

Determination

CSR Building Products (NZ) Limited and Brickworks Building Products (NZ) Pty Limited [2012] NZCC 30

The Commission: Dr Mark Berry
Dr Stephen Gale
Anita Mazzoleni

Summary of application: An application from CSR Building Products (NZ) Limited and Brickworks Building Products (NZ) Pty Limited seeking clearance to establish a joint venture to supply clay bricks in New Zealand.

Determination: Under s 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance to the proposed joint venture.

Date of determination: 10 October 2012

Confidential material in this report has been removed. Its location in the document is denoted by [].

The proposal

1. A notice under s 66(1) of the Commerce Act 1986 (the Act) was registered on 31 August 2012. The Notice seeks clearance for CSR Building Products (NZ) Limited (trading as Monier Bricks and Roofing) or any interconnected bodies corporate of CSR Building Products (NZ) Limited (CSR) and Brickworks Building Products (NZ) Pty Limited (trading as Austral Bricks) or any interconnected bodies corporate of Brickworks Building Products (NZ) Pty Limited (Brickworks) (together the applicants) to acquire up to 100% of the assets of the applicants' respective New Zealand brick businesses (except CSR's manufacturing plant located at New Lynn, Auckland).

Procedure

2. Section 66(3) of the Act requires the Commission to either clear or decline to clear the acquisition referred to in a s 66(1) notice within 10 working days, unless the Commission and the person who gave notice agree to a longer period. An extension of time was agreed between the Commission and the applicants. Accordingly, a decision on the application is required by 26 October 2012.
3. The Commission's approach to analysing the competition effects of the proposed acquisition is based on the principles set out in its Mergers and Acquisitions Guidelines.¹
4. The Commission obtained views and information from a number of industry participants who are listed in Attachment 1.

Statutory framework

5. Any person who proposes to acquire the assets or shares of a business, and considers that the acquisition may breach s 47 of the Act, can apply for clearance under s 66.
6. If the Commission is satisfied under s 66(3)(a) of the Act that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market, the Commission must give clearance for the proposed acquisition.
7. The Court of Appeal in *Port Nelson v Commerce Commission*² held that for something to be "likely" it must be "above the mere possibility but not so high as more likely than not and is best expressed as a real and substantial risk that the stated consequence will happen".
8. The High Court in *Woolworths & Ors v Commerce Commission*³ observed that "a substantial lessening of competition is one that is "real or of substance" as distinct from ephemeral or nominal. Accordingly a substantial lessening of competition

¹ Commerce Commission, *Mergers and Acquisitions Guidelines*, January 2004.

² *Port Nelson v Commerce Commission* (1996) 5 NZBLC 104, 150; (1996) 3 NZLR 562-563.

³ *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC).

occurs if it is likely that there will be a reduction in competition that is real or of substance”.

9. If the Commission is not satisfied that the proposed acquisition will not have or would not be likely to have the effect of substantially lessening competition in a market or it is ‘in doubt’ as to whether that is the case, it must decline the application under s 66(3)(b) of the Act.⁴
10. The burden of proof lies with the applicants, to satisfy the Commission on the balance of probabilities that the acquisition is not likely to substantially lessen competition.⁵ The decision to grant or refuse clearance is to be made on the basis of all the evidence.⁶ The Commission will sometimes have before it conflicting evidence from different market participants and must determine what weight to give to the evidence of each party.⁷

Analytical framework

11. The Commission’s analytical framework for assessing whether an acquisition is likely to result in a substantial lessening of competition is described in the Commission’s Mergers and Acquisitions Guidelines. The specific manner in which the Commission applies this framework depends on the facts in each case.
12. In any assessment, the determination of the relevant market or markets may be an important tool. To define markets, the Commission identifies the areas of overlap between the businesses of the acquirer and the target, and then considers what, if any, products and geographic regions, constitute relevant close substitutes from both a customer’s and a supplier’s point of view.
13. The Commission uses a forward-looking analysis to assess whether a substantial lessening of competition is likely. This exercise “requires a comparison of the likely state of competition if the acquisition proceeds (the factual) against the likely state of competition if it does not (the counterfactual).”⁸ That assessment is dependent on the facts revealed during the Commission’s investigation of the application.
14. In framing a suitable counterfactual, the Commission bases its view on a pragmatic and commercial assessment of what is likely to occur in the absence of the proposed acquisition.⁹
15. The High Court in *Air New Zealand v Commerce Commission (No.6)*¹⁰ accepted that an absence of market power would suggest there had been no substantial lessening of competition in a market but did not see this as a reason to forsake an analysis of

⁴ *Commerce Commission v Woolworths Ltd* (2008) 8 NZBLC 102,336 (CA).

⁵ *Commerce Commission v Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA) at [7] and *Commerce Commission v Woolworths Ltd* (CA) above n 4 at [97].

⁶ *Commerce Commission v Woolworths Ltd* (CA) above n 4 at [101].

⁷ *Brambles New Zealand Ltd v Commerce Commission* (2003) 10 TCLR 868 at [64].

⁸ *Commerce Commission v Woolworths Ltd* (CA) above n 4 at [63].

⁹ New Zealand Electricity Market (Commerce Commission Decision 277, 30 January 1996) at 16.

¹⁰ *Air New Zealand v Commerce Commission (No.6)* (2004) 11 TCLR 347 at [42].

the counterfactual as well as the factual. Justice Rodney Hansen stated that “a comparative judgment is implied by the statutory test which now focuses on a possible change along the spectrum of market power rather than on whether or not a particular position on that spectrum, that is, dominance has been attained”.

16. In addition to an analysis of existing competitors, the assessment may include an analysis of potential competitors. Potential competitors can act as a constraint on a business or businesses that might otherwise be able to exert market power. An acquisition is unlikely to result in a substantial lessening of competition in a market if the businesses in that market continue to be subject to real constraints from actual, or threatened, market entry.
17. If entry is to act as an antidote to what otherwise might be a substantial lessening of competition in a market, that entry must be likely, timely and of sufficient extent to constrain market participants. However, the central question is whether or not a merged firm would be constrained in a timely way by likely market entry (or expansion) in the event it increased prices or reduced services.

Parties

CSR Building Products (NZ) Limited

18. CSR is ultimately owned by CSR Limited in Australia. CSR Limited manufactures and supplies various building products including insulation, processed glass, concrete products, plasterboard, fibre cement, and roof tiles. CSR supplies clay bricks manufactured at its New Lynn plant in Auckland. CSR supplies its clay bricks under the Monier brand.

Brickworks Building Products (NZ) Pty Limited

19. Brickworks is ultimately owned by Australian company Brickworks Limited. Brickworks Limited supplies various building products including Schist, pavers, concrete products, concrete and terracotta roof tiles, timber and terracotta cladding. Brickworks Limited has manufacturing operations in New South Wales, Victoria, Tasmania, South Australia, Western Australia and Queensland. Brickworks imports all of the clay bricks it supplies in New Zealand. Brickworks supplies its clay bricks under the Austral Bricks brand.

Other parties

Domestic clay brick suppliers

20. Other than CSR and Brickworks, there are three other suppliers of clay bricks currently supplying in New Zealand, namely:
 - 20.1 NZ Brick & Stone Limited (NZ Brick & Stone), which does not manufacture clay bricks in New Zealand but recently began distributing clay bricks throughout New Zealand produced by Boral Limited (Boral) in Australia;

- 20.2 W.D. Boyes & Sons Limited, trading as Canterbury Clay Bricks (Canterbury Clay), which manufactures clay bricks in Christchurch and supplies these clay bricks principally in the Canterbury region; and
- 20.3 Clay Bricks Limited (Clay Bricks), which manufactures clay bricks in Huntly and supplies these clay bricks in the central North Island region around Hamilton and Auckland.

Australian clay brick manufacturers

- 21. Along with CSR and Brickworks, there are three other companies which manufacture clay bricks in Australia, namely:
 - 21.1 Boral which has manufacturing plants throughout Australia and which currently supplies clay bricks to NZ Brick & Stone which in turn on-sells those clay bricks in New Zealand;
 - 21.2 Brikmakers Pty Limited (Brikmakers) which has a large clay bricks plant in Western Australia but which does not currently supply clay bricks into New Zealand; and
 - 21.3 Selkirk Brick Pty Limited (Selkirk), with two manufacturing plants in Victoria and which, although currently not supplying clay bricks into New Zealand, has supplied [] quantities [] in the past.

Customers

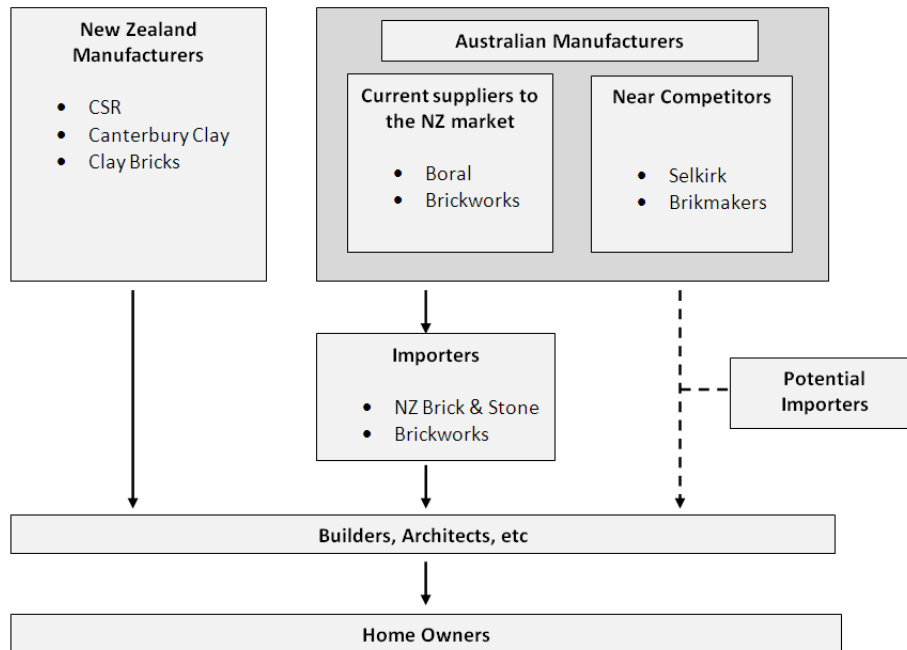
- 22. Builders purchase clay bricks on behalf of end-customers. Builders purchase clay bricks either:
 - 22.1 directly from the supplier (such builders include the large building companies and building developers like G.J. Garner and Ryman Healthcare); or
 - 22.2 via merchant chains, such as PlaceMakers or ITM.

Industry background

- 23. Clay bricks are a type of external cladding material on houses and other buildings. External cladding on residential buildings has two main purposes. It is a design feature of a house as well as ensuring the building remains weather-tight.
- 24. While a number of different materials can be used for external cladding, the most popular are clay bricks, fibre cement weatherboards and timber weatherboards.
- 25. Demand for external cladding materials has decreased in the last few years in both New Zealand and Australia. This has been driven by the downturn in the building industry in both countries due to the global recession. This downturn has significantly reduced the number of building consents for new houses in both countries.

26. As a result of this reduced demand, most external cladding manufacturing facilities in New Zealand and Australia are operating at well below capacity.
27. Diagram 1 shows how clay bricks are supplied by the various industry participants.

Diagram 1 - Overview of industry participants



Market Definition

28. Market definition provides a potentially useful framework to assess the competitive effects of a merger. It focuses the competition assessment on the key competitive alternatives available to buyers. A relevant market is ultimately determined, in the words of the Act, as a matter of fact and commercial commonsense.¹¹
29. For the purposes of this decision the Commission considers that the relevant market is the market for the manufacture/import and supply of clay bricks in New Zealand.

The applicants' view of the relevant market

30. The applicants submitted that the relevant market is the manufacture or import and wholesale or retail supply of external cladding products.
31. The applicants submitted that:
- 31.1 there is a high degree of substitutability between clay bricks and all other types of external cladding products used in the construction of residential homes;

¹¹ Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

31.2 clay bricks compete with all other types of external cladding products including concrete, timber, cement and exterior insulation and finishing systems (EIFS); and

31.3 the Commission has previously defined an external cladding market.¹²

The Commission's view of the relevant market

32. In previous clearance decisions the Commission analysed competition effects within a market for the supply of exterior architectural claddings for industrial, commercial and residential buildings.¹³ This market included fibre cement, brick veneer, steel, timber, concrete slab and block, and polystyrene sheet cladding systems.¹⁴

33. However, for the purposes of the current analysis, the Commission has taken a more conservative approach and adopted a narrower product market limited to clay bricks. This is because, if no competition concerns arise in this more narrowly defined 'clay bricks market', then there is unlikely to be concerns in a more widely defined 'external cladding' market.

Product Market

34. As explained above, external cladding is a design feature of a house and also ensures the building remains weather-tight. Industry participants advised the Commission that clay bricks and all other types of external cladding products are designed to ensure weather tightness and so are technical substitutes for each other.

35. While all types of external cladding may be technical substitutes, at the design phase of a new build, homeowners tend to select a particular type of external cladding based on a combination of factors such as appearance, price, budget, quality, durability and maintenance costs.

36. It follows that while there may be competition between these different external cladding types, the strength of the competition between any two types of external cladding will depend on the factors set out above.

37. The fact that clay bricks and other external cladding forms are technical substitutes indicates that clay bricks could form part of a wider differentiated product market for external cladding for the following reasons.

37.1 While other types of external cladding can be more expensive than clay bricks – which could suggest a limited price-disciplining effect of such external cladding on the price of clay bricks¹⁵ – there is some information to suggest

¹² James Hardie and Long International (Commerce Commission Decision 412, 15 December 2000) and Bondor New Zealand and Long International (Commerce Commission Decision 530, 22 July 2004).

¹³ Ibid.

¹⁴ Cladding is a differentiated product which varies in demand depending on price, aesthetics or appearance, and functional characteristics such as weatherproofing.

¹⁵ Despite a price difference, costlier cladding could still have a price disciplining effect on brick if such cladding was associated with a clear increase in quality or, regardless of quality, there was an overall strong consumer preference for such cladding. In such situations, an attempted increase in the price of brick could

that homeowners do not make their external cladding decisions based solely on price as external cladding is only a minor cost in the overall build of the house. When customers with a limited budget prefer an external cladding that is more expensive than clay bricks, this can be achieved by cutting costs in other aspects of the house.

- 37.2 Most new houses use a combination of external cladding materials. This suggests that if the price of clay bricks increased, homeowners would not necessarily switch all their external cladding away from clay bricks but might do so for a proportion of their external cladding requirements.
- 37.3 While clay bricks are one of the cheaper forms of external cladding, there are other external cladding products such as concrete bricks that have a similar installed cost to that of clay bricks.
38. While the Commission acknowledges that there is some evidence to suggest a differentiated external cladding market, there is also some evidence to suggest that other external cladding products may not be particularly close substitutes for clay brick cladding.
- 38.1 Most parties interviewed considered that CSR and Brickworks to be each other's closest competitors.
- 38.2 Large building companies such as [] advised the Commission that if a customer has a strong preference for clay brick cladding, they would be unlikely to switch to other forms of external cladding even if the price of clay bricks increased by 5-10%. This is because external cladding represents only a small proportion of the total build cost of a new house - approximately 1-2%.
39. This evidence suggests that some customers do not consider other external cladding types to be sufficiently close substitutes for clay bricks to mean that they should be included in the same market.

Supply-side substitutability

40. Generally, when defining markets, the Commission focuses on substitution by customers. However, the Commission may widen the market if suppliers would likely switch or expand their production of the relevant product(s) in the case of a small but significant, non-transitory increase in its price (SSNIP). This is more likely to be the case where suppliers can shift production easily and quickly, using largely unchanged production facilities, little or no additional investment, and where it would be profitable for them to do so with regard to profits on any foregone sales.

be rendered unprofitable by consumers switching to pricier but preferred cladding. Alternatively, if there was no such preference, consumers would be less likely to switch to alternative cladding that remained more expensive despite the increase in the price of brick.

41. The Commission is not satisfied that local non-clay cladding manufacturers would have the ability or incentive to switch to producing clay bricks in the case of a SSNIP.
42. Non-clay brick external cladding manufacturers such as [] advised the Commission that they would be unlikely to switch from manufacturing their current production to clay brick (or any other type of external cladding).
43. For example, [] advised the Commission that it would have to make a significant investment in order to manufacture an alternative type of external cladding. This is because:
- 43.1
- 43.2]
44. These other external cladding products are therefore not considered to be close enough supply-side substitutes to be included in the relevant market.
45. However, Australian clay brick manufacturers are considered by the Commission as near competitors. This is because they can easily and readily supply to New Zealand - which includes their ability to manufacture New Zealand sized clay bricks and to import these quickly and with little difficulty. This is discussed in full in the competition analysis.
46. Overall, for the reasons explained above, for the purposes of this decision, the Commission has focused its analysis on the clay bricks market.

Functional Dimension

47. The Commission has considered the proposed joint venture at the manufacture/importation and wholesale supply levels of the clay bricks value chain. This supply includes the:
- 47.1 local manufacture of clay bricks by CSR in Auckland, Canterbury Clay in Christchurch and Clay Bricks in Huntly; and
- 47.2 the importing (and potential imports from near competitors) of clay bricks.
48. In relation to imports, as noted earlier, NZ Brick and Stone is already supplying clay bricks into New Zealand from Boral in Australia.

Geographic Dimension

49. The Commission considers that the clay bricks market is national in scope.
50. The Commission notes that the three large clay brick suppliers supply on a national basis. CSR transports its locally manufactured clay bricks by truck throughout the

North Island and by ship and truck to the South Island. Brickworks and NZ Brick & Stone ship their respective clay bricks from Australia to various New Zealand ports.

51. The Commission found that freight costs are similar when delivered to sites around New Zealand. The cost of clay bricks delivered to site is almost identical, []¹⁶. Both Australian clay bricks as well as clay bricks from the North Island are supplied into the South Island at comparative prices. Further, Australian clay bricks are supplied to the port closest to the site.¹⁷
52. For these reasons, the geographic market is considered national in scope.

Overall conclusion – market definition

53. For the purposes of this analysis, the Commission considers that the relevant market is that for the manufacture/import and supply of clay bricks (the clay bricks market).

Factual and counterfactual

Factual

54. In the factual, a joint venture company would be formed which would acquire the applicants' respective clay brick businesses in New Zealand. The proposed joint venture would then manage the supply of clay bricks in New Zealand []

Counterfactual

55. Absent the acquisition, CSR and Brickworks would likely each maintain their existing operations. Accordingly, the Commission considers that the relevant counterfactual is the status quo. The reasons for this view are discussed below.
56. The applicants submitted that their respective businesses are loss making and this is unsustainable. Therefore, in the applicants' view there is a reasonable chance that CSR or Brickworks or both firms could exit the clay bricks market.
57. The applicants and other industry participants noted that volumes and revenues across the building industry have decreased. This is primarily due to a reduction in the number of building consents issued in New Zealand. However, there is no evidence to suggest that either applicant would exit the clay bricks market.
58. Brickworks advised the Commission that []

¹⁶

[]

¹⁷ The Commission notes that Canterbury Clay and Clay Bricks are smaller players and supply bricks regionally. However, this in itself does not indicate that there are regional markets given that the three large clay bricks suppliers supply nationally.

59. CSR advised the Commission that its brick manufacturing plant in New Lynn []

60. The New Lynn plant is excluded from the proposed joint venture []

61. []

Competition analysis

62. In a merger between competitors, the Commission considers whether the merger would be likely to substantially lessen competition either through the merged entity:

62.1 having the ability to unilaterally raise its product prices or lower the quality or service of its offering; and/or

62.2 all other competitors in a market, collectively being able to increase market prices as a result of the accommodating responses of all market participants to a price increase.

63. The Commission's analysis compares the likely state of competition if the proposed joint venture goes ahead, with the likely state of competition if CSR and Brickworks continue to compete independently of one another.

64. For the reasons explained the Commission is satisfied that, even in a narrowly defined clay bricks market, the proposed joint venture is unlikely to substantially lessen competition, given that the proposed joint venture is likely to face competition, in varying degrees, from:

64.1 NZ Brick & Stone;

64.2 Domestic clay brick manufacturers;

64.3 Australian brick manufacturers []; and

64.4 Non-brick cladding suppliers.

65. In examining the constraint provided from Australian brick manufacturers, the Commission considered whether the price of New Zealand clay bricks is currently below the landed price of Australian clay bricks (the import parity price). If the New Zealand price were below the 'import parity price', the proposed joint venture may be able (absent constraint from domestic manufacturers) to increase prices to import parity levels without prompting entry from Australian manufacturers. However the Commission found that prices in New Zealand are very similar to that of Australian imports.

The applicants' submissions

66. The applicants submitted that the proposed joint venture would continue to supply clay bricks in direct competition with all other suppliers of external cladding products. External cladding suppliers could easily expand and would prevent the proposed joint venture from raising prices or reducing the quality of its service post acquisition.
67. In terms of clay bricks, the applicants also submitted that there are a number of other clay bricks suppliers in New Zealand and Australia that would continue to compete vigorously with the proposed joint venture. These include:
- 67.1 existing importers, such as NZ Brick & Stone;
 - 67.2 local manufacturers such as Canterbury Clay and Clay Bricks; and
 - 67.3 large Australian brick manufacturers such as Brikmakers and Selkirk who could quickly supply New Zealand if incentivised by price increases in the clay bricks market.

Existing competition

68. The Commission considers that the proposed joint venture would continue to face significant competition from NZ Brick & Stone. Further, the proposed joint venture would also be constrained to some degree by the presence of Canterbury Clay, a regional clay brick manufacturer.
69. At present, CSR and Brickworks are the two largest suppliers of clay bricks in New Zealand. Industry participants noted that CSR and Brickworks compete directly with one another on a number of factors including price, colour and range of clay bricks as well as service levels.

70. Table 1 shows the current estimated market shares in the clay bricks market.

Table 1: Estimated market share for the clay bricks market 2011/12

Supplier	Revenue shares		Shares based on volume		Shares based on capacity	
	\$(m)	%	Units (m)	%	Units (m)	%
CSR	[
Brickworks						
Proposed Joint Venture¹⁸						
NZ Brick & Stone ¹⁹						
Canterbury Clay						
Clay Bricks						
Australian Manufacturers						
Boral	[
Selkirk						
Brikmakers]
Total	[]	100	[]	100	[]	100

Source: Industry participants, current supply and capacity figures

71. Table 1 shows that the proposed joint venture would have a market share of between [] and the three-firm concentration ratio would increase from [] to [].
72. The Commission notes that the applicants, Boral (which supplies NZ Brick & Stone), and some near competitors such as Brikmakers all have [] in the clay bricks market.
73. In markets where the products across suppliers are relatively homogeneous and there is significant excess capacity, market shares are typically calculated using capacity and excess capacity figures. The above market shares show that proposed joint venture would have [] capacity share when measured across Australasia, which is [] based on revenue or volume.

NZ Brick & Stone

74. The Commission considers that the proposed joint venture would continue to face significant competition from NZ Brick & Stone, supplied as it is by Boral from Australia.

¹⁸ The capacity figures include current supply to New Zealand, capacity at the New Zealand manufacturing plant and the capacity at the CSR and Brickworks plants in Australia.

¹⁹ NZ Brick & Stone's revenue and volume market share figures relate to Boral's ownership of the business. NZ Brick & Stone came under new ownership in July 2012.

75. Prior to July 2012, Boral supplied clay bricks to New Zealand in its own capacity under the Midland brand. In July, Boral sold its New Zealand operations to NZ Brick & Stone. In 2011/12, Boral supplied around [] of the clay bricks sold in New Zealand.

76. NZ Brick & Stone then signed a distribution arrangement with Boral.
[]²⁰

77. Boral advised the Commission that it had decided to change its New Zealand business model due to a combination of:

77.1 [

77.2

77.3

77.4]

78. At present, NZ Brick & Stone is supplying a large volume of clay bricks to []

79. For NZ Brick & Stone to effectively constrain the proposed joint venture, it would need to establish itself as a credible alternative to the proposed joint venture and this would involve supplying to the large building companies.

80. NZ Brick & Stone advised that []

81. The main residential building companies advised that the main criteria they require of a clay brick supplier is sufficient product range, nationwide delivery, technical support, competitive price and consistent quality.

²⁰ []

81.1 [] advised that they consider that NZ Brick & Stone would be a viable alternative to the proposed joint venture because its clay bricks are comparable to that of CSR and Brickworks, and NZ Brick & Stone is simply replicating Brickworks existing import supply model.

81.2 [] expressed some concern about NZ Brick & Stone as an alternative supplier because it is an entity that came about from the apparent failure of Boral in New Zealand.

82. [] would all consider NZ Brick & Stone if it could meet their respective supply criteria of sufficient product range, nationwide delivery, technical support, competitive price and consistent quality.

83. The Commission considers that NZ Brick and Stone would meet such criteria. As noted above,

[]

84. NZ Brick & Stone has advised that it currently has

[]

85. Moreover, there seems no real impediment to NZ Brick & Stone increasing its imports from Boral.

86. Boral advised that

[
21

22

]

87. Furthermore, the fact that NZ Brick & Stone already imports all of its clay bricks from Boral illustrate that imports are competitively priced. As discussed above in the market definition section, delivered costs are comparative when delivered to customers around New Zealand.

88. For these reasons, the Commission considers that NZ Brick & Stone would likely be a credible alternative to the proposed joint venture.

21

22

[]
[]

- 88.1 NZ Brick & Stone's clay bricks are comparable to those of the proposed joint venture in terms of quality, range and price.
- 88.2 Its import and distribution model is similar to that used by Brickworks.
- 88.3 There is no reason to believe that NZ Brick & Stone would not be able to increase its supply in response to a price increase from the proposed joint venture.

Domestic clay brick manufacturers

89. The Commission considers that the two regional, domestic manufacturers of clay bricks, Canterbury Clay and Clay Bricks, may impose some degree of constraint on the proposed joint venture.
90. Canterbury Clay is based in Christchurch and produces approximately [] clay bricks per annum. Because it is a small operation it supplies all its clay bricks locally. Given [], Canterbury Clay would have to expand its presence in the clay bricks market to act as a significant constraint on the proposed joint venture.
91. [] Canterbury Clay, advised the Commission that []
92. []
-]
93. Accordingly, the Commission considers that Canterbury Clay may offer some degree of competition to the proposed joint venture.
94. Clay Bricks is based in Huntly and manufactures approximately []
-]
-]
95. The Commission therefore considers that Clay Bricks would be unlikely to constrain the proposed joint venture because of its regional supply profile and its niche product offering.

Supply from Australian brick manufacturers

95. In addition to CSR, Brickworks and Boral, Brikmakers and Selkirk also manufacture clay bricks in Australia.

96. The Commission notes that in Australia clay bricks manufacturers supply larger 110mm clay bricks, which are primarily used to provide the structural integrity of a new house. While in New Zealand clay bricks are 70mm, the Commission considers that Australian clay brick manufacturers could shift production of their 110mm clay bricks to manufacturing New Zealand 70mm clay bricks easily, quickly and cheaply if incentivised to do so.²³
97. The Commission considers there are no significant impediments that would prevent an Australian manufacturer from commencing supply into New Zealand. This includes Boral, []
98. First, the Commission found that bricks in New Zealand are priced at import parity as these are very similar to the prices of Australian imports²⁴. This is illustrated in Table 2:

Table 2 – Import parity pricing

Submitted by:	Australian landed price in New Zealand (at NZ port)	Manufactured in New Zealand (ex-yard)
[] ²⁵ (Builder)	[]	
Merging parties	²⁶	[]

Source: [], the applicants

99. [], Boral, advised the Commission []. Similarly, CSR stated that it is [], to supply clay bricks to the South Island from Australia than from Auckland to the South Island. This is because the unit cost of a brick in Australia is lower and the transport cost from Australia to the South Island via ships is often lower than Auckland to the South Island via truck, ship and truck.
100. [], Ryman Healthcare (based in Christchurch) advised the Commission that []

²³ Brickworks and Boral’s experience shows that it is feasible to change their respective production processes from producing 110mm to 70mm clay bricks. Both advised the Commission that changing the dimensions of a clay brick requires little additional investment. []

[], noted that manufacturing 70mm clay bricks results in a much faster output per tonne compared to 110mm clay bricks. []

²⁴ Smaller customers, such as localised builders or individuals, would buy clay bricks from distributors or showrooms. These distributors would receive comparative prices for New Zealand and Australian manufactured clay bricks and therefore the final retail prices of these clay bricks would be similar.

²⁵ []

²⁶ Price varies depending on quality. []

101. Secondly, there is [] capacity at Australian clay brick plants.
[
27]
102. Thirdly, while all the Australian-based clay brick manufacturers advised the Commission that they would require a minimum volume to be incentivised to supply the New Zealand clay bricks market with 70mm clay bricks,
[]
- 102.1 []
- 102.2 []
- 102.3 []
103. Finally, the Commission understands that no significant investments are required by Australian manufacturers in order for them to supply the New Zealand clay bricks market.
- 103.1 Clay bricks are bulk, dry products. There are no special containers or storage facilities required for the import of this product.
- 103.2 While [] advised that distribution channels would be important when looking to supply into New Zealand,
[] advised the Commission that setting up a distribution channel would be relatively easy. One could achieve this by using any number of well established logistics and transport companies to directly supply clay bricks to customers ([]). Alternatively, one could supply via a building merchant or via a building products distributor. [] advised the Commission that the most important factor was to ensure that there is on the ground expertise in respect of the distribution. For example,
[]

²⁷ []

103.3 []

103.4 These Australian manufacturers have advised that they are []

104. For these reasons, if the proposed joint venture raised prices or reduced the quality of its services, the Commission considers that Boral and Brikmakers [] could quickly enter the New Zealand clay bricks market and provide a significant competitive constraint on the proposed joint venture.
105. Selkirk, [], has supplied to New Zealand in the past and could re-enter should there be demand for its clay bricks. The Commission considers that Selkirk would provide some competitive constraint on the proposed joint venture.

Competition from non-brick external cladding products

106. The Commission considers that the proposed joint venture would likely be constrained, to some degree, by the presence of other external cladding products.
107. The Commission considers that the many factors that customers consider when selecting an external cladding shows that clay bricks are competing, at least to some degree, with all other types of external cladding.
108. Other than clay bricks, the two most popular options for external cladding are fibre cement and timber weatherboards. The share of external cladding used by material is outlined in Table 2.

Table 2: Share of external cladding by material

Cladding material	Percentage of buildings
Clay Brick	45%
Fibre Cement	20%
Timber weatherboard	10%
Concrete block	5%
Exterior insulation and finishing systems (EIFS)	5%
Other	15%
Total	100%

Source: applicants, industry participants.

109. All of the external cladding suppliers interviewed, and three of the large building firms, advised the Commission that clay bricks compete to some degree in a “pool” of external cladding materials. This is, as noted above, is because some customers have a preference for external cladding that is more expensive than clay bricks. Given such preferences, an attempted increase in the price of clay bricks could be rendered unprofitable by customers switching to a pricier, but preferred external cladding. Also, there are other external cladding products, such as concrete bricks, that have a similar installed cost to that of clay bricks that some customers (who do not have strong external cladding preferences) could switch to in the face of an increase in the price of clay bricks.
110. Overall, the Commission considers that the proposed joint venture would likely be constrained, to some degree, by the presence of other external cladding products.

Conclusion

111. The Commission considers that the proposed joint venture would not likely have the market power to unilaterally increase prices in the clay bricks market as it faces significant competition from existing competitors and near competitors in Australia. The proposed joint venture would also be constrained by non-brick cladding suppliers.

Determination on notice of clearance

112. The Commission is satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the clay bricks market.
113. Under section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for CSR Building Products (NZ) Limited (trading as Monier Bricks and Roofing) or any interconnected bodies corporate of CSR Building Products (NZ) Limited (CSR) and Brickworks Building Products (NZ) Pty Limited (trading as Austral Bricks) or any interconnected bodies corporate of Brickworks Building Products (NZ) Pty Limited (Brickworks) (together the applicants) to acquire up to 100% of the assets of the applicants' respective New Zealand brick businesses (except CSR's manufacturing plant located at New Lynn, Auckland).

Dated this 10th day of October 2012

Dr Mark Berry

Chair

Attachment 1 – List of parties interviewed by the Commission

Applicants

CSR Building Products (NZ) Limited
Brickworks Building Products (NZ) Pty Limited

Clay brick suppliers

New Zealand Brick & Stone Limited
W.D. Boyes & Sons Limited (trading as Canterbury Clay Bricks)
Clay Bricks Limited
Boral Limited
Brikmakers Pty Limited
Selkirk Brick Pty Limited

Non-clay external cladding suppliers

Fletcher Concrete & Infrastructure Limited
Carter Holt Harvey Limited
Dynex Extrusions Limited
James Hardie New Zealand Limited
Nuplex Industries Limited

Residential building companies

Decon Holdings Limited (trading as G.J. Gardner)
Platinum Homes (NZ) Limited
Ryman Healthcare Limited
Jennian Construction Limited
Stonewood Homes Limited
A1 Homes