

31 May 2022

Tourism Holdings Limited / Apollo
Submission by Tourism Holdings Limited on the Statement of Unresolved Issues

1. INTRODUCTION

- 1.1 This submission is made by Tourism Holdings Limited (*thl*) in response to the Commerce Commission's (**Commission**) Statement of Unresolved Issues dated 28 April 2022 (**SOUI**).
- 1.2 As was the case for the Statement of Issues dated 11 March 2022 (**SOI**), the SOUI sets out a number of preliminary conclusions which are internally inconsistent and/or are not supported by the evidence.
- 1.3 *thl* repeats its view that the Proposed Transaction is not likely to have the effect of substantially lessening competition in any market. For the reasons set out below, *thl* submits that:
- (a) the merged entity is likely to be constrained by excess capacity in the industry until at least the end of 2024. There can therefore be no lessening of competition resulting from the Proposed Transaction in this period;
 - (b) in the medium term, the merged entity will be constrained by:
 - (i) competition from other motorhome rental operators. Other motorhome rental operators currently account for approximately [REDACTED] of the motorhome rental segment excluding peer-to-peer (or more than [REDACTED] of the motorhome segment including peer-to-peer). The SOUI [REDACTED] and significantly underestimates the degree of constraint that will be provided by smaller motorhome rental operators;
 - (ii) competition from campervan rental operators. No meaningful distinction can be drawn between campervans and motorhomes, and the evidence shows that customers consider campervans and motorhomes to be substitutes;
 - (iii) the ability of existing motorhome and campervan rental operators to expand. The evidence shows that [REDACTED].
 - (iv) RVs available to rent through peer-to-peer platforms and other travel and accommodation options.

2. IMPACT OF THE PANDEMIC – THE ‘SHORT TERM’ AND THE ‘MEDIUM TERM’

- 2.1 *thl* agrees with the Commission's conclusion that in the 'short term', the excess supply in the market will constrain the merged entity and therefore the Proposed Transaction will not have the effect of substantially lessening competition during this period. However, *thl* disagrees with the Commission's views on when the 'short term' will end, the Commission's views on the period it defines as the 'medium term' and the Commission's views on the market conditions that will exist in the 'medium term'. The evidence shows that:
- (a) the 'short term' is likely to last until at least the end of 2024 (and therefore the merged entity will be constrained in this period); and
 - (b) the current supply constraints are likely to resolve by the end of 2023, well before the end of the short term and the commencement of the 'medium term'. The merged entity will therefore also be constrained in the medium term by, amongst other things, expansion of existing operators and the threat of new entry as explained in section 6 below. Even if the current predictions for the return of international visitors are conservative and demand increases sooner than expected, motorhome operators will be able to access additional supply to meet that demand which will constrain the merged entity.

2.2 The Commission concludes at [35.1] that “the short term demand constraints are likely to persist until the 2023/2024 summer season at the earliest”. *thl* submits that the short-term demand constraints are likely to persist until at least the second half of 2024 (more than 2 years from now) and potentially later, and therefore the motorhomes available for rent will continue to significantly exceed demand. This is supported by recent forecasts by the Tourism Export Council of New Zealand (**TECNZ**) which estimate that the total number of annual visitor arrivals into New Zealand by YE May 2023 will be approximately 64.6% of pre-COVID arrivals and by YE May 2025 will be approximately 95.5% of pre COVID annual arrival numbers. A copy of the forecasts are **enclosed**.

2.3 The Commission has defined the ‘medium term’ as the period starting when the ‘short term’ ends (in approximately 18 months) and will end with the cessation of supply constraints and the return of market confidence (within 3 years or longer). As explained above, the ‘medium term’ is unlikely to commence until at least the second half of 2024. Further, *thl* disagrees with the Commission’s conclusion that the current supply constraints will persist for up to 3 years or longer. The evidence shows that the current supply constraints are likely to be resolved by the end of 2023 and well before demand improves to a level where excess supply will no longer constrain the merged entity. In particular:

- (a) At [6.34] of the Application, *thl* stated that it expects the current supply chain issues to resolve in [redacted]. Indications that *thl* has received from informal discussions with its supply partners suggests that the current supply issues will now be resolved by the end of 2023. For example, [redacted]. Further, *thl* has made inquiries with a number of motorhome manufacturers in China for supply of vehicles to New Zealand. Those manufacturers have indicated that they have substantial unutilised capacity that could be utilised by existing or new operators in the market. We **enclose** copies of these confidential communications;
- (b) Thor Industries, the world’s largest RV manufacturer with a significant presence in both North America and Europe, stated in its most recent quarterly results release that “we currently expect to see the global chassis issues begin to resolve by the end of the 2022 calendar year.”¹
- (c) [redacted];²
- (d) [redacted];³
- (e) [redacted].⁴

2.4 At footnote 18 of the SOUI, the Commission states that “other parties expect supply chain issues to continue for two to three years or to mean that motorhome rental operators will struggle to expand their fleets to match demand”. [redacted].⁵ [redacted].

2.5 Accordingly, the appropriate definition of the ‘medium term’ is the period after which supply no longer significantly exceeds demand, at least 2-2.5 years from now, with supply constraints having eased well before this period. For all the reasons explained later in this submission, the Proposed Transaction will not substantially lessen competition in any market in the ‘medium term’. The Commission has inappropriately placed greater weight on assumptions as to the market conditions in 2 years’ time compared to market conditions over the next two years in reaching its views.

3. MARKET DEFINITION

3.1 While *thl* agrees with the Commission that it is not necessary to define the precise boundaries of the relevant market, provided that all relevant competitive constraints are considered, *thl* considers that

¹ See <https://ir.thorindustries.com/investor-resources/press-releases/press-release-details/2022/THOR-Industries-Continues-to-Achieve-Excellent-Financial-Results-With-Net-Sales-of-3.88-Billion-Consolidated-Gross-Profit-Margin-of-17.4-and-Earnings-per-Share-of-4.79-for-the-Second-Quarter-of-Fiscal-2022/default.aspx>

² For example, see: [redacted].

³ [redacted]

⁴ [redacted]

⁵ [redacted]

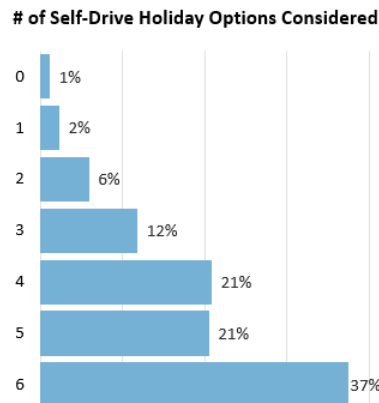
the Commission's approach to market definition in this case has led it to dismiss competitive constraints that plainly exist in the market.

3.2 **thl** maintains that the appropriate market for assessing the competitive effects of the Proposed Transaction is the national market for RV rentals, which includes both motorhomes and campervans. Campervan rentals are a significant constraint on motorhome rentals (and vice versa): customers can and will switch between, campervans and motorhomes, particularly where they are of the same berth size and have the same facilities.

3.3 We **enclose** a report of recent consumer research undertaken by independent market research consultants, TKP, on **thl's** behalf, together with a letter to the Commission from TKP. The study comprised an online survey with a cross-section of 609 respondents which gives 95% confidence that the population results fall within +/- 4% of the survey result. The customer survey is unequivocal evidence that customers consider motorhomes and campervans to be substitutable, in addition to other self-drive options. In particular, the survey results show that, of those respondents who hired or are in the process of booking a motorhome:

- (a) 43% also considered a converted car/van option;
- (b) 62% also considered a 5m campervan option;
- (c) 73% also considered a 7m campervan option;
- (d) 78% also considered a combination of a rental car and hotel/motel room (including Airbnb) option; and
- (e) 72% also considered a car and cabin in a holiday park option.

3.4 91% of survey respondents considered 3 or more different self-drive holiday options, as shown by the graph below:



3.5 At [96] of the SOUI, the Commission acknowledges the substitutability between campervans and motorhomes of the same berth size:

We acknowledge the potential for customers looking to rent a two to four berth motorhome (particularly at the budget end of the spectrum) to see a two to four berth campervan as an alternative, either based on price or the driveability advantages of campervans over motorhomes. Customers looking to rent one of the Parties' cheapest two berth motorhome models may consider a two berth campervan to be an alternative.

3.6 However, despite this acknowledgment, the Commission has drawn a distinction between campervans and motorhomes of the same berth-size and dismissed the competitive constraint that will be imposed

on the merged entity by campervan rental operators, particularly Jucy. Even if comparing vehicles with identical facilities, there are both campervan and motorhome options. For example, Jucy's Chaser 'campervan' has the full range of facilities that are found in what the Commission defines as a 'motorhome', including a plumbed toilet/shower, a full kitchen, and living space.

3.7 The Commission's approach is also inconsistent with the approach taken by the Australian Competition and Consumer Commission (**ACCC**) to market definition. The ACCC has stated in its Statement of Issues that "*the ACCC considers the relevant product market to be the supply of motorised RV rentals, including motorhomes, campervans and 4WD campers*".⁶ The ACCC has taken the correct approach to market definition in this industry; its approach is supported by the customer survey and the other evidence presented in this submission and previously.

3.8 The Commission states at footnote 33 of the SOUI:

Unlike in Brambles v Commerce Commission (2003) 10 TCLR 868 (Brambles) at [135], where the Commission relied heavily on the SSNIP test, we have considered a variety of quantitative and qualitative evidence in reaching this view. The High Court in Brambles also endorsed the High Court of Australia's view in Queensland Wire Industries Ply Ltd v Broken Hill Ply Co Ltd (1989) 167 CLR. 177 at 196 that market definition "involves value judgments about which there is some room for legitimate differences of opinion".

3.9 It is unclear what weight the Commission has placed on the "*variety of quantitative and qualitative evidence*" it has relied on, but it is clear it has placed insufficient weight on the economic analysis provided by NERA on product substitutability.

3.10 In *Brambles v Commerce Commission* the Court accepted that it may be necessary for the Commission to make a value judgment where data was not available to enable the SSNIP test to be applied:⁷

We accept it is appropriate to attempt to apply the ssnip test for the purposes of market definition, but the data on which the Commission relied in determining the cost differential between crate hire and cardboard boxes were not sufficiently reliable to provide a soundly based result.

...

This was a case where there was significant product differentiation and therefore real difficulties in applying the ssnip test. It is appropriate to make a common sense assessment, based on the evidence before the Commission. Clearly, cardboard cartons and plastic crates are technical substitutes for most produce lines, and both are being used in the produce distribution chain at the moment. There are a variety of preferences for one or the other, based on grower or retailer preference and the particular requirements of the produce line, but there is considerable use of both for the same purpose.

3.11 The situation which arises in relation to the Proposed Transaction is very different to *Brambles*. The data and market survey evidence provided to the Commission clearly demonstrates that campervans and motorhomes are substitutes. It is not an appropriate approach for an antitrust regulator to ignore data and evidence of substitutability and apply instead a subjective 'value judgment'. This approach, in preference to accepted objective economic analysis to determine substitutability, would result in a standard similar to the 'chancellor's foot' standard in equity;⁸ market definition will mean what a particular division of the Commission chooses it to be on a case-by-case basis.

⁶ ACCC – Statement of Issues (*THL* – proposed acquisition of Apollo) dated 28 April 2022 at [43].

⁷ *Brambles v Commerce Commission* (2003) 10 TCLR 868 (*Brambles*) at [131]–[132].

⁸ John Seldon, *Table Talk of John Seldon* (Pollock ed) (1927) at 43; "*Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower so is equity. Tis all one as if they should make the Standard for the measure we call a foot, to be the Chancellors foot; what an uncertain measure would this be. One Chancellor has a long foot another a short foot a third an indifferent foot; tis the same thing for the Chancellors Conscience*".

- 3.12 Moreover, *Queensland Wire Industries Ply Ltd v Broken Hill Pty Co Ltd*, decided 35 years ago before the SSNIP test was widely applied by regulators, recognised nevertheless that economic substitutability was the key determinate of market definition:

*Cross-elasticities of supply and demand reveal the degree to which one product may be substituted for another, an important consideration in any definition of a market.*⁹

- 3.13 The hypothetical monopolist test (**HMT**) imposes analytical rigour to the process of assessing whether goods or services are substitutable for each other, which in turn determines the boundaries of the market in which the effect on competition must be assessed. It assumes a hypothetical future situation in which a sole supplier of the goods or services in question increases price by a significant amount for a significant period, and measures whether that would result in a sufficient proportion of the supplier's customers switching to another product or service so as to render the price increase unprofitable. It follows that evidence of a lack of historic switching between products in the absence of a sole supplier price increase is irrelevant. The views of market participants as to market delineation are also of little weight because they do not apply the HMT analysis which is fundamental to the assessment of substitutability for antitrust analysis.
- 3.14 The customer survey report shows that, of the respondents, around 50% of motorhome hirers would switch to alternatives in the face of a 5% price increase and more than 60% of motorhome hirers would switch to alternatives in the face of a 10% price increase. Of those who would seek to switch, just over a quarter would consider an alternative RV, such as a campervan, in the face of a 5% price increase and just under a quarter would consider an alternative RV in the face of a 10% price increase. The critical loss analysis undertaken by NERA¹⁰ shows that a 6% loss of volume would render a price increase unprofitable.
- 3.15 The evidence is therefore compelling that motorhomes do not constitute a single product market.
- 3.16 As **thl** has previously explained, there is no meaningful distinction either from the demand or supply-side between motorhomes and campervans and the Commission's attempt to draw a distinction for the purposes of its competition analysis is arbitrary, rigid and does not reflect commercial common sense. [REDACTED].
- 3.17 The Commission has placed significant weight on the opinions expressed by third parties that motorhomes and campervans are distinct, and the Apollo website which separately lists campervans and motorhomes on different pages.¹¹ However:
- (a) the definitions of a 'motorhome' and 'campervan' used by Apollo on its website do not align with the Commission's definition at [25] of the SOUI. As explained at [2.12] of **thl's** submission on the SOI dated 24 March 2022 (**SOI Submission**), there is no common definition of a campervan and motorhome;
 - (b) **thl** itself does not draw a consistent distinction between motorhomes and campervans in its marketing collateral, nor does it approach the marketing of motorhomes differently to the marketing of campervans. This is because **thl** is not able to differentiate between customers for the purposes of marketing and pricing its products. The difficulty of segmenting **thl's** customer base is demonstrated by the age demographics for different product categories. The below table shows the distribution of hirers in FY19 by age for **thl's** Mighty 2-berth campervan, the oldest and smallest motorised RV on **thl's** fleet, and the Maui 6-berth motorhome, the newest and largest motorised RV on **thl's** fleet. While there is a skew to the age demographics

⁹ *Queensland Wire Industries Ply Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR. 177 at 199; see also *Re Queensland Co-operative Milling Association Ltd* 25 FLR 169 at [189] in which the Trade Practices Tribunal explains that explaining that the defining feature of a market is substitution.

¹⁰ NERA report, "**THL/Apollo**: review of certain aspects of the Commerce Commission's Statement of Preliminary Issues", dated 18 February 2022 at [17]-[21].

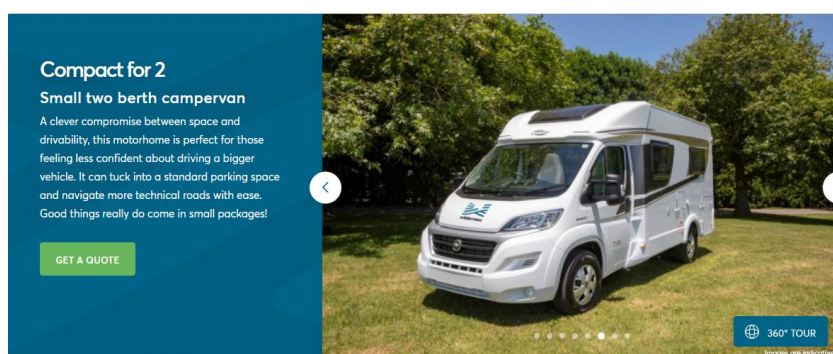
¹¹ See SOUI at [95].

for these vehicles, bookings are distributed across all age groups, illustrating that **thi** cannot exclusively target a single age group for a particular vehicle type.


New Zealand - Customers by Age		
Driver age	Mighty 2B Campervan	Maui 6B Motorhome
20 and under	[REDACTED]	
21 to 30	[REDACTED]	[REDACTED]
31 to 40	[REDACTED]	[REDACTED]
41 to 50	[REDACTED]	[REDACTED]
51 to 60	[REDACTED]	[REDACTED]
61 to 70	[REDACTED]	[REDACTED]
71 to 80	[REDACTED]	[REDACTED]
Other	[REDACTED]	[REDACTED]

(c) as explained in **thi's** previous submissions, many of the operators who offer both motorhomes and campervans do not draw a clear or consistent distinction between these vehicles on their websites or in their marketing. For example:

(i) Wilderness uses these terms interchangeably on its website:



(ii) Wendekreisen also uses the terms interchangeably:

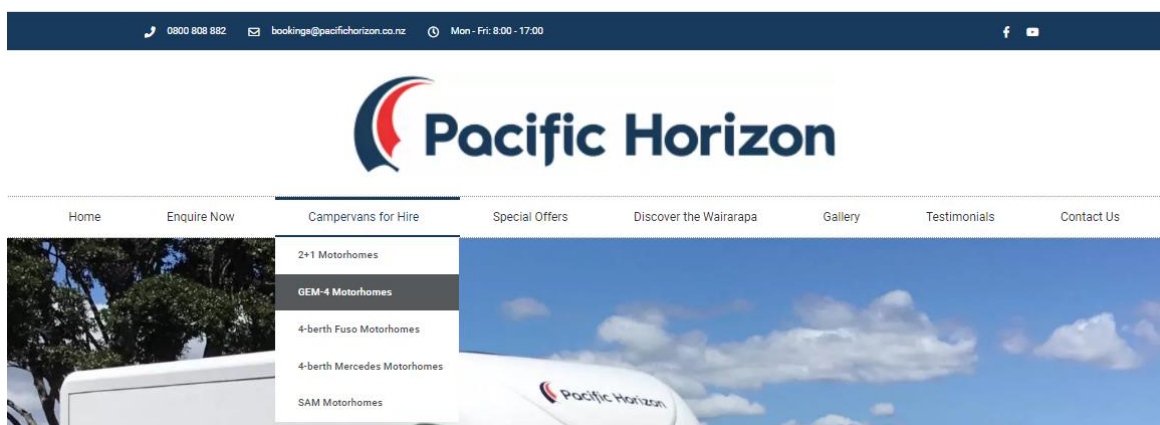
KORU STAR 4 FREEDOM	
	Capacity 4 People, Motorhome
	Beds 2 Double
	Shower/ Toilet Yes
	Water Hot & Cold
	Kitchen Gas stove Cooking extractor Fridge Sink Central Heating (Diesel) Solar Panel (280W)
	Vehicle VW Crafter 40, 130KW, 2019 model or newer

Koru Star 4 Freedom

The Wendekreisen Koru Star 4 Freedom Campervan has been designed for freedom camping off the grid with up to four adults. It is beyond doubt competing to be New Zealand's best non-composite 4 person motorhome hire in New Zealand.

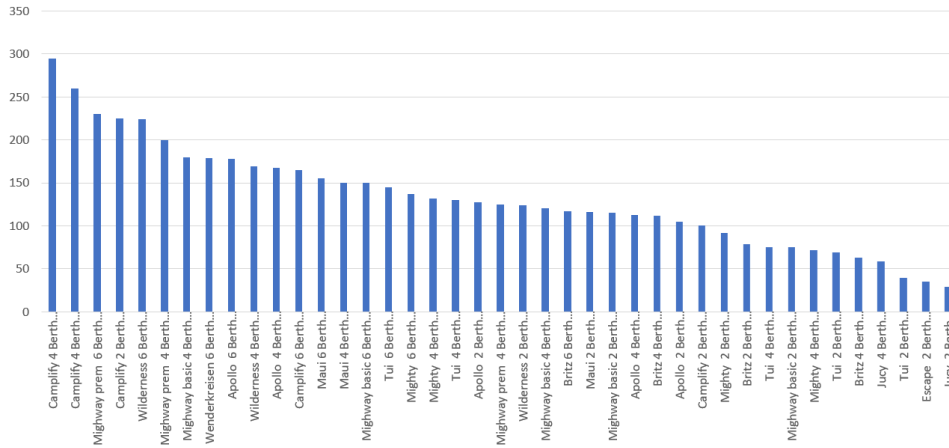
The VW Crafter has been upgraded to a 130KW engine and offers a range of safety features such as side wind compensation, autonomous emergency braking, collision warning assist and active 360° sensor side protect. The Crafter complies with the EU6 emission standard and is extremely economical at 10l/100km.

(iii) Pacific Horizon uses the terms interchangeably:

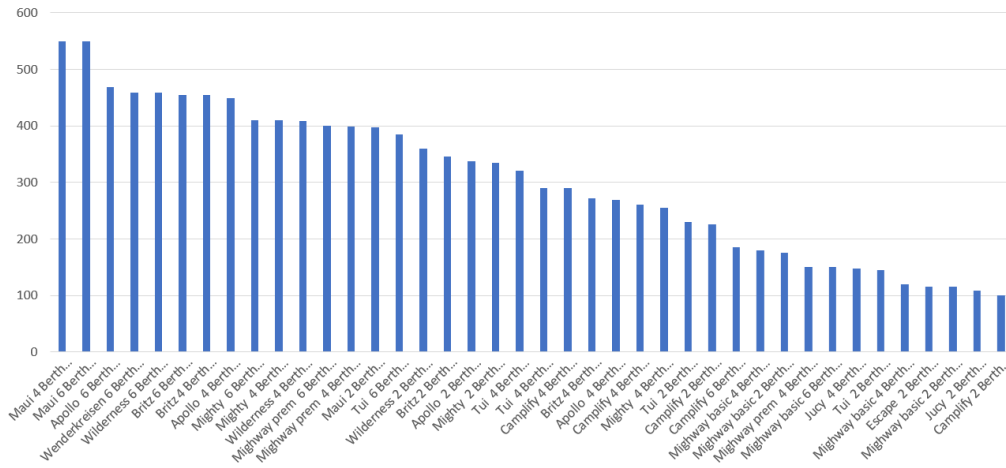


- 3.18 While *thl* accepts that a customer demanding a 6-berth motorhome is unlikely to view a 2-berth campervan with no toilet and shower to be substitutable if there are more than 2 people travelling in the group, there is plainly substitution across the full spectrum of products in the RV rental market (as well as with other travel and accommodation options) as shown by the customer survey results discussed at paragraph [3.3] above. This reinforces that 6-berth motorhome rentals will ultimately be constrained by smaller campervan rentals through a chain of substitution which includes campervans and motorhomes of all sizes and quality.
- 3.19 Finally, at [99] of the SOUI, the Commission states that “*there is a distinct price split between the pricing of motorhomes and campervans. Data provided by thl indicates that on average there is around a \$[redacted] per day peak period price difference between the pricing of its no toilet/shower vehicles and motorhomes.*” However, as explained in the NERA Report in response to the SOUI, the comparison drawn by the Commission is between the two extreme ends of the range and simply reflects the significant difference in quality of the two products compared. It does not mean that they are in separate markets, or that the lower quality product does not constrain the higher quality product. As noted in *Brambles* at [130] “*in considering the ‘price-product -service packages’ in relation to differentiated products, it is unwise to concentrate solely on price.*”
- 3.20 *thl* has analysed the pricing of a basket of products based on pricing data sourced from the internet from a mix of peer-to-peer rentals (more established/reviewed products were selected) and traditional operators. As shown by the following graphs, there is significant overlap in the pricing between campervans and motorhomes, and berth-sizes, which illustrates that there is no bright line between categories. Pricing is on a spectrum:

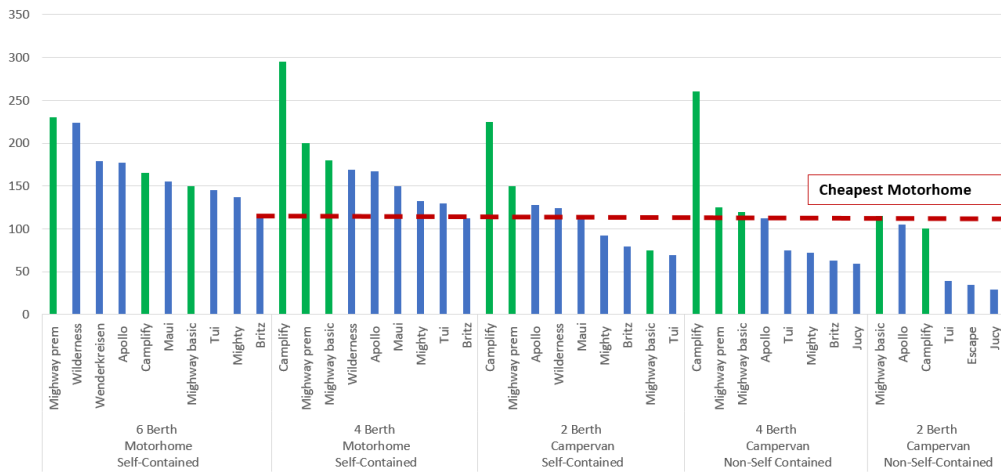
May 2022 Prices at 22/03/22



Dec / Jan 2022 Prices at 22/03/22



May 2022 Prices at 22/03/22





4. CLOSENESS OF COMPETITION BETWEEN APOLLO AND THL

4.1 The Commission seeks further submissions on the closeness of competition between **thl** and Apollo and the extent to which Apollo is a price leader, follower or disrupter.¹²

4.2 **thl** accepts that Apollo is a close competitor. However, it disagrees with the comments by industry participants that Apollo is “*more price aggressive or... a disrupter*”.¹³ The evidence does not support a conclusion that Apollo is a “*disrupter*” or “*maverick*”.

4.3 First, Apollo’s market position and behaviour is markedly different from entities whom have typically been characterised as maverick firms by competition regulators. For example, in assessing Barloworld’s proposed acquisition of Watty, the Australian Competition and Consumer Commission determined Wattle to be a “*vigorous and effective competitor*” due to the innovative nature of Wattle’s standalone “*Solver*” brand, low cost-base relative to other market-participants, and strategy of using price as the primary means by which to expand sales. Apollo can be distinguished from Wattle in several respects. For instance, Apollo’s rental fleet and operations are substantially similar to other market participants insofar as Apollo does not use innovative technology or services to drive competition. Furthermore, Apollo operates on a similar cost-base to other market participants and (as discussed below) there is no evidence indicating that Apollo is a price leader or disrupter.

4.4 Second, **thl** maintains that competitors’ pricing is not the main determinant of pricing in the motorhome and campervan rental segments. It is the demand for **thl’s** products, and its capacity, which ultimately determines the price it offers.

4.5 [REDACTED].

[REDACTED]

4.6 [REDACTED].

4.7 [REDACTED].

4.8 [REDACTED].

4.9 [REDACTED].

¹² See SOUI at [69].

¹³ See SOUI at [68].

- 4.10 [REDACTED], the capacity for a market participant (such as Apollo) to operate as a ‘disrupter’ or ‘maverick’ through pricing is inherently and critically limited.
- 4.11 Third, while Apollo has regularly used pricing specials to stimulate consumer demand (as has all other competitors offering RV rentals including Camplify) there is no evidential basis for asserting that these specials make Apollo a price leader, maker or disrupter. For example, there is no indication that the frequency of these specials or the associated degree of discounting substantially exceeds those of other market participants. Similarly there is no indication that Apollo has routinely been the first market participant to take action on pricing changes. Instead, it appears that such pricing specials have been pursued by various market participants at differing points throughout the market cycle to address perceived reductions in demand and, therefore, there has been no identifiable price leader or disrupter in the relevant market segments. As the NERA report in response to the SOUI explains, there is nothing in *thl’s* and Apollo’s pricing data to suggest that Apollo is particularly aggressive or disruptive. Further, the diagrams at paragraph 3.20 above show that Apollo’s pricing is generally middle of the range and does not price aggressively to buy market share.
- 4.12 While *thl* monitors the activities of Apollo, including its pricing, *thl* also monitors the activities of several other competitors, [REDACTED]. At [68] of the SOUI, the Commission has cherry picked a handful of statements from [REDACTED], [REDACTED], [REDACTED].¹⁴

5. CONSTRAINT FROM OTHER MOTORHOME RENTAL OPERATORS

- 5.1 *thl* disagrees with the Commission’s current view at [72] that competition from other existing motorhome operators is unlikely to be sufficient in the medium term to effectively constrain the merged entity.
- 5.2 While some of the other motorhome rental operators would have smaller motorhome rental fleets than the merged entity, *thl* maintains that smaller operators will continue to constrain the merged entity going forward. Smaller operators offer customers a genuine alternative to the merged entity and any attempt to exercise market power by the merged entity will result in a loss of volume from the merged entity to those operators. As the customer survey report shows, 81% of respondents considered something other than “*is a large business*” as the most important factor when choosing an RV rental provider.
- 5.3 [REDACTED], capacity is not static. As previously explained, investment in motorhome vehicles is not sunk and expansion can be incremental. This is demonstrated by the Commission’s [REDACTED].
- 5.4 The constraint provided by smaller operators is supported by the critical loss analysis set out in the report prepared by NERA dated 18 February 2022. As explained in that report, the merged entity would be very sensitive to volume loss (compared to firms in most other markets in the economy) and therefore only a relatively small loss of volume to other operators would be required to constrain the merged entity. The Commission’s conclusions [REDACTED]. In particular, NERA concluded that *thl’s* critical volume loss was equivalent to an average fleet size of [REDACTED] vehicles. NERA has updated this analysis based on confidential data received from the Commission and has concluded that *thl’s* critical volume loss was equivalent to an average fleet size of [REDACTED] vehicles. The Commission’s own analysis shows that [REDACTED].
- 5.5 *thl* understands that the Commission has placed no weight on the critical loss analysis undertaken by NERA on the basis that there is no evidence of what volume *thl* would actually lose in the event of a price increase. However, as explained by NERA in the NERA SOUI Report, for actual loss to be less than the critical loss in this industry, the demand elasticity for motorhome rentals would need to be similar to the demand elasticity for goods such as fuel. Given that motorhome rentals are a non-essential purchase, this simply cannot be the case.
- 5.6 At [77] of the SOUI, the Commission states that “*[s]ome industry participants see scale as important*” and that “*with the Proposed Acquisition, thl is seeking to gain scale globally and benefit from cost and*

¹⁴ [REDACTED].

fleet synergies from the scale of the merged entity". The Commission has referred to the **thl** Investor Presentation dated 10 December 2021 in support of this statement.

5.7 However, the Investor Presentation does not support the Commission's statement or conclusions and the Commission has taken the three statements about scale in that document out of context. In particular:

- (a) at page 20, it states that *"Pooling of financial resources and improved scale accelerates progress on the electrification of our fleet"*. The 'scale' referred to is the ability to spread the losses associated with the Future Fit Business actions across a wider international revenue base (i.e. **thl** will be able to offer the same amount of days with less fleet globally). It is therefore not related to increasing the size of **thl's** rental fleet. **thl** will be able to continue to spend a similar percentage of revenue on research and development whilst increasing the absolute dollars contributed to the spend on these activities. **thl** notes that the Future Fit Business actions will offer significant public benefits and the benefits from the fleet efficiencies that **thl** will derive from the Proposed Transaction will be re-invested into these initiatives;
- (b) at page 20, it further states that the merger will create future-fit branches *"Consolidating and establishing large scale joint branches..."*. This sentence relates to the efficiencies that will be gained by removing the duplication of branch locations, not about the scale of **thl's** rental fleet. It is a benefit that only arises as a consequence of the pandemic and the significant under-utilisation of the parties' properties; and
- (c) at page 17, it states that *"Apollo is a material beneficiary of the current strength in the Australian vehicle sales market due to its distributed retail dealership network. The network offers significant scale benefit, while sales of third-party brands lends an element of downside protection"*. Again, this statement is not relevant to the scale of the merged entity's rental fleet.

5.8 The purpose of the Proposed Transaction is not to gain scale in terms of its rental fleet. The synergies which the parties seek to achieve through the Proposed Transaction are largely attributable to duplicated group overhead costs. [REDACTED].¹⁵ **thl** and Apollo as two publicly listed companies have significant and overlapping group overhead cost structures including costs such as listing fees, audit, directors' fees and directors' insurance, legal and other head office expenditure. Other operators are unlikely to be incurring these costs (either at all, in respect of costs like listings fees and directors' fees, or to the same extent, in respect of legal and compliance costs) due to their corporate structure as private companies. The ability for **thl** and Apollo to realise synergies in relation to these duplicate costs is therefore unrelated to the scale of their rental businesses and, instead, related to their corporate structure. For example, the expected combined costs incurred by **thl** and Apollo across audit, legal, listing fees and other costs relating to being publicly listed (director fees and insurance, share registry and annual meeting) is close to \$[REDACTED]. As an example, a merger between **thl** and Jucy would not provide the same synergy benefits due to the different corporate and organisational structures of each company.

5.9 Given the significant impact to the respective businesses of **thl** and Apollo from the COVID-19 pandemic, both businesses are also operating well below capacity levels at their respective sites. These circumstances create the current opportunity for site consolidation synergies given **thl** and Apollo have branches in many of the same locations around the world. These synergies would not otherwise have been available to the same extent in a normal operating environment where the businesses were operating at closer to maximum capacity levels.

5.10 At [77] of the SOUI, the Commission states that *"industry participants consider that scale may give the merged entity significant advantages over smaller rivals in dealing with international wholesalers, travel agents and web consolidators"*. This is not **thl's** experience. The reality is **thl** expects (based on market precedent and experience) that being a larger player will be disadvantageous within the wholesale trade channel. This is because, like intermediaries in other markets, the greater the revenue that wholesalers, travel agents and web consolidators deliver to market participants, the higher the rebates an operator is required to pay. **thl** expects to be in a higher rebate % category post-Transaction. Further, **thl's** experience is that, by being a larger operator, there is greater pressure

¹⁵ [REDACTED]

from wholesalers and travel agents to spend more on additional category development and training and development. In every acquisition of a smaller business over the past 15 years **thl** has found that the smaller operators have had a lower cost of sale with trade agents compared to **thl**.

- 5.11 **thl** submits that smaller operators are in a better position than **thl** to negotiate more favourable terms to enter wholesalers' and travel agents' brochures. This is because smaller operators are less dependent on wholesalers and travel agents for revenues.
- 5.12 Being a supplier to the trade agent channel is in most cases a choice. Within New Zealand, **thl** is aware that Wilderness made the deliberate decision to withdraw from the trade market to establish a lower cost of sale in the direct market.
- 5.13 **thl** expects based on past history and normal market practice that wholesalers and travel agents will not allow the merged entity to continue to brochure the same number of brands as **thl** and Apollo currently have individually. **thl** expects that the merged entity will lose share in the trade market as a result of the Proposed Transaction. It will likely have less space, pay more per customer, and have less bargaining power than a smaller operator.
- 5.14 There is also evidence which suggests that wholesalers and travel agents account for only a small proportion of the market. The customer survey shows that:
- (a) 90% of respondents prefer to shop around rather than booking with a travel agent; and
 - (b) 75% of respondents who had booked an RV visited two or more websites before they booked, supporting **thl's** view that presence on aggregator sites, peer-to-peer sites or buying advertising for direct sites is of greater importance for successfully competing in the RV rental market.
- 5.15 Further, there are a myriad of wholesalers, travel agents, and web consolidators globally which offer (or offered prior to the COVID-19 pandemic) motorhome rentals in New Zealand, including (in addition to those wholesalers, travel agents and web consolidators previously identified to the Commission) [REDACTED]. As explained previously, **thl** does not typically have exclusive or preferred arrangements with wholesalers, travel agents and web consolidators, and smaller operators can (and do) establish their own relationships with these entities.
- 5.16 Finally, the Commission is seeking further submissions on whether there would be sufficient constraint across the entire size and quality spectrum of the market to effectively constrain the merged entity. While some motorhome operators choose to focus on particular segments, there is a high-degree of supply-side substitutability across the different sizes, ages and types of motorhome rentals. Existing operators can readily expand into different market segments in response to an increase in price or decrease in quality, and most motorhome operators offer a range of vehicle sizes and types. Further, from the demand-side, the customer survey report shows high levels of cross-shopping, with 91% of potential customers considering 3 or more types of self-drive options to be suitable.

6. CONSTRAINT FROM ENTRY AND EXPANSION

- 6.1 **thl** accepts that entry and expansion is less likely while supply significantly exceeds demand (i.e. the short term period). However, as the Commission accepts at [12] of the SOUI, the merged entity will be constrained in the short term by excess capacity, and accordingly there can be no lessening of competition as a result of the Proposed Transaction in this period.
- 6.2 However, **thl** disagrees with the Commission's conclusions at [107]-[108] that entry and expansion will not occur to a sufficient extent in the medium term (i.e. when supply no longer significantly exceeds demand) which would act as a sufficient constraint on the merged entity. As previously submitted, once supply no longer significantly exceeds demand, there will be incentives for new entry by large, well-resourced overseas operators, and for expansion by existing operators.
- 6.3 The Commission concludes at [112] that the conditions of "*entry and expansion is likely to remain difficult... [in the medium term] due to:*

- (a) *the need to match motorhome rental fleet sizes with consumer demand for motorhome sales at the end of a rental vehicle's rental life;*
- (b) *ongoing supply constraints; and*
- (c) *the need to establish distribution channels."*

6.4 However, the weight of the evidence does not support the Commission's conclusions:

- (a) [REDACTED]¹⁶ [REDACTED]. [REDACTED]¹⁷ [REDACTED]¹⁸ As *thl* explained at [7.8] of its SOI Submission, there is simply no need for rental operators (whether they offer "motorhome" rentals, "campervan" rentals or both) to match their rental fleet sizes with consumer demand for sales. In any event, there is strong demand in New Zealand for new and used motorhomes and therefore there is very low risk for a motorhome rental operator that it will not be able to sell its motorhome fleet at the appropriate time. Given the strength of the motorhome sales market, there is greater opportunity for an operator such as McRent, Lets Go from Australia or similar to enter or expand their RV rental fleet with the knowledge that there is a ready sales market for any fleet that is not rented in the short term.
- (b) As explained at [2.3] above, current supply chain issues are likely to resolve within the next 12-18 months (ie within the 'short term' period) and therefore will not be a factor in the medium term.
- (c) As the Commission acknowledged at [110] of the SOUI, while some market participants identified the need to establish distribution channels as a barrier to entry or expansion, others indicated that distribution channels are not difficult to establish. As the Commission itself concludes at [110], "*the requirements to establish distribution channels may pose challenges to some new entrants but may only be a low barrier to entry.*" *thl* agrees with the Commission's conclusion that the need to establish distribution channels is (at its highest) a low barrier to entry.

6.5 For all of the reasons provided at [6.33] to [6.40] of *thl's* Application and [7.1] to [7.14] of the SOI Submission, barriers to entry and expansion into the supply of motorhome rentals are low and the merged entity will be constrained from increasing prices above the competitive level or reducing quality by the threat of entry or expansion.

6.6 The ease with which existing operators could expand their fleets is demonstrated by [REDACTED].

6.7 [REDACTED]¹⁹ [REDACTED]²⁰ [REDACTED]²¹ [REDACTED]²² [REDACTED].

6.8 The Commission's conclusions that [REDACTED] make it clear that expansion on a sufficient scale to constrain the merged entity is both possible and likely if the merged entity were to attempt to increase prices above the competitive level and/or reduce quantity. Further, there is evidence that existing campervan operators in New Zealand [REDACTED] have plans to enter or expand into the motorhome segment in the medium term. As explained at [7.5(c)] of the SOI Submission, [REDACTED].

- (a) [REDACTED].
- (b) [REDACTED];

16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]

(c) [REDACTED].

6.9 [REDACTED].

6.10 Further, *thl* has recently informed the market that it may be looking to sell its Kiwi Experience business. *thl* has had [REDACTED] expressions of interest which demonstrates that capital is available for investment in the tourism industry

6.11 Finally, as explained at [5.2] above, *thl* disagrees with the Commission's view that existing or new entrants need to be of a reasonably large scale in terms of fleet numbers to constrain the merged entity. Customers do not consider being a large operator important: 81% of customer's surveyed, considered something other than being a large business, the most important factor. Further, customers do not know the size of individual operators' fleet. When a customer searches for motorhome (and campervan) rentals online, they will only see listings for each category of vehicle supplied by a rental operator, not listings for every vehicle on the operator's fleet. *thl* may have 200 units in a category, but this still represents as a single listing to a customer and will be compared equally against a single listing from a small operator (which may have 10 units) or a single listing from a private owner on a peer-to-peer platform (who only has 1 unit). Accordingly, the greater the number of smaller operators, the less share of listings that *thl* will have and, if *thl's* pricing is higher than other operators, the later in the search results its listings are likely to appear. Smaller operators therefore can (and do) collectively provide a substantial constraint on the merged entity.

7. CONSTRAINT FROM P2P PLATFORMS

7.1 The Commission states that it is not satisfied that peer-to-peer platforms are likely to sufficiently constrain the merged entity.²³ *thl* disagrees with the Commission's conclusions about the constraint that the merged entity will likely face from vehicles rented through peer-to-peer platforms. While peer-to-peer platforms are still emerging in the RV rental industry and New Zealand, *thl's* experience in other jurisdictions and the observed experience in other relevant New Zealand industries with peer-to-peer platforms shows that motorhomes listed for rent on peer-to-peer platforms will provide increasing (and significant) constraint on the merged entity. [REDACTED].

7.2 The Commission acknowledges that from the perspective of some rental customers, the motorhomes listed for rent on peer-to-peer platforms are likely substitutes for the motorhomes available for rent from motorhome rental operators. The customer survey report shows that 48% of potential customers sampled saw motorhomes listed on peer-to-peer platforms as substitutes, with 21% preferring a peer-to-peer RV provider and 27% having no preference. As NERA's critical loss analysis shows, only 6% of the merged entity's customers need to find vehicles offered on peer-to-peer platforms to be an economic substitute to undermine any exercise of market power by the merged entity, in the absence of an ability to price discriminate.

7.3 The Commission states that competing motorhome rental operators have been more dismissive of the extent of constraint from peer-to-peer platforms.²⁴ This [REDACTED].

(a) [REDACTED]

(b) [REDACTED]

(c) [REDACTED]

(d) [REDACTED]

(e) [REDACTED]

²³ See SOUI at [129].

²⁴ See SOUI at [130].

7.4 **thl** submits that the views of market participants who do not see peer-to-peer platforms as a constraint are naïve or based on incomplete evidence. In particular:

(a) [REDACTED].²⁵ [REDACTED].

(b) [REDACTED].²⁶ [REDACTED].²⁷

7.5 **thl** submits that the experience of other “*sharing economy*” platforms such as uber and AirBnB are instructive and ought not to be dismissed by the Commission. The evidence is that these platforms have had a significant disruptive effect on the hotel and taxi industries.

7.6 Similarly, the Commission has dismissed the experience in other jurisdictions such as the USA or Australia, where motorhomes listed for rent on peer-to-peer platforms provide increasing and significant constraint on traditional motorhome rentals. The Commission states that it does not consider the growth of peer-to-peer platforms is likely to be on the same scale as in the USA or Australia “*where the composition of the privately-owned RV fleet is different to that of New Zealand*”, but does not explain why the composition of the privately owned fleet is relevant. The Commission appears to place greater weight on assertions made by industry participants about their experience to date in New Zealand than it does on **thl’s** and Apollo’s evidence supported by:

(a) **thl’s** first-hand experience with the growth of peer-to-peer platforms in the USA;

(b) Apollo’s first-hand experience with the growth of Camplify in Australia; and

(c) [REDACTED].²⁸

7.7 The Commission notes that evidence indicated that motorhome rentals via peer-to-peer platforms may be cheaper than the prices of motorhome rental operators at times such as during peak seasons but can also be more expensive than motorhome rental operators.²⁹ However peak seasons are when the constraint provided by peer-to-peer motorhome rentals is most important; during off peak periods supply exceeds demand which is why commercial operators’ prices are low. The Commission seems too focused on the fact that peer-to-peer pricing is not as seasonal and motorhome owners do not benchmark pricing against traditional operators. This does not mean that vehicles on peer-to-peer platforms are not a constraint. It simply reflects the different priorities of owners compared to traditional operators.

7.8 The Commission also states that evidence indicates that motorhome rental operators set their pricing primarily with reference to the pricing of other motorhome rental operators rather than based on the prices motorhomes are rented off peer-to-peer platforms. As **thl** has said previously, peer-to-peer platforms are still emerging in the RV rental industry in New Zealand and the true impact of peer-to-peer platforms on pricing to date has been masked by the COVID-19 pandemic. As borders reopen, **thl** expects that the impact of peer-to-peer platforms on the RV rental market will be felt over the next 1.5 to 3 years. Further, while **thl** does not respond to peer-to-peer pricing directly in the form of monitoring changes and responding, it does respond to peer-to-peer pricing where it results in a change in demand. If **thl** observes a fall in demand it reduces its price to meet the market. It is plainly the case that **thl’s** pricing will be constrained by peer-to-peer platforms to the extent that customers choose to rent through a peer-to-peer platform instead of from **thl**.

7.9 At [139] of the SOUI, the Commission states that “[e]vidence suggests that motorhome rental operators may not necessarily be competing for the same customers that rent motorhomes through peer-to-peer platforms and may be focused on different customer segments”. As was observed in both the accommodation and taxi industries, peer-to-peer platforms both grew the market and disrupted the

²⁵ [REDACTED]

²⁶ [REDACTED]

²⁷ [REDACTED]

²⁸ [REDACTED]

²⁹ See SOUI at [134].

existing market.³⁰ **thl** expects that the same will occur in the RV rental market in New Zealand: it will grow the market by attracting customers who would not otherwise rent a vehicle from a traditional operator, as well as attract renters away from traditional operators. While this therefore means that there will be some customers for which traditional operators and peer-to-peer platforms do not compete, there is likely to be a sufficient number of customers who are willing to switch to constrain the merged entity. As previously explained, similar types of purchasers split their purchases across several options. Because of the (perceived) homogeneity of tourists, it would be difficult for the hypothetical monopolist to price discriminate between the tourist who would consider other RV options and those who are committed to a particular type of RV. Therefore, the marginal customers will protect the infra-marginal customers.

- 7.10 **thl** also refers the Commission to its previous submissions on the proportion of international travellers who booked vehicles through **thl's** Highway in 2019.³¹ At [141] of the SOUI, the Commission dismisses this data on the basis that Highway gets referrals from **thl's** own websites, which it suggests overstates the proportion of customers who would independently seek to book via peer-to-peer platforms. However, the fact that a customer may have followed a referral link does not make it more likely that a customer will book a rental through a peer-to-peer platform: it is simply the mechanism by which the customer found the platform. The Commission is attempting to draw a connection between how a customer is first introduced to a peer-to-peer platform and a customer's propensity to book through a peer-to-peer platform which is inappropriate. As is clear from the data referred to at [7.2] above, a large proportion of customers would choose to book a motorhome on a peer-to-peer platform. The evidence that **thl** has provided on the proportion of international travellers who booked through **thl's** Highway platform in 2019 should not be dismissed by the Commission.
- 7.11 Finally, the Commission states at [151] of the SOUI that it is not satisfied that **thl** would not have a material influence on Camplify, as a result of its post-transaction shareholding and the proposed 'strategic relationship' between Camplify and **thl**. **thl** submits that the merged entity would not have the ability to influence Camplify's decision-making or operations. In particular, even with a shareholding of approximately 22% of the issued capital in Camplify, the merged entity will not be able to pass resolutions without the support of a majority of the Camplify Board, the members of which have a fiduciary duty to act in the best interests of the company and not in the best interests of a single (minority) shareholder. Accordingly, the merged entity's influence will be no greater than any other shareholder – with each share only providing one ordinary vote in a general meeting of shareholders.
- 7.12 While it was proposed as part of Camplify's acquisition of Highway and SHAREaCAMPER that Camplify and **thl** would enter a 'strategic relationship', it is far from certain that the proposal will be formalised. [REDACTED].
- 7.13 At [152] of the SOUI, the Commission has requested further submissions "on the degree of influence that Apollo currently has, and has had to date, on Camplify's decision making and strategies". Apollo [REDACTED].³² **thl** submits that, while Apollo competes directly with Camplify in relation to RV rentals, both organisations employ different revenue models. It is not the case that their interests are aligned. The different revenue models for both organisations mean that both have an incentive to maximise bookings – Apollo to maximise return on its assets and Camplify to increase fees earned through use of its platform. Therefore, there is no incentive for either organisation to compete less vigorously with one another.
- 7.14 It should be noted that Karl Trouchet, Apollo's Executive Director – Strategy & Special Projects has been a Non-Executive Director on the Camplify Board since 2017 (after Apollo acquired its interest in Camplify). However, Karl's influence over Camplify is limited to a 1/6 vote on the Camplify Board. Karl is one of six highly experienced professional directors with significant industry experience and, furthermore, is a Non-Executive Director with no involvement in the day-to-day operations of Camplify. Accordingly, the fact that Apollo holds a board seat on Camplify is not, of itself, sufficient to affect the corporate mind. In addition, several members on the Board have been with Camplify since its inception (including Justin Hales, the CEO and Executive Director) and would unlikely permit any board decisions

³⁰ [REDACTED]

³¹ Submission by **thl** on Statement of Issues dated 24 March 2022.

³² [REDACTED]

that are not in the best interests of Camplify. Moreover, Karl has fiduciary duties to the shareholders of both Apollo and Camplify, in his position as a Board member of two public companies. Those duties are well established and have significant penalties for breaches, reinforcing the structural legal barriers which require that competition between the two organisations remains vigorous.

8. COUNTERVAILING POWER

8.1 At [157] of the SOUI, the Commission states that “[b]y removing Apollo as a major option for wholesalers, travel agents and web consolidators, the Proposed Acquisition is likely to materially reduce the range of options available to such parties and may limit their ability to negotiate competitive arrangements for motorhomes offered for rent”. **thl** disagrees with this statement.

8.2 As explained earlier in this submission, most of the travel agents, wholesalers and web consolidators that **thl** has relationships with offer a range of travel products and services and/or to a range of destinations. Motorhome rentals in New Zealand is just one of many of the products offered by many of these entities.

8.3 [REDACTED].³³

8.4 **thl** agrees with the Commission³⁴ that agents, wholesalers or web consolidators can exercise countervailing power by giving preferential treatment to particular operators. As the evidence shows, they can also seek to work with other operators.

8.5 Finally, **thl** disagrees that with the Commission’s statement at [159] of the SOUI that “wholesalers, travel agents and web consolidators switching to competitors to the merged entity would not constitute an exercise of countervailing power”. The threat of switching can be an exercise of countervailing power, particularly in relation to agents, wholesalers and web consolidators who aggregate demand.

9. CONSTRAINT FROM ALTERNATIVE ACCOMMODATION AND TRANSPORT OPTIONS

9.1 **thl** disagrees with the Commission’s current view of the constraint provided by alternative accommodation and transport options. The evidence shows that alternative accommodation and transport options will offer a real constraint on the merged entity and should not be ignored by the Commission. The customer survey report shows that:

- (a) as explained earlier, 78% of respondents who hired a motorhome also considered a car and hotel/motel/AirBnB option and 72% of respondents who hired a motorhome also considered a car and cabin in a holiday park;
- (b) 29% of respondents (and 27% of motorhome hirers) would look for a car and alternative accommodation if their preferred RV option was not available; and
- (c) if the cost of a customer’s preferred self-drive option increased by 5%, 20% of potential customers would first consider a car and motel/hotel room or a car and cabin within their budget.

9.2 While **thl** has always considered alternative transport and accommodation options to be a constraint, the degree of constraint revealed by the customer survey was even greater than expected and supports the yield comparison data previously provided to the Commission and discussed at [9.4] below.

9.3 **thl** has previously provided the Commission with significant evidence demonstrating the constraint provided by alternative accommodation and transport options. This evidence is supported by statements made by some third parties in interviews with the Commission, including [REDACTED].³⁵

³³ [REDACTED]

³⁴ See SOUI at [158].

³⁵ [REDACTED]

9.4 While the Commission also spoke with third parties who were [REDACTED]. To the contrary, *thl*'s tracked average yield across its rental fleet over time compared with the average daily rate of hotels in New Zealand (provided to the Commission on 21 February 2022) shows the correlation coefficient for the two sets of data is [REDACTED]³⁶, thereby evidencing the constraint.

10. COORDINATED EFFECTS

10.1 The Commission appears to have failed to take account of the evidence presented by *thl* and comments made by third parties in reaching its preliminary views on coordinated effects. In particular, the Commission has failed to properly consider the following key factors:

- (a) A large proportion of the parties' [REDACTED] revenues are derived from agents and wholesalers, and therefore pricing through these channels is not transparent;³⁷
- (b) RV rental pricing for a particular trip varies over time in the lead up to the date of the trip and consumers transact at different times. This dynamic adds another degree of complexity which makes coordinated pricing unlikely. This is supported by statements made by [REDACTED]³⁸
- (c) The highly fragmented nature of the market (including as a result of vehicles listed on peer-to-peer platforms), which (by its nature) makes the market less vulnerable to coordination.

10.2 Further, the potential for price coordination in the market is undermined by the substitutability of RV rentals with other transport and accommodation options. Operators are not able to identify those customers which are more or less likely to consider alternative transport and accommodation options, and therefore operators are not able to employ price discrimination strategies. Any attempt to coordinate pricing will therefore be undermined by customers switching to these alternatives.

10.3 Finally, as explained in section 4 above, Apollo is not a destabilising competitor. The removal of Apollo from the market is therefore unlikely to make coordination more likely.

31 May 2022

³⁶ Letter to the NZCC dated 21 February 2022 at [2.4].

³⁷ NERA report, "*THL/Apollo: review of certain aspects of the Commerce Commission's Statement of Issues*", dated 24 March 2022 at 4.

³⁸ [REDACTED]