

# Application for Clearance by Assa Abloy New Zealand Limited to acquire NZ Fire Doors Limited

## Submission by Dormakaba Group to the Commerce Commission on its Statement of Issues

18 June 2021

### Preliminary

1. This is our submission to the Commerce Commission on its Statement of Issues consultation paper. We reiterate the contentions in our previous submission that Assa Abloy's acquisition of NZ Fire Doors would substantially lessen competition in the market for commercial door hardware because the merged entity would have the incentive and ability to foreclose a substantial portion of the market to competitors. Our responses to the specific issues raised by the Commission focus on those contentions, and should be read in context of our previous submission.
2. We recognise that Assa Abloy has presented a very different view of the market, and the Commission's assessment is likely to come down to factual determination about how the relevant markets actually work in practice. We welcome further engagement with the Commission as it seeks to understand the market. Our contact person for this submission is:

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## Relevant product market

3. Our previous submission was framed in terms of a distinct product market for fire door hardware, given the non-substitutability on the buyer side of the market, the particular concerns raised for competition in that product category, and the commercial reality of how we as a supplier engage in the relevant markets. In particular:
  - (a) A focus on fire door hardware assists with explaining the risks of market foreclosure we have identified, because it is in this product dimension of the market that the risks are most acute.
  - (b) There is a genuine likelihood that the product dimension of the market is not reducible to a discrete category, as the applicant claims. Rather, there is likely to be a spectrum of substitutability, as hardware is substitutable in some contexts and not others. This matters even if the applicant's broader product market definition is adopted because it means that broader markets do not by themselves ease anti-competitive concerns. Further, the applicant's claim that market shares understate the likely competitive tension in the market post-merger should be resisted.<sup>1</sup>
4. As long as these important points factor into the analysis, we are not dogmatically committed to a narrow product market definition in terms of the appropriate analytical construct for the Commission's competition assessment. If the market is understood in its full context, our concerns that the merger will result in a substantial lessening of competition remain. This is to say, a combined product market is potentially feasible from the perspective of competition law analysis, provided that it does not overlook the very real concerns with potential market foreclosure that have been identified.
5. Our expectation is that the Commission will come to its own view on the most appropriate market definition for the purposes of its assessment after it has had the opportunity to engage directly with the full range of market participants and understand the key competition law issues. That said, we note that it is standard practice among competition law enforcement agencies to adopt a narrower market definition where genuine competition law concerns are raised, other factors being equal, as this framing best isolates the key competition issues that are likely to arise and allows those issues to be fully tested.
6. In light of that accepted standard practice, if the Commission were to adopt the applicant's preferred market definition we would expect significant justificatory analysis to support that decision. The applicant has not been able to provide that level of justification to date, and it should be of concern to the Commission that the applicant has doubled down on a broad product dimension to the market despite its assurances that there are no competition law concerns with respect to the fire door hardware market in any case.

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<sup>1</sup> For example, Assa Abloy Clearance Application at [6.5].

## Foreclosure of competing commercial hardware manufacturers

7. Our principal concern remains that there is a significant risk of a substantial lessening of competition post-merger due to foreclosure of a significant portion of the commercial door hardware supply market. We reiterate our view that Assa Abloy has the ability and incentive to foreclose. The practical effects of this in terms of our ability to compete is significant, and we anticipate other door hardware suppliers will be in a similar position.

### Limitations on customer choice

8. In its Clearance Application, Assa Abloy claimed that in the “vast majority” of transactions “the acquisition of hardware is the decision of the customer”.<sup>2</sup> Our previous submission sought to contextualise this claim, noting that in at least the case of fire door hardware Assa Abloy (through its interrelated businesses) has significant influence over the customer’s purchasing decision. In many cases that influence will be determinative.
9. In its cross-submission, Assa Abloy has implicitly acknowledged that the supply of hardware is more complicated than a simple customer discretion. Instead, in addition to a percentage of bundled fire doors and hardware, it now acknowledges that:<sup>3</sup>
  - (a) the procurement process is iterative rather than linear, reflecting the complexities of supply chain management in the construction sector;
  - (b) parties other than the customer can have significant influence over the choice of doors and hardware (the cross-submission notes in particular the role of architects);
  - (c) non-complying products are routinely accepted as part of the tendering process, giving integrated offerings an advantage; and
  - (d) door supply contracts are typically awarded ahead of hardware supply contracts, locking out suppliers of non-approved hardware.
10. It should be obvious that there are multiple opportunities for an integrated supplier of commercial doors and associate hardware to influence the end-customer’s choice. By way of example:
  - (a) door manufacturers can and do cultivate relationships with architects or other upstream service providers to make their product the presumptive choice, limiting the choice of associated hardware;

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<sup>2</sup> Assa Abloy Clearance Application at [6.18].

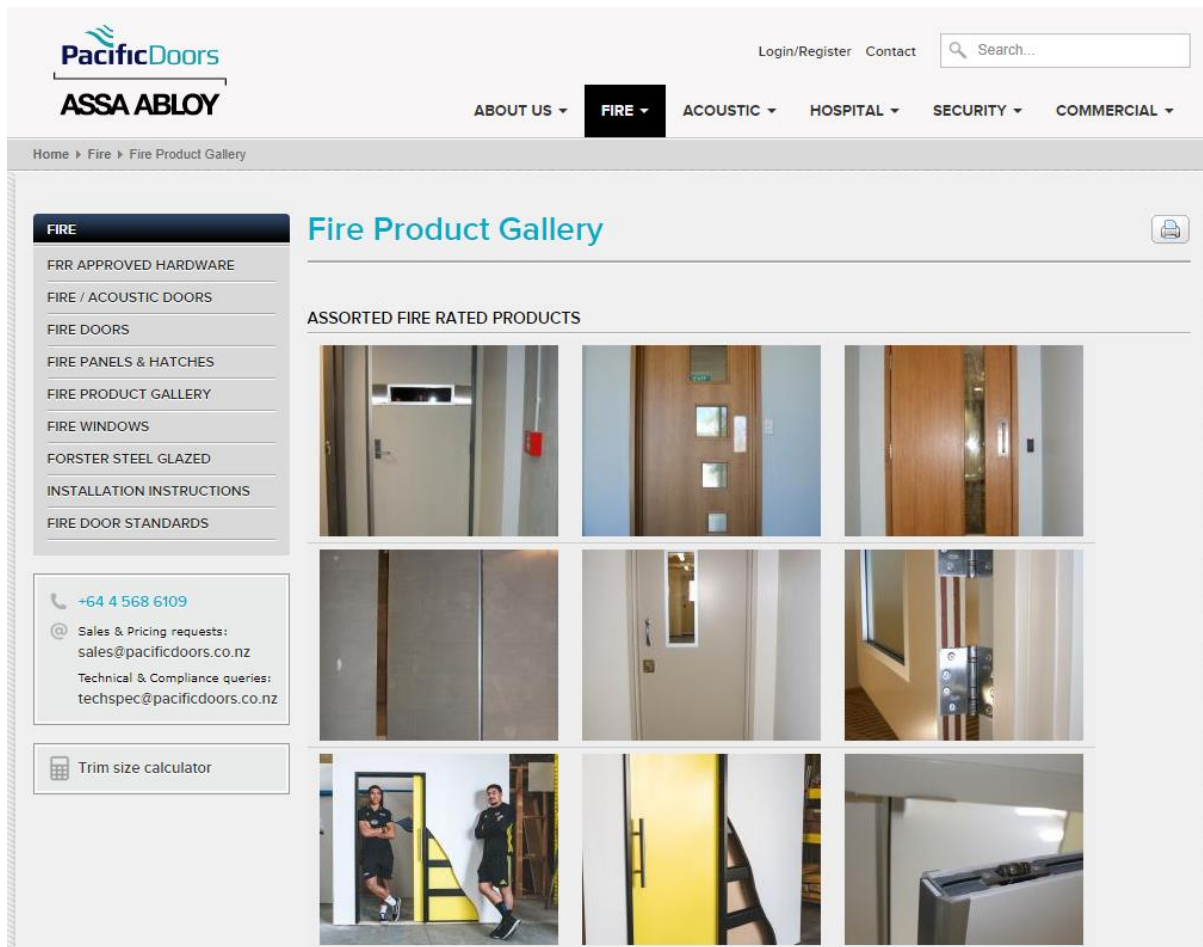
<sup>3</sup> Assa Abloy cross-submission at [2.6].

- (b) door manufacturers usually tender in advance of the final hardware decision point, meaning that:
    - (i) the choice of door is locked in early and drives the customer's choice of hardware; and
    - (ii) hardware suppliers often do not know who the door supplier is when tendering, which allows door manufactures to influence specification changes to disadvantage competing hardware suppliers; and
  - (c) door manufacturers can and do regularly tender with non-compliant options to 'undo' the customer's initial hardware selection, if one has been made.
11. In respect of this final point, an integrated offering obviously has an advantage in terms of a non-compliant tender as the supplier is able to offer the customer a complete solution. This gives Assa Abloy and its related companies an advantage over standalone hardware suppliers. Firms such as Dormakaba can be locked out of the supply process through the choice of a particular commercial door supplier, but Assa Abloy's integrated offering means that it always has a chance to win back a customer.
12. Our core point here is that end-customers are not simply free to pick and choose among the full range of options for both commercial doors and associated hardware. Door suppliers can and do influence the selection process in strategic ways, and Assa Abloy has a particular advantage in this regard due to its ability to offer an integrated solution. The result is a de facto tying of doors and hardware. The more control Assa Abloy has of the commercial door market, the more Dormakaba and other hardware suppliers are placed competitively on the back foot by these tying arrangements.

## **Fire safety testing**

13. These market dynamics that benefit Assa Abloy to the detriment of its competitors is exacerbated by the control Assa Abloy has (through its interrelated companies) over fire safety testing of competitor hardware on its fire door products. Assa Abloy's permission is required to undertake the necessary fire safety testing for Dormakaba's hardware to be used with Pacific Door's products. This gives Assa Abloy the power to lock us and our competitors out of the portion of the market Assa Abloy effectively controls.
14. Assa Abloy has addressed this point at length in its cross-submission, although the argument it advances there will do little to give the Commission any real comfort regarding its incentives and ability to foreclose. The fact remains that, through its company structure, Assa Abloy has control over the testing process.
15. The incentives facing an integrated supplier in this situation are also more than clear. A combined offering of doors and hardware allows Assa Abloy to capture more of the market where it can exclude standalone hardware suppliers. This is an evident part of its core marketing strategy at present, as the following screenshot

demonstrates. The integrated pairing between Assa Abloy and Pacific Doors is obvious.<sup>4</sup>



16. While we recognise that an integrated offering can bring genuine competitive tension to the market it does reveal where the balance of incentives actual lie: where there is anti-competitive power to exclude hardware competitors, the dominant incentive is for that power to be exercised.
17. Assa Abloy have pointed to a countervailing incentive to ensure interoperability, so that its doors are able to be paired with a range of hardware.<sup>5</sup> We do not doubt that this incentive exists. The key question is the strength of the relevant incentives in the real-world context of the market. Our contention is a straight-forward one based on the evidence: that the incentive towards prioritising interoperability is weak and will only grow weaker as Assa Abloy exert effective control over a larger market share in the commercial door market. If this were not the cases we would not see an integrated marketing campaign of this sort. The dominant incentive is therefore to exclude hardware competitors, and thereby control a greater portion of the market.

<sup>4</sup> www.ebos.co.nz.

<sup>5</sup> Assa Abloy cross-submission at [2.19].

## Anti-competitive impact on competitors

18. We are already seeing the effects of Assa Abloy's ability and incentive to exclude hardware competitors. Following the acquisition of Pacific Doors by Assa Abloy, [ ].<sup>6</sup> We of course accept that a general trend in this direction over time might be explained with reference to reinvigorated competition. However, such a large and sudden change points to the ability to exercise a concerning degree of market power. It would be surprising to us to say the least if other hardware suppliers were not similarly affected.
19. What this evidence demonstrates is effective control over a portion of the market, which is being leveraged to exclude competing suppliers of hardware products. As we have previously submitted, the only real question for the Commission is whether the proposed merger represents a substantial lessening of competition relative to a counterfactual where foreclosure is already occurring.
20. In respect of the extent of anti-competitive restraint, we note the following points:
  - (a) The merged entity will be the largest player in the commercial door market by some margin, providing Assa Abloy with unsurpassable access to an integrated offering. Even if Dormakaba or other hardware suppliers can partner up with competing door manufacturers, they will lack the scale and scope of the merged entity.
  - (b) There is some ongoing debate about the precise level of market concentration in the factual where the proposed merger takes place, as a result of both a lack of objective market share data and competing approaches to market definition. Regardless, the proposed merger would result in a substantial increase in the portion of the market under Assa Abloy's effective control relative to the counterfactual. This is sufficient in itself to result in a substantial lessening of competition.
  - (c) The fact that Pacific Doors and NZ Fire Doors are not close competitors exacerbates the potential for competitive harm for excluded hardware suppliers. The extent of any foreclosure will increase with respect to both scale and scope.
  - (d) Major supply contracts are the most likely to prefer an integrated solution. While this may be the result of a competitive offering, it does leave standalone competitors reliant on smaller supply contracts. Losing the ability to compete in respect of these smaller contracts for reasons of market foreclosure therefore has a disproportionate impact on Dormakaba and other standalone suppliers.
21. In light of these factors, the risk of a substantial lessening of competition resulting from the proposed merger is genuine and significant.

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6 See Confidential Exhibit A to this submission.

## Confidential information

22. As with our previous submission, Dormakaba requests confidentiality in respect of the information that is contained in square brackets and highlighted in yellow, and that is contained in Confidential Exhibit A. This information is commercially sensitive to Dormakaba and is provided to the Commission under an obligation of confidence.
23. Confidentiality is sought in respect of this same information for the purposes of section 9(2)(b) for the Official Information Act 1982 on the grounds that:
  - (a) the information is commercially sensitive and valuable information that is confidential to Dormakaba; and
  - (b) disclosure would be likely to unreasonably prejudice Dormakaba's commercial position.
24. Dormakaba requests that it is notified of any request made to the Commission under the Official Information Act for release of this confidential information, and that the Commission seek and consider Dormakaba's views as to whether the information remains confidential and commercially sensitive at the time responses are being considered.

# Confidential Exhibit A

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