PUBLIC VERSION

Cross-submission on THL's submission on SOUI

This cross-submission is made on behalf of our client in response to Tourism Holdings Limited's ("**THL**") submission dated 31 May 2022 ("**THL Submission**") on the Commerce Commission's Statement of Unresolved Issues ("**SOUI**").

Our client submits that the THL Submission does not provide sufficient grounds to enable the Commission to be satisfied that the merger of THL and Apollo ("**Merger**") will not substantially lessen competition. As the Commission has previously observed:[1]

> *"In Woolworths the Court of Appeal held that "the existence of a 'doubt' corresponds to a failure to exclude a real chance of a substantial lessening of competition… The burden of proof lies with [the applicant], to satisfy us on the balance of probabilities that the acquisition is not likely to have the effect of substantially lessening competition."*

Our client considers it clear that THL has not met that burden and that significant doubts remain about the competitive impacts of the Merger. Therefore, the balance of evidence requires the Commission to decline clearance. In particular, although the THL Submission addresses a number of ancillary points and further clarifies technical arguments that THL has previously made, it does not provide sufficient new evidence to address the significant competition concerns regarding the Merger. Our client's view remains that it is a merger of the top two suppliers and closest competitors, and it will result in a merged entity with a huge market share and produce a highly concentrated industry.

As outlined in the submission of James Every Palmer QC, these factors give rise to significant competition concerns and present a *very high* hurdle for the applicant to overcome. The THL Submission fails to clear that hurdle. The Commission cannot, therefore, exclude a real chance of a substantial lessening of competition.

Weighting of evidence

The THL submission places a great deal of weight on a customer survey of 609 respondents, the details and methodology of which was not made available to our client until yesterday. Our client intends to review that customer survey in more detail and make further cross-submissions next week.

Our client does note though, that customer survey evidence of this nature is more likely to be useful in examining demand-side impressions following actual completed purchases. In our client's view it is unlikely to have much (if any) probative value in respect of hypothetical purchasing intentions if prices were different (THL Submission paragraph 3.14) or the ability of smaller operators to constrain the merged entity (THL Submission paragraph 5.16).

[1] At [19] and [20]. Trade Me Limited and Limelight Software Limited [2018] NZCC 1.

Our client also urges the Commission to carefully assess the weight it places on THL's submissions in respect of market share and the critical loss analysis by NERA. Although it is difficult for our client to verify due to redacted sections that it does not have access to, THL appears to continue to argue that market shares are lower than [ ], based on "estimated 2022 inventory".[2] Estimated inventory of competitors (especially when carried out by a party with an interest in the Commission's decision) must be treated as inherently less reliable than [ ]. Equally, the conclusions of a hypothetical critical loss modelling exercise should not be given greater weight than [ ] what happened to prices following the 2012 merger – a much more limited industry consolidation than this one.

Furthermore, our client submits that critical loss analysis is merely a tool and not a substitute for the statutory test of whether the Commission is satisfied that the Merger will not have, or be likely to have, the effect of substantially lessening competition. Our client notes that it is well recognised that critical loss analysis is not without its limitations and detractors:

- Scheffman and Simons argue that the key advantage of standard critical loss analysis is that it is 'just arithmetic' but suggest more case-specific evidence is required to reach an informed conclusion on competitive effects.[3]

- Critical loss analysis can identify the reduction in output which would have to occur to make the hypothetical price increase unprofitable but does not identify whether such a reduction would actually occur.[4]

- According to Hüschelrath, economic theory, particularly in differentiated markets, predicts that a price rise by the merged entity would typically incentivise third parties to unilaterally raise their price.[5] This risks the critical loss analysis underestimating the profitability of a certain price increase.

- O'Brien and Wickelgren highlight the key issues that the typical inference drawn from the analysis is that high gross margins, and resultingly higher critical losses make a merger less likely to be anticompetitive. Generally, the fewer close substitutes a firm faces, the higher the margin will be. Economic theory would therefore predict that mergers lead to greater price increases when margins are high rather than when margins are low. This is contrary to what critical loss analysis purports to show.[6]

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[2] THL Submission 1.3(b)(i), NERA Economic Consulting Submission on Statement of Unresolved Issues, 31 May 2022, paragraphs 19, 26-27.
[3] D Scheffman and J Simons, "The State of Critical Loss Analysis: Let's Make Sure We Understand the Whole Story" (2003) Antitrust Source 1-9.
[4] HARRIS AND VELJANOVSKI: CRITICAL LOSS ANALYSIS: [2003] E.C.L.R
[5]Hüschelrath, Kai, Critical Loss Analysis in Market Definition and Merger Control (2009). ZEW - Centre for European Economic Research Discussion Paper No. 09-083, Available at SSRN: https://ssrn.com/abstract=1547085 or http://dx.doi.org/10.2139/ssrn.1547085
[6] Daniel P. O'Brien & Abraham L. Wickelgren, A Critical Analysis of Critical Loss Analysis (FTC Working Paper, May 23, 2003), available at *http://www.ftc.gov/be/workpapers/wp254.pdf.*

Short term and medium term

Our client would urge the Commission to be careful about the confidence with which THL asserts both that: (i) demand constraints from the pandemic will continue for at least a further 2 years; and (ii) supply chain difficulties will quickly resolve.

In our client's view both these points will remain inherently uncertain at the time the Commission must make a decision. Our client acknowledges this uncertainty but has presented evidence indicating that alternative outcomes on both counts remain very possible. In our client's view, the history of commercial forecasts during the pandemic surely provides caution to those who still feel able to confidently predict the future in a COVID impacted world.

Supply chain difficulties are linked to the pandemic itself and as the current Omicron outbreak in China indicates, it is far from clear that manufacturing will not be subject to further disruption, even if current challenges ease, particularly in terms of the flow through to the motorhome rental market. Even as manufacturing returns to normal levels it will take some time for the backlog to be cleared and for new inventory to begin being rented out on the ground in New Zealand.

Our client notes that THL's assertions appear, to some extent, to be based on "confidential communications" that THL has had with "a number of motorhome manufacturers in China for supply of vehicles to New Zealand" who have "indicated that they have substantial unutilised capacity that could be utilised by existing or new operators in the market" (THL Submission paragraph 4.4). Our client trusts that the Commission will treat such communications with the appropriate critical eye given, from a commercial perspective, a competitor would not want to disclose a potential weakness (i.e. a shortage in capacity) to a competitor that could be used against it in commercial negotiations with potential customers (even setting aside any other Commerce Act considerations inherent in such communications between competitors).

There is also evidence [ ] that international travel to New Zealand may well recover faster than expected by either THL or the Commission in the SOUI. [ ]

[ ]

[ ]

[ ]

[ ]

[ ]

[ ]

In our client's view, the evidence requires the Commission to acknowledge it is possible both that supply chain disruption may ease faster or slower than its best current estimate *and* that international tourists may return faster or slower than its best current estimate.

In assessing each of these scenarios, our client considers it is critical that the Commission factors in how motorhome rental operators have changed their businesses since 2019 - in particular, the reduced cost bases and lower levels of inventory now carried.

As acknowledged by NERA's submission on the SOUI, the market for rental cars is similar to that for motorhome rentals.[7] Given the similarities between the two markets, our client considers it curious that THL is so certain of such a gloomy view of the potential for motorhome rental recovery, given the recently reported financial results in the car rental sector, which is also emerging from the effects of the pandemic. There, low inventory levels have enabled suppliers to benefit from much higher prices as demand has returned. Some examples of recent financial results illustrate this point:

Hertz 2022 Q1 Earnings call: "*The* ***recent industry dynamics of limited fleet supply****, combined with rapid post-COVID recovery of travel, have led to demand for rental cars materially exceeding available supply,* ***which is reflected in pricing****."[emphasis added]*[8]

Avis Budget 2022 Q1 results: "*We ended the quarter with revenues 77% above the first quarter 2021, at $2.4 billion. Our revenues were driven by rental days as demand improved throughout the quarter* ***and increased revenue per day****.*

Net income was $527 million and our Adjusted EBITDA was $810 million, our best first quarter Adjusted EBITDA in our history. Utilization for the quarter was 67.4% and in-line with first quarter 2021, showing our fleet is well positioned to meet seasonal peak demand."[emphasis added][9]

Europcar 2022 Q1 Earnings call: "*We have delivered a record booking quarter with a positive EBITDA in Q1. That is the first time in our group history. This reflects* ***the strong pricing*** *I just mentioned, our outstanding fleet management and the continued strict control and our network in H2."*

…

"This sustained demand coupled with our strict discipline on pricing and selective distribution channels, ***resulted in sharp increases in pricing in all our segments****."*

…

"As regard to ***fixed and semi-fixed costs, they decreased by 15%,*** *aligning with volume trends versus 2019"[emphasis added]*[10]

Our client acknowledges that these corporate results reflect other international markets less affected by border closures than New Zealand's motorhome industry. However, our client considers the key drivers of these results – lower cost bases and higher prices driven by reduced inventory are likely to apply to New Zealand motorhome rentals once international travel begins returning at much lower numbers than 2019.

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[7] NERA Submission on Statement of Unresolved Issues, 31 May 2022, para 16.

[8] https://ir.hertz.com/static-files/249ee162-d77e-4658-8488-c27c56232a67

[9] https://avisbudgetgroup.gcs-web.com/news-releases/news-release-details/avis-budget-group-reports-record-first-quarter-results-0

[10] https://investors.europcar-group.com/static-files/fa37aed0-db68-4173-b8b5-bf42bb9ae2bd

Our client's view is that this means focusing on raw tourist numbers is incorrect and misleading. While our client considers it is difficult to be certain of the exact date at which international arrivals will return to a level for New Zealand motorhome rental operators to be profitable and for excess supply to cease constraining the merged entity, the level of visitors required will be materially lower than 2019. Our client notes that THL has reduced its New Zealand fleet size by 44% between Dec 2019 and June 2021,[11] and likely even further since that date. THL has also credited improved "cost management" for reducing the loss on its New Zealand rental business in its FY22 interim results.[12]

While our client accepts that it would be more complex than just assuming 56% of 2019 visitor numbers would be required for demand constraints to be resolved (i.e. to match the 44% fleet reduction), it must be true that given such strong inventory reduction and cost removal the required level of visitors will be significantly lower than numbers in 2019. [ ]

Accordingly, the Tourism Export Council of New Zealand statistics (THL Submission para 3.2) about raw visitor numbers are not the appropriate metric. [ ].

Closeness of competition between THL and Apollo

The Commission does not need to find that Apollo is a "maverick" or "disruptor" to remain not satisfied that the removal of Apollo as a competitor is unlikely to substantially lessen competition. As [ ], Apollo is the only remaining competitor of any scale to THL. [ ].

Apollo is the only other vertically integrated operator which controls its own manufacturing and can supplement its rental business with new and used vehicle sales at sufficient scale. Apollo is also the only other operator [ ] to use dynamic flex pricing to vary its prices regularly to meet supply, demand and competitor activity.

It is the removal of such a close and significant competitor (and the absence of any remaining competitors at scale) that requires the Commission to conclude that it cannot be satisfied the Merger will not lessen competition, not the fact that Apollo is a disruptor or maverick.

Our client is unsure what THL means by its comments in paragraph 4.4 that "competitors' pricing is not the main determinant of pricing in the motorhome and campervan segments". However, from our client's perspective:

- this comment would appear to defy ordinary and accepted economic logic on what drives competitive prices in a market. As the Commission's website states: "Competitive markets help to keep prices down and ensure that the quality of goods

[11] From 2,700 to 1,500, THL/Apollo investor presentation, page 16.
[12] THL Investor Presentation FY22 interim results, p 16. http://www.thlonline.com/FinancialInvestorInformation/Documents/HalfYearResultsDocs2022/thl-FY22-investor-presentation-interim-results.pdf

and services remains high. Competition also ensures consumers have a range of choices, and firms have incentives to innovate, invest and operate efficiently."[13] It would be inconsistent with that ordinary and accepted economic logic to form a view that competitors' pricing is not an important constraint on pricing in these markets.

- to the extent this comment has any validity, it would:
    - appear consistent with our client’s comments around the existing strength of THL’s position in the market, that it already (before the Merger) has market power, which means it does not feel constrained by competitor pricing; and
    - appear to contradict the critical loss analysis of NERA.

From our client's perspective, the removal of Apollo as the last remaining competitor of any scale to THL would inevitably further enhance THL's market power, and enable it further scope to increase prices above competitive levels to the further detriment of consumers.

THL's chain of substitution argument misses the point

THL advanced the argument that motorhomes and campervans all sit somewhere on a pricing spectrum with no clear break between them constituting a single product market given the chain of substitution (THL Submission at paragraph 3.18). Ultimately, market definition is merely a means to an end and what matters is whether, post-Merger, THL will be sufficiently constrained to prevent price increases or degradation in quality.

The Commission's guidelines provide that:[14]

> *A lessening of competition does not need to be felt across an entire market, or relate to all dimensions of competition in a market, for that lessening to be substantial. A lessening of competition that adversely affects a significant section of the market may be enough to amount to a substantial lessening of competition.*

THL rightly concede 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.*

Post-Merger, [ ] THL will have a market share of [ ]% in 4-6 berth motorhomes. Consistent with THL's own claims, these consumers will not trade down to smaller vehicles and, therefore, are "captive" to the suppliers of such larger vehicles. As the ACCC sets out in its Merger Guidelines:[15]

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[13] Commerce Commission. Avoiding anti-competitive behaviour. Retrieved from: https://comcom.govt.nz/business/avoiding-anti-competitive-behaviour#:~:text=Competitive%20markets%20help%20to%20keep,innovate%2C%20invest%20and%20operate%20efficiently.

[14] Commerce Commission *Merger and acquisitions Guidelines* (May 2022) at [2.25].

[15] https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF

> *"If suppliers can discriminate, a customer that has limited substitution possibilities receives different terms and conditions from suppliers to a customer that has strong substitution possibilities. In this situation it may be appropriate to consider two separate markets for merger analysis. One market would include the relevant product and the alternative product, and would focus on those consumers who have the option of substitution. The second market would not include the alternative product and would focus on those consumers who are 'captive' or do not have the option of substitution."*

The logical conclusion from this is that customers for at least 6 berth motorhomes are "captive" to suppliers of those large motorhomes and that in pricing such motorhomes, THL will not have any material regard to the prices offered by competitors who specialise in smaller sleeper vans. Our client estimates that 4-6 berth motorhomes account for between [ ] and [ ] of all bookings based on revenue. Even if the Commission considered that the market encompassed all motorhomes, 4-6 berth motorhomes clearly constitute a significant section of the market. A substantial lessening of competition in the supply of such large motorhomes would either constitute a substantial lessening of competition in the market for those large motorhomes, or would constitute a substantial lessening of competition in a broader market by resulting in a lessening in a significant section of the market.

Further reinforcing this concern, while THL submits that there is "no common definition of a campervan and motorhome[16]" and "no meaningful distinction can be drawn between campervans and motorhomes",[17] THL's own previous statements evidence that distinctions can be (and are) logically drawn within the industry – with THL commonly referring to "large motorhomes" as being a distinct and identifiable product set. For example, THL noting:

> *"This year in New Zealand, we negotiated the purchase of **large motorhomes** from a competitor (Jucy). This was a very positive opportunity for thl and has seen thl further expand its **large motorhome offering**. Jucy no longer offers **large motorhomes** for rent in New Zealand or Australia." [emphasis added][18]*

> *"thl led an industry consolidation in 2012, buying 2 of 4 main competitors in **the large motorhome market.**" [emphasis added][19]*

> *"Although the yields are currently challenging, Explore More and our rebranded Backpacker product has gained market dominance and has curtailed the growth and product mix of competitors. More importantly, we have extended the useful rental life of our **smaller vehicles** in preference to selling them to low cost start-ups." [emphasis added][20]*

Analysts (as published on THL's website) have also similarly noted:

> *"Following the merger of THL with United and Kea, THL operates ~45% of the motorhomes in New Zealand and 60% of **the large motorhome market**, which makes it the country's dominant player." [emphasis added][21]*

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[16] 3.17(a).
[17] 3.16.
[18] http://www.thlonline.com/FinancialInvestorInformation/Documents/AnnualResultsDocs2018/thl-FY18-Shareholder-Annual-Review.pdf
[19] http://www.thlonline.com/SiteCollectionDocuments/Investors/thl-Investor-update-August-2015.pdf
[20] http://www.thlonline.com/SiteCollectionDocuments/Announcements/Minutes%20of%20the%20Annual%20Meeting%20on%2011th%20November%202008.pdf
[21] http://www.thlonline.com/SiteCollectionDocuments/Investors/29Aug14-thl-release-Edison-Investment-Research-Report.pdf

From our client's perspective, the above statements reinforce (irrespective of the specific terminology used), that there are distinctions that can be drawn in the industry between small and large motorhomes, and therefore that certain customer types are at risk of being "captive" or discriminated against if the two largest providers of vehicles that would suit their needs were allowed to merge.

Constraints from other operators and on entry and expansion

In paragraphs 5.6-5.9 of the THL submission, THL argues that comments about scale in the SOUI have been taken out of context and that seeking scale is not a rationale for the Merger. In our client's view, THL's argument adopts a too narrow interpretation of "scale" in this context far and is inconsistent with its prior statements and that of analysts [ ], in respect of both the 2012 Merger and this current Merger.

Our client's view is that scale is important in the context of being able to benefit from a vertically integrated business, controlling your own manufacturing, generating revenue from new and used motorhome sales as well as rentals etc. This is a point that has been emphasised by both THL and Apollo in their investor updates throughout the pandemic and has enabled them to mitigate the pandemic in better shape than many smaller competitors. As THL has noted: "We believe that we have reduced fleet at a lesser rate than the wider market and grown our share as competitors have exited in certain markets."[22]

While there are compliance costs to being listed on a public stock exchange, there are also benefits, including more ready access to capital on better terms. A benefit not available to smaller operators and one likely to be particularly useful as the industry re-fleets following the pandemic. As THL has previously observed in relation to the benefits its business has over its competitors, its scale and access to capital is a key competitive advantage:

> *"There are positive indications that thl has also made significant gains in market share in all rentals markets that we operate. Wholesaler feedback is positive and we have had glowing reviews from customers regarding the significant improvements in product and more importantly the customer experience. These have come from a focus on the customer, product design and innovation and strongly focused marketing,* ***backed by the financial strength*** *and flexibility that come from most likely being the largest rental motorhome operator in the world. thl is a large player in markets* ***where many competitors do not have a strong capital base****." [emphasis added]*[23]

In our client's view it is also not plausible to suggest that the primary motivating factor for the Merger is reducing the listed company compliance costs.

A far more likely motivating factor, from our client's perspective, is the opportunity for "fleet rationalisation" in which the merged entity will be able to significantly reduce the overall levels of inventory, with the associated impact on prices.

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[22] http://www.thlonline.com/FinancialInvestorInformation/Documents/AnnualResultsDocs2021/thl-FY21-investor-presentation-annual-results.pdf

[23] https://www.scoop.co.nz/stories/BU1111/S00806/speech-thl-chair-to-shareholders.htm

In this context, our client's view is that THL's explanations in paragraph 5.7 of the THL Submission for its prior statements are unconvincing. The ability to obtain greater revenue from less fleet is, in our client's submission, absolutely a scale benefit not available to smaller operators (5.7(a)), being able to operate a much larger fleet with the same number of depot locations is another scale benefit (5.7(b)), as is the ability to leverage Apollo's exclusive manufacturing deals to restrict the availability of rental inventory to competitors (5.7(c)).

Our client considers that THL's arguments in respect of wholesalers, travel agents and aggregators ("Third Parties") are even less compelling. While the total percentage of revenue received by THL from *all* Third Parties may be material to it, that total is produced from (in THL's own words) "a myriad of wholesalers, travel agents, and web consolidators globally".[24] That is, there is active competition between a number of different Third Parties seeking motorhome rentals. No one Third Party will have strong commercial leverage over the merged entity, whereas THL's control over such a high percentage of the total New Zealand inventory and the absence of alternatives of sufficient scale, means each Third Party will be at a significant bargaining disadvantage.

Our client's view is that the balance of commercial negotiating power will lie overwhelmingly with the merged entity, rather than any Third Party. There are simply not enough alternative motorhome rental providers for any one of these Third Parties to exercise countervailing power. [ ].

THL also argues that scale is not important in existing competitors (para 5.2) or in new entrants or expansion (para. 6.11). In both cases our client considers this ignores the point the Commission has correctly identified in the SOUI[25] – any competitor's ability to constrain THL is limited to the amount of inventory they hold. Smaller operators cannot continue to constrain the merged entity beyond the point their small fleet (e.g. 5-10 vehicles) are all rented out. A new entrant or expanding incumbent will also require "200 units in a category",[26] like THL, in order to provide a realistic competitive constraint.

In any event, even if THL's consumer survey can be considered credible, the fact that almost 20% of respondents to the consumer survey indicated that the fact that the provider "is a large business" is the **most important factor** (above price or availability) for them in selecting a motorhome rental provider demonstrates that size does matter. This suggests that currently one in five consumers would only consider THL and Apollo are viable options for them. The Merger therefore eliminates (assuming the survey can be considered credible) all choice for 20% of customers and creates a captive market for THL to exploit through higher prices or lower quality service offerings.

P2P, and especially Camplify, is not a constraint on THL

Our client agrees with the Commission that P2P will not be a material constraint on THL post-Merger.

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[24] THL Submission, para 5.15.
[25] SOUI para 116.
[26] THL Submission, para 6.11.

However, even if the Commission were minded to agree with THL's submission, the largest P2P provider in New Zealand, Camplify, is clearly "associated" with THL.

Post-Merger and Camplify's acquisition of THL's peer-to-peer platforms, THL would hold 22-23% of the shares in Camplify and have a seat on Camplify's Board of Directors. In addition, Camplify and THL have expressed an intention to enter an ongoing strategic and commercial relationship. Our client's view is that this clearly constitutes a material influence given:

- The merged entity's level of shareholding in Camplify will exceed the Commission's threshold for when it is likely to have concerns:
  - The Commission's own guidelines provide that:[27]

> *For example, a shareholder may have a substantial degree of influence on a firm if it has a shareholding of 10% in the firm and the balance of the shareholding in the firm is a mix of smaller shareholders.*

  - The Commission's previous guidelines provided that:[28]

> *In the case of a listed company, the Commission normally examines shareholdings of **15 percent or more**, although in some circumstances a lower shareholding may be of concern.*

- The merged entity will be the largest shareholder in Camplify;[29]
- The merged entity will have the right to appoint a director to the board of Camplify;[30]
- The merged entity will be a significant industry participant, so its views are likely to be given weight by other shareholders;[31]
- THL and Camplify have made public statements that suggest that the merged entity and Camplify will have a close working relationship including:

> *"It establishes a relationship between RV-industry leaders that will leverage cross-promotional marketing benefits, and deliver value-added services to van-owners in New Zealand and Australia"*[32]

[27] Commerce Commission *Merger and acquisitions Guidelines* (May 2022) at [2.9].
[28] At [2.1]
[29] See Decision No. 459 National Foods Limited / New Zealand Dairy Foods Limited (26 September 2002) at [56].
[30] See *Air New Zealand Limited and Qantas Airways Limited* Commerce Commission Final Determination (23 October 2003); and *Connor Healthcare Limited and Acurity Health Group Limited* [2014] NZCC 39.
[31] See Decision No. 459 National Foods Limited / New Zealand Dairy Foods Limited (26 September 2002) at [56]; and UK Competition Commission report sent to the Secretary of State (BERR) - *Acquisition by British Sky Broadcasting Group plc of a 17.9 per cent stake in ITV plc* (14 December 2007) at [3.66].
[32] https://www.businessnewsaustralia.com/articles/camplify-consolidates-nz-tyre-print-with--7-37m-acquisition.html#:~:text=Camplify%20founder%20and%20CEO%20Justin,Holdings%20(NZX%3A%20THL).

> *"This transaction enables THL to retain a presence in the peer-to-peer space in New Zealand through Camplify and benefit from the scale Camplify has created in Australia"*[33]
>
> *"We look forward to assisting Camplify's continued growth in their New Zealand and Australian operations as they build on the success of Mighway and SHAREaCAMPER to date"*[34]
>
> *"This acquisition also begins a strategic relationship between THL and Camplify. The two companies will work together on servicing more customers and growing the Camplify brand in Australia and New Zealand"*[35]
>
> *"As part of this relationship THL, through RV Supercentre, will provide management of Camplify RV owner's vehicles in New Zealand and Australia. This relationship will extend to marketing Camplify's platform to owners of vehicles who utilise the services of THL"*[36]

Furthermore, our client considers that THL's submission (at 7.13) that THL and Mighway are competitors, but their different business models mean they have no incentive to "compete less vigorously with one another" is inconsistent. Either THL and Mighway are competitors (in which case they would inevitably have incentives to compete less vigorously as a matter of economic logic), or they are not competitors (in which case there would be no incentives to compete less vigorously, because they do not compete).

Our client's submission is that THL cannot have it both ways. Either it is the case that:

- P2P platforms operate in a different market to commercial motorhome rental providers and as such are not a constraint on THL post-Merger; or
- P2P platforms are a constraint on THL post-Merger, in which case the largest P2P provider in New Zealand Camplify is not a constraint as it is associated with THL.

Finally, our client notes that THL has not applied to the Commission for clearance to acquire any shares in Camplify.[37] Accordingly, consistent with the Commission's previous practice of investigating minority acquisitions in competitors, our client assumes that the Commission would closely scrutinise that acquisition if it were to form the view there is any meaningful competitive constraint between THL and P2P providers.

Upstream and vertical issues need to be considered

While not addressed in THL's submission, it is important that the Commission's decision also takes into account the upstream overlap between THL and Apollo, and the potential for that to give rise to vertical issues. For example, as noted in THL's materials regarding the Merger, "RVs are built at each company's own manufacturing facilities".[38] In this respect,

[33] Ibid.
[34] Ibid.
[35] https://www.businessnewsaustralia.com/articles/camplify-acquires-mighway-and-shareacamper-for--7-37m.html
[36] Ibid.
[37] Commerce Commission *Camplify Co (NZ) Limited, Tourism Holdings Limited and TH2connect LP* [2022] NZCC 8 at footnote 6.
[38] http://www.thlonline.com/FinancialInvestorInformation/Documents/Announcements2021/211210-Investor-Presentation.pdf

our client notes that it has previously been acknowledged that THL is an important upstream supplier of vehicles to its competitors, and that THL has taken the importance of its upstream position into account in making its decisions regarding sales of its inventory:

> *"Although the yields are currently challenging, Explore More and our rebranded Backpacker product has gained market dominance and has curtailed the growth and product mix of competitors. More importantly, we have extended the useful rental life of our smaller vehicles* ***in preference to selling them to low cost start-ups****." [Emphasis added]* [39]

> *"Meanwhile post-GFC, there is no longer cheap and easy finance to fuel cut-rate competitors. Today, some 95 per cent of THL's used van sales are* ***to individuals for their own use****." [Emphasis added]*[40]

Our client considers that this upstream control of manufacturing facilities will be particularly important in the coming years given supply chain challenges and as motorhome rental operators have reduced inventory in order to survive the pandemic. As international travel starts coming back, our client considers that the merged entity will be able to steadily increase its market share in the motorhome rental market over time by having the ability and incentive (as a combined entity) to withhold inventory to competitors. Our client expects this vertical foreclosure strategy to be particularly strong in the large (4-6 berth) motorhome segment, where more bespoke manufacturing is required and other barriers to entry are already highest. Given the merged entity's control over manufacturing and importing of these vehicles, our client expects the barriers to operators expanding into large motorhomes to increase significantly with the Merger given the additional ability and incentive the Merger will provide the merged entity to withhold supply.

Concluding remarks

Based on its review of the further submissions made in the THL Submission, our client remains of the view that the Commission cannot exclude a real chance of a substantial lessening of competition – and in fact, remains of the view that the Merger *will* substantially lessen competition by combining the number one and number two players in the market. No compelling evidence to the contrary was provided in the THL Submission and, therefore, our client repeats its submission that the Commission must decline to grant clearance.

[39] http://www.thlonline.com/SiteCollectionDocuments/Announcements/Minutes%20of%20the%20Annual%20Meeting%20on%2011th%20November%202008.pdf
[40] https://www.pressreader.com/new-zealand/sunday-star-times/20150517/282600261458885