

Determination

Camplify Co (NZ) Limited, Tourism Holdings Limited and TH2connect LP [2022] NZCC 8

The Commission:	Sue Begg Dr Derek Johnston Vhari McWha
Summary of application:	An application from Camplify Co (NZ) Limited seeking clearance to acquire the New Zealand assets and business of the peer-to-peer digital marketplace platforms trading under the names Highway and SHAREaCAMPER from Tourism Holdings Limited and TH2connect LP.
Determination:	Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission gives clearance to the proposed acquisition.
Date of determination:	24 March 2022

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The proposed acquisition

1. On 11 January 2022, we registered an application (the Application) from Camplify Co (NZ) Limited (Camplify) seeking clearance to acquire the New Zealand assets and business of the peer-to-peer digital marketplace platforms trading under the names Mighway and SHAREaCAMPER from Tourism Holdings Limited (THL) and TH2connect LP (the Proposed Acquisition).
2. Camplify, Mighway and SHAREaCAMPER are peer-to-peer platforms which enable customers to search for and rent a motorhome, campervan and other recreational vehicles (together RVs), and enable RV owners, including private individuals, to rent out their vehicles in New Zealand. With the Proposed Acquisition, Camplify would become the largest peer-to-peer RV rental platform currently operating in New Zealand.

Our decision

3. The Commission gives clearance to the Proposed Acquisition because it is satisfied that the acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
4. The demand for renting RVs on (and via) peer-to-peer platforms has declined and remains subdued because of the COVID-19 pandemic, which has significantly affected the tourism industry. The results of Mighway and SHAREaCAMPER in recent years have been heavily impacted by the pandemic and a lack of international tourism in New Zealand.¹
5. A focus of our investigation was the assessment of the counterfactual; that is, what would likely happen to THL's Mighway and SHAREaCAMPER if not sold to Camplify. After careful consideration, including taking into account all available evidence, we determined that in the counterfactual:
 - 5.1 THL would likely close down both Mighway and SHAREaCAMPER; and
 - 5.2 it is unlikely that the assets of Mighway and SHAREaCAMPER would be acquired by a third party that would use them to operate a peer to-peer RV rental platform in New Zealand.
6. We are therefore satisfied that the Proposed Acquisition would not be likely to result in a substantial lessening of competition.
7. During our process of considering the Proposed Acquisition, we had decided to issue a Statement of Issues, but after informing the Parties of this, we received significant further evidence. Having considered this additional evidence, we decided to clear the Proposed Acquisition without publishing a Statement of Issues.

¹ Camplify ASX Announcement (25 October 2021).

Our framework

8. Our approach to analysing the competition effects of mergers is based on the principles set out in our Mergers and Acquisitions Guidelines (our guidelines).²
9. We assess mergers using the substantial lessening of competition test. We determine whether a merger is likely to substantially lessen competition in a market by comparing the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).³
10. Where, absent a merger, a target is unlikely to continue operating, and its assets are unlikely to remain in the market under different ownership, the firm can be described as a 'failing firm'.⁴ In these circumstances, there is often very little difference in competition between the counterfactual and the factual.⁵

The parties

Camplify

11. Camplify is a subsidiary of Camplify Holdings Limited, which is listed on the Australian Securities Exchange. Camplify's peer to-peer RV rental platform launched in New Zealand in 2019.

THL

12. THL is a global tourism company, whose shares are listed on the New Zealand stock exchange. Relevant to the Application, THL's businesses in New Zealand include the manufacture and sale of motorhomes, the rental of motorhomes (under brands that include Maui, Britz and Mighty) and the operation of the peer-to-peer RV rental platforms Mighway and SHAREaCAMPER.

With and without scenarios

13. With the Proposed Acquisition, Camplify will acquire Mighway and SHAREaCAMPER.⁶
14. Based on the evidence before us, we consider that in the counterfactual:

² Commerce Commission, *Mergers and Acquisitions Guidelines* (July 2019).

³ *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

⁴ See Mergers and Acquisitions Guidelines above n1 at Attachment E.

⁵ See Mergers and Acquisitions Guidelines above n1 at Attachment E at [E3].

⁶ As part of the Proposed Acquisition, Camplify and THL (the Parties) will also enter an ongoing strategic and commercial relationship, and THL will acquire shares in Camplify. The Application at [3.3], Camplify ASX Announcement (25 October 2021) and THL NZX announcement (26 October 2021). Any clearance given to Camplify is for the acquisition of the subject assets only. Under s 66(1) of the Commerce Act 1986, a person who proposes to acquire assets or shares may give the Commission a notice seeking clearance for the acquisition. Any clearance given by the Commission under s 66(3)(a) of the Commerce Act 1986 is only in relation to the proposed acquisition of assets or shares described in the notice seeking clearance.

- 14.1 THL would be unlikely to sell Mighway and SHAREaCAMPER as a going concern and would instead close the platforms down; and
- 14.2 the assets of Mighway and SHAREaCAMPER would not be acquired by a third party that would use them to operate a peer to-peer RV rental platform in New Zealand.
15. We discuss matters relating to our assessment of the counterfactual further below.

Mighway and SHAREaCAMPER unlikely to be sold as a going concern to another purchaser

16. We consider it unlikely, in the counterfactual, that Mighway and SHAREaCAMPER would be acquired by an alternative purchaser as going concern businesses before THL closed the platforms. Even though there may be third parties that might be interested in acquiring Mighway and SHAREaCAMPER, we consider that there is not a real chance of the platforms being sold as a going concern to a third-party purchaser in the counterfactual before THL closed them.
17. In the Application, it was suggested that in the counterfactual THL might attempt to locate another buyer for Mighway and SHAREaCAMPER. However, it was further submitted that it is unlikely that THL would locate a realistic buyer who is prepared to pay a price above the ongoing losses THL would incur through to execution of any sale, for sale to another buyer to be a likely counterfactual.⁷ THL also submitted that it cannot see who would buy Mighway and SHAREaCAMPER, or that anyone else would complete an acquisition at speed before it closed down the platforms.⁸
18. THL had taken no steps to find another buyer for Mighway and SHAREaCAMPER.⁹ We made hypothetical enquiries with some third parties around their interest in acquiring Mighway and SHAREaCAMPER, the value they see in the assets and the timeframe in which they could complete an acquisition. While our limited enquiries identified at least one third party with an interest in acquiring Mighway and SHAREaCAMPER, we did not identify any party that would be likely to negotiate (let alone complete) an acquisition in the counterfactual before THL closed Mighway and SHAREaCAMPER. We also were unable to confirm the price that third parties might be prepared to pay for Mighway and SHAREaCAMPER. On this basis, we are satisfied that it is unlikely that Mighway and SHAREaCAMPER would be sold to an alternative purchaser as going concern businesses.

18.1 []
10

18.2 [].¹¹

⁷ The Application at [6.35].

⁸ Commerce Commission interview with THL (11 March 2022).

⁹ Commerce Commission interview with THL (17 February 2022).

¹⁰ []

¹¹ []

18.3 []¹²

18.4 []¹³

THL would likely close down both Highway and SHAREaCAMPER

19. We consider that, in the counterfactual, THL would likely close down Highway and SHAREaCAMPER and would be unlikely to continue to operate the platforms.

The Parties' submissions

20. THL submitted that it is likely to close down both Highway and SHAREaCAMPER in the counterfactual, primarily because [] and it cannot justify the investment required to expand its platforms in Australia to achieve the necessary scale to breakeven.¹⁴

21. THL further submitted that:

21.1 since the Proposed Acquisition was announced, it has lost key Highway and SHAREaCAMPER staff, and would not be able to effectively operate the platforms if it lost more staff;¹⁵

21.2 it has not seen the benefits (for its wider business and operations) anticipated from peer-to-peer platform ownership, and the benefits that it has seen have not been at a level that []¹⁶

21.3 the costs associated with closure are significantly less than the costs of selling Highway and SHAREaCAMPER (whether as a going concern or selling its assets after closure) to an alternative third-party;¹⁷ and

21.4 it could close the businesses quickly. THL [] and its contracts with external vendors are predominantly month to month. THL has no contracts with RV owners that use its platforms that require a notice period to be given to RV owners.¹⁸

Our assessment

22. Based on the evidence before us, we do not consider it is likely that Highway or SHAREaCAMPER would be sold as a going concern. Rather, we consider that both businesses would be closed.

¹² []

¹³ []

¹⁴ The Application at [3.11] and [6.34]-[6.35].

¹⁵ Commerce Commission interview with THL (11 March 2022).

¹⁶ Commerce Commission interview with THL (17 February 2022).

¹⁷ Letter from Minter Ellison (on behalf of THL) to the Commerce Commission (14 March 2022) at [8.1].

¹⁸ Commerce Commission interview with THL (11 March 2022).

23. The demand for renting RVs on (and via) peer-to-peer platforms has declined and remains subdued because of the COVID-19 pandemic, which has significantly affected the tourism industry. The results of Mighway and SHAREaCAMPER in recent years have been heavily impacted by the pandemic and a lack of international tourism in New Zealand.¹⁹

24. The evidence indicates that both Mighway and SHAREaCAMPER []²⁰
[]

25. The THL Board has decided to close both Mighway and SHAREaCAMPER if the businesses are not sold to Camplify.²¹ THL advised that the Board does not believe that there is a []²²

25.1 [];

25.2 [];

25.3 []; and

25.4 [].

26. []²³

¹⁹ Camplify ASX Announcement (25 October 2021).

²⁰ []

²¹ Letter from Minter Ellison (on behalf of THL) to the Commerce Commission (14 March 2022) at [2.1] [].

²² Letter from Minter Ellison (on behalf of THL) to the Commerce Commission (14 March 2022) at [4.2] [].

²³ []

The assets would not be used to operate a peer to-peer platform in New Zealand

27. After the closure of Mighway and SHAREaCAMPER in the counterfactual, we consider it would be unlikely that the assets of the platforms would be acquired by a party that would use them to operate a peer to-peer RV rental platform in New Zealand. This is essentially because the value, and attractiveness, of the assets of Mighway and SHAREaCAMPER is likely to reduce substantially once the platforms are closed.
28. The key assets of Mighway and SHAREaCAMPER that would remain beyond closure of the platforms would be the software/code for the platforms plus the Mighway and SHAREaCAMPER brands. Beyond these key assets, it appears that Mighway and SHAREaCAMPER do not have any other assets of material value.²⁴ There are no formal contracts with RV owners, meaning that the RV owner listings on Mighway and SHAREaCAMPER only have value while the platforms continue to operate. If THL were to close down Mighway and SHAREaCAMPER, then the value associated with the RV owner listings it currently has would become zero as RV owners migrate their business elsewhere.
29. We do not see a real chance that the assets of Mighway and SHAREaCAMPER would remain in the relevant market(s). Further, THL is unlikely to maintain the assets with a view to possibly re-entering the relevant market(s) again, given its reason for closing Mighway and SHAREaCAMPER in the counterfactual. Once THL has closed Mighway and SHAREaCAMPER, the remaining assets of the businesses are unlikely to be of material value to third party purchasers. The value of the software/code is likely to decline rapidly following closure of the platforms. Even if the Mighway and SHAREaCAMPER brands were sold to a third party, it is unlikely that this would give that party a significant advantage over other entrants in attracting customers.

Overall conclusion

30. In the counterfactual, Mighway and SHAREaCAMPER would exit the relevant market(s). Accordingly, we are satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in any relevant market.

²⁴ Commerce Commission interview with THL (11 March 2022).

Determination on notice of clearance

31. Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to Camplify Co (NZ) to acquire the New Zealand assets and business of the peer-to-peer digital marketplace platforms trading under the names Mighway and SHAREaCAMPER from Tourism Holdings Limited and TH2connect LP.

Dated this 24th day of March 2022

Sue Begg
Deputy Chair