGC 'bundle' fibre cement products with plasterboard.² CSR also bundles fibre cement products with its extensive range of building materials including bricks, which are by far the most prevalent external wall cladding material in Australian housing.³ As James Hardie manufactures only fibre cement products, it is unable to engage in equivalent bundling practices.

James Hardie is aware that its competitors acquire James Hardie's technology differentiated products from distributors and re-supply them as part of a bundle to other distributors and end-users. The bundling practices of James Hardie's competitors, coupled with the vertical integration between its competitors and distributors, diminish, if not foreclose, James Hardie's opportunity to sell its own core products to many distributors and end users.

2. Proposed conduct

2.1 Former distribution policy

James Hardie's former distribution policy restricted distributors from on-selling its fibre cement products to James Hardie's competitors, or to distributors owned by, or franchisees of, its competitors without first obtaining James Hardie's consent.⁴ James Hardie proposes to relax its former distribution policy to allow its distributors to on-sell to any customer its Artista™ Columns and Accessories.

2.2 New distribution policy

James Hardie would like to implement a new distribution policy (the *policy*) to govern distribution of its products.

Under the policy, James Hardie will request 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

² 'Bundling' generally refers to the situation where two or more products or services are sold as a single package. The price of the bundled package is usually at a discount to that of acquiring given amounts of the products separately: ACCC *Bundling in Telecommunications Markets – An ACCC Information Paper* August 2003 p 3.

³ Between 2001-2004, 78% of new detached houses in Australia were forecast to be built of brick: BIS Shrapnel Report *"Building Materials and Fittings in Australia 2001 – 2004"*

⁴ The ACCC considered James Hardie's former distribution policy, and decided not to challenge it.

- (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.

3. Section 47

Implementation of the policy falls within s47(2)(a) of the *Trade Practices Act 1974* (Cth) (the **Act**) on the basis that James Hardie will supply or offer to supply its:

- (a) products, other than Artista™ Columns and Accessories, on the condition that distributors will not, except to a limited extent, re-supply the products to particular persons or classes of persons: s47(2)(f)(i); and
- (b) new technology differentiated products, on the condition that distributors will not, or will not except to a limited extent, re-supply goods acquired directly or indirectly from a competitor of James Hardie and on the condition that they will not or will not, except to a limited extent, re-supply the new technology differentiated products to particular persons or classes of persons: ss47(2)(e) and 47(2)(f)(i).

These forms of exclusive dealing contravene the Act only where any of them has the purpose, effect or likely effect of substantially lessening competition within s47(10) of the Act.

4. Market considerations

There may be various ways of characterising the relevant markets. However, the policy is unlikely to have the effect of substantially lessening competition on any reasonable market definition.

- (a) James Hardie products

James Hardie submits that its products fall within a number of product markets, based on functionality and appearance. These are the Australian markets for:

- (i) external wall cladding;
- (ii) flooring;
- (iii) internal lining;
- (iv) eaves lining;
- (v) columns / piers;
- (vi) fencing; and
- (vii) sheet bracing.

- (b) The new technology differentiated products

James Hardie submits that the new technology differentiated products fall within the markets described above. Specifically, James Hardie submits that the most appropriate

market definition in relation to Linea™ Weatherboard and Linea™ Trim is the market in Australia for external wall cladding.⁵ In relation to AquaTec™ Wet Area Flooring and Ezi-Grid® Tile Underlay, James Hardie submits the most appropriate market definition is the market in Australia for flooring. In relation to Eclipsa™ Eaves Lining, James Hardie submits the most appropriate market definition is the market in Australia for eaves lining.

The narrowest possible market definition applicable to Linea™ Weatherboard and Linea™ Trim may be a weatherboard/weatherboard look market in Australia. In relation to AquaTec™ Wet Area Flooring, James Hardie submits that the narrowest reasonable market definition is the wet area structural flooring market in Australia.

It is unnecessary to define whether the relevant market or markets have separate wholesale and retail elements, or whether the market or markets should be defined as comprising the supply of products generally. On either characterisation, there is no substantial lessening of competition.

Even if the policy is assessed by reference to the narrow definitions described above, the policy does not contravene the Act.

4.1 Substitution possibilities

There are low barriers to entry to the market, however characterised.

Supply side substitution possibilities are available in respect of both core and technology differentiated products. James Hardie's competitors manufacture fibre cement products that have very similar general features and benefits to the core products produced by James Hardie. In relation to James Hardie's technology differentiated products, including its new technology differentiated products, competitors can respond to these products by creating their own technology differentiated products. There are no significant technical, legal or financial impediments to doing so.

James Hardie is aware of some examples of its competitors developing their own technology differentiated products. CSR has developed:

- Rendaline™: this is a similar product to James Hardie's CMX® product that it withdrew from the market earlier this year;
- Residential ExpressWall™: this is a similar product to James Hardie's ExoTec product, but due to its smaller sheet size and different fixing system, is used in residential applications; and
- Cemintel™ External Texture Coating System: James Hardie has not developed an external texture coating system but third party providers provide their own coating solution for James Hardie products.

Guardian Building Products Australia Pty Ltd imports and distributes:

- Guardian Fibre-X Columns & Capitals: these are similar products to James Hardie's Artista™ Columns and Accessories, but are made of fibre composite rather than fibre

⁵ BIS Schrapnel defines external wall cladding as including full / double brick (rendered and exposed), brick veneer (rendered and exposed), concrete blocks, Hebel lightweight panels, Zinalume / galvanised steel sheets, colorbond/pre-painted steel sheets, aluminium, glass curtain walling, composite panels (pre-cast and tilt up), fibre cement, natural timber and processed timber: BIS Schrapnel *Building Material and Fittings in Australia, 2001-2004, Volume 3*.

cement.⁶ Guardian's Fibre-X Columns & Capitals are also promoted as being able to be 'cut the same as timber products and therefore diamond cutting is not needed'⁷ James Hardie recommends use of a diamond tip HardiBlade for its columns.

On the demand side, there are numerous substitution options. We set out below some of these substitution options in relation to the new technology differentiated products.

Substitution options for all James Hardie products are set out in Attachment B.

- (a) Linea™ Weatherboard and Linea™ Trim are substitutable for:
- (i) James Hardie's HardiPlank® Cladding;
 - (ii) James Hardie's PrimeLine® Weatherboard;
 - (iii) timber weatherboards;
 - (iv) engineered timber weatherboards (such as those manufactured by Weathertex, which was formerly owned by CSR);
 - (v) other fibre cement 'weatherboard' products (such as CSR 'Plank Smooth', CSR 'Plank Woodgrain' and CSR 'Weatherboard Smooth' and BGC 'Duraplank');
 - (vi) Vinyl weatherboard (such as that manufactured by Austech);
 - (vii) Aluminium weatherboard; and
 - (viii) other functional substitutions, including brick, Colorbond/pre painted steel, precast concrete panels, concrete block systems, polystyrene systems and zincalume / galvanised steel.
- (b) AquaTec™ Wet Area Flooring and Ezi-Grid® Tile Underlay are substitutable for:
- (i) concrete slab flooring (72% of wet area flooring in Australia)⁸;
 - (ii) particle-board, structural or sheet flooring (20% of wet area flooring in Australia)⁹;
 - (iii) James Hardie's HardiPanel® Compressed fibre cement and Ceramic Tile Underlay sheets; and
 - (iv) other compressed fibre cement sheets (such as CSR 'Cemintel Compressed Sheet' and CSR 'Cemintel Ceramic Tile Underlay Sheet', and BGC compressed sheet and tile underlay sheet).
- (c) Eclipsa™ Eaves Lining is substitutable for:
- (i) James Hardie's Hardiflex® Eaves Sheet painted on-site; and
 - (ii) other fibre cement eaves sheets (such as CSR 'Cemintel Eaves Lining Sheet' and BGC 'Durasheet') painted on-site.

⁶ Fibre composite consists of fibre and polymer, whereas fibre cement is made from timber pulp, sand, cement and water.

⁷ Guardian brochure: *fibre-x columns & capitals: Information on Fibre-X Columns & Capitals released in July 2005*

⁸ BIS Shrapnel Report "*Building Materials and Fittings in Australia 2001 – 2004*"

⁹ BIS Shrapnel Report "*Building Materials and Fittings in Australia 2001 – 2004*"

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PUBLIC REGISTER**

4.2

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4.3 Purpose of the policy

In the building products industry James Hardie faces competitors who manufacture and/or distribute a broad range of building products of which fibre cement products are only a small part. That gives them a considerable competitive advantage over James Hardie. However the range of fibre cement products manufactured by these competitors is not as extensive as the James Hardie range. Hence they seek to destroy James Hardie's competitive edge in this regard by obtaining particular James Hardie products – usually its innovative, technology differentiated products – for themselves and on-selling them as part of their own product range.

The new policy is intended to protect James Hardie's capacity to compete vigorously in the various product markets in which it operates. More specifically, the purposes of James Hardie's policy are to:

- (a) maximise sales by increasing sales opportunities for James Hardie's core products;
- (b) improve efficiencies of production through increased volumes and scale;
- (c) encourage product development and innovation consistent with James Hardie's vision of product leadership; and
- (d) respond competitively to bundling practices in the marketplace.

No one of these is an anti-competitive purpose.

Paragraph (a) of the policy

Given that James Hardie's competitors manufacture very close substitutes to James Hardie's core products, it is unlikely competitors will seek to purchase equivalent core products from James Hardie. Conceivably they may do so if, for example, they had insufficient capacity to supply customers with their own products. James Hardie submits that inhibiting supply of its core products to competitors in these circumstances is pro-competitive as it:

- allows James Hardie to market products to its competitor's customers, in circumstances where the competitor is unable to supply them with its own; and
- provides an incentive to its competitors to be efficient and reliable.

So far as its technology differentiated products are concerned, these are the products which James Hardie uses to distinguish its business from those of its competitors and thereby drive sales of its core products as explained in paragraph 1.1 above. The pro-competitive strategy is that, if end-users are not able to acquire these products from a distributor that otherwise refuses to acquire James Hardie products, they will resort to the many distributors prepared to distribute James Hardie products. This will then increase the likely sales of James Hardie products overall, while at the same time providing an incentive to distributors to deal with James Hardie generally, and not merely in relation to particular technology differentiated products. In short, it may lead to a break down of the exclusive dealing arrangements engaged in by its competitors which foreclose opportunities for the sale of James Hardie products.

James Hardie previously informed the ACCC of this aspect of the policy and the ACCC considered it in detail.

Paragraph (b) of the policy

This aspect of the policy is calculated to take advantage of the narrow and transient window of opportunity afforded by the availability of the new technology differentiated products to maximise overall sales of James Hardie products, and especially its core products. Thus the proposed system for distributing the new technology differentiated products is intended to operate as an incentive to deal with James Hardie, rather than its competitors. In this way James Hardie seeks to compete on the basis of the quality of its range, as well as on price. In competitive terms, however, this policy is no different from

the bundling policies of its competitors whereby they offer price discounts or rebates as an incentive to distributors to deal exclusively with them.

As previously mentioned, each of the new technology differentiated products is closely substitutable for other products manufactured by James Hardie and many of its competitors. Hence any of its distributors has a genuine choice whether to accept the basis upon which these products are to be made available, or to turn to competing products offered both by James Hardie and its competitors. Moreover James Hardie anticipates that its competitors will respond to the policy by developing their own products which match or exceed the innovative features of these new technology differentiated products. Once they become available any competitive advantage offered by these products will have dissipated. Hence the window of opportunity afforded by their availability is narrow and transient.

5. Public Benefit

James Hardie submits that implementation of the policy does not have the purpose, effect or likely effect of substantially lessening competition. Were the Commission to find otherwise, James Hardie sets out below public benefits that flow from implementation of the policy. These benefits clearly outweigh any possible public detriments caused by the policy.

Public benefits are assessed by reference to the 'future with' or 'future without' test. This involves comparing the public benefits and detriments likely to result in the future with, and in the future without, implementing the policy.¹⁰

The notion of public benefits is wide. In the recent decision of *Qantas Airways Ltd* ([2004] ACompT 9, the Australian Competition Tribunal (the *Tribunal*) held that public benefits do not need to be quantified in precise terms¹¹ and that an accurate, objective quantification of public benefits can in fact be very difficult.¹² In that case, the Tribunal adopted a total welfare approach to assess public benefit, which involves taking into account efficiencies that accrue to both consumers and producers.¹³

(a) The future without test

James Hardie submits that if it does not implement the policy:

- (i) James Hardie's incentive to develop new products will decrease, and it will consider whether to discontinue its research and development business strategy in Australia which currently involves significant investment in product innovation;
- (ii) The incentive for James Hardie's competitors to invest in research and to develop new products will remain low and will probably decrease;

¹⁰ *Re QIW Ltd* (1995) 132 ALR 225 at 276; *Qantas Airways Ltd* [2004] ACompT 9 at 152

¹¹ *Qantas Airways Ltd* [2004] ACompT 9 at 201

¹² *Qantas Airways Ltd* [2004] ACompT 9 at 203

¹³ *Qantas Airways Limited* [2004] ACompT 9 at 185

- (iii) James Hardie's competitors will be able to cherry pick its most innovative products, and on-sell them to their own customers;
- (iv) James Hardie's competitors will be able to free ride on its investment in developing technology differentiated products;
- (v) James Hardie may be prevented from generating volumes of sales that would otherwise allow it to achieve efficiencies and economies of scale, which benefits James Hardie can use to offset increases in input costs for the benefit of its distributors and ultimately consumers; and
- (vi) James Hardie's ability to compete with its vertically integrated competitors will diminish.

(b) Public benefits

James Hardie submits that the principal public benefits that will flow from the policy are:

- (i) enhanced product innovation and expanded consumer choice;
- (ii) an ability for James Hardie to increase sales volumes, that will lead to economies of scale and consequent cost benefits; and
- (iii) increased competition.

These possible future detriments and public benefits are discussed in more detail below.

5.1 Enhanced innovation and expanded consumer choice

(a) Dynamic efficiency and innovation

The Tribunal has recognised that in assessing the nature and extent of public detriment and benefit, it is necessary to consider the significance of any issues of allocative, dynamic and productive efficiency.¹⁴

James Hardie submits that the policy will enhance dynamic efficiency. Dynamic efficiency reflects the need for industries to make timely changes to products in response to changes in consumer tastes and productive opportunities:

[It] is a concept that involves consideration of adaptation by firms to the evolving supply and demand forces in the market. It is a function of innovation and change, and relates to the search for new ideas, new products and new production methods, all of which can expand consumer choice, raise output levels and lead to cost savings in production.¹⁵

James Hardie was the first company to develop fibre cement, and has continued to innovate in order to grow the product category. James Hardie's distribution policy provides an incentive for James Hardie to continue to innovate, and encourages its competitors to respond competitively.¹⁶ Competitors can respond to the technology differentiated

¹⁴ *Qantas Airways Ltd* [2004] ACompT 9 at 157

¹⁵ *Qantas Airways Ltd* [2004] ACompT 9 at 159

¹⁶ The Commission has recognised that "improvement in the quality and safety of goods...and expansion of consumer choice" is a public benefit: Australian Competition and Consumer Commission 'Guide to authorisations and notifications' (November, 1995) at 20

products by conducting their own research and development in fibre cement products.¹⁷ The costs of doing so are relatively modest.

Development by competitors of new products akin to the technology differentiated products will in turn expand consumer choice.

(b) Preventing cherry picking¹⁸

James Hardie intends to use its technology differentiated products to distinguish its business, and drive sales of its core products. The policy will prevent competitors from 'cherry picking' James Hardie's most innovative products and 'bundling' them with general building products to increase their own sales to customers. Such a practice disadvantages James Hardie and consumers by reducing the addressable market to which James Hardie can market its technology differentiated products. It may also lead to customers believing the technology differentiated products were manufactured by the competitor, rather than James Hardie. James Hardie submits that such practices impede the competitive process, and remove any incentive for competitors to respond competitively to James Hardie's innovation.

(c) Free-riding

The development of technology differentiated products involves considerable sunk development costs which James Hardie seeks to recoup through increased sales volumes, especially of its core products. The relevant product markets described at paragraph 4(a) above are very competitive, which means that James Hardie cannot re-coup these sunk costs through sales of the technology differentiated products to competitors, even at retail prices.

Without the policy, James Hardie's competitors can 'free ride' on James Hardie's investment in the technology differentiated products which in turn may deter James Hardie from investing in development in the future. Free riding also prevents James Hardie from recouping sunk costs which drives up its overall cost burden and leads to inefficiency and therefore inhibited capacity to compete on price and quality of service. Such 'free riding' practices have been recognised by the Tribunal as a relevant detriment when weighing up the future with and without a policy the subject of an authorisation application.¹⁹

5.2 Reduced costs and efficiency gains

The Tribunal has recognised that public benefits should be assessed by reference to a total welfare standard²⁰ that involves taking account of efficiencies that accrue to consumers or producers.

¹⁷ The Commission has recognised that economic development, for example through "encouragement of... research and capital investment" is a public benefit: *Re ACI Operations Pty Ltd* (1991) ATPR (Com) at 56,067; Australian Competition and Consumer Commission 'Guide to authorisations and notifications' (November, 1995) at 20

¹⁸The ACT recognised 'cherry picking' as a public detriment in *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4 (8 April 2004) at 163-170

¹⁹ *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4 (8 April 2004) at 184-193

²⁰ *Qantas Airways Limited* [2004] ACompT 9 at 185

Paragraph (b) of the policy allows James Hardie to provide the new technology differentiated products on an exclusive basis, and thereby enables it to compete more effectively. The reason is that these products give James Hardie a temporary competitive advantage over its competitors – effectively a first mover advantage. They enable James Hardie to use its new technology differentiated products to increase sales volumes of its core products. If James Hardie sells large volumes of its products, it will achieve efficiencies and economies of scale, which will in turn allow it either to pass on costs savings to distributors or to absorb foreshadowed increases in input costs such as raw material and manufacturing costs. These efficiency gains and cost savings comprise a clear public benefit.²¹

Given the pricing constraints described at paragraph 4.2 above, the policy will not enable James Hardie simply to increase its prices.

5.3 Promoting competition

Implementation of the policy will promote competition.²²

Unlike its principal competitor, James Hardie is not vertically integrated. By requiring its distributors not to on-sell its products (other than Artista™ Columns and Accessories) to competitors, and by selling its new technology differentiated products to distributors subject to a condition of exclusivity, James Hardie:

- (a) can respond competitively to its competitors' practice of bundling James Hardie products with other building products;
- (b) will enhance its ability to compete at the manufacturing level of the market with vertically integrated competitors; and
- (c) will preserve its ability to compete vigorously on price and product quality.

²¹ *Qantas Airways Limited* [2004] ACompT 9 at 189

²² Promotion of competition in industry is considered by the Commission to be a public benefit: Australian Competition and Consumer Commission *'Guide to authorisations and notifications'* (November, 1995) at 20

ATTACHMENT B

1. Core products

Product	Description	Non-fibre cement alternative
Ceramic Tile Underlay	Substrate for ceramic tiles laid over existing timber strip, particle board or plywood sheet floors. Comes as a flat sheet.	Concrete, Timber, Engineered Timber (e.g. Particle Board, Plywood)
Vinyl & Cork Underlay	Substrate for vinyl and cork floors over existing timber strip, plywood or particle board floors.	Concrete, Timber, Engineered Timber (e.g. Particle Board, Plywood)
HardiFlex® Eaves Lining	Sheet for lining eaves, with a smooth surface ready for painting.	Metal (e.g. Colorbond), Natural Timber, Engineered Timber (e.g. plywood)
HardiFlex® Sheets	Sheet for external wall cladding, with a smooth surface for painting.	Natural Timber, Engineered Timber (e.g. plywood), Metal sheets, Rendered Brick
HardiPlank® Cladding	Plank for external wall cladding, designed to look like weatherboard.	Natural Timber, Engineered Timber (e.g. Weathertex)), Aluminium, Vinyl
HardiTex® Base Sheets	Flat panel for external wall cladding. Supports a wide range of acrylic finishes, including finishes that look like cement render.	Rendered Brick, polystyrene systems, aerated concrete (e.g. Hebel), precast concrete panels
PanelClad® Sheets	Flat panel for external wall cladding. Comes in two surface textures – stucco, and a rough-hewn board and batten finish.	Natural Timber, Engineered Timber (e.g. Ecoply), Metal, Vinyl
D3-ComTex® Facade Panel	Flat panel for use in commercial buildings. Particularly used for providing a monolithic look.	Rendered Brick, polystyrene systems, aerated concrete (e.g. Hebel), precast concrete panels
HardiPanel® Compressed Sheets	Thick flat sheets for substrate or base on floors, external decks and verandas,	Timber, Engineered Timber (e.g. Particle Board, Plywood) Concrete

Product	Description	Non-fibre cement alternative
PineRidge® Lining	Textured sheet for internal walls with a pine timber panelling appearance.	Natural Timber, Engineered Timber (e.g. Ecoply), Metal Vinyl
Versilux® Wall and Ceiling Lining	Lining sheet for internal walls and ceilings similar to gyprock.	Water Resistant Plasterboard (e.g. Gyprock), brick, concrete timber
Villaboard® Lining and HardiRock® Lining	Lining sheet for internal walls in wet areas (including walls on which tiles are affixed). Also suitable for commercial uses in high impact areas (e.g. gymnasiums) – impact resistant.	Water Resistant Plasterboard (e.g. Gyprock), brick, concrete, engineered timber
HardiScreen® Lattice	Sheet with punched square and diamond patterns. Looks like traditional lattice.	Timber, Plastic, Metal
HardiBrace® Sheet Bracing	Sheet to brace timber or steel wall frames in areas subject to wind force.	Timber, Engineered Timber

2. Technology differentiated products

Product	Description	Non-fibre cement alternative
AquaTec™ Wet Area Flooring	Structural sheet flooring with all the benefits of fibre cement flooring but is easier to install than compressed fibre cement.	Concrete, Engineered Timber (e.g. Particleboard, Plywood)
Artista™ Columns and Accessories *excluded from the policy	Fibre cement round columns (hollow) for both structural and decorative uses.	Brick Piers, Plastic and PVC Tubing
ExoTec® Facade Panel (and accessories)	Flat panel for use in external wall cladding of commercial buildings. Also used in tunnel linings.	Aluminium, Metal (e.g. Colorbond), Timber, Engineered Timber, Brick
Ezi-Grid® Tile Underlay	Substrate for ceramic tiles	Concrete, Timber, Engineered

Product	Description	Non-fibre cement alternative
	laid over existing timber strip, particle board or plywood sheet floors. It has an embossed grid pattern for easy cutting.	Timber (e.g. Particle Board, Plywood)
Eclipsa™ Eaves Lining	Pre-painted eaves lining sheet with a removable adhesive slipsheet.	Metal (e.g. Colorbond), Natural Timber, Engineered Timber (e.g. plywood)
HardiFence® Sheets	Fibre cement fencing with a corrugated profile and dug in the ground (sold only in Western Australia)	Plasterboard, brick or concrete wall, with tiles applied
HardiGlaze® Tile Sheets	Sheet with a patterned polyurethane finish with a tiled appearance for walling in bathrooms, showers, kitchens, laundries and other wet areas.	Plasterboard, brick or concrete wall, with tiles applied
HardiGroove® Lining	Machined sheet for indoor walling and eaves with a tongue and groove timber panel appearance.	Natural Timber, Engineered Timber (e.g. MDF)
Linea™ Weatherboard	Weatherboard, which is lower maintenance and more durable than traditional timber weatherboards, and is fire and termite resistant. Has a thicker profile than any other fibre cement weatherboard currently on the market.	Natural Timber, Engineered Timber (e.g. Weathertex)), Aluminium, Vinyl
Linea™ Trim	External window and corner trim made of fibre cement. Designed to complement Linea™ Weatherboard.	Natural Timber, Engineered Timber, Aluminium, PVC
PrimeLine® Weatherboard	External wall cladding product that is designed to look like conventional weatherboard with machined faced profiles	Natural Timber, Engineered Timber (e.g. Weathertex)), Aluminium, Vinyl

Product	Description	Non-fibre cement alternative
	(common in timber weatherboards) and an interlocking installation aid (plastic strip). It is similar to HardiPlank (see above) except that it is thicker and has a different face pattern and different installation method.	