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COMMERCE COMMISSION

Decision No. 368

Determination pursuant to the Commerce Act 1986 in the matter of an application for clearance of a business acquisition involving:

Tourism Holdings Limited

and

**Britz New Zealand Rentals Limited and
Backpacker Campervans Limited**

The Commission: E M Coutts

**Summary of
Proposed Acquisition:** The acquisition by Tourism Holdings Limited of the assets, liabilities and businesses currently operated by Britz New Zealand Rentals Limited and Backpacker Campervans Limited.

Determination: Pursuant to s 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition.

Date of Determination: 13 August 1999

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CONTAINED IN SQUARE BRACKETS []**

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THE PROPOSAL

- 1 Pursuant to section 66(1) of the Commerce Act 1986 (the Act), Tourism Holdings Limited (THL) gave notice to the Commission dated 2 August 1999 (the application) seeking clearance for it to acquire the assets, liabilities and businesses currently operated by Britz New Zealand Rentals Limited and Backpacker Campervans Limited (together called “Britz”).

THE PROCEDURES

- 2 Section 66(3) of the Act requires the Commission either to clear, or to decline to clear, a notice given under section 66(1) within 10 working days, unless the Commission and the person who gave the notice agree to a longer period. No extension was sought by either party. Accordingly, a decision on the application is required by 17 August 1999.
- 3 THL sought confidentiality for the fact of the application, and a confidentiality order was made in respect of the application for a period of 20 working days from the Commission’s determination of the notice. When the confidentiality order expires, the provisions of the Official Information Act 1982 will apply.
- 4 The Commission’s determination is based on an investigation conducted by its staff and their subsequent advice to the Commission.

THE PARTIES

Tourism Holdings Limited (THL)

- 5 THL is a publicly listed company based in Dunedin. THL is involved in a range of tourism activities including coach tours, flightseeing operations, tourist travel centre operations, and the operation of the Treble Cone skifield, in the South Island. In addition to its New Zealand-based operations, THL also has international marketing activities in overseas locations.
- 6 Of particular interest to this application, THL operates “Maui”, a motorhome rental business, in New Zealand, Australia and South Africa. In New Zealand, Maui has a current fleet of [] motorhomes, ranging from two berth to six berth models. Maui also has a fleet of [] rental cars.

Britz

- 7 Britz Australia operates motorhome rental services in New Zealand, Australia and South Africa. In New Zealand, its operations are Britz New Zealand Rentals Limited, and Backpacker Campervans Limited.
- 8 In New Zealand, Britz has a fleet of [] motorhomes, incorporating a range of sizes.

BACKGROUND

Motorhome Rentals

- 9 The tourism industry generally refers to “motorhomes” as being larger than “campervans”, and designed for families and groups of up to six people. For the purposes of this decision, the Commission uses the term “motorhome” to include “campervans”.

- 10 Motorhomes are a transport and accommodation option for tourists. Generally, motorhomes will range in size from two berth to six berth models. Motorhomes contain a variety of facilities depending upon their size and price, including shower facilities, a flush toilet, gas cooker, fridge and bedding.
- 11 Motorhomes are generally adapted from two types of vehicle. The first of these is a “panel van”, a standard commercial van refitted with the motorhome facilities. The second such vehicle is a “recreational vehicle” cab and chassis, with a “caravan” adapted onto the rear of the vehicle. THL advised that there are a number of coach builders in New Zealand who undertake these conversions, and the purchase price of a new two berth motorhome is approximately []. Second hand motorhomes are usually sold after three to four years, an approximate price for a two berth motorhome being [].

Marketing of Motorhome Rentals

- 12 Motorhomes are marketed in the same manner as other tourism and transport products. THL advised that []% of its sales are pre-purchased by tour wholesalers, and sold through the retail travel industry overseas. The remainder of sales are made to tourists upon arrival in New Zealand, with a small proportion of hires made by New Zealand tourists.
- 13 THL advised that the larger tour wholesalers normally require a “mix” of motorhome vehicles (offering a range of sizes and facilities), and will therefore only purchase products from the larger fleet operators. In addition, tour wholesalers offer three or four different operators in their packages, providing a choice to the consumer. THL advised that it markets through approximately [] wholesalers worldwide.
- 14 The smaller fleet operators (below 50 vehicles) market through secondary tour wholesalers, as well as direct marketing at airports and tourist accommodation, and through the media.
- 15 [] Internet sales offer a very attractive option to tourism operators as it removes the need for a wholesaler and increases the margin to the operator, and it is inexpensive. An increasing number of tourism participants, including motorhome operators, market via the internet.

THE MARKETS

Introduction

- 16 The purpose of defining a market is to provide a framework within which the competition implications of a business acquisition can be analysed. The relevant markets are those in which competition may be affected by the acquisition being considered. Identification of the relevant markets enables the Commission to examine whether the acquisition would result, or would be likely to result, in the acquisition or strengthening of a dominant position in any market in terms of s 47(1) of the Act.
- 17 Section 3(1A) of the Act provides that:

“the term ‘market’ is a reference to a market in New Zealand for goods and services as well as other goods and services that, as a matter of fact and commercial common sense, are substitutable for them.”

- 18 Relevant principles relating to market definition are set out in *Telecom Corporation of New Zealand Ltd v Commerce Commission*¹ and in the Commission's *Business Acquisition Guidelines* ("the Guidelines")². A brief discussion of the methodology follows.
- 19 Markets are defined in relation to product type, geographical extent, and functional level. The boundaries of the product and geographical markets are identified by considering the extent to which buyers are able to substitute other products, or across geographical regions, in response to a change in relative prices of the products concerned. A market is the smallest area in which all such substitution possibilities are encompassed. It is in this area that a hypothetical monopoly supplier could exert market power.
- 20 A properly defined market will include products which are regarded by buyers or sellers as being not too different ('product' dimension), and not too far away ('geographical' dimension). A market defined in these terms is one within which a hypothetical profit-maximising sole supplier of a product could impose at least a small yet significant and *non-transitory* increase in price (the "*ssnip*" test), assuming other terms of sale remain unchanged. It will also include those suppliers currently in production who are likely, in the event of such a *ssnip*, to shift promptly to offer a suitable alternative product, or offer their product to alternative acquirers.
- 21 Markets are also defined in relation to functional level. Typically, the production, distribution, and sale of products proceeds through a series of vertical functional levels, so the functional levels affected by the application have to be determined as part of the market definition. For example, that between manufacturers and wholesalers might be called the "manufacturing market", while that between wholesalers and retailers is usually known as the "wholesaling market".

Product Market

- 22 THL submits that motorhome rentals are part of the wider tourism market and more specifically part of the accommodation and rental transport sector. In support of this submission, THL makes reference to Decision No 262, *Newmans/Mt Cook*³. In that Decision (at para 19) the Commission noted that, in respect of coaches and sightseeing,:
- "attempts to delineate that market in any strict fashion are difficult to sustain since, arguably, this form of tourist travel (in a coach) competes with tourist travel by rail, air or sea, either directly or indirectly."*
- 23 THL submits that this approach extends to other transport/accommodation mixes for the purposes of tourism in New Zealand. In addition, THL submits that the available evidence suggests that tourists generally use motorhomes as part of a tourism package including accommodation, airfares and rental transport.
- 24 Due to the confidential nature of the application the Commission has not made specific industry inquiries within the industry, but believes that it has sufficient information available to it to give the application proper consideration. The Commission recognises that there are some arguments available that would support a broader market. However, given that the proposal involves an aggregation in the motorhome rental business, it appears appropriate to analyse the competitive effects of the proposal with reference to

¹ (1991) 4 TCLR 473.

² Commerce Commission, *Business Acquisition Guidelines*, 1999, 11-16.

³ *Newmans/Mt Cook*, Decision 262, Commerce Commission, 8 March 1991.

that business activity. For the purposes of this application therefore, the Commission proposes to adopt a “narrow” market definition of motorhome rentals. In doing so it is noted that if there are no dominance concerns arising out of this narrow market, there are unlikely to be any dominance concerns within the wider market.

Geographic Market

- 25 THL and Britz operate nationally, as do other motorhome rental operators. A national operation allows the customer to collect the motorhome at one location (such as the point of entry into New Zealand), and drop off the vehicle at a different location (such as the airport of departure). The Commission understands that this is standard practice within the motorhome rental market.
- 26 Given the national coverage available to consumers, the Commission considers that the geographic market is a national one.

Conclusion on Market Definition

- 27 For the purposes of analysing the competitive effects of the proposed acquisition, the Commission concludes that the relevant market is the national market for motorhome rentals.

ASSESSMENT OF DOMINANCE

Competition Analysis Overview

- 28 Section 66(3) of the Act, when read in conjunction with s 47(1) of the Act, requires the Commission to give clearance for a proposed acquisition if it is satisfied that the proposed acquisition would not result, and would not be likely to result, in a person acquiring or strengthening a dominant position in a market. If the Commission is not so satisfied, clearance must be declined.

- 29 Section 3(9) of the Act states that a person is in a “dominant position” if:

... a person as a supplier or an acquirer of goods or services either alone or together with an interconnected or associated person is in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in that market ...

- 30 That section also states that a determination of dominance shall have regard to:

- market share, technical knowledge and access to materials or capital;
- the constraint exercised by competitors or potential competitors; and
- the constraint exercised by suppliers or acquirers.

- 31 In *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554, the Court of Appeal approved the following dominance standard, adopted by McGechan J in the High Court:

...dominance involves more than “high” market power; more than mere ability to behave “largely” independently of competitors; and more than power to effect “appreciable” changes in terms of trading. It involves a high degree of market control.

- 32 In the Commission’s view, a dominant position in a market is generally unlikely to be created or strengthened where, after the proposed acquisition, either of the following situations exist:
- the merged entity (including any interconnected or associated persons) has less than in the order of a 40% share of the relevant market;
 - the merged entity (including any interconnected or associated persons) has less than in the order of a 60% share of the relevant market and faces competition from at least one other market participant having no less than in the order of a 15% market share.
- 33 However, as Tipping J stated in the High Court decision of *New Zealand Magic Millions Limited & Anor v Wrightson Bloodstock Limited* (1990) 3 NZBLC 99-175:
- [M]arket share is not the sole determinant of the presence or absence of dominance or market power. The most that can be said is that dominance is frequently attended by substantial market share but all the other relevant factors must be brought to account. For example, a substantial market share without barriers to entry will seldom, if ever, be indicative of dominance.*
- 34 Accordingly, before a conclusion on dominance is reached, it is necessary to consider all factors listed in s 3(9) and any other relevant factors.

The National Market for Motorhome Rentals

Market Shares

- 35 THL submitted estimations based upon its industry knowledge and experience. Given the confidential nature of this application, the Commission has not sought to confirm market shares, but is prepared to accept THL’s estimations as a starting point for an analysis of the proposed acquisition.
- 36 THL’s estimation of the market share of the combined entity in the motorhome rental market is shown in Table 1.

TABLE 1
Estimated Market Shares of Participants in
the National Market for Motorhome Rentals

Participant	Fleet Number	Estimated Market Share (%)
Maui	[]	[]%
Britz	[]	[]%
Combined Entity	[]	[]%
Adventure	[]	[]%
Pacific Horizon	[]	[]%
Kea	[]	[]%
Others*	[]	[]%
Total	[]	100%

* “Others” represents numerous minor operators of motorhome rentals

- 37 On the basis of the above figures the combined entity’s market share does not fall within the Commission’s “safe harbours” (refer paragraph 32) as there is no other single

competitor having a market share in the order of 15%. However, the fact that a proposed acquisition may lead to a market share falling outside these “safe harbours” does not necessarily mean that it will be likely to result in the acquisition or strengthening of a dominant position in a market. Additional factors must also be considered before a conclusion on dominance is reached. An analysis of those additional factors follows.

Constraint by Existing Competitors

- 38 As discussed earlier, the proposed acquisition affects the national motorhome rental market. THL submits that the combined entity would continue to be constrained by the conduct of existing competitors. THL submits further that many of the competitors are small with low cost structures, and are in a position to price at a level below that of a larger competitor.
- 39 The Commission notes that there is a number of other national operators currently in the market. Three operators have a fleet size estimated at over [] vehicles, and have been operating for over six years. A number of other operators have smaller, yet sizeable, fleets estimated (by THL) at between 20 and 70 vehicles. These operators have been in the market for between one and ten years. Overall therefore, the mix of operators currently in the market represents both established large-scale businesses, and recent entrants operating smaller fleets.
- 40 These smaller operators do not place product with international tour wholesalers. They do however obtain sales through direct marketing at airports, tourism centres, and tourism publications. Further, internet technology now affords these operators the opportunity to market internationally, without the traditional need for tour wholesalers.
- 41 THL submits further that each of the current competitors could readily expand their operations, and that any such expansion could be effected within three months. [

] Expansion would require the purchase of additional vehicles. The Commission understands that the larger operators upgrade their fleets on a regular basis [] The regular upgrade offleets produces a corresponding number of used vehicles for the second hand market and, consequently, the opportunity for other operators to upgrade and/or expand their fleet.

- 42 The Commission considers that, if the proposal were to proceed, there would be an effective constraint provided by existing competitors on the combined entity.

Constraint by Potential Competitors

- 43 THL submits that there are few barriers to entry into this market and, consequently, that the combined entity will be effectively constrained by the threat of potential entry.
- 44 The Commission considers that barriers to entry are not onerous. There are no specific legislative or regulatory requirements to be met. Vehicles can be purchased new or second-hand. As stated earlier, a number of New Zealand coachbuilders modify vans into motorhomes. The Commission also understands that there is a ready supply of second hand motorhomes. Generally, these second-hand vehicles are those being sold by the larger operators, after a period of three to four years. Given these factors, the lead-in time for a potential competitor is likely to be, at the longest, three months.
- 45 While the larger operators have depots at Auckland and Christchurch (being cities with international airports), the Commission understands that it is common in both the

motorhome rental and car rental businesses for operators to appoint “agents” in other locations. In the motorhome rental business these agents may be motels, garages or other smaller sized tourism/transport operators. Having agencies in a number of locations allows for an increased presence nationally, and also assists with the repositioning of vehicles.

- 46 Some form of reservation facility will also be necessary, however this can be achieved through a computer and telephone system, and at a reasonably low cost given modern technologies. An alternative is to contract out this work to a call-centre or travel agency. In any event, the requirement for a reservation facility does not present a barrier to entry into the market.
- 47 THL submits that a number of overseas operators are potential entrants into New Zealand. The Commission understands that the “franchise” arrangement (as referred to by THL) between Britz and Budget ended recently, enabling Budget to re-enter the market. [

] Other major overseas operators are listed as potential entrants. If these operators did enter the market, it is likely that they possess the capital resources, industry experience and international exposure to enter on a significant scale.

- 48 Given these factors, the Commission considers that potential entry to the market by a new operator would act as a constraint on the combined entity.

Constraint by Purchasers

- 49 The Commission accepts THL’s submission that the combined entity will be constrained by the major purchasers of motorhome rental packages. Sales are generated mainly offshore, through overseas wholesalers. As described earlier, these wholesalers will typically offer a number of similar operators within their brochures and can readily change suppliers to meet the customers’ service and price expectations (subject in some instances to the contractual relationship between the wholesaler and operator). That is, wholesalers would be able to find other suppliers that could provide motorhome rentals of the required quality and pricing standards, or would choose not to carry the products of operators who do not meet such standards.
- 50 The Commission concludes that the countervailing power of the major purchasers of motorhome rental packages is significant, and that they will continue to exercise an effective constraint on the conduct of the combined entity in the post-acquisition market.

Conclusion on Dominance in the National Market for Motorhome Rentals

- 51 The proposed acquisition will result in an aggregation of market share in the national market for motorhome rentals. However, the combined entity is likely to be constrained by the presence of a number of existing national and local operators.
- 52 Further, entry barriers are not onerous and are unlikely to represent a major barrier to any prospective entrant wishing to enter the market, or to existing participants seeking to expand their operations. The Commission also considers that there is a degree of countervailing power held by the purchasers of travel packages, such that the combined entity will be effectively constrained post-acquisition.

- 53 Given these factors, it is concluded that the proposal would not result, or would not be likely to result, in any person acquiring or strengthening a dominant position in this market.

OVERALL CONCLUSION

- 54 The Commission has considered the impact of the proposal in the national market for motorhome rentals.
- 55 Having regard to the factors set out in section 3(9) of the Commerce Act and all other relevant factors, the Commission is satisfied that the proposed acquisition would not result, or would not be likely to result, in any person acquiring or strengthening a dominant position in a market.

DETERMINATION ON NOTICE OF CLEARANCE

- 56 Accordingly, pursuant to section 66(3) of the Commerce Act 1986, the Commission determines to give clearance for the acquisition by Tourism Holdings Limited of the assets, liabilities and businesses currently operated by Britz New Zealand Rentals Limited and Backpacker Campervans Limited.

Dated this 13th day of August 1999

E M Coutts
Member