

NOTICE OF LODGMENT
AUSTRALIAN COMPETITION TRIBUNAL

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL on 04/04/2016 4:13 pm AEST and has been accepted for lodgment under the Interim Practice Direction dated 21 August 2015. Filing details follow and important additional information about these are set out below.

Lodgment and Details

Document Lodged: Originating application - Form S – REDACTED

File Number: ACT 2 of 2016

File Title: Application by Sea Swift Pty Ltd under s 95AU of the *Competition and Consumer Act 2010* (Cth) for an authorisation under s 95AT(1) to acquire shares in the capital of a body corporate or to acquire assets of another person

Registry: NEW SOUTH WALES – AUSTRALIAN COMPETITION TRIBUNAL



Dated: 04/04/2016 4:13 pm AEST

A handwritten signature in blue ink, consisting of a stylized 'S' followed by a '4'.

Deputy Registrar

Important Information

As required by the Interim Practice Direction dated 21 August 2015, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Tribunal. Under the Tribunal's Interim Practice Direction the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4:30 pm local time at that Registry) or otherwise the next working day for that Registry.



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PART ONLY**

Application to the Australian Competition Tribunal for Merger Authorisation - Form S

**Sea Swift Pty Ltd's Proposed Acquisition of certain
Toll Marine Logistics assets**

4 April 2016

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Form S

Commonwealth of Australia

Competition and Consumer Act 2010 – section 95AU

APPLICATION FOR MERGER AUTHORISATION

To the Australian Competition Tribunal

Application is hereby made under section 95AU of the *Competition and Consumer Act 2010* for an authorisation under subsection 95AT(1) to acquire shares in the capital of a body corporate or to acquire assets of another person.

1 The Applicant (the Acquirer)

(a) Name and registered office (where applicable) of the Applicant including the ACN (where applicable) and place of incorporation (where applicable)

1.1 The application is made by Sea Swift Pty Ltd (ACN 010 889 040) (**Sea Swift**), a subsidiary of Sea Swift (Holdings) Pty Limited (ACN 159 387 390) (**Sea Swift Holdings**).

1.2 The address of the registered office of Sea Swift is 41-43 Tingira Street, Portsmith Queensland 4870.

1.3 Sea Swift is incorporated in Queensland.

(b) Describe the business or businesses carried on by the Applicant including the products and services the Applicant supplies

1.4 Sea Swift is a marine logistics company providing shipping and associated services in Far North Queensland (**FNQ**) and the Northern Territory (**NT**).

1.5 The main products and services that Sea Swift supplies are:

(a) **general cargo services:** Sea Swift operates both scheduled and charter services providing seaborne delivery of freight including food,

fuel and other goods to customers such as businesses, government agencies, mining projects and individuals on remote islands and in coastal communities;

- (b) **fishery support:** Sea Swift provides mothership services to fishing fleets, including the delivery of fuel, fresh water, packaging, consumables and exchange crew to fishing vessels and the transportation of catch back to port;
- (c) **charter and project logistics:** Sea Swift provides logistics services to resources and infrastructure customers who require large, sporadic or one-off deliveries, including the movement of construction and infrastructure materials and machinery for major projects;
- (d) **passenger cruise:** Sea Swift also provides limited services transporting passengers and their vehicles to various locations across FNQ and the Torres Strait Islands;
- (e) **fuel retail:** Sea Swift also retails a small volume of fuel to regional communities at depots located in FNQ and the Torres Strait Islands.¹

(c) Provide details of all related bodies corporate of the Applicant including the ACN

1.6 The related bodies corporate of Sea Swift are:²

- (a) Sea Swift Holdings;
- (b) Sea Swift (Finance) Pty Limited (ACN 159 387 550); and
- (c) Sea Swift (NT) Pty Limited (ACN 010 889 040).

¹ First Statement of Fred White dated 16 September 2015 (**First White Statement**) [19]-[20].

² First Statement of Paul Readdy dated 21 September 2015 (**First Readdy Statement**) [14] and Annexure PSR-2.

(d) Address in Australia for service of documents on the Applicant

Gilbert + Tobin
2 Park Street Sydney NSW 2000
Attn: Luke Woodward

(e) Name and address of any person for whose benefit or on whose behalf the shares or assets to be acquired will be held

1.7 Sea Swift Pty Limited, 41-43 Tingira Street, Portsmouth, Queensland 4870.

2 The Target

(a) In the case of a body corporate whose shares or assets are to be acquired:

(i) Name of the body corporate including the ACN where applicable

2.1 The two entities whose shares are being acquired are:

- (a) Perkins Maritime Pty Ltd (ACN 009 616 960); and
- (b) Perkins Lady Jan Pty Ltd (ACN 064 110 247).

2.2 The three entities from which the assets are being acquired are:

- (a) Perkins Shipping Pty Ltd (ACN 009 597 835);
- (b) Perkins Properties Pty Ltd (ACN 009 592 885); and
- (c) Gulf Freight Services Pty Ltd (ACN 010 755 683).

2.3 Each of the entities listed in 2.1 and 2.2 (together, the **Toll Entities**) is a subsidiary of Perkins Industries Pty Limited (ACN 009 593 257).³

³ Statement of Adam Martin dated 15 September 2015 (**Martin Statement**) [5.1].

2.4 Perkins Industries Pty Limited is a subsidiary of Perkins Group Holdings Pty Limited (ACN 124 935 413). Perkins Group Holdings Pty Limited is a subsidiary of Toll Holdings Limited (ACN 006 592 089) (**Toll**). Toll is a subsidiary of Japan Post Co Ltd.⁴

(ii) Place of incorporation of the body corporate

2.5 Each of the Toll Entities is incorporated in Australia.⁵

(iii) Registered office of the body corporate

2.6 Each of the Toll Entities has its registered office at Level 7, 380 St Kilda Road, Melbourne Victoria 3004.⁶

(iv) Describe the business or businesses carried on by the body corporate including the products and services the Target supplies

2.7 The Relevant Toll Entities are associated with the Toll Marine Logistics (**TML**) business of Toll. Part of the TML business provides coastal and community shipping services (being the seaborne delivery of freight or marine freight) on a scheduled basis and a charter basis in the NT and FNQ. References to TML in this Form refer to this part of the TML business. TML operates as part of the Toll Government and Resources Logistics (**TRGL**) Division of Toll.⁷

2.8 Freight shipped by TML to the remote and coastal communities in the NT and FNQ includes essential goods (such as food, fuel and medical supplies) as well as a range of general and refrigerated cargo, vehicles, transportable housing, essential mining consumables and heavy earthmoving machinery.⁸

⁴ Martin Statement [5.2].

⁵ Martin Statement [5.4].

⁶ Martin Statement, Annexure ATM-1 at Table ATM-2.

⁷ Statement of Scott Woodward dated 16 September 2015 (**First Woodward Statement**) [4.3]-[4.4], [4.8], [4.11].

⁸ First Woodward Statement [5.7]-[5.8].

2.9 The TML business is part of the broader Toll group and does not publish a separate annual report. A copy of Toll's FY2014 annual report is contained in Annexure ATM-3 to the statement of Adam Martin.

(v) Number and type of shares or description of assets to be acquired

2.10 Sea Swift proposes to acquire both shares and assets from Toll (the **Proposed Transaction**).⁹

2.11 Sea Swift proposes to acquire 100% of the shares in each of:

- (a) Perkins Maritime Pty Ltd (ACN 009 616 960); and
- (b) Perkins Lady Jan Pty Ltd (ACN 064 110 247).

2.12 Sea Swift proposes to acquire assets associated with TML's NT and FNQ general marine freight business, including the transfer or novation of certain vessels, customer contracts and title or rights to various containers, equipment and miscellaneous small assets, as well as the assignment of a long-term lease held over facilities at Gove and goodwill.¹⁰

2.13 The vessels Sea Swift proposes to acquire from TML are:

- (a) *Toll Coral Bay*;
 - (b) *Toll Fourcroy*; and
 - (c) *Toll Biquele Bay*,
- (together the **TML Vessels**).¹¹

2.14 The additional assets include:

- (a) a small number of leases or freehold title to depots and residential houses (used as staff accommodation) in various locations; and

⁹ First Readdy Statement [83].

¹⁰ First Readdy Statement [84]-[90].

¹¹ First Readdy Statement [85].

- (b) title or rights under leases to various containers, equipment (such as vehicles, container handlers, forklifts, and transportable demountable buildings used as offices) and miscellaneous small assets.¹²

2.15 A summary of the assets proposed to be transferred to Sea Swift in each of FNQ and the NT is contained in Annexure SW-18 to the statement of Scott Woodward dated 16 September 2015 (**First Woodward Statement**).

(b) In the case of a body corporate whose shares are to be acquired, provide details of:

(i) the issued capital of the body corporate;

(ii) the holders of such issued capital.

Body corporate ¹³	Issued share capital	Holder of issued capital
Perkins Maritime Pty Ltd	\$3.00 comprising 3 fully paid ordinary shares	Held and beneficially owned by Perkins Industries Pty Ltd
Perkins Lady Jan Pty Ltd	\$10,000 comprising 10,000 fully paid ordinary shares	Held and beneficially owned by Perkins Industries Pty Ltd

(c) Provide details of all related bodies corporate of the body corporate whose shares or assets are to be acquired by the Applicant

2.16 A list of the related bodies corporate in Australia of the body corporates listed above is contained in Annexure ATM-2 to the statement of Adam Martin.

¹² First Readdy Statement [91].

¹³ Martin Statement, Annexure ATM-1 at Table ATM-1.

(d) in the case of a person (other than a body corporate) whose assets are to be acquired

- (i) Name and address of the person**
- (ii) Describe the business or businesses carried on by the person including the products and services the person supplies**
- (iii) Describe the assets to be acquired**

2.17 Not applicable.

3 The Acquisition

(a) Outline the nature and details of the contract, arrangement, understanding or proposal for the acquisition and, if applicable, the public offer document, and provide a copy of any relevant contract, document or public offer document.

Background to the Proposed Transaction

3.1 On 24 November 2014, Sea Swift and Toll executed an Asset and Share Sale Agreement (the **Original Proposed Transaction**) under which Sea Swift would acquire the shares and assets set out in paragraphs 2.11–2.14(b) above.¹⁴

3.2 The details of the transaction have changed since that date, as set out below.

3.3 Completion under the Original Proposed Transaction was conditional on Sea Swift having obtained either formal or informal merger clearance from the ACCC, or merger authorisation from the Australian Competition Tribunal, by 31 May 2015.¹⁵

¹⁴ First Readdy Statement [82].

¹⁵ First Readdy Statement [96].

- 3.4 On 5 December 2014, Sea Swift made a confidential application for informal clearance from the ACCC. By late May 2015 it became apparent that the ACCC might not reach a decision by the sunset date of the approval condition, and the parties began to renegotiate the Original Proposed Transaction to extend the sunset date and make other changes.¹⁶
- 3.5 On 26 June 2015, the parties executed an Amended Asset and Share Sale Agreement (**First Amended Sale Agreement**) that extended the sunset date for the approval condition to 30 November 2015 and made other alterations to reflect changed market conditions.¹⁷ On 26 June 2015, the parties also executed a side deed to the First Amended Sale Agreement. A copy of the First Amended Sale Agreement and Side Deed are contained in Annexures PSR-14 and PSR-15 to the statement of Paul Readdy dated 21 September 2015 (**First Readdy Statement**).
- 3.6 On 9 July 2015, the ACCC advised that it would not grant informal clearance.¹⁸
- 3.7 On 21 September 2015, the parties executed a further side deed amending certain clauses of the First Amended Sale Agreement. A copy of this side deed and a mark-up of the Amended and Restated Shareholders' Deed are contained in Annexures PSR-21 and PSR-22 respectively to the First Readdy Statement.¹⁹

Sea Swift's Original Application to the Tribunal

- 3.8 On 21 September 2015, Sea Swift filed an application with the Tribunal under section 95AU of the *Competition and Consumer Act 2010* seeking authorisation of the Proposed Transaction (**Original Application**).²⁰
- 3.9 On 16 November 2015, Sea Swift withdrew the Original Application.²¹

¹⁶ First Readdy Statement [98]-[105].

¹⁷ First Readdy Statement [112].

¹⁸ First Readdy Statement [130] and [132].

¹⁹ First Readdy Statement [133].

²⁰ Statement of Fred White dated 4 April 2016 (**Second White Statement**) [4].

The Proposed Transaction

3.10 Following the withdrawal of the Original Application, and as a result of further negotiation between the parties, the parties executed a Deed of Amendment on 17 March 2016 (**Deed of Amendment**), which appends an Amended and Restated Asset and Share Sale Agreement (**Amended and Restated Sale Agreement**) (together, the **Proposed Transaction**).

3.11 [REDACTED]
[REDACTED] A copy of the Deed of Amendment containing the Amended and Restated Sale Agreement is contained in Annexure PSR-24 to the statement of Paul Readdy dated 4 April 2016 (**Second Readdy Statement**).²²

3.12 Under the Proposed Transaction, Sea Swift is to provide Toll with the following consideration:

(a) [REDACTED]
[REDACTED]

(b) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

(c) [REDACTED]²³

3.13 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

²¹ Second White Statement [5].

²² Statement of Paul Readdy dated 4 April 2016 (**Second Readdy Statement**) [28].

²³ Second Readdy Statement [25].



Sea Swift's New Application to the Tribunal

3.14 Sea Swift now files a further application in the Tribunal, seeking authorisation of the Proposed Transaction (the **New Application**). The New Application relies on statements from Sea Swift and TML witnesses that were filed in support of the Original Application. It is also supported by additional statements which set out updated and additional information.

3.15 Under the New Application, Sea Swift requests that the Tribunal grant authorisation of the Proposed Transaction on the conditions set out in **Annexure A (the Conditions)**.

3.16 The following is a summary of those conditions:

Transferred Contracts Condition

3.17 Sea Swift will not give effect to or rely on any provision in the Transferred Contracts which requires the Customer to:

- (a) exclusively use the marine freight services of Sea Swift; or
- (b) ship a minimum volume of freight with Sea Swift,

(together the **Transferred Contracts Condition**).

3.18 The Transferred Contracts are regularly contested by actual and potential competitors through tender processes conducted on a periodic basis.²⁵ The effect of the Transferred Contracts Condition is to enhance the contestability of these contracts during the remainder of the term of the Transferred Contracts.

²⁴ Second Readdy Statement [30].

²⁵ First White Statement [187]-[190], Statement of Pasquale (Lino) Bruno dated 17 September 2015 (**First Bruno Statement**), [169]-[175] and First Woodward Statement [7.13]-[7.16].

3.19 This is a commitment that would not be provided by Sea Swift absent the Proposed Transaction, in circumstances where TML exits the relevant markets and is no longer providing scheduled services (see section 15, below).

Remote Community Service Condition

3.20 For five years after the completion of the Proposed Transaction, Sea Swift will:

- (a) maintain a minimum level of scheduled services to the locations and at the frequencies set out in the Remote Community Service Schedule contained in Schedule 3 of the Conditions; and
- (b) maintain an up-to-date shipping schedule of services on its website,

(together the **Remote Community Service Condition**).

3.21 The Remote Community Service Condition provides an assurance that communities will continue to experience regular scheduled services following the Proposed Transaction. This is a commitment to remote communities that would not be provided by Sea Swift if the Proposed Transaction is not authorised, in circumstances where TML is exiting the relevant markets and will no longer provide scheduled services (see section 15, below).

3.22 Sea Swift's obligation to comply with the Remote Community Service Condition will be suspended if another operator commences operating a weekly (or more frequently than weekly) scheduled service, and operates that service for a period of 8 consecutive weeks or more, along certain routes or to specific destinations set out in the Remote Community Service Schedule contained in Schedule 3 of the Conditions.

Remote Community Price Condition

3.23 For five years after the completion of the Proposed Transaction, Sea Swift will, in respect of the services referred to in Schedule 4 of the Conditions

(being the transport of “dry freight”, “refrigerated freight” and “passenger vehicles”):

- (a) charge no greater than the Maximum Charge for a destination listed in the Remote Community Service Schedule; and
- (b) comply with the requirements for an increase to the Maximum Base Price or to any Other Fees,

(together the **Remote Community Price Condition**).

3.24 The Maximum Charge comprises various pricing components, including a Maximum Base Price.

3.25 Under the Remote Community Price Condition, Sea Swift will commit to setting maximum base prices for the transport of “dry”, “refrigerated” and “passenger vehicle” freight . The maximum base prices that will apply for these types of freight will be based on:

- (a) Sea Swift’s current scheduled rates as at 1 August 2015 in FNQ; and
- (b) TML’s current scheduled rates as at 1 September 2015 in the NT, or Sea Swift’s current scheduled rates as at 1 August 2015 in the NT in relation to any destinations that are not currently serviced by TML,

subject to annual price increases in accordance with publicly available price indexes.

3.26 Schedule 4 also sets out how Sea Swift will impose the other components of its pricing for these services, such as the fuel surcharge, port cargo fees / harbour dues, a dangerous goods surcharge, a minimum freight charge and charges for any additional services.²⁶

3.27 The services to which the Remote Community Price Condition applies (being “dry”, “refrigerated” and “passenger vehicle” freight) are those

²⁶ Statement of Pasquale (Lino) Bruno dated 4 April 2016 (**Second Bruno Statement**) [46], [54].

services which are most commonly purchased by uncontracted customers.²⁷

3.28 The Remote Community Price Condition assures uncontracted customers in remote communities that the maximum price charged by Sea Swift for those services most commonly used by them will be consistent with current scheduled prices offered by TML or Sea Swift (subject to annual price increases in accordance with publicly available price indexes). This protects uncontracted customers of marine freight services in the NT and FNQ by ensuring that they will not be subject to arbitrary price increases following the Proposed Transaction.

3.29 The Remote Community Price Condition is primarily of benefit to uncontracted customers. This is because other customers (being contracted customers or custom rate customers) are likely to have negotiated prices which are lower than Sea Swift's scheduled rates for those services.²⁸

3.30 The Remote Community Price Condition is only intended to set a price cap, that would not otherwise be offered, and all customers remain able to negotiate custom rates or discounts on prices with Sea Swift if the Proposed Transaction is authorised.

3.31 The maintenance of current scheduled pricing is a benefit which would not be provided by Sea Swift if the Proposed Transaction is not authorised, in circumstances in which TML exits the relevant market and is no longer providing scheduled services (see section 15, below).

3.32 The process under which Sea Swift may increase its current scheduled rates (in accordance with publicly available price indexes) is set out in Schedule 4 to the Conditions. The maximum annual price increases will be calculated based on:

²⁷ Second Bruno Statement [42], [44].

²⁸ Second Bruno Statement [45].

- (a) annual changes in the *Consumer Price Index, All groups, Australia*, published by the Australian Bureau of Statistics. *CPI* is a common price index utilised by government and business to measure changes in the economy's general price levels and the cost of living;
- (b) annual labour rate percentage increases set out in the Sea Swift Collective Agreement. This is the annual rate by which Sea Swift is required to increase its wages to employees under its publicly available Collective Agreement;
- (c) monthly fluctuations in the *AIP Terminal Gate Pricing – Diesel – National Average*, published by the Australian Institute of Petroleum. Terminal Gate Pricing (**TPG**) represents the wholesale price for the bulk supply of fuel and diesel. The national average sets out the TPG for Sydney, Melbourne, Brisbane, Adelaide, Perth, Darwin and Hobart. Changes in the national average TPG indicate fluctuations in the cost of purchasing fuel/diesel.

3.33 Apart from these indexed increases, Sea Swift may only increase prices for the services affected by the Remote Community Price Condition if:

- (a) the increase is approved by an independent price expert; or
- (b) the Australian Competition Tribunal determines that it is no longer necessary for Sea Swift to comply with the Remote Community Price condition.

Independent Price Review

3.34 If Sea Swift seeks a price increase which is not in accordance with the Remote Community Price Condition, the independent price expert will consider the proposed price increase and make a final and binding determination on whether the increase is reasonable having regard to the principles set out in paragraph 5 of Schedule 5 to the Conditions.

3.35 Sea Swift is required to ensure that the independent price expert who is appointed satisfies various criteria (including criteria relating to independence) that are set out in paragraph 1 of Schedule 5 to the Conditions. The independent price expert will be required to report directly to the ACCC regarding any issues that arise in the performance of his or her functions.

Compliance and Monitoring of the Conditions

3.36 The Conditions require Sea Swift to submit documentation to the ACCC in relation to its compliance with the Conditions at the end of each financial year.

3.37 The Annual Compliance Report is designed to ensure that Sea Swift has complied with its obligations under the Conditions in the relevant financial year and to minimise the need for external monitoring regarding adherence to the Conditions.

3.38 Sea Swift is also required to provide to the ACCC details of any arrangements it enters to subcontract the performance of its obligations under the Conditions to another qualified supplier.

Additional Proposed Conditions relating to TML

3.39 If the Tribunal grants authorisation of the Proposed Transaction, Toll will also commit:

(a) to release the two charter vessels that TML currently uses in the NT, the *Toll Territorian* and the *Bimah Tujuh*, handing these vessels back to their respective owners;

(b) to sell its vessel the *Warrender* in a timely manner and at a fair market value [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] and

(c) [REDACTED]

- (b) Provide details of the commercial rationale for the acquisition and copies of all documents that were prepared specifically for the purpose of evaluating the proposed acquisition with respect to the market(s) affected and the nature of those effects**

3.40 The financial position of both the TML and Sea Swift businesses in the NT and FNQ is poor and not sufficient to sustain continued reinvestment over time. The TML business in the NT and FNQ has made heavy losses in the last two financial years [REDACTED] and [REDACTED]²⁹

3.41 The commercial rationale for the Proposed Transaction for Sea Swift is that as a result of the acquisition of certain TML assets it will be in a position to maintain continuity across its services and to return its operations in both FNQ and the NT to a sustainable position.

3.42 As an existing marine freight operator in both the NT and FNQ, the Proposed Transaction would give Sea Swift access to additional revenues, vessels and equipment and allow it to rationalise and reduce the combined fixed costs of both operations and maintain service on a more efficient and sustainable basis.³⁰ Given the high fixed costs of providing a regular scheduled marine freight service and the limited demand for those services in both FNQ and the NT, the Proposed Transaction would improve Sea Swift's ability over the long term to maintain the viability of its business.³¹

3.43 A copy of the White Paper prepared by Champ Ventures (the majority shareholder of Sea Swift) which sets out the business case for the

²⁹ Kruger Statement [4.3].

³⁰ First White Statement [211], First Readdy Statement [73]-[74]

³¹ First White Statement [214], First Readdy Statement [73].

acquisition of TML is contained in Annexure PSR-3 to the First Readdy Statement.³²

- 3.44 The commercial rationale of the Proposed Transaction for Toll is that, given the TML business is heavily loss-making with little prospect of returning to profitability, a divestment of the TML business in the NT and FNQ to Sea Swift provides Toll a greater return than the only alternative, which is to wind up the business.³³ The Proposed Transaction also provides Toll with the ability to achieve an orderly exit which minimises potential disruption for its customers and ensures continuity of services.³⁴
- 3.45 A copy of a confidential memorandum prepared for the Toll Board in August 2014 which discusses the Proposed Transaction and the alternative of wind up is contained in Confidential Annexure BGK-5 to the statement of Brian Kruger.
- 3.46 As referred to above in section 3(a), Sea Swift withdrew the Original Application. The First Amended Sale Agreement was then renegotiated. TML has indicated to its customers that its intention is to exit its operations in the NT and FNQ if the transaction does not proceed.³⁵ In October 2015, TML sent a letter to its customers which set out its plans to exit if the transaction does not proceed. A copy of this letter is at Annexure PSR-25 to the Second Readdy Statement.³⁶
- 3.47 In renegotiating the Proposed Transaction, Sea Swift has considered whether to just let TML exit. However, Sea Swift has elected to enter into the Amended and Restated Sale Agreement, for the following reasons:³⁷
- (a) the Proposed Transaction will provide Sea Swift with the opportunity to secure additional freight volume to ensure its sustainability;

³² See also Second Readdy Statement [33]-[36].

³³ Kruger Statement [6.4], [7.1]-[7.4].

³⁴ Kruger Statement [7.4], First Woodward Statement [13.7].

³⁵ Second Readdy Statement [36].

³⁶ Second Readdy Statement [36].

³⁷ First Readdy Statement [121]-[123]; Second Readdy Statement [35].

- (b) [REDACTED]
- (c) in the absence of the Proposed Transaction, there is still some risk that given Toll's size (and that of its parent company, Japan Post Co Ltd), it may continue to subsidise TML and incur losses for an extended period while it seeks to maximise value for the assets on sale, in which case Sea Swift's unsustainable position will be subject to continuing uncertainty;
- (d) the Proposed Transaction provides Sea Swift with a higher level of certainty over the continuity of TML's revenues, which underpin the costs of providing the additional services, and
- (e) there is value to Sea Swift in having an orderly handover of the assets of the TML business, which would be less disruptive to TML's existing customers and Sea Swift's existing services, than if TML exited the market without such a deal.

3.48 The value that Sea Swift attributes to the orderly handover of the assets that form part of the TML business is on the basis that:

- (a) Sea Swift will be acquiring vessels that are fit for purpose and are tried and tested on the routes that they are running, which is low-risk and convenient;
- (b) the Proposed Transaction allows for a controlled and staged transition of key customer contracts;
- (c) TML's interest in Sea Swift provides a benefit in ensuring the transition of vessels and contracts is conducted in a manner that is not inconsistent with Sea Swift's interests; and

(d) the Proposed Transaction gives Sea Swift's lenders more certainty, and improves Sea Swift's ability to secure additional funding.³⁸

(c) Indicate whether the acquisition involves proposed ancillary arrangements and describe the proposed arrangements

3.49 The parties propose to enter into a transitional licence agreement for the Sea Swift's temporary use of facilities currently owned and leased by Toll at the Frances Bay terminal in Darwin for a period of three months from completion.³⁹

3.50 This transitional licence will allow for the staged transfer of TML's larger customers in the NT and avoid any disruption to their services. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁴⁰

4 Background information

(a) Describe the industry sector(s) to which the acquisition relates

4.1 Set out in **Annexure B** is an Industry Overview which describes the marine freight services industry.

4.2 A marine freight service is the carrying of cargo by ship. A large variety of cargo is shipped in FNQ and the NT. There are generally two ways in which a supplier provides marine freight services in FNQ and the NT.

4.3 The first method is by carriage of cargo on a scheduled service.

4.4 A scheduled service is where the supplier regularly carries cargo between two or more locations and does so according to a regular schedule. The

³⁸ First Readdy Statement [122], First White Statement [217]-[223].

³⁹ First Woodward Statement [6.51].

⁴⁰ First White Statement [218], First Readdy Statement [122].

supplier carries cargo for anyone who wishes to ship cargo between those locations.

- 4.5 An example of this is that currently Sea Swift operates a scheduled service from Cairns to Horn Island, Thursday Island, Seisia (Bamaga) and Weipa, departing from Cairns on Tuesday and arriving at the other locations according to a schedule that is published by Sea Swift in advance.⁴¹ Any customer who wishes to ship goods from Cairns to those locations can deliver goods to Sea Swift in Cairns prior to a particular cut off time on Monday for the shipment that departs on Tuesday. Regardless of whether it receives sufficient cargo to cover its costs for that journey, Sea Swift makes that voyage.
- 4.6 The second method of a supplier providing marine freight services is by the carriage of cargo through charter or project services.
- 4.7 The primary reason that communities in FNQ and the NT require marine freight services is that they are not accessible by road. This affects:
- (a) island communities, where there is a significant body of water between the island and the mainland;
 - (b) remote mainland communities which do not have any significant road connecting that community with larger centres; and
 - (c) communities which have road access, but that road access is cut off during the wet season.⁴²

Sea Swift's operations in FNQ and NT

- 4.8 Sea Swift has provided a scheduled service to remote communities in FNQ for more than 30 years. Sea Swift's main depot is in Cairns, and from there it ships to the remote communities.⁴³

⁴¹ First Bruno Statement [22].

⁴² First White Statement [24]-[25].

⁴³ First Bruno Statement [82].

- 4.9 Sea Swift also competes to provide charter/project services in FNQ. Sometimes Sea Swift competes on the basis that the freight for which the charter is required could be carried on its scheduled service. At other times, Sea Swift competes on the basis that it would provide a separate vessel (or vessels) for the purpose of the charter/project services.
- 4.10 Sea Swift has provided a scheduled service to remote communities in the NT since 2013, when it acquired a previous operator, Tiwi Barge. Between 2013 and October 2014, Sea Swift serviced many of the NT communities.⁴⁴ In October 2014 Sea Swift ceased services to a number of NT locations. It has recently re-commenced a weekly service to some of those locations, but it is not clear for how long it will operate that service.⁴⁵
- 4.11 Sea Swift also competes to provide charter/project services in the NT.

TML's operations in FNQ and NT

- 4.12 In 2009, Perkins Shipping was acquired by Toll. Perkins Shipping provided scheduled services to remote communities in the NT for over 40 years. Since acquiring Perkins in 2009, Toll (through TML) has operated a scheduled service in the NT.⁴⁶ TML's main depot is in Darwin, and from there it ships to the remote communities.⁴⁷ TML also competes to provide charter/project services in the NT.⁴⁸
- 4.13 Through its acquisition of Gulf Freight Services in 2003, Perkins Shipping operated a scheduled service from Cairns to Weipa in FNQ. After acquiring Perkins Shipping in 2009, Toll (through TML) continued operating that service.⁴⁹
- 4.14 In 2014, TML started to provide a scheduled service from Cairns to the various remote communities in the Outer Torres Strait Islands (**OTSI**) in

⁴⁴ First White Statement [119].

⁴⁵ Second Bruno Statement [10].

⁴⁶ First Woodward Statement [4.1]-[4.2].

⁴⁷ First Woodward Statement [5.13].

⁴⁸ First Woodward Statement [4.11]-[4.12].

⁴⁹ First White Statement [86].

FNQ and continues to do so.⁵⁰ TML also competes to provide charter/project services in FNQ.⁵¹

(b) Describe the area(s) of overlap in the operations of the Applicant and Target and any related bodies corporate (the merger parties)

4.15 Sea Swift and TML currently both provide a scheduled service in FNQ. Set out below are the communities that each party currently services, and the frequency of that service:

Community	Sea Swift	TML
Aurukun	Weekly (Wet season only)	-
Badu	Weekly	Weekly
Seisia (Bamaga)	Twice weekly	Weekly
Boigu	Weekly	Weekly
Coconut	Weekly	Weekly
Darnley	Weekly	Weekly
Dauan	Weekly	Weekly
Hammond	Weekly	As required
Horn Island	Twice weekly	Weekly
Kubin (Moa Island)	Weekly	Weekly
Lockhart River	Weekly	-
Mabuiag	Weekly	Weekly
Murray	Weekly	Weekly
Saibai	Weekly	Weekly
St Pauls (Moa Island)	Weekly	Weekly

⁵⁰ First Woodward Statement [4.8], [5.4], [5.13].

⁵¹ First Woodward Statement [4.11]-[4.12].

Community	Sea Swift	TML
Stephen Island	Monthly (tide dependant)	-
Thursday Island	Twice weekly	Weekly
Warraber	Weekly	Weekly
Weipa	Twice weekly	Weekly
Yam	Weekly	Weekly
Yorke	Weekly	Weekly

4.16 In FNQ Sea Swift and TML both have depot facilities in Cairns, Thursday Island, Horn Island, Seisia (Bamaga) and Weipa.⁵²

4.17 Sea Swift and TML currently both provide a scheduled service in the NT across certain routes. Set out below are the communities that each party currently services, and the frequency of that service:

Community	Sea Swift	TML
Bickerton Island	-	Fortnightly
Croker Island (Minjilang)	-	Weekly
Elcho Island	Weekly	Weekly
Garden Point (Pirlangimpi)	Twice weekly	Weekly
Goulburn Island (Warruwi)	-	Weekly
Gove	Weekly	Weekly
Groote Eylandt	Weekly	Weekly
Lake Evella	-	Weekly

⁵² First Bruno Statement [82]-[87], First Woodward Statement [6.40].

Community	Sea Swift	TML
Maningrida	Weekly	Weekly
Milikapiti	Weekly	-
Milingimbi	Weekly	Weekly
Nguiu	Twice weekly	-
Numbulwar	-	Fortnightly
Paru	Twice weekly	-
Port Keats	Weekly (wet season only)	-
Ramingining	Weekly	Weekly
Umbakumba	Weekly	Fortnightly

4.18 In the NT, Sea Swift and TML both have depot facilities in Darwin and Gove.⁵³

4.19 Sea Swift currently provides charter/project services, which it carries out in both FNQ and NT depending on demand for this work and whether Sea Swift is able to successfully win the work.⁵⁴ TML also competes to provide charter/project services in both FNQ and the NT.⁵⁵

(c) Provide details of any acquisitions made by the merger parties and any other acquisitions made in the industry sector(s) during the past five years

4.20 As noted above, in 2009 Toll acquired Perkins Shipping, which had operations in both the NT and FNQ.⁵⁶

⁵³ First Bruno Statement [88]-[90], First Woodward Statement [6.41].

⁵⁴ First Bruno Statement [33]-[34],

⁵⁵ First Woodward Statement [4.11].

⁵⁶ First Woodward Statement [4.1].

4.21 As noted above, in 2013 Sea Swift acquired the Tiwi Barge business in the NT.⁵⁷ Sea Swift also acquired certain assets of Silentworld Shipping in FNQ in 2012.⁵⁸

4.22 In addition, in 2013 Bhagwhan Marine acquired Workboats Northern Australia in the NT.⁵⁹

(d) Provide details of any existing vertical or horizontal relationships between the merger parties and related bodies corporate

4.23 There are limited vertical or horizontal relationships or arrangements currently in place between the TML business in the NT and FNQ and Sea Swift. The arrangements in place are:

- (a) Sea Swift accesses TML's facility at Gove on an ad hoc basis;⁶⁰
- (b) TML has subcontracted to Sea Swift the performance of a customer contract held by the TML business in FNQ, with IBIS;⁶¹
- (c) TML and Sea Swift have, from time to time, subcontracted the provision of coastal and community shipping services to each other on an ad hoc basis in order to ensure the continued provision of services to customers – for example, during periods in which a vessel needs to be docked or inspected, or in the event of equipment or vessel breakdown, failure or maintenance. This includes a temporary subcontracting arrangement relating to the OTSI in FNQ;⁶² and
- (d) TML and Sea Swift have a reciprocal slot rate arrangement in place which allows for each party to carry the other party's freight in the event of emergency, breakdown etc. This provides an essential

⁵⁷ First White Statement [102].

⁵⁸ First White Statement [158].

⁵⁹ First White Statement [175].

⁶⁰ First Woodward Statement [6.32].

⁶¹ First Woodward Statement [7.29].

⁶² First Woodward Statement [14.2], Supplementary Statement of Scott Woodward dated 2 March 2016 (**Second Woodward Statement**) [2.2]-[2.6].

backup for unforeseen events and allows for remote ports to continue receiving essential supplies.⁶³

4.24 In 2015, Sea Swift chartered TML's *Biquele Bay* vessel for a temporary period due to the docking of one of its own vessels.⁶⁴ This arrangement ceased in September 2015.⁶⁵

(e) Describe any other cooperative agreements to which any of the merger parties is a party

4.25 Other than as explained above, neither Toll nor Sea Swift is a party to any cooperative agreements or alliances with any other parties in relation to the provision of coastal and community shipping services in the NT and FNQ.⁶⁶

5 Market definition

Describe the market(s) (product, functional, geographic and time) relevant to the assessment of the acquisition's effect on competition – this includes markets for the supply of goods or services and markets for the acquisition of goods or services (the relevant market(s))

5.1 The markets relevant to the assessment of the Proposed Transaction's effect on competition are:

- (a) the market for the supply of coastal and community marine freight services to FNQ and the NT; or
- (b) alternatively, the markets for the supply of coastal and community marine freight services to each of:
 - (i) FNQ; and

⁶³ First Woodward Statement [14.2(e)].

⁶⁴ First Woodward Statement [6.5].

⁶⁵ Second Woodward Statement [2.1].

⁶⁶ First Woodward Statement [14.3(f)].

- (ii) the NT; or
- (c) alternatively, the markets for the supply of scheduled coastal and community marine freight services to each of:
 - (i) FNQ; and
 - (ii) NT.

5.2 The product dimension of each of these markets includes:

- (a) the shipping of goods from Darwin to destinations in the NT or from Cairns to destinations in FNQ on a scheduled coastal and community shipping service. This is a service that is:
 - (i) regular, and scheduled in most cases at least weekly;
 - (ii) provided on an integrated logistics or “depot to door” basis; and
 - (iii) provided to both contracted and uncontracted customers;⁶⁷
- (b) in some instances, the shipping of goods from other destinations in the NT back to Darwin, and from other destinations in FNQ back to Cairns. However, the volume of goods shipped in those directions is small;⁶⁸ and
- (c) a range of other services that provide substitutes to these services for certain customers and use the same facilities as these services, allowing suppliers to redeploy their facilities in order to supply these services, such as:
 - (i) unscheduled or charter services;
 - (ii) limited scheduled services between particular origins and destinations;

⁶⁷ First White Statement [31], [62]-[63], [65].

⁶⁸ First Bruno Statement [114], First White Statement [32].

- (iii) depot-to-depot (rather than depot-to-door) services; and
- (iv) overland road freight services, particularly between certain origins and destinations and at particular times of year.

5.3 Customer requirements and the economics of supplying these services suggest that there is a distinct demand for “full service” scheduled coastal and community shipping services.⁶⁹ However, this demand can be met by a wide range of suppliers who are able to redeploy resources and facilities from the services they currently supply and switch to providing scheduled coastal and community shipping services. This supply-side substitutability suggests that the relevant product market includes all coastal and community marine freight services.⁷⁰

5.4 The geographic dimension of the market encompasses both coastal mainland or “trunk” routes and “branch” routes to a wide range of remote islands and communities,⁷¹ including:

- (a) in FNQ, Weipa, Thursday Island, Seisia (Bamaga), Horn Island and the Outer Torres Strait Islands; and
- (b) in the NT, the Northern Territory coast from the eastern edge of northern Western Australia to the western edge of Cape York Peninsula.

5.5 The geographic dimension is broadly defined by the distance from the closest cities with major road and air freight facilities over which a freight service may be maintained. Shipping services in the FNQ region generally originate from Cairns. The FNQ region is currently served by a trunk coastal route from Cairns to Weipa connecting with coastal and island routes servicing smaller towns and communities. Shipping services provided in the NT generally originate from Darwin.⁷² The NT region is

⁶⁹ First White Statement [62].

⁷⁰ First Bruno Statement [143], [144].

⁷¹ First Bruno Statement [200].

⁷² First Bruno Statement [114].

currently served by routes out of Darwin. Historically the NT and FNQ regions have been joined by connecting routes, although a connecting service is not currently provided.⁷³

- 5.6 The potential for suppliers to redeploy vessels and equipment between regions and to access or establish facilities in different regions⁷⁴ provides competitive constraint on operators in either region. A supplier in FNQ provides a constraint on a supplier in the NT and vice versa. A good example of this is the entry by TML into the FNQ market and the entry of Sea Swift into the NT market. This indicates that the geographic dimension of the market includes the coast and islands of FNQ and the NT. However, the geographic dimension of the market may be broader than this because suppliers in other regions are able to re-deploy their vessels.
- 5.7 The functional dimension of each market is the direct distribution of freight services to customers. These customers may be companies, associations, government agencies or individuals, and the goods transported may or may not be on-sold to end customers.⁷⁵
- 5.8 The temporal dimension of each market suggests that substitution possibilities for scheduled services may be limited in the immediate term, since for sustained periods there is not enough demand to support more than one full service provider in the market. However, in the longer term there is significant competition for particular contracts and routes and strong substitution possibilities. Since most customer contracts run for 3 to 5 years, and may be terminated for convenience or non-exclusive,⁷⁶ it is likely that over a maximum 5-year timeframe every customer in the market will become contestable. For some destinations, over the longer term, road freight may become a more significant substitute as road facilities are improved.

⁷³ First Woodward Statement [5.22].

⁷⁴ First Bruno Statement [143]-[144].

⁷⁵ First Bruno Statement [160].

⁷⁶ First White Statement [190]-[191].

6 Suppliers

- (a) Describe the inputs into the production of goods or services by each of the merger parties in the relevant market(s) and indicate the value of those inputs as a proportion of total production. Where alternative inputs are available, provide a list of substitutes

6.1 A supplier of marine freight services requires the following equipment and infrastructure:

- (a) vessels;
- (b) shore side equipment and assets (i.e. located onshore);
- (c) access to the relevant wharves/landing sites; and
- (d) staff.⁷⁷

6.2 Vessels and shore side equipment and assets can be owned or leased. For vessels it is possible to charter or lease a vessel, either from Australian operators or internationally. There are two ways that this can be done:

- (a) **bareboat charter**: this is where the customer pays for the supplier to provide its ship, but the supplier does not provide any crew for the ship; or
- (b) **time charter**: this is where the supplier provides its ship along with crew and other equipment (e.g. forklifts) for the customer's purposes.⁷⁸

6.3 A general description of each of these inputs is set out in the Industry Overview at **Annexure B**.

⁷⁷ First Bruno Statement [54]-[59], [80]-[87], [86]-[96].

⁷⁸ First Bruno Statement [57], First Woodward Statement [5.21].

Sea Swift assets and inputs

6.4 To provide scheduled coastal and community shipping services to customers in the NT and FNQ, the Sea Swift business uses the following assets:

- (a) seven vessels in FNQ, including:
 - (i) two line haul, the *Trinity Bay* and *Newcastle Bay*;
 - (ii) three landing craft, the *Malu Titan*, *Malu Chief* and *Temple Bay*; and
 - (iii) a tug and barge set, the *Cossack* and *Comal III*; and
- (b) four vessels in the NT, all landing craft: the *Tiwi Islander*, *Malu Trader*, *Malu Explorer* and *Malu Warrior*;⁷⁹
- (c) various owned or leased supporting infrastructure (such as a depot or warehouse) and equipment (such as shipping containers and forklifts) at some of the port destinations serviced by Sea Swift;⁸⁰
- (d) various landing facilities which are largely common user facilities (Sea Swift only operates a private landing facility in Darwin, and currently has non-exclusive access to a further landing facility in Gove, being the Gove Yacht Club boat ramp);⁸¹ and
- (e) staff.⁸²

6.5 A detailed description of these Sea Swift inputs is set out in paragraphs 37 to 140 to the statement of Pasquale (Lino) Bruno dated 17 September 2015 (**First Bruno Statement**).

⁷⁹ First Bruno Statement [53]-[55], Second Bruno Statement [10] -[11].

⁸⁰ First Bruno Statement [80]-[81], [91]-[96].

⁸¹ First Bruno Statement [82]-[90].

⁸² First Bruno Statement [103]-[111].

6.6 The table below sets out the various costs to the business, accruing from these assets and inputs, as a proportion of revenue for each of Sea Swift's FNQ and NT operations in FY2015.⁸³ The percentages add up to greater than 100% as the business is currently loss making.

Sea Swift	Costs as a % of total revenue for FY2015		Costs as a % of total costs for FY2015	
	Description	FNQ	NT	FNQ

TML assets and inputs

6.7 To provide scheduled coastal and community shipping services in the NT and FNQ to customers, the TML business uses the following assets.⁸⁴

⁸³ Second Bruno Statement [37], and Confidential Annexure PB-78. The accounts on which these figures are based are described in paragraphs [12]-[24] of the Second White Statement.

⁸⁴ First Woodward Statement [4.10] and section 6, as updated by Second Woodward Statement, section 2.

- (a) two vessels in FNQ (owned by Toll), the *Toll Fourcroy* and *Toll Warrender*, and three vessels in the NT, the *Toll Coral Bay* (owned by Toll) and the chartered *Toll Territorian* and *Bimah Tujuh*, which comprise landing craft and general cargo vessels;⁸⁵
- (b) various owned or leased supporting infrastructure (such as a depot or warehouse) and equipment (such as shipping containers and forklifts) at some of the port destinations serviced by TML;
- (c) various landing facilities which are largely common user facilities (TML only operates private wharf facilities in Darwin and at Gove in the NT); and
- (d) staff.

6.8 An additional vessel (owned by Toll), the *Biquele Bay*, was previously used by TML to provide coastal and community shipping services in the NT. It has not been used to provide any scheduled services since around August or September 2014. Since that time it has generally been laid up in Darwin and has performed some charter services and freight overflow services.⁸⁶

6.9 A detailed description of these TML assets and inputs in the NT and FNQ is set out in the First Woodward Statement at paragraphs 6.1 to 6.51.

6.10 The table below sets out the various costs of the vessels and landside assets as a proportion of total revenue for TML's combined FNQ and NT operations in FY2015.⁸⁷ The percentages add up to greater than 100% as the business is currently loss making. The table below also sets out those costs as a proportion of total costs in FY2015.⁸⁸

⁸⁵ Second Woodward Statement, section 2.

⁸⁶ First Woodward Statement [6.5].

⁸⁷ First Woodward Statement [6.9].

⁸⁸ First Woodward Statement [6.49], First Woodward Statement, Confidential Annexure SW-17.

TML	Costs as a % of total revenue for FY2015	Costs as a % of total costs for FY2015
Direct - Vessel Costs (excl. Depreciation)		

TML	Costs as a % of total revenue for FY2015	Costs as a % of total costs for FY2015

(b) Provide the names and contact details of a representative selection of suppliers of inputs to each of the merger parties in the relevant market(s)

6.11 Set out in **Annexure C** are the names and contact details for a selection of the suppliers of the inputs listed above, which includes:

- (a) for vessels – the names and contact details of various vessel brokers and suppliers of charter vessels, and the estimated cost of acquiring or chartering these kinds of assets;⁸⁹
- (b) for shore side equipment and assets – the names of various businesses that supply the kinds of shore side equipment used, such as forklifts and freight containers, and the estimated value of these kinds of assets;⁹⁰ and
- (c) for access to the relevant wharves/landing sites – a list of the relevant local council authorities and contacts for obtaining access to those sites.⁹¹

⁸⁹ First Bruno Statement, Annexure PB-38 and PB-39.

⁹⁰ First Bruno Statement, Annexure PB-40.

⁹¹ First Bruno Statement, Annexure PB-45.

6.12 Staff are generally sourced either by word of mouth, or via advertising in either the local newspapers or via online providers such as Seek.com.⁹²

- (c) Describe any purchasing arrangements in place with each of the suppliers identified above and outline whether it is expected or anticipated that these arrangements will continue or be varied in any way post-acquisition

Charter vessels

6.13 TML currently charters the *Bimah Tujuh* from Barge Express (formerly Sealink) (**Barge Express**) on a time charter basis. Barge Express supplies the vessel and crew, and provides the coastal and community shipping services on behalf of TML under TML's supervision and direction. TML also currently charters the *Territorian* from Australian Offshore Solutions under a bareboat charter. TML uses its own crew to operate the vessel and provide the services. Post-acquisition, as noted above, Toll is proposing to commit to terminating or not renewing the charter arrangements relating to these two vessels and the vessels will be handed back to their respective owners.⁹³

Owned vessels

6.14 Post-acquisition, three Toll owned vessels (*Biquele Bay*, *Coral Bay* and *Fourcroy*) currently or previously used by the TML business in the NT and FNQ to provide scheduled services will be transferred to Sea Swift. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁹⁴

6.15 Post-acquisition, as noted above, Toll is proposing to commit to implementing a process to sell the remaining vessel used by TML in the NT and FNQ to provide scheduled services, the *Warrender*, [REDACTED]

[REDACTED] Toll intends to sell the *Warrender*

⁹² First Bruno Statement [111].

⁹³ First Woodward Statement [6.7].

⁹⁴ First White Statement, Confidential Annexure FW-32.

in a timely manner and at fair market value and accordingly [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁹⁵

Landing facilities

6.16 With the exception of Darwin and Gove, all of the landing facilities that Sea Swift uses to provide coastal and community shipping services in the NT and FNQ are 'common user' facilities.⁹⁶ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁹⁷

6.17 With the exception of Darwin and Gove, all of the landing facilities that TML uses to provide coastal and community shipping services in the NT and FNQ are 'common user' facilities. The TML business has no exclusive or preferential rights to such facilities and they are open and available to all providers of coastal and community shipping services on the same terms of access as TML.⁹⁸ There will be no transfer of any access rights to these facilities as part of the Proposed Transaction. TML will simply cease to access the landing facilities to provide scheduled services post-acquisition.⁹⁹

6.18 In Darwin, TML currently operates from a facility at Frances Bay. The Proposed Transaction does not involve the transfer to Sea Swift of the Frances Bay facility or land, which will remain with Toll.¹⁰⁰ Following a decision by the Tribunal, and irrespective of whether or not the proposed transaction proceeds, the Frances Bay terminal facility will close and will no longer be used for marine freight services. This is subject to a short

⁹⁵ First Woodward Statement [6.7].

⁹⁶ First Bruno Statement [117], [119].

⁹⁷ Second White Statement [36].

⁹⁸ First Woodward Statement [6.15].

⁹⁹ First Woodward Statement [6.20].

¹⁰⁰ First Woodward Statement [6.21].

period, if the Proposed Transaction proceeds, during which Sea Swift will be able to access the facility to ensure a smooth transition and continuity of service for customers.¹⁰¹ [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] This is Toll's intention irrespective of whether or not the Proposed Transaction proceeds.¹⁰²

6.19 In Gove, TML operates on land pursuant to a lease. That lease includes the landing facilities at the Port of Gove comprising a landing ramp and heavy lift wharf. The lease relating to TML's Gove facility will be transferred to Sea Swift as part of the Proposed Transaction.¹⁰³

Shore side infrastructure and equipment

6.20 TML operates certain shore side infrastructure (such as depots, storage or laydown areas) in the NT and FNQ and equipment to receive, consolidate, deconsolidate and otherwise handle and store cargo. Some of this infrastructure and equipment is common user, and some is leased or owned.¹⁰⁴

6.21 The warehousing and depot infrastructure and mobile equipment used by the TML business in the NT and FNQ at each landing facility (if any), and the assets and supporting infrastructure / equipment in each location (if any) that are proposed to be transferred to Sea Swift as part of the Proposed Transaction, are contained in Annexure SW-15 to the First Woodward Statement.

6.22 [REDACTED]
[REDACTED]

¹⁰¹ Second Woodward Statement [3.2].

¹⁰² Second Woodward Statement [3.3].

¹⁰³ First Woodward Statement [6.23].

¹⁰⁴ First Woodward Statement [6.38]-[6.41].

(a) [REDACTED]
[REDACTED]
[REDACTED]

(b) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁰⁵

Staff

6.23 Toll employs sea staff to work on two of the three Toll-owned vessels used by TML in the NT and FNQ which are proposed to be transferred to Sea Swift, namely the *Coral Bay* and the *Fourcroy*. Toll does not employ any sea staff to work on the *Biquele Bay* (the third Toll owned vessel proposed to be transferred to Sea Swift) because the vessel is not currently used by TML to provide any scheduled services.¹⁰⁶

6.24 Toll employs sea staff to work on two other vessels used by TML in the NT and FNQ: the *Warrender* (owned by Toll) and the *Territorian* (which Toll charts under bare boat arrangements). These vessels are not proposed to be transferred to Sea Swift and will be sold (in the case of the *Warrender*) [REDACTED] irrespective of whether or not the Proposed Transaction proceeds.¹⁰⁷

6.25 Toll does not employ any sea staff to work on the *Bimah Tujuh* vessel, which TML uses pursuant to a charter with Barge Express. This vessel is crewed by staff employed by Barge Express, not Toll. This vessel is not proposed to be transferred to Sea Swift [REDACTED]
[REDACTED]¹⁰⁸

¹⁰⁵ First White Statement, Confidential Annexure FW-32.

¹⁰⁶ Second Woodward Statement [4.2].

¹⁰⁷ Second Woodward Statement [4.2].

¹⁰⁸ Second Woodward Statement [4.2].

6.26 Toll also employs staff as part of TML's operations in the NT and FNQ, including at the Frances Bay terminal and other depots.¹⁰⁹

6.27 No employees of the TML business are to be transferred to Sea Swift as part of the Proposed Transaction.¹¹⁰

6.28 All employees of the TML business in the NT and FNQ have been informed by TML that they will be either made redundant or be redeployed irrespective of whether or not the Proposed Transaction proceeds.¹¹¹

7 Competitors

(a) Provide details of alternative suppliers of products now, or shortly to be, competitive with, or otherwise substitutable for, goods or services produced by each of the merger parties in the relevant market(s)

7.1 Current and recent operators of shipping services in FNQ include:

- (a) Carpentaria Contracting;
- (b) Carpentaria Freight;
- (c) Silentworld Shipping (exited in 2012 but still operating in the Solomon Islands); and
- (d) Marine Industrial Port Engineering Contracting (**MIPEC**).¹¹²

7.2 Current and recent operators of shipping services in the NT include:

- (a) Barge Express;
- (b) Shorebarge;
- (c) Ezion/Teras; and

¹⁰⁹ First Woodward Statement [6.45], Second Woodward Statement [4.2].

¹¹⁰ First Woodward Statement [6.47], First Readdy Statement [84].

¹¹¹ Second Woodward Statement [4.2].

¹¹² First White Statement [142]-[146], [151]-[160], First Woodward Statement [8.6], Second White Statement [40]-[43].

(d) Bhagwan Marine.¹¹³

7.3 These operators are currently focused on charter operations and limited scheduled services. However, they have the potential to expand their services to provide a scheduled service (and in some instances, have already done so or have indicated their intention to do so¹¹⁴). This can be seen from the following:¹¹⁵

(a) Ezion/Teras provides a scheduled service between Darwin and the Tiwi Islands and between Darwin and Port Keats;

(b) Carpentaria Contracting previously provided a scheduled service between Weipa and Aurukun during the wet season. This ceased in mid-May 2015;¹¹⁶

(c) Barge Express provides a scheduled service from Darwin to various remote locations in the NT on behalf of TML, under a time charter arrangement.¹¹⁷ Barge Express announced in February 2016 that it intends to commence a scheduled service in the NT.¹¹⁸ Barge Express plans to service Elcho Island and various other communities;¹¹⁹

(d) Shorebarge expanded into providing general freight services in the NT, including previously providing a scheduled service from Darwin to various remote locations in the NT; and

(e) MIPEC approached the Torres Strait Island Regional Council (**TSIRC**) in FNQ in December 2015 with a proposal to provide a scheduled service between Cairns and the OTSI.¹²⁰

¹¹³ First White Statement [161]-[181], First Woodward Statement [8.26].

¹¹⁴ See Second Statement of Ken Conlon dated 3 March 2016 (**Second Conlon Statement**) [5.1]-[5.3].

¹¹⁵ First Woodward Statement [8.6].

¹¹⁶ Second Bruno Statement [9].

¹¹⁷ First Woodward Statement [6.6].

¹¹⁸ Second Conlon Statement [5.1]-[5.3].

¹¹⁹ Second Conlon Statement [5.3].

¹²⁰ Second White Statement [40]-[43].

7.4 Any of these operators is capable of competing and expanding into full service operations (i.e. providing a scheduled service to multiple destinations) in response to a rise in prices or reduction in services. This is especially the case in relation to certain routes that are more profitable to service as they include larger communities and therefore generate greater volume of freight demand. These routes are:¹²¹

- (a) Cairns – Weipa;
- (b) Cairns – Horn Island/Thursday Island;
- (c) Darwin – Gove; and
- (d) Darwin – Groote Eylandt.

7.5 Some large customers have single destination contracts on these routes.¹²² Other large customers have multi-destination contracts which may include the above routes as well as more remote communities.¹²³

7.6 For all these reasons, smaller operators are able to compete in at least three different ways:

- (a) by offering customers the use of charter services;
- (b) by expanding their operations to provide a scheduled service to multiple locations; and
- (c) by expanding their operations to provide a scheduled service to one or a small number of more profitable locations which do not amount to full service freight operations.¹²⁴

7.7 For these reasons, the full service operators (currently, TML and Sea Swift) are constrained by operators that do not currently operate a full service business. The full service operators are constrained because the

¹²¹ First White Statement [183].

¹²² First White Statement [184].

¹²³ First White Statement [186].

¹²⁴ First White Statement [182]-[197].

smaller operators are able to take business away from the full service operators and may, in particular, focus on the most profitable of the routes upon which they wish to compete.

7.8 Operators are able to compete for these services (either as a full service operator, or for specific routes) readily, as major customer contracts are relatively short in duration and are frequently put out to competitive tender. Further, some contracts may be terminated at short notice for convenience, and many have no exclusivity requirements or minimum volume guarantees.¹²⁵

7.9 In the past, major customers have often sponsored or encouraged new entry or expansion into full-service operations or have bypassed existing freight providers and established their own services. Even smaller customers can exercise significant countervailing power and will continue to do so following the Proposed Transaction.¹²⁶

(b) If the suppliers identified above do not produce goods or services which are substantially the same as those goods or services produced by the merger parties in the relevant market(s), explain why it is considered that these goods or services are viable alternatives

7.10 See paragraphs 7.1 to 7.7 above.

8 Customers

(a) Provide the names and contact details of a representative selection of the customers of each of the Applicant and the Target in the relevant market(s)

8.1 The following are the main types of customer for marine freight services which are located in the remote communities referred to above.

¹²⁵ First White Statement [203]-[205].

¹²⁶ First White Statement [193].

Mining projects

8.2 Various mining projects are located at remote locations in FNQ and the NT. These companies require the shipping of equipment and materials for mining operations as well as other supplies which are necessary to support their workforces.¹²⁷

Customer	Supplier	Region	Contact details	Value (FY2015 Revenue)
Rio Tinto Alcan - Gove	TML	NT		
Rio Tinto Alcan - Weipa	Sea Swift	FNQ		
South 32 (formerly BHP) GEMCO	TML	NT		

Utilities

8.3 Many communities in both FNQ and NT obtain their power from remote power stations which run on diesel fuel. Fuel is regularly shipped into the community for the purpose of keeping those power stations in operation.¹²⁸

Customer	Supplier	Region	Contact details	Value (FY2015 Revenue)
Ergon Energy	Sea Swift	FNQ		
Caltex Australia (fuel supplier to Ergon Energy)	Sea Swift	FNQ		

¹²⁷ First Woodward Statement [7.4(a)], First White Statement [34(a)], First Bruno Statement [161]-[163].

¹²⁸ First Woodward Statement [7.4(d)], First White Statement [34(b)], First Bruno Statement [161]-[163].

Customer	Supplier	Region	Contact details	Value (FY2015 Revenue)
PUMA (fuel supplier to NT Power and Water Corporation)	TML	NT		

Councils/Community Enterprises

8.4 Councils and various community enterprises in FNQ and the NT also rely on marine freight services for the supplies necessary for their operations. This includes items such as building supplies, vehicles, food and fuel.¹²⁹

Customer	Supplier	Region	Contact details	Value (FY2015 Revenue)
Torres Strait Islander Regional Council	Sea Swift	FNQ		
Gumatj Corporation	Sea Swift	NT		
Seisia Enterprises	Sea Swift	FNQ		
Bamaga Enterprises	Sea Swift	FNQ		
Tiwi Islands Regional	Sea Swift	NT		

¹²⁹ First Woodward Statement [7.4(c)], First White Statement [34(d)]–[34(e)].

Customer	Supplier	Region	Contact details	Value (FY2015 Revenue)
Council				
	TML	NT		

Supermarkets

8.5 Various supermarkets and retail stores have operations in these communities. These stores require their stock (including dry goods, refrigerated goods and fresh fruit and vegetables) to be shipped in.¹³⁰

Customer	Supplier	Region	Contact details	Value (FY2015 Revenue)
Woolworths – Weipa	Sea Swift	FNQ		
Woolworths – Gove	Sea Swift	NT		
ALPA	TML	NT		
IBIS	TML	FNQ		

¹³⁰ First Woodward Statement [7.4(b)], First White Statement [34(c)], First Bruno Statement [161]-[163].

Customer	Supplier	Region	Contact details	Value (FY2015 Revenue)
	TML	NT		

Other Commercial Enterprises

8.6 There are other enterprises within the communities which also require goods to be shipped in for the purpose of their businesses. These include hotels, resorts and pubs.¹³¹

Customer	Supplier	Region	Contact details	Value (FY2015 Revenue)
BP Australia	Sea Swift	FNQ		
Island and Cape Enterprises Retail	Sea Swift	FNQ		
Takkarina Tucker Box	Sea Swift	NT		
The Arnhem Club	Sea Swift	NT		
Kamayán Café	Sea Swift	NT		

¹³¹ First Woodward Statement [7.22] and Annexure SW-21.

Customer	Supplier	Region	Contact details	Value (FY2015 Revenue)
	TML	FNQ		
	TML	NT		
	TML	NT		
	TML	NT		
	TML	FNQ		
	TML	FNQ		
	TML	FNQ		

Individuals

8.7 Individuals living in the communities may also require the shipment of goods. This might include items such as clothes, books, gifts, furniture or vehicles, as well as some food and groceries.

- (b) Describe the distribution channels available to the merger parties in supplying goods and services to customers and identify the relevant distribution channels in respect of each of the customers identified above**

8.8 The parties supply freight services directly to their customers.

- (c) Describe the existing supply arrangements that the merger parties have in place with the customers identified above and whether it is expected or anticipated that these arrangements will continue or be varied in any way post-acquisition**

8.9 A table summarising the existing supply arrangements that TML and Sea Swift currently have in place with the customers identified above is set out in **Annexure D**, including which of Sea Swift or TML currently services each customer.

8.10 Those customers who are currently serviced by Sea Swift will continue to be serviced by Sea Swift post-transaction.

8.11 The Proposed Transaction involves the transfer or novation of certain customer contracts held by the TML NT and FNQ business to Sea Swift, subject to the customer consenting to such a novation. In summary, these involve:

- (a) four larger customer contracts in the NT, being Rio Tinto Gove, South 32 (formerly BHP) GEMCO, ALPA and PUMA;
- (b) one larger customer contract in FNQ, being IBIS; and
- (c) a number of contracts with smaller customers which relate, with one exception, to the NT.

8.12 A table summarising the customer contracts to be transferred to Sea Swift is contained in Confidential Annexure SW-24 to the First Woodward Statement.¹³²

8.13 Sea Swift intends to honour the terms of the contracts transferred to it under the Proposed Transaction.

9 Market concentration

Provide estimates of current and post-acquisition market shares for the merger parties and existing alternative suppliers or purchasers in the relevant market(s) identified above

9.1 Sea Swift and TML have each provided revenue and volume figures as part of this Application. However, given differences in Sea Swift and TML's internal recording systems and the absence of volume and revenue data for third party operators, it has not been possible to empirically derive market shares.

9.2 Set out below are Sea Swift management's estimates for that portion of volumes covered by its scheduled services, TML's or a third party operator, for the previous 5 years based on their knowledge of certain routes. Sea Swift management was unable to provide estimates for charter / project services.¹³³

Far North Queensland

Operator	Area	FY2011	FY2012	FY2013	FY2014	FY2015
Sea Swift	OTSI					
	TI/HI/NPA					
	WEIPA					

¹³² As updated by the Second Woodward Statement [5.2].

¹³³ Second Bruno Statement [69]-[70].

Operator	Area	FY2011	FY2012	FY2013	FY2014	FY2015
TML	OTSI					
	TI/HI/NPA					
	WEIPA					
Other operators	OTSI					
	TI/HI/NPA					
	WEIPA					
Basis for estimate						

Northern Territory

Operator	Area	FY2011	FY2012	FY2013	FY2014	FY2015
TML	Gove	-	-			
	Groote	-	-			
	Rest of Market (ROM)	-	-			
Sea Swift	Gove	-	-			
	Groote	-	-			
	ROM	-	-			

Operator	Area	FY2011	FY2012	FY2013	FY2014	FY2015
Other operators	Gove	-	-	[REDACTED]	[REDACTED]	[REDACTED]
	Groote	-	-			
	ROM	-	-			
Basis for estimate		[REDACTED]				

10 Constraints on the exercise of market power

(a) Provide details of the extent to which the merger parties are likely to be constrained post-acquisition from raising prices and profit margins and/or reducing the quality of goods and/or services by:

- (i) input suppliers
- (ii) competitors in the relevant market(s)
- (iii) customers in the relevant market(s)
- (iv) others

10.1 Following the Proposed Transaction, Sea Swift will be significantly constrained from raising prices or reducing the quality of services for the following reasons.

Constraints from other operators

10.2 As set out in section 13 below, the inputs used in supplying full service coastal and community freight services are non-specialised, commonly available and in most cases inherently redeployable.¹³⁴

10.3 As set out in paragraph 10.6 (below), customer contracts come up for tender regularly, which means that a new entrant to the market can readily compete for those contracts. The availability of these contracts is therefore not a significant barrier to entry.

10.4 There is nothing unique about the assets required to offer a full service freight business, and there are many providers of a range of freight services who already own or control these assets or can quickly acquire them.¹³⁵

10.5 As set out in section 7, although the history of entry and exit suggests that FNQ and NT can only sustain one full service supplier of scheduled services, there is strong and frequent competition for particular contracts and routes from time to time, and additional competitive constraint from suppliers of charter services and scheduled services on particular routes or to particular communities that do not amount to full service freight operations.¹³⁶

Countervailing power of large customers

10.6 Customers will continue to exercise significant countervailing power and competitive constraint. Large customer contracts sufficient to underpin new entry or expansion are frequently put out to tender, have terms of 3–5 years or less, and are often either subject to termination at the customer's convenience or are non-exclusive.¹³⁷ As a result, customers who are dissatisfied with the services provided following the Proposed Transaction

¹³⁴ First Bruno Statement [71]-[78], [97]-[102], [112]-[113] and [140].

¹³⁵ First Bruno Statement [71]-[76], First Woodward Statement [8.10].

¹³⁶ First White Statement [182]-[197].

¹³⁷ First White Statement [190]-[192].

will have ample opportunity to change providers (or threaten to change providers) if they wish.¹³⁸

10.7 These larger customers include:

- (a) Woolworths;
- (b) Rio Tinto;
- (c) South32 (formerly BHP GEMCO);
- (d) PUMA;
- (e) Caltex;
- (f) ALPA; and
- (g) IBIS.

10.8 Smaller customers are also able to negotiate significant discounts due to the need to maintain a level of business sufficient to contribute to fixed costs, which will continue to be important to any full service operator.¹³⁹

10.9 The consent of TML's customers is needed to assign and novate their customer agreements as part of the Proposed Transaction.¹⁴⁰ This will provide an opportunity for any TML customers in the NT and FNQ who may be concerned about the Proposed Transaction to consider alternative arrangements.

Conditions of authorisation

10.10 Further, as set out above in section 3, Sea Swift is committing to waive any obligations of exclusivity or minimum volume requirements, to the extent that they exist, in its customer contracts novated from the TML business in NT and FNQ for the remainder of the contract term. This

¹³⁸ First White Statement [194].

¹³⁹ First Bruno Statement [176], [179].

¹⁴⁰ First Woodward Statement [7.31].

will allow all former TML customers to consider alternative, supplementary or trial arrangements at any time.

10.11 Finally, as set out above in section 3, Sea Swift will make a commitment to maintain service quality and frequency over all its current routes, and to continue to offer current scheduled prices subject to annual price increases in accordance with publicly available price indexes, with any proposed further price changes subject to independent expert review. This will give customers certainty that service will be maintained and prices will not rise above competitive levels, which is particularly important for coastal and community customers.¹⁴¹

11 Imports

(a) Provide details of the actual and potential level of imports in the relevant market(s) and details of the importers and their suppliers

11.1 Not applicable.

(b) Describe any barriers to importation in the relevant market(s) including whether significant investment in facilities or in distribution arrangements is needed to facilitate importation

11.2 Not applicable.

(c) Describe facilities and distribution arrangements necessary for importation in the relevant market(s), their capacity and who has ownership or control of these facilities and arrangements

11.3 Not applicable.

(d) Provide details of the price of imports as opposed to domestic production in the relevant market(s) and explain any divergence in these prices

11.4 Not applicable.

¹⁴¹ First White Statement [227].

- (e) Provide details as to the extent of constraint which would be likely to be provided by imports on domestic suppliers including the merger parties in the relevant market(s) post-acquisition**

11.5 Not applicable.

12 Exports

- (a) Provide details of the actual and potential level of exports in the relevant market(s)**

12.1 Not applicable.

- (b) Describe the export barriers faced by suppliers of inputs to the merger parties in the relevant market(s)**

12.2 Not applicable.

- (c) Provide details of the sale price of exports as opposed to domestic sales in the relevant market(s) and explain any divergence in these prices**

12.3 Not applicable.

- (d) Describe whether the suppliers of inputs to the merger parties are or would be able to export such inputs post-acquisition and, if so, describe the extent of constraint this would be likely to provide on the merger parties post-acquisition**

12.4 Not applicable.

13 Barriers to entry and expansion

- (a) Provide details of any barriers to entry and expansion in the relevant market(s)**

13.1 There are a number of operators in each region who provide a range of marine freight and project services using the same equipment, facilities

and expertise as are used to provide full service coastal and community operations; and a number of large sophisticated customers who have demonstrated the capacity and inclination to sponsor new entry or expansion or to establish their own freight services.¹⁴²

13.2 Historically there has tended to be only one supplier of full service coastal and community scheduled services in each of FNQ and the NT, although:

- (a) the identity of the supplier of full service coastal and community scheduled services has been subject to change;
- (b) there have been transitional periods of new entry or expansion during which multiple suppliers contest each region,¹⁴³ usually ending with one or more of these suppliers exiting the market or reducing their services; and
- (c) throughout the period, some operators have provided scheduled services to a smaller group of the total number of remote communities in FNQ and the NT.¹⁴⁴

13.3 Customer contracts are typically short-term and many have no minimum volume requirements, may be terminated at the customer's convenience or are otherwise not exclusive.¹⁴⁵

13.4 The key inputs that a new entrant, being someone who is not already an existing provider of charter services or limited scheduled services, would require in order to establish a business offering a regular scheduled service in FNQ and the NT are:

- (a) **vessels:** including line haul vessels used to ship high volumes of freight across long distances, and smaller landing craft used to deliver freight to more remote locations. These vessels are widely

¹⁴² First White Statement [142]-[186] and [193], First Bruno Statement [143]-[144].

¹⁴³ First Woodward Statement [8.3]-[8.4], First Woodward Statement, Annexure SW-25.

¹⁴⁴ First Bruno Statement [71], [91] and [97].

¹⁴⁵ First White Statement [190]-[192].

available to purchase or lease at short notice and at a wide range of costs depending on size and age;¹⁴⁶

- (b) **vessel registration:** including registration as a domestic commercial vessel with the Australian Maritime Safety Authority, ongoing classification with a member of the International Association of Classification Societies to ensure safety and seaworthiness, permits from the Great Barrier Reef Marine Park Authority and optional food handling certification. None of these registrations are overly onerous to obtain or maintain;¹⁴⁷
- (c) **depot facilities:** established at larger destinations to assist with the consolidation and deconsolidation of freight, including land, warehousing facilities and equipment such as forklifts and trucks. These facilities are not difficult to establish or access is on a common-user basis, and equipment is commonly available;¹⁴⁸
- (d) **staff:** vessels are subject to minimum crew requirements and crew qualification requirements, and shore side staff may require a forklift or truck licence. There is no shortage of qualified candidates in the area at present;¹⁴⁹
- (e) **landing facilities:** including primary ports such as Cairns and Darwin, second tier wharves or landing facilities at the larger coastal and island community destinations, and mud or beach ramps in smaller and more remote communities. All of these ports or landing facilities are common-user facilities with the exception of TML's facility in Gove, where alternative landing facilities are available.¹⁵⁰

¹⁴⁶ First Bruno Statement [37], [70]-[78], First Woodward Statement [6.8]-[6.11].

¹⁴⁷ First Bruno Statement [39]-[51].

¹⁴⁸ First Bruno Statement [97]-[102], First Woodward Statement [6.44].

¹⁴⁹ First Bruno Statement [112]-[113].

¹⁵⁰ First Woodward Statement [6.14]-[6.20].

Fees for landing facilities vary considerably but are not overly expensive;¹⁵¹ and

- (f) **customer contracts:** major customer contracts are required to provide the sustained volumes necessary to underpin a full service operation in each region. Major customers in both FNQ and the NT run periodic competitive tenders for their marine freight service providers. Contracts tend to run for 3 to 5 years and many either allow termination by the customer without cause on short notice, or impose no requirements for exclusivity or minimum volumes.¹⁵² Major customers may encourage (by the promise of a particular contract or otherwise) another operator to enter the market either on one route or multiple routes.¹⁵³

(b) Provide details of any firms not currently supplying or acquiring goods or services in the Relevant Market(s) but which could enter the Relevant Market(s) quickly and provide an effective competitive constraint in the Relevant Market(s) to the merged entity

13.5 As suggested at paragraphs 7.1 to 7.3 above, current providers of charter services or limited scheduled freight services in or near the region who might expand into full service operations in response to a rise in prices or reduction in services include:

- (a) **in FNQ:** Carpentaria Contracting, Carpentaria Freight and MIPEC;¹⁵⁴ and
- (b) **in the NT:** Barge Express, Shorebarge, Ezion/Teras and Bhagwan Marine.¹⁵⁵

13.6 In the past, a number of suppliers and potential suppliers in the FNQ and NT markets have approached customers, including by bidding for or

¹⁵¹ First Bruno Statement [114]-[141].

¹⁵² First White Statement [190]-[192], First Woodward Statement [8.6].

¹⁵³ First White Statement [193].

¹⁵⁴ First White Statement [142]-[155], First Woodward Statement [8.6(a)-(b)], Second White Statement [40]-[43]

¹⁵⁵ First White Statement [161]-[181], First Woodward Statement [8.6(d)-(g)].

winning contracts that are capable of underpinning, and in many cases did underpin, broader entry into these markets. For example:

- (a) Shorebarge provided general community services across East and West Arnhem in the NT and serviced the NT Power & Water contract across multiple destinations;¹⁵⁶
- (b) in 2012–2013 Sea Swift won the Caltex subcontract for fuel haulage to NT Power & Water sites and the Woolworths contract to supply Gove, allowing it to enter and expand in the NT;¹⁵⁷
- (c) in 2013 Ezion/Teras established scheduled services from Darwin to the Tiwi Islands, and in 2014 it also won a contract with the Port Keats Store from Sea Swift and established a weekly scheduled service to Port Keats/Wadeye;¹⁵⁸
- (d) in 2013 Workboats Northern Australia (recently acquired by Bhagwan Marine) bid against Sea Swift and TML for the Rio Tinto contract in Weipa FNQ, though it was unsuccessful;¹⁵⁹
- (e) in 2014 Carpentaria Contracting established a weekly scheduled service between the communities of Weipa and Aurukun in FNQ servicing the ALPA contract over the wet season. That service concluded at the end of the wet season in mid-May 2015;¹⁶⁰
- (f) in 2014 Barge Express bid against Sea Swift, TML and others for the Puma subcontract to provide fuel services to remote power stations operated by NT Power & Water; and ¹⁶¹
- (g) in December 2015 MIPEC approached TSIRC to provide a scheduled service between Cairns and the OTSI.¹⁶²

¹⁵⁶ First White Statement [166]-[168].

¹⁵⁷ First White Statement [101].

¹⁵⁸ First Woodward Statement [8.6], First White Statement [169]-[173].

¹⁵⁹ First White Statement [174].

¹⁶⁰ First White Statement [142]-[146], Second Bruno Statement [9].

¹⁶¹ First White Statement [161]-[164].

(c) Provide details of any firms which have recently tried and failed to enter the relevant market(s), including the reasons (if known) for their failure

13.7 As referred to above, there is a long history of entry and exit of operators unsuccessfully attempting to provide a regular scheduled services either on a full service basis, or even on a lesser basis, across both the FNQ and the NT. Set out below are some examples.

13.8 Sea Swift entered into the NT in January 2013 through the acquisition of Tiwi Barge. It commenced a 6–7 vessel service throughout the NT to win customer volumes, and was successful in winning the major Caltex fuel haulage and Woolworths Gove contracts. However, despite winning approximately █% of the available volume, Sea Swift was unable to make its scheduled service economically sustainable, and over the course of 2014 reduced its services in the NT to a 3 vessel operation which serviced fewer communities in the NT.¹⁶³ Sea Swift has recently commenced operating a weekly service to Elcho Island, Ramingining and Milingimbi in the NT with a fourth vessel to support cyclone recovery works, however it is unclear how long it will run these services for.¹⁶⁴

13.9 TML expanded its operations in FNQ in or around January 2014 when it commenced servicing the OTSI. This expansion into the OTSI has not been successful.¹⁶⁵ Apart from one contract (subcontracted to Sea Swift), TML does not have any other larger customer contracts in FNQ and its FNQ operations are heavily loss making.¹⁶⁶

13.10 Silentworld Shipping entered the FNQ in 2010 competing with Sea Swift and TML for customers, and was successful in winning some market share. However, Silentworld was unable to gain enough volume to

¹⁶² Second White Statement [40]-[43].

¹⁶³ First White Statement [102], [114], [115], [118]-[119], [138], [203]-[205].

¹⁶⁴ Second Bruno Statement [10].

¹⁶⁵ First Woodward Statement [9.2]-[9.3].

¹⁶⁶ First Woodward Statement [7.29], [9.8]-[9.10].

maintain a sustainable operation and sold certain assets and transferred certain contracts to Sea Swift in 2012.¹⁶⁷

13.11 Despite these failures, suppliers continue to enter and expand in both FNQ and the NT in response to competitive opportunities for the ongoing benefit of customers.

14 Dynamic characteristics

Provide details of the dynamic characteristics of the relevant market(s)

14.1 The relevant markets are relatively unsophisticated with low levels of innovation, technological change and product and service differentiation. They have also experienced limited growth and some contraction in recent years as economic activity in the area has decreased.¹⁶⁸

15 Vigorous and effective competitor

Indicate whether the Target or any other participant in the relevant market(s) could be described as a vigorous and effective competitor to the Applicant or other market participants to any and to what extent, and why

15.1 TML is not a vigorous and effective competitor because its operations in the NT and FNQ are not sustainable.

15.2 During the time that TML has operated in the same regions as Sea Swift, it has competed aggressively for customers, including by discounted pricing in both the NT and FNQ. However, TML's operations in FNQ and NT have not been and are not sustainable for the reasons outlined below.

15.3 In the absence of the Proposed Transaction, Toll intends to wind up the TML business in the NT and FNQ.¹⁶⁹

¹⁶⁷ First White Statement [157]-[158].

¹⁶⁸ First White Statement [74]-[77], First Bruno Statement [191]-[196].

¹⁶⁹ First Woodward Statement [13.1], [13.8]-[13.10], Statement of David Jackson dated 11 September 2015 (**Jackson Statement**) [8.1], Kruger Statement [7.1]-[7.4], Second Woodward Statement [6.1]-[6.5].

15.4 There is no meaningful prospect that Toll could complete an equivalent or similar transaction for TML in a suitable timeframe with an alternative purchaser.¹⁷⁰ As such, if the Tribunal decides not to grant authorisation to the Proposed Transaction, subject to board approval Toll will commence implementing steps to wind up the TML business in the NT and FNQ.¹⁷¹ Scott Woodward, General Manager of TML, and David Jackson, CEO of the TRGL division in which TML sits, have recommended to Brian Kruger, the Managing Director of Toll, that the business be wound up.¹⁷²

15.5 Toll's intention is that TML will exit the relevant markets as soon as possible following a decision by the Tribunal not to grant authorisation¹⁷³ and Toll will take immediate steps to effect a timely and complete shutdown of the TML business in the NT and FNQ if the Proposed Transaction does not proceed. Toll has communicated this intention to its customers, stating that if the Proposed Transaction does not proceed, it will commence winding up the business in the NT and FNQ and anticipates that this would be completed in approximately 60 days from the date of the Tribunal's decision.¹⁷⁴ Toll will be focused on quickly shutting down the relevant business, and ceasing scheduled services, as soon as possible to forestall and minimise further losses being incurred.¹⁷⁵

15.6 As part of its exit, Toll intends to [REDACTED]
[REDACTED]
[REDACTED] notify customers with respect to its plans to exit, [REDACTED]
[REDACTED].¹⁷⁶ When TML's relevant assets are sold, they will be sold with a view to maximising TML's financial return. Given the non-specialised nature of the assets being sold, there is no certainty that the sale of those

¹⁷⁰ Kruger Statement [7.1].

¹⁷¹ First Woodward Statement [13.1], [13.3]-[13.4].

¹⁷² First Woodward Statement [13.1], Jackson Statement [8.1].

¹⁷³ First Woodward Statement [13.4], Second Woodward Statement [6.3]-[6.5].

¹⁷⁴ Second Woodward Statement [6.2]-[6.4].

¹⁷⁵ Second Woodward Statement [6.5].

¹⁷⁶ First Woodward Statement [13.4]-[13.9], Second Woodward Statement [6.3]-[6.4].

assets will be to other suppliers in FNQ or the NT. The assets may well be sold overseas.

15.7 Proceeding with a wind up of the TML business in the NT and FNQ in the absence of the Proposed Transaction has already been discussed, in principle, by the Toll Board in or around August 2014, when it considered and made a recommendation as to pursuing discussions with Sea Swift regarding the Proposed Transaction.¹⁷⁷

15.8 The financial performance of TML with respect to its NT and FNQ operations has been extremely poor over recent years with the business recording earnings before interest, tax, depreciation and amortization (EBITDA) of [REDACTED] in FY2014 and [REDACTED] [REDACTED]¹⁷⁸

15.9 TML's losses in the NT and FNQ are forecast to continue for so long as the TML business continues to operate. The forecast for the TML business in NT and FNQ for the 2016 financial year forecasts EBITDA, until 30 June 2016, of [REDACTED]¹⁷⁹

15.10 In terms of cash flow, TML's NT and FNQ operations have generated significant cash losses in recent years. In FY2015, the business generated a cash loss of [REDACTED] (after working capital and capital expenditure, but pre-tax and pre-funding). This equates to a cash loss of approximately [REDACTED] per month or [REDACTED] per day.¹⁸⁰

15.11 [REDACTED]
[REDACTED]¹⁸¹

15.12 As a result of TML's poor financial performance in the NT and FNQ, Toll has implemented a range of restructuring measures over the last few years designed to improve the profitability of the TML business. There are

¹⁷⁷ Kruger Statement [5.7]-[5.14].

¹⁷⁸ First Woodward Statement [11.8].

¹⁷⁹ Second Woodward Statement [7.3].

¹⁸⁰ First Woodward Statement [11.11].

¹⁸¹ First Woodward Statement [11.12]-[11.24].

no further cost-cutting or efficiency-improving measures available to Toll that could meaningfully affect TML's profitability in the NT and FNQ.¹⁸²

15.13 If the transaction is not approved, TML will not remain present in the relevant markets and its assets will be sold or disposed of individually. For that reason, TML is not an effective competitor.

16 Vertical integration

(a) Describe whether the acquisition would, or would be likely to, result in increased vertical integration between firms involved at different functional levels in the relevant market(s)

16.1 Not applicable.

(b) Describe whether the acquisition would, or would be likely to, increase the risk of limiting the supply of inputs or access to distribution such that downstream or upstream rivals face higher costs post-acquisition or full or partial foreclosure of key inputs or distribution channels

16.2 The Proposed Transaction would not increase this risk as all inputs are readily obtainable by other operators (see section 13, above).

16.3 The only area in which the Proposed Transaction will result in some level of control over the supply of inputs is in relation to the TML landing facility at Gove. The main wharf facility at Gove is currently operated under a long term lease by TML¹⁸³ who currently provides access to those facilities at commercial rates. As part of the Proposed Transaction, the lease over those facilities will transfer to Sea Swift who will continue to provide access to those facilities on a commercial basis. As a result, the ability of other operators to access that facility remains unchanged following the Proposed Transaction.

¹⁸² First Woodward Statement [12.1]-[12.7].

¹⁸³ First Bruno Statement [120].

16.4 Alternative landing facilities will remain available for operators wishing to access Gove, including:

- (a) the Rio Tinto Cargo Wharf located on Melville Bay road, east of the TML facility and approximately 13km from the town of Nhulunbuy;¹⁸⁴
- (b) the Gove Yacht Club boat ramp, which is a 'roll on, roll off' facility, suitable for most landing craft vessels and located approximately 10.5km from the town of Nhulunbuy;¹⁸⁵ and
- (c) the 'Catalina' ramp, located approximately 14km from the town of Nhulunbuy.¹⁸⁶

16.5 The fact that other operators can use facilities other than the TML facility at Gove is shown by the fact that Sea Swift did not use the TML facility when it commenced operations in Gove. Rather, Sea Swift operated and continues to operate from the Gove Yacht Club boat ramp.

16.6 During the merger clearance process described in section 3, the ACCC indicated that it had concerns about the arrangements for accessing the TML facility at Gove. Should the Tribunal have the same concerns, Sea Swift is offering, as a condition of authorisation, to enter into an undertaking that it will ensure unhindered and non-discriminatory access to the Gove facility for third parties, at commercial rates. Set out in **Annexure E** is the proposed form of this undertaking.

17 Prices and profit margins

(a) Provide details of recent and current levels of pricing in the relevant market(s) including the use of rebates and discounts

17.1 Pricing generally falls into three categories:¹⁸⁷

¹⁸⁴ First Woodward Statement [6.36], First White Statement [127].

¹⁸⁵ First Woodward Statement [6.36], First White Statement [127], [131].

¹⁸⁶ First Woodward Statement [6.36].

¹⁸⁷ First Bruno Statement [166].

- (a) contracted customers, who are party to a contract with the relevant provider which governs the customer's freight requirements;
- (b) custom rate customers, who are not party to a written contract, but have negotiated a discount from the relevant provider's usual prices (scheduled rates) for their shipping requirements; or
- (c) uncontracted customers (or customers on scheduled rates), who ship cargo on the basis of the relevant provider's scheduled rates without any discount.

17.2 For contracted customers, prices are negotiated with customers at the commencement of each contract (including through tenders) and are protected by those contractual arrangements. Changes to pricing at the end of a contract are subject to any competitive tendering process undertaken by customers, however contractual provisions allowing customers to test the market may see also prices reduce during the term.¹⁸⁸

17.3 For custom rate customers, prices are negotiated with the provider on the basis of a longstanding relationship, because the customer has particular regular requirements or as a discount through a provider being willing to match the price of a competitor.¹⁸⁹

17.4 For uncontracted customers, TML and Sea Swift generally offer scheduled rates. These rates are offered to customers seeking services on a spot basis.¹⁹⁰ Scheduled rates are generally set according to the type of freight to be shipped (i.e. dry freight, refrigerated freight, or passenger vehicles) and the delivery destination.

17.5 Details of Sea Swift's scheduled rates for dry freight, refrigerated freight and passenger vehicles in both the FNQ and NT for 2010–2015 are set

¹⁸⁸ First White Statement [191], First Woodward Statement [7.24].

¹⁸⁹ First Bruno Statement [189], First Woodward Statement [7.24].

¹⁹⁰ First Bruno Statement [177]-[178], First Woodward Statement [7.23] as updated by Second Woodward Statement [5.7].

out in Confidential Annexure PB-73 to the First Bruno Statement.¹⁹¹ The rates for 2015 reflect Sea Swift's current schedule of rates for these services, which were set on 1 August 2015. Sea Swift's average general freight rates for FY2015 are set out in Confidential Annexure PB-80 to the statement of Pasquale (Lino) Bruno dated 4 April 2016 (**Second Bruno Statement**).

17.6 Details of TML's current scheduled rates as at 1 September 2015 are set out in Annexure SW-22 to the First Woodward Statement. These rates have not altered since 1 September 2015 and remain TML's current rates. TML's scheduled rates for general freight over recent years are set out in Confidential Annexure SW-41 to the Second Woodward Statement.¹⁹²

(b) Provide details of supply costs of goods and services supplied by the merger parties including manufacturing, marketing and distribution costs in the relevant market(s)

17.7 Sea Swift and TML both incur capital and operating costs in supplying their services. These costs generally fall into two categories:

- (a) **vessel-related costs:** including depreciation costs, the cost of chartering or hiring vessels, insurance and registration, vessel maintenance charges, fuel costs, labour costs, access charges for landing facilities and harbour or pilot fees; and
- (b) **shore side costs:** including fixed costs associated with owning, renting and maintaining a depot, owning or renting mobile equipment such as forklifts, fuel and related costs to operate that equipment, hire or rental costs for containers, refrigerated containers and storage boxes, and labour costs.

17.8 The costs that make up vessel and shore side costs can be either fixed costs or variable costs. A large proportion of the costs associated with

¹⁹¹ First Bruno Statement [180].

¹⁹² First Woodward Statement [7.25], Second Woodward Statement [5.5]–[5.6].

running a scheduled service are fixed in nature, as the service must occur, irrespective of the volume of freight that is shipped in any one voyage.¹⁹³

17.9 Both parties also incur administration and overhead costs associated with providing the services.¹⁹⁴

17.10 A breakdown of Sea Swift's consolidated and divisional costs is set out in Confidential Annexure PB-78 to the Second Bruno Statement.

17.11 A breakdown of TML's costs in FY2015 in the NT and FNQ is set out in Confidential Annexure SW-17 to the First Woodward Statement.¹⁹⁵

(c) Describe the competitive constraints, if any, which would, or would be likely to, prevent the merger parties from being able to significantly and sustainably increase the prices paid by their customers, or lower the prices paid to their suppliers, post-acquisition in the relevant market(s)

17.12 As set out in section 10, there are number of constraints that would continue to prevent Sea Swift from being able to significantly and sustainably increase the prices paid by its customers, or lower the prices paid to its suppliers, following the Proposed Transaction. In summary:

- (a) input suppliers have a wide range of purchasers for their inputs, which are non-specialised, commonly available and in most cases inherently redeployable;
- (b) as referred to in section 7 above, there is strong and frequent competition from other suppliers and potential suppliers and customers exercise considerable countervailing power; and
- (c) as referred to in section 3 above, Sea Swift proposes to commit to current service frequencies and scheduled rates (subject to annual price increases in accordance with publicly available price indexes).

¹⁹³ Second Bruno Statement [19]-[22].

¹⁹⁴ Second Bruno Statement [35]-[36]; First Woodward Statement [10.1]-[10.4].

¹⁹⁵ First Woodward Statement [10.2].

(d) Describe the impact of the acquisition on the potential for coordinated conduct between remaining competitors in the relevant market(s) post-acquisition

17.13 The Proposed Transaction will not give rise to any increased potential for coordinated conduct between the remaining competitors. For the reasons given in sections 7 and 13 above, given that barriers to entry are low, and that there are a range of potential entrants who could win key contracts or routes, there is very little scope for coordination between operators.

(e) Describe the likely impact of the acquisition on the profit margins of the merger parties post-acquisition and the expected cause of any change

17.14 Sea Swift is currently operating a reduced service in the NT on [REDACTED], and has been operating a full service in FNQ on a [REDACTED].¹⁹⁶ Following the Proposed Transaction, Sea Swift expects that its operations will return to a sustainable position given the additional revenue stream and only marginal increase in its costs to run the additional services.¹⁹⁷

17.15 A breakdown of Sea Swift's consolidated and divisional profits and losses for FY2012–2015 and forecast FY2016 are set out in Confidential Annexure FW-33 to the statement of Fred White dated 4 April 2016 (**Second White Statement**).

17.16 Although the Proposed Transaction would result in Sea Swift's operations in FNQ and the NT being more sustainable, Sea Swift would nevertheless be vulnerable to other operators competing for freight volume through one or more of the following:

- (a) a smaller operator servicing one or more major contracts by way of charter arrangements;

¹⁹⁶ Second White Statement [25].

¹⁹⁷ First White Statement [214].

- (b) a smaller operator commencing a scheduled service for a small number of destinations, in competition with Sea Swift's scheduled services to all locations; or
- (c) a customer encouraging (by the promise of a particular contract or otherwise) another operator to enter the market either on one route or multiple routes.

17.17 TML's operations in the NT and FNQ have generated significant cash losses in recent years.¹⁹⁸ The Proposed Transaction will allow Toll to realise value from this loss-making business.

18 Related markets

(a) Describe the extent of complementarity between products supplied by the merger parties

18.1 Not applicable.

(b) Describe the extent to which the products identified above are, or could be, offered to customers as a product range through bundling or tying

18.2 Not applicable.

(c) Describe the competitive constraints that would, or would be likely to, prevent such bundling or tying from significantly foreclosing the ability of the merged entity's competitors to compete, including foreclosure of access to distribution by the merged entity's competitors

18.3 Not applicable.

¹⁹⁸ First Woodward Statement [11.10].

19 Detriment from a lessening of competition

Having regard to the information provided above, and any other relevant information, describe any detriment which would or would be likely to flow from a lessening of competition as a result of the acquisition

19.1 Given TML will exit the relevant markets absent the Proposed Transaction (see section 15) and the constraints that Sea Swift will continue to be subject to post transaction (as set out above in section 10), there is no lessening of competition as a result of the Proposed Transaction. The Proposed Transaction will not result in any detriment to consumers or customers. There are substantial public benefits that flow from the transaction, as set out below in section 21.

20 Other public detriment

Describe any public detriment likely to result from the proposed acquisition that has not already been described above

20.1 Not applicable.

21 Public benefit claims

- (a) Describe any public benefit in the form of increased efficiencies (for example, economies of scale or scope) which would, or would be likely to, result from the acquisition**
- (b) Describe whether the acquisition would, or would be likely to, result in a significant increase in the real value of exports**
- (c) Describe whether the acquisition would, or would be likely to, result in significant substitution of domestic products for imported goods**
- (d) Detail any public benefit claims relating to the international competitiveness of any Australian industry arising from the acquisition**

(e) Detail any other public benefit claims

21.1 The following public benefits arise from the transaction.

Public benefits arising for TML's contracted customers

21.2 Under the Proposed Transaction, Sea Swift will honour TML's existing contracts with customers in the NT and FNQ, which means these customers will receive the benefit of the contract they currently have with TML, including the prices negotiated under those contracts, for the term of that agreement.¹⁹⁹

21.3 The contracted customers will benefit from the controlled and staged transfer of the services from TML to Sea Swift and will face minimal disruption to their services as a result, which would not necessarily be the case absent the Proposed Transaction.²⁰⁰

21.4 Absent the Proposed Transaction, TML's contracted customers would need to seek an alternative provider, would lose the benefit of their current agreements, and the larger customers may be required to re-tender their contracts earlier than they ordinarily would have.²⁰¹ The benefit of the Proposed Transaction to those contracted customers with exclusivity or minimum volumes provisions is enhanced, as Sea Swift is committing to not enforce those provisions, to the extent that they exist. This means that these customers will be able to seek an alternative provider prior to the expiry of their arrangements, if they wish to do so.

21.5 Absent the Proposed Transaction TML will exit the FNQ and NT markets and will therefore not be able to continue supplying its current customers. In those highly uncertain circumstances, all customers would need to make alternative arrangements to locate alternative shippers so as to ensure continued delivery of supplies (including essential items such as food and fuel). [REDACTED]

¹⁹⁹ First White Statement [210], First Woodward Statement [7.31].

²⁰⁰ First White Statement [218], First Woodward Statement [13.6]-[13.7].

²⁰¹ First White Statement [218].

[REDACTED]

21.6 The Proposed Transaction provides these contracted customers with the certainty that their services will continue to be provided, and that their contracts will be honoured.

Public benefits arising for all customers

21.7 All customers will obtain the benefit of a more sustainable full service operator in both the NT and FNQ and the certainty that their services will continue. This certainty is supported by the pricing and service commitments given by Sea Swift as Conditions of this Application.

21.8 Under the Remote Community Service Condition, Sea Swift will commit to:²⁰³

- (a) servicing all of the communities currently serviced by either TML or Sea Swift; and
- (b) maintaining the current frequency of services to those communities, though it will not duplicate TML's services if a community is currently serviced by both Sea Swift and TML.

21.9 This obligation would apply to all locations currently serviced by TML and Sea Swift in FNQ and the NT. It is designed to protect the most vulnerable communities by ensuring the provision of scheduled services at the current frequency. Sea Swift's obligation to continue providing those services

²⁰² First Woodward Statement [13.5]-[13.6].

²⁰³ First White Statement [227], see also the Conditions set out in Annexure A to this Application.

provides a public benefit because certainty of supply is highly valued by these remote communities.

21.10 Under the Remote Community Pricing Condition (as discussed in section 3 above), the maximum base rates that Sea Swift can charge for certain of its services (“dry freight”, “refrigerated freight” and “passenger vehicles”) will be capped at:

- (a) for customers in FNQ, the scheduled rates of Sea Swift as at 1 August 2015,
- (b) for customers in the NT, TML’s scheduled rates as at 1 September 2015, or Sea Swift’s scheduled rates as at 1 August 2015 in the NT in relation to any destinations that are not currently serviced by TML; and

subject to annual price increases in accordance with publicly available price indexes.

21.11 If Sea Swift wishes to increase its prices at a rate that is higher than those publicly available price indexes, it must apply to an independent price expert under a process detailed in the Conditions, and the independent price expert must only determine a price increase where it is reasonable and appropriate, taking into account the interests of both Sea Swift and customers.

21.12 Under this condition, the most vulnerable communities in both the NT and FNQ are protected by a price cap for their scheduled services for the term of the Conditions.²⁰⁴ This is because the services which are the subject to the price cap are those services which are most commonly purchased by uncontracted customers.²⁰⁵

21.13 Sea Swift’s commitments to service and pricing are of real public benefit in circumstances where, if the Proposed Transaction does not go ahead,

²⁰⁴ First White Statement [227].

²⁰⁵ Second Bruno Statement [44].

TML will exit the markets in any case and cease to provide scheduled services (see section 15). After that occurs, Sea Swift is likely to have a financial incentive to rationalise routes and increase prices (subject to the competitive constraints provided by the possibility of entry of other providers). The commitment to service and pricing would provide limits on Sea Swift's ability to take those steps which would otherwise be in its own financial interest. If the Proposed Transaction does not go ahead, those limits will not exist.

Public benefits arising from the orderly exit of TML

21.14 As a result of the Proposed Transaction:

- (a) the TML vessels will remain in the NT and FNQ for use in the provision of scheduled services, which may not otherwise be the case;²⁰⁶
- (b) TML's customers will face minimal disruption to their services;²⁰⁷ and
- (c) Toll will minimise the potential for damage to its reputation and customer relationships.²⁰⁸

21.15 As a result of the Proposed Transaction, Toll's failing TML marine freight business in the NT and FNQ will be afforded the opportunity to exit the market in an orderly way. Toll will in turn benefit from realising more value for its assets than it would through a wind up scenario.²⁰⁹

21.16 Allowing TML to exit through the Proposed Transaction effectively lowers the costs of entry for future potential entrants who will see entry into the market as less risky if the opportunity to exit via a transaction of this nature remains available.

²⁰⁶ First Woodward Statement [13.7], Second Woodward Statement [6.3], [6.5] –[6.7].

²⁰⁷ Kruger Statement [7.4], First Woodward Statement [7.31], [13.7].

²⁰⁸ Kruger Statement [7.4], First Woodward Statement [7.31], [13.7].

²⁰⁹ Kruger Statement [7.4], First Woodward Statement [13.12].

Public benefits arising from Sea Swift continuing as the full service operator for the NT and FNQ

21.17 The Proposed Transaction will deliver to Sea Swift an additional revenue stream through the transfer of TML's major contracted customers in the NT and FNQ to Sea Swift. The volumes available under these contracts will enable Sea Swift to establish a reliable and regular scheduled service throughout the NT and FNQ that is sustainable in the long term.²¹⁰

21.18 As a result of the Proposed Transaction, the costs associated with running two full service operations in the NT and FNQ will be rationalised with the removal of duplication and overlap between the parties, creating certainty for a more sustainable business.²¹¹

22 The counterfactual

Describe the likely state of the relevant market(s) in the future if the proposed acquisition does not take place, giving reasons

22.1 In the absence of the Proposed Transaction, Toll will immediately commence implementing steps to wind up the TML business in the NT and FNQ and exit the relevant markets as soon as possible, which it anticipates would occur within 60 days of the date of the Tribunal decision (as set out in section 15 above).²¹²

22.2 The counterfactual is therefore one in which TML is not present in the relevant markets and in which TML's assets are to be sold or disposed of individually.

²¹⁰ First White Statement [214], First Readdy Statement [73].

²¹¹ First White Statement [215], First Readdy Statement [74].

²¹² First Woodward Statement [13.1], [13.8]-[13.10], Jackson Statement [8.1] and Kruger Statement [7.1]-[7.4], Second Woodward Statement [6.3]-[6.5].

23 Joint ventures

- (a) Does this application for authorisation deal with a matter relating to a joint venture (see section 4J of the Act)
- (i) If so, are there any other applications for clearance or authorisation under Part VII of the Act being made simultaneously with this application in relation to the joint venture
 - (ii) If so, describe the nature of the applications and who is making those other applications

23.1 Not applicable.

24 International

- (a) Does the acquisition involve:
- (i) A company operating in Australia that has a foreign parent
 - (ii) Australian businesses or consumers affected by conduct occurring overseas
 - (iii) Foreign consumers affected by conduct occurring in Australia
 - (iv) Conduct occurring across international boundaries

24.1 Toll is owned by Japan Post Co Ltd. Toll was acquired by Japan Post Co Ltd by Scheme of Arrangement effective on 28 May 2015 and was subsequently delisted from the ASX on 29 May 2015.²¹³

- (b) Provide details of competition authorities in jurisdictions other than Australia to which the proposed acquisition has been, or is intended to be, notified and the timing of such notifications

24.2 Not applicable.

²¹³ Martin Statement [5.2].

25 Period of authorisation

Outline the period for which authorisation is sought, detailing reasons why authorisation should be granted for the requested period

25.1 Not applicable.

26 Undertaking

Consistent with subsection 95AV (2) of the Act, the Applicant is required, pursuant to the regulations, to give an undertaking to the Commission under section 87B of the Act that the acquisition will not be made while the application for authorisation is being considered by the Tribunal. An undertaking which is in a form that must be offered to the Commission is attached to this Form.

26.1 Set out in **Annexure F** is this undertaking.

27 Further information

Name, postal address, telephone, facsimile and email contact details of person authorised by the notifying parties to provide additional information in relation to this application

Luke Woodward
Partner, Gilbert + Tobin
Postal address: GPO Box 3810
Sydney NSW 2000
Telephone: +61 2 9263 4014
Facsimile: +61 2 9263 4111
Email: lwoodward@gtlaw.com

28 Information provided in relation to the Target

Where the Target has been consulted during the preparation of information provided in response to the questions contained in this Form relating to the Target, an authorised representative of the Target must indicate here that information relating to the Target is complete and accurate.

Dated..... 4 April 2016

Signed ~~by~~ on behalf of the Target


(Signature)

Geoffrey Carter
(Full Name)

29 Declaration

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, and that all estimates are identified as such and are their best estimates of the underlying facts and that all the opinions expressed are sincere.

The undersigned are aware of the provisions of section 95AZN of *the Competition and Consumer Act 2010*.



Signature of authorised person



Signature of authorised person

MD & CEO SEASWIFT PTY LTD

Office held

DIRECTOR

Office held

FRED WHITE

Name of authorised person

PAUL READDY

Name of authorised person

Date: 4 April 2016

ANNEXURE A

CONDITIONS TO THE TRIBUNAL AUTHORISATION

CONDITION NOT TO ENFORCE MINIMUM VOLUME OR EXCLUSIVITY PROVISIONS IN TRANSFERRED MARINE FREIGHT CONTRACTS

1 Transferred Contracts Condition

- (a) The authorisation is subject to the condition that Sea Swift will not give effect to, or rely on, any provision in the Transferred Contracts which requires the Customer to:
 - (i) exclusively use the marine freight services of Sea Swift; or
 - (ii) ship a minimum volume of freight with Sea Swift,(together the **Transferred Contracts Condition**).
- (b) For the purposes of the Transferred Contracts Condition:
 - (i) **Transferred Contracts** means the contracts listed in Confidential Schedule 2; and
 - (ii) Sea Swift must ensure that its obligations under the Transferred Contracts Condition are communicated to Customers within 30 days of the Completion Date.

REMOTE COMMUNITY SERVICES CONDITION

2 Remote Community Service Condition

- (a) The authorisation is subject to the condition that Sea Swift will:
 - (i) maintain a minimum level of scheduled services to the locations and at the frequencies set out in the Remote Community Service Schedule contained in Schedule 3; and
 - (ii) maintain an up-to-date shipping schedule of services on its website,(together the **Remote Community Service Condition**).
- (b) Sea Swift's obligations under the Remote Community Service Condition are suspended to the extent that it is prevented from carrying out those obligations by an event or circumstance, or combination of events or circumstances, that are beyond the reasonable control of Sea Swift, including but not limited to:

- (i) fire, lightning, explosion, flood, earthquake, storm or any other act of God or force of nature;
- (ii) damage to vessel(s) or port facilities;
- (iii) civil commotion, sabotage, war, revolution, radioactive contamination, or toxic or dangerous chemical contamination;
- (iv) strikes, lock-outs, industrial disputes, labour disputes, industrial difficulties, labour difficulties, work bans, blockades or picketing;
- (v) the impact of public holidays or necessary vessel maintenance or refit; or
- (vi) any event or circumstance that prevents or jeopardises the safe operation of any scheduled service.

REMOTE COMMUNITY PRICE CONDITION

3 Remote Community Price Condition

- (a) The authorisation is subject to the condition that Sea Swift will:
 - (i) charge no greater than the Maximum Charge for the destinations and services listed in the Remote Community Service Schedule, except as allowed by condition 4 or in accordance with the Independent Price Review Process set out in Schedule 5;
 - (ii) publish on its website the Maximum Base Price for the Services, as well as the applicable rate of GST, Consignment Note Fee, Dangerous Goods Surcharge and Minimum Freight Charge, for each Financial Year,

(the **Remote Community Price Condition**).

- (b) For the purposes of the Remote Community Price Condition:
 - (i) Subject to clause 3(b)(ii) below, **Maximum Charge** means,
 - (A) for Vehicle Freight Services, the Maximum Base Price multiplied by the number of units carried; and
 - (B) for all other Services, the Maximum Base Price multiplied by total tonnes or total cubic metres carried (whichever is greater);

(the **Maximum Base Freight Charge**),

Plus additional charges that may include:

- (C) the Fuel Surcharge Fee;
- (D) applicable GST;
- (E) the Consignment Note Fee;
- (F) the Port, Council and Royalty Charges;
- (G) the Dangerous Goods Surcharge (if applicable); and
- (H) Other Charges (if applicable).

(ii) If, for a particular service, the sum of:

- (A) the Maximum Base Freight Charge;
- (B) the Fuel Surcharge Fee;
- (C) the Consignment Note Fee;
- (D) the Port, Council and Royalty Charges; and
- (E) the Dangerous Goods Surcharge (if applicable);

is less than the Minimum Freight Charge, then the Maximum Charge is the total of:

- (F) the Minimum Freight Charge;
- (G) applicable GST; and
- (H) Other Charges (if applicable).

(iii) **Maximum Base Price** is to be determined in accordance with the following formula:

$$\text{Maximum Base Price} = \text{Base Price} \times (1 + \text{CI})$$

where:

$$\text{CI} = \text{CPI} + \text{LRI}$$

Base Price is determined as follows:

For the Financial Year commencing 1 July 2015 the rates set out for the services listed in Schedule 4.

For each subsequent Financial Year, the Base Price is the accumulated Maximum Base Price as calculated for the previous Financial Year.

CPI is determined with the following formula:

$$\text{CPI} = [(\text{CPI}^n - \text{CPI}^b) / \text{CPI}^b] \times \text{WF}^{\text{CPI}}$$

where:

CPIⁿ = the quarterly *Consumer Price Index: All groups, Australia* for the quarter that was most recently published as at the date on which Sea Swift proposes to complete an Annual Price Review.

CPI^b = the quarterly *Consumer Price Index: All groups, Australia* for the quarter ending June of the previous Financial Year.

WF^{CPI} = the cost component weighting of general costs to provide the Service (31%).

And CPI is subject to a minimum of zero. CPI cannot be a negative number.

LRI is determined with the following formula:

$$\text{LRI} = \text{LRI}^n \times \text{WF}^{\text{WPI}}$$

where:

LRIⁿ = the annual labour rate percentage increases as set out in the Sea Swift Collective Agreement.

WF^{WPI} = the cost component weighting of labour costs to provide the Service (52%).

And LRI is subject to a minimum of zero. LRI cannot be a negative number.

(iv) **Consignment Note Fee** is a per-consignment fee to cover the cost of documenting a consignment from receipt through to delivery. The Consignment Note Fee is as follows:

(A) for destinations listed in the Remote Community Service Schedule in the Northern Territory: \$15.00 plus GST.

(B) for destinations listed in the Remote Community Service Schedule in Far North Queensland: \$15.00 plus GST.

- (v) **Port, Council & Royalty Charges** means any charges or statutory fees levied by the applicable port, government or council bodies on the cargo that is imported and exported to/from a wharf, barge ramp or any other landing site in respect of the Service being provided to the customer.
- (vi) **Fuel Surcharge Fee** is calculated as a percentage of the Maximum Base Freight Charge for a Service. The percentage surcharge and fee are calculated (on a monthly basis) as follows:

$$\text{Fuel Surcharge percentage} = [(F^n - F^b) / F^b] \times WF^F$$

$$\text{Fuel Surcharge Fee} = \text{Fuel Surcharge percentage} \times \text{Maximum Base Freight Charge}$$

where:

F^b = the average fuel price as at 2 February 2016 obtained from *AIP Terminal Gate Pricing – Diesel – National Average* (exclusive of GST and any applicable rebates)

F^n = the average fuel price on the first Business Day of the month prior to the Monthly Fuel Surcharge Review obtained from *AIP Terminal Gate Pricing – Diesel - National Average* (exclusive of GST and any applicable rebates)

WF^F = the cost component weighting of the fuel costs to provide the Service (17%)

And the Fuel Surcharge Fee is subject to a minimum of zero. The Fuel Surcharge Fee cannot be less than zero.

- (vii) **Other Charges** means any charges for voluntary additional services that a customer requests to be provided in conjunction with the service. These charges are notified to and accepted by the customer prior to the service being provided.
- (viii) **Dangerous Goods Surcharge** is applied as a percentage of the Maximum Base Freight Charge for all goods that are classified as dangerous goods under the Australian Dangerous Goods Code or the International Maritime Dangerous Goods Code. During the term of this Condition, the Dangerous Goods Surcharge percentage will be no higher than 25%.
- (ix) **Minimum Freight Charge** means a specified minimum charge to consolidate and transport a single consignment of freight. The Minimum Freight Charge is as follows:
 - (A) for destinations listed in the Remote Community Service Schedule in the Northern Territory: \$50.00.

- (B) for destinations listed in the Remote Community Service Schedule in Far North Queensland: \$50.00.

4 Price Reviews

- (a) Sea Swift may increase the Maximum Base Price for the Services from or on 1 July each Financial Year in accordance with the formulas set out in Clause 3(b)(iii) above (**Annual Price Review**).
- (b) Sea Swift may increase the Fuel Surcharge Fee on a monthly basis in accordance with the formula set out in Clause 3(b)(vi) above (**Monthly Fuel Surcharge Review**).
- (c) Sea Swift may increase the applicable GST at any time but only in accordance with changes legislated by the Australian Federal Government.
- (d) Sea Swift may only:
 - (i) increase its Base Price above the Maximum Base Price determined using the formula in Clause 3(b)(iii); or
 - (ii) increase the Additional Fees above the amounts set out in or determined according to Clause 3(b)(iv)-3(b)(viii);

in accordance with the Independent Price Review Process set out in Schedule 5.
(**Additional Proposed Price Increase**).

5 PERIOD FOR WHICH SEA SWIFT MUST COMPLY WITH THE CONDITIONS

- (a) Subject to paragraph (b) and (c) below, Sea Swift must comply with the Conditions until the earlier of the date:
 - (i) five years from the Completion Date;
 - (ii) a determination is made by the Australian Competition Tribunal that it is no longer necessary for Sea Swift to comply with the Conditions (including in circumstances where the Australian Competition and Consumer Commission (**ACCC**) has accepted an undertaking under section 87B of the *Australian Competition and Consumer Act 2010* (Cth) in substantially the same terms as the Conditions); and
 - (iii) if the parties do not complete the Proposed Acquisition, when Sea Swift notifies the Tribunal of the non-completion of the Proposed Acquisition (and provides a copy of the notice to the ACCC).

- (b) Sea Swift will be relieved of its obligation to comply with the Transferred Contracts Condition in respect of each of the Transferred Contracts on the date that the current term of that Transferred Contract expires.
- (c) Sea Swift will be suspended of its obligation to comply with the Remote Community Service Condition for the remainder of the Term if another operator commences operating a weekly (or more frequent than weekly) Scheduled Service, and operates that Scheduled Service for a period of 8 consecutive weeks or more:
 - (i) along one of the following routes, in which case the suspension applies to that route and any destination transhipped through that route:
 - (A) Cairns – Weipa;
 - (B) Cairns – Thursday Island / Horn Island;
 - (C) Darwin – Gove; or
 - (D) Darwin – Groote Eylandt,
 - OR
 - (ii) to any specific destination set out in the Remote Community Service Schedule contained in Schedule 3, in which case the suspension applies in respect of that destination.
- (d) Sea Swift may subcontract any or all of its obligations under the Remote Community Service Condition to another qualified supplier, but will remain responsible for satisfying the Remote Community Service Condition, subject to clause 5(c) above, at prices that comply with the Remote Community Price Condition.

SELF-COMPLIANCE REPORTING

6 Annual Reporting

- (a) Within 60 days of the end of each Financial Year comprising the Term of these Conditions, Sea Swift is to provide the ACCC with a report containing the following information:
 - (i) in relation to each of the Services to destinations listed in the Remote Community Service Schedule:
 - (A) the Base Prices that it charged for the previous Financial Year;

- (B) the Base Prices that it is charging in the current Financial Year, including details of all inputs and calculations underlying any increase to the Base Prices from the previous Financial Year that have been made in accordance with Clause 3(b)(iii);
 - (C) the Fuel Surcharge Fee for each calendar month of the past Financial Year, including all underlying calculations;
 - (D) the result of any Independent Price Review process during the previous Financial Year, including all documents prepared for the purpose of, or resulting from, the Independent Price Review;
- (ii) the current schedule of Services and the frequency of those Services to each of the destinations set out in the Remote Community Service Schedule;

7 Event Reporting

- (a) Within 30 days of the occurrence of an event listed below which occurs during the Term of these Conditions, Sea Swift is to provide the ACCC with a report containing the following information:
- (i) for any suspension of Sea Swift's obligation to comply with the Remote Community Service Condition under clause 2(b):
 - (A) the nature and duration of these circumstances; and
 - (B) the resulting changes that Sea Swift has made to its Scheduled Service schedule and the expected duration of those changes,
 - (ii) for any suspension of Sea Swift's obligation to comply with the Remote Community Service Condition under clause 5(c):
 - (A) details of the Scheduled Service route(s) and destination(s) that Sea Swift has ceased or intends to cease servicing;
 - (B) details of the other operator who has commenced operating a Scheduled Service in relation to the relevant routes(s) or destinations(s) including the frequency and continuous duration of the Scheduled Service provided by that operator,
 - (iii) for any obligations under the Remote Community Service Condition that are subcontracted by Sea Swift to another qualified supplier under clause 5(d):

- (A) the details of the Scheduled Service route(s) and destination(s) that Sea Swift has subcontracted; and
- (B) a copy of the subcontract agreement between Sea Swift and the qualified supplier.

8 REVIEW EVENT

- (a) If a Review Event occurs, Sea Swift may apply to the Tribunal to vary or suspend (for a period of time) one or more of the Conditions to the extent the variation or suspension is necessary to deal with the effect of the Review Event on Sea Swift.
- (b) **Review Event** means an event or circumstance that has the result that Sea Swift:
 - (i) is unlikely to be able to comply with its obligations under the Conditions; or
 - (ii) believes that it is necessary to seek some variation due to changed circumstances (including any relevant market change, such as the loss of major contracts to competing coastal and community marine freight suppliers, or overall market contraction, or changes within the relevant regulatory environment, any of which that has a material impact on service viability).

9 DEFINED TERMS AND INTERPRETATION

- (a) A term or expression starting with a capital letter in the conditions:
 - (i) which is defined in the Dictionary in Part 1 of Schedule 1 of the Conditions (Dictionary), has the meaning given to it in the Dictionary; or
 - (ii) which is defined in the Corporations Act, but is not defined in the Dictionary, has the meaning given to it in the Corporations Act.

SCHEDULE 1 TO THE CONDITIONS

DICTIONARY

ACCC means the Australian Competition and Consumer Commission.

Additional Fees means the Fuel Surcharge Fee, the Consignment Note Fee, the Port, Council and Royalty Charges, the Dangerous Goods Surcharge and Other Charges.

Additional Proposed Price Increase has the meaning given in clause 4.

Annual Price Review has the meaning given in clause 4.

Base Price has the meaning given in clause 3(b)(iii).

Completion Date means the date on which the Proposed Acquisition is completed.

Conditions means each of the conditions set out in this Annexure.

Consignment Note Fee has the meaning given in clause 3(b)(iv).

Customer means a counterparty to the Transferred Contracts identified in Confidential Schedule 2.

Dangerous Goods means dangerous or hazardous materials classified under the Australian Dangerous Goods Code or the International Maritime Dangerous Goods Code.

Dangerous Goods Surcharge has the meaning given in clause 3(b)(viii).

Dry Freight Services means scheduled services for the transport of cargo by sea (including the transport of Dangerous Goods) which does not require a temperature controlled environment and does not include Vehicle Freight Services.

Financial Year refers to the period from 1 July to 30 June in each year.

Fuel Surcharge has the meaning given in clause 3(b)(vi).

GST means the Goods and Services Tax.

Independent Price Expert means the person appointed under Schedule 5.

Independent Price Review Process means the process set out in Schedule 5.

Maximum Base Price has the meaning given in clause 3(b)(iii).

Maximum Charge has the meaning given in clause 3(b)(i).

Minimum Freight Charge has the meaning given in clause 3(b)(ix).

Monthly Fuel Surcharge Review has the meaning given in clause 4(b).

Other Charges has the meaning given in clause 3(b)(vii).

Port, Council & Royalty Charges has the meaning given in clause 3(b)(v).

Price Increase Notice has the meaning given in clause 3(a) of Schedule 5.

Proposed Acquisition means the proposed acquisition by Sea Swift of Toll Marine Logistics Australia, a business unit ultimately owned by Toll Holdings Limited ACN 006 592 089.

Refrigerated Freight Services means scheduled services for the transport of cargo by sea (including the transport of Dangerous Goods) which requires a temperature controlled environment and does not include Vehicle Freight Services.

Remote Communities Independent Price Expert means the person appointed in accordance with clause 1(a) of Schedule 5.

Remote Community Price Condition has the meaning given in clause 3.

Remote Community Service Condition has the meaning given in clause 2.

Remote Community Service Schedule means the schedule identified in Schedule 3.

Review Event has the meaning given in clause 8.

Scheduled Service means a service by which an operator offers to the public to carry freight between two or more destinations at predetermined dates or days of the week.

Sea Swift means the entity Sea Swift Pty Ltd ACN 010 889 040.

Sea Swift Collective Agreement means the collective agreement between Sea Swift and employees of Sea Swift lodged with the Fair Work Commission in 2009 in relation to employees' terms and conditions of employment, and includes any replacement of that agreement in the future.

Services means the scheduled general cargo services set out in Schedule 4, being:

- (a) Dry Freight Services;
- (b) Refrigerated Freight Services; and

(c) Vehicle Freight Services,

but excluding charter services.

Term means the period between the Completion Date and that date that is five years after the Completion Date.

TML means the entity trading as Toll Marine Logistics Australia.

Transferred Contracts means the contracts listed in Confidential Schedule 2.

Transferred Contracts Condition has the meaning given in clause 1.

Tribunal means the Australian Competition Tribunal.

Vehicle Freight Services means scheduled services for the transport of motor vehicles by sea, specifically meaning a domestic vehicle under 6m in length.

SCHEDULE 2 - CONFIDENTIAL

TRANSFERRED CONTRACTS

Item	Customer	Exclusivity / minimum volume provision (if any)
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		
9.		
10.		
11.		
12.		
13.		
14.		
15.		
16.		
17.		
18.		
19.		
20.		
21.		
22.		
23.		

Item	Customer	Exclusivity / minimum volume provision (if any)
24.		
25.		
26.		
27.		
28.		

SCHEDULE 3

REMOTE COMMUNITY SERVICE SCHEDULE

	Frequency (per week) ¹			
	Dry Services	Refrigerated Services	Dangerous Goods Services	Vehicle Services
North Queensland (ex Cairns)				
Boigu	1	1	1	1
Dauan	1	1	1	1
Mabuiag	1	1	1	1
Saibai	1	1	1	1
St Pauls	1	1	1	1
Hammond	1	1	1	1
Coconut	1	1	1	1
Murray	1	1	1	1
Darnley	1	1	1	1
Stephen Island	(1/mth tide dependant)	(1/mth tide dependant)	(1/mth tide dependant)	(1/mth tide dependant)
Warraber	1	1	1	1
Yam	1	1	1	1
Yorke	1	1	1	1
Badu	1	1	1	1
Kubin	1	1	1	1
Horn Island	2	2	2	2
Thursday Island	2	2	2	2
Seisia/Bamaga	2	2	2	2
Aurukun	1 (wet season only)	1 (wet season only)	1 (wet season only)	1 (wet season only)
Lockhart River	1 (wet season only)	1 (wet season only)	1 (wet season only)	1 (wet season only)
Weipa	2	2	2	2
Northern Territory (ex Darwin)				
Milingimbi	1	1	1	1
Ramingining	1	1	1	1
Elcho Island	1	1	1	1
Numbulwar	(1/ fortnight tide dependant)	(1/fortnight tide dependant)	(1/fortnight tide dependant)	(1/fortnight tide dependant)
Umbakumba	1	1	1	1
Bickerton Island	Fortnightly	Fortnightly	Fortnightly	Fortnightly
Lake Evella	1	1	1	1
Groote Eylandt	1	1	1	1
Nguiu	2	2	2	2
Pirlangimpi	2	2	2	2
Port Keats	1 (wet season only)	1 (wet season only)	1 (wet season only)	1 (wet season only)
Milikapiti	1	1	1	1
Gove	1	1	1	1
Paru	2	2	2	2
Croker Island	1	1	1	1
Goulburn Island	1	1	1	1
Maningrida	1	1	1	1

¹ Unless otherwise specified.

SCHEDULE 4

BASE PRICES

NORTH QUEENSLAND

Schedule of rates (excludes GST)¹

Freight (ex-Cairns) ²	Bamaga / Seisia (NPA), Thursday Island, Horn Island, Weipa	OTSI, Lockhart, Aurukun
Dry (m ³ or tonnes) ³		
Refrigerated (m ³ or tonnes) ⁴		
Passenger vehicles (each) ⁵		

¹ Excludes Additional Fees, including the Fuel Surcharge Fee and Port & Council Charges (see further information below on Additional Fees).

² Dry and refrigerated freight will be charged either per cubic metre or per tonne, whichever measure is the greatest for a given consignment. Note that where freight is outside standard slot dimensions (20ft container size 6m x 2.4m x 1.8m) or weighing more than 20 tonnes, this schedule of rates will not apply and the Remote Community Price Condition does not apply to that service. Sea Swift will provide an individual quote to customers for such freight.

³ Sea Swift and TML adopt different terminology in categorising their respective rates. Sea Swift's standard terminology for all dry freight is "Dry". TML's standard terminology for dry freight is "General Cargo". Sea Swift's terminology has been adopted in this Schedule.

⁴ Sea Swift's standard terminology for temperature controlled freight is "Refrigerated". TML's standard terminology for temperature controlled freight is "Freezer / Chiller". Sea Swift's terminology has been adopted in this Schedule.

⁵ Sea Swift's standard terminology for vehicle freight is "Passenger Vehicles". TML's standard terminology for vehicle freight is "Vehicles up to 5.3 mtrs". Sea Swift's terminology has been adopted in this Schedule. Note that the schedule of rates will not apply to vehicles over 6 metres in length and the Remote Community Price Condition does not apply to that service. Sea Swift will provide an individual quote to customers for such freight.

NORTHERN TERRITORY

Schedule of rates (excludes GST)¹

Freight (ex-Darwin) ²	Bickerton / Numbulwar / Umbakumba	Black Point	Nguiu ⁶ / Paru ⁷	Croker	Snake Bay (Milikapiti) ⁸	Elcho	Goulburn	Garden Pt (Pirlan-gimpi)	Groote Eylandt	Gove	Lake Evella	Maning-rida	Milingimbi / Ramingining	Port Keats ⁹
Dry (m ³ or tonnes) ³	401.84	208.15		208.15		302.07	218.96	156.07	369.99	250.00	329.92	217.79	279.74	
Refrigerated (kg) ⁴	1.44	1.44		1.40		1.40	1.40	1.37	1.62	1.61	1.40	1.40	1.40	
Passenger vehicles (each) ⁵	2,809.52	-		1,486.36		2,158.82	1,564.66	1,114.14	1,000.00	1,000.00	2,356.88	1,555.96	2,008.64	

¹ Excludes Additional Fees, including the Fuel Surcharge Fee and Port & Council Charges (see further information below).

² Dry freight will be charged either per cubic metre or per tonne, whichever measure is the greatest for a given consignment. Refrigerated freight will be charged per kg. Note that where freight is outside standard slot dimensions (20ft container size 6m x 2.4m x 1.8m) or weighing more than 20 tonnes, this schedule of rates will not apply and the Remote Community Price Condition does not apply to that service. Sea Swift will provide an individual quote to customers for such freight.

³ Sea Swift's standard terminology of "Dry" freight has been adopted.

⁴ Sea Swift's standard terminology of "Refrigerated" freight has been adopted.

⁵ Sea Swift's terminology for vehicle freight has been adopted in this Schedule. Note that the schedule of rates will not apply to vehicles over 6 metres in length and the Remote Community Price Condition does not apply to that service. Sea Swift will provide an individual quote to customers for such vehicles.

⁶ Note that TML does not currently service Nguiu. Sea Swift's rates as at 1 August 2015 for deliveries to Nguiu have been adopted.

⁷ Note that TML does not currently service Paru. Sea Swift's rates as at 1 August 2015 for deliveries to Paru have been adopted.

⁸ Note that TML does not currently service Snake Bay. Sea Swift's rates as at 1 August 2015 for deliveries to Snake Bay have been adopted.

⁹ Note that TML does not currently service Port Keats. Sea Swift's rates as at 1 August 2015 for deliveries to Port Keats have been adopted.

Additional Fees Information

Fuel Surcharge Fee	A fuel surcharge fee applies on all deliveries. The fuel surcharge fee is subject to monthly review based on movements in the national average fuel price as monitored by the Australian Institute of Petroleum.
Consignment Note Fee	A one-off consignment fee applies on all deliveries (\$15.00).
Port & Council Fees	Various ports and councils charge port cargo fees on the volume of cargo that is shipped through the relevant facility. port & council fees will be added to those consignments which attract port cargo fees (where applicable).
Dangerous Goods Surcharge	For goods classified as dangerous goods under the Australian Dangerous Goods Code or the International Maritime Dangerous Goods Code, a 25% surcharge on the Maximum Base Freight Charge will apply.
Minimum Freight Charge	Where the total calculated rate for a consignment (including all Additional Fees other than any applicable Other Charges) is below \$50.00, a minimum charge of \$50.00 for those services will apply, in accordance with clause 3.2(b)(ii).
Other Charges	Where customers request additional services from Sea Swift, including pallet wrapping or transport by road to the departure depot, Sea Swift may apply a charge for those additional services.

SCHEDULE 5

INDEPENDENT PRICE REVIEW CONDITION PROCESS

1 Appointment of Remote Communities Independent Price Expert

- (a) Within 28 days of the Completion Date, Sea Swift must appoint a Remote Communities Independent Price Expert for, subject to paragraph 1(c) of this Schedule 5, the duration of this Condition.
- (b) The Remote Communities Independent Price Expert must have the qualifications and experience necessary to carry out its functions independently of Sea Swift and must not be:
 - (i) an employee or officer of Sea Swift or its Related Bodies Corporate or of Toll or its Related Bodies Corporate, whether current or in the past 3 years;
 - (ii) a professional adviser of Sea Swift or its Related Bodies Corporate or of Toll or its Related Bodies Corporate, whether current or in the past 3 years;
 - (iii) a person who holds a material interest in Sea Swift or its Related Bodies Corporate or of Toll or its Related Bodies Corporate;
 - (iv) a person who has a contractual relationship with Sea Swift or its Related Bodies Corporate or of Toll or its Related Bodies Corporate (other than the terms of appointment of the Remote Communities Independent Price Expert);
 - (v) a customer, material supplier or material customer of Sea Swift or its Related Bodies Corporate or of Toll or its Related Bodies Corporate; or
 - (vi) an employee or contractor of a firm or company referred to in paragraphs 1(b)(iii) to 1(b)(v) of this Schedule 5.
- (c) Sea Swift must, as soon as practicable, appoint a replacement Remote Communities Independent Price Expert who meets the requirements set out in paragraph 1(b) of this Schedule 5 in the following circumstances:
 - (i) if the Remote Communities Independent Price Expert resigns or otherwise stops or is unable to act as the Remote Communities Independent Price Expert; or

- (ii) if Sea Swift has terminated the Remote Communities Independent Price Expert's terms of appointment in accordance with those terms of appointment.
- (d) Where the Remote Communities Independent Price Expert is unable to act for a period of time, Sea Swift may appoint a replacement Remote Communities Independent Price Expert to act as the Remote Communities Independent Price Expert for that period of time only.
- (e) Within 2 Business Days of the appointment of the Remote Communities Independent Price Expert under paragraph 1(a) of this Schedule 5 or replacement of the Remote Communities Independent Price Expert under paragraph 1(c) of this Schedule 5, Sea Swift must:
 - (i) forward to the ACCC a copy of the executed terms of appointment; and
 - (ii) publish the name and contact details of the Remote Communities Independent Price Expert on Sea Swift's website.

2 Conditions relating to the Remote Communities Independent Price Expert's functions

Sea Swift must:

- (a) procure that the terms of appointment of the Remote Communities Independent Price Expert include obligations on the Remote Communities Independent Price Expert to:
 - (i) continue to satisfy the independence criteria in paragraph 1(b) of this Schedule 5 for the period of his or her appointment;
 - (ii) provide any information or documents requested by the ACCC about Sea Swift's compliance with this Independent Price Review Condition Process directly to the ACCC; and
 - (iii) report or otherwise inform the ACCC directly of any issues that arise in the performance of his or her functions as the Remote Communities Independent Price Expert or in relation to any matter that may arise in connection with this Independent Price Review Condition Process;
- (b) comply with and enforce the terms of appointment for the Remote Communities Independent Price Expert;

- (c) maintain and fund the Remote Communities Independent Price Expert to carry out his or her functions;
- (d) indemnify the Remote Communities Independent Price Expert for any expenses, loss, claim or damage arising directly or indirectly from the performance by the Remote Communities Independent Price Expert of his or her functions as the Remote Communities Independent Price Expert except where such expenses, loss, claim or damage arises out of the gross negligence, fraud, misconduct or breach of duty by the Remote Communities Independent Price Expert;
- (e) not interfere with, or otherwise hinder, the Remote Communities Independent Price Expert's ability to carry out his or her functions as the Remote Communities Independent Price Expert;
- (f) provide and pay for any external expertise, assistance or advice required by the Remote Communities Independent Price Expert to perform his or her functions as the Remote Communities Independent Price Expert;
- (g) provide to the Remote Communities Independent Price Expert any information or documents requested by the Remote Communities Independent Price Expert that he or she considers necessary for carrying his or her functions as the Remote Communities Independent Price Expert or for reporting to or otherwise advising the ACCC; and
- (h) ensure that the Remote Communities Independent Price Expert will provide information or documents requested by the ACCC directly to the ACCC.

3 Raising an Additional Proposed Price Increase

- (a) Sea Swift may seek an Additional Proposed Price Increase by providing written notice to the Remote Communities Independent Price Expert (**Price Increase Notice**).
- (b) A Price Increase Notice must detail:
 - (i) the specific Service and location (within the Northern Territory or Far North Queensland) to which the Additional Proposed Price Increase relates;
 - (ii) the specific amount of the Additional Proposed Price Increase; and
 - (iii) Sea Swift's reasons for the Additional Proposed Price Increase. By submitting a Price Increase Notice, Sea Swift agrees to comply with this Independent Price Review Condition Process.

- (c) Sea Swift may at any time withdraw a Price Increase Notice by written notice to the Remote Communities Independent Price Expert, in which case the powers and authority of the Remote Communities Independent Price Expert to make a determination of that Price Increase Notice under paragraph 4 of this Schedule 5 shall forthwith cease.

4 Remote Communities Independent Price Expert Determination

- (a) Where the Remote Communities Independent Price Expert has received an Price Increase Notice in relation to an Additional Proposed Price Increase, the Remote Communities Independent Price Expert must:
 - (i) determine whether Sea Swift's proposed price increase is reasonable and appropriate having regard to the principles listed in paragraph 5 below; and
 - (ii) decide whether to accept, reject or vary Sea Swift's proposed price increase.
- (b) The Remote Communities Independent Price Expert will make his or her determination within:
 - (i) 30 days of the receipt of the Price Increase Notice from the Sea Swift; or
 - (ii) such further period as necessary for the Remote Communities Independent Price Expert to consider information requested under paragraph 4(c) of this Schedule 5, as the Remote Communities Independent Price Expert reasonably requires.
- (c) Sea Swift must provide the Remote Communities Independent Price Expert with any information he or she requires to make a determination under this paragraph 4 of this Schedule 5 within a timeframe reasonably determined by the Remote Communities Independent Price Expert.
- (d) In the event that more than one Price Increase Notice is received in relation to a proposed new Additional Proposed Price Increase for a particular Service, the Remote Communities Independent Price Expert will only make a single determination about that Additional Proposed Price Increase.
- (e) The Remote Communities Independent Price Expert's decision is final and binding on Sea Swift.
- (f) When making a determination under this paragraph 4 of this Schedule 5, the Remote Communities Independent Price Expert is acting as an expert and not as an arbitrator.

5 Relevant considerations

In determining whether a Additional Proposed Price Increase is reasonable and appropriate, the Remote Communities Independent Price Expert will have regard to the following principles:

- (a) that the Additional Proposed Price Increase should be set taking into account:
 - (i) all efficient input costs;
 - (ii) an appropriate allocation of Sea Swift's relevant overhead costs;
 - (iii) expected volumes over the period Sea Swift has used to calculate the proposed price increase;
 - (iv) whether the "weighting factors" (WF^{CPI} , WF^{WPI} and WF^F) referred to in the calculation of Maximum Base Price continue to accurately reflect the cost component weighting of general costs, labour and fuel;
 - (v) a rate of return that utilises a weighted average cost of capital which would be required by a benchmark efficient entity providing services with a similar degree of risk as that which applies to Sea Swift; and
 - (vi) the long term interests of customers of the Service.

6 Notice and Publication Of Decision

- (a) The Remote Communities Independent Price Expert must notify Sea Swift of the decision within seven days of making a determination.
- (b) Within 30 days of receiving the decision:
 - (i) Sea Swift must notify its affected customers of the Remote Communities Independent Price Expert's determination by writing to or emailing customers, or publishing the information about the determination on its website;
 - (ii) if a retrospective adjustment is necessary to comply with the Remote Communities Independent Price Expert's determination, Sea Swift must refund the relevant adjustment amount to the relevant customer(s).
- (c) Whatever the outcome, the cost of the expert determination will be borne by Sea Swift.

7 Date price increase takes effect

- (a) If the Remote Communities Independent Price Expert makes a determination under paragraph 4, then the new price increase as determined by the Remote Communities Independent Price Expert takes effect on the date that Sea Swift is notified under paragraph 6(a) of Schedule 5.

ANNEXURE B INDUSTRY OVERVIEW

MARINE FREIGHT SERVICES IN FAR NORTH QUEENSLAND AND THE NORTHERN TERRITORY

1. This document contains a summary of the marine freight services industry in Far North Queensland (**FNQ**) and the Northern Territory (**NT**). That summary is set out by reference to the following headings:
 - (a) Types of marine freight services;
 - (b) The communities requiring marine freight services;
 - (c) Customers for marine freight services;
 - (d) Customer requirements in the marine freight services market;
 - (e) Suppliers of Scheduled Services – FNQ;
 - (f) Suppliers of Scheduled Services – NT;
 - (g) Other shipping operators – competitors;
 - (h) Requirements for the supply of marine freight services;
 - (i) The competition for customers in marine freight services;
 - (j) Operating a Regular Scheduled Service; and
 - (k) History of Scheduled Services in FNQ and the NT.

Types of marine freight services

2. A marine freight service is the carrying of cargo by ship. A large variety of cargo is shipped in FNQ and the NT, as described in further detail by reference to particular types of customers, below.
3. There are generally two ways in which a supplier provides marine freight services in FNQ and the NT.
4. The first method is by carriage of cargo on a **Scheduled Service**.
5. A Scheduled Service is where the supplier regularly carries cargo between two or more locations and does so according to a regular schedule. The supplier carries cargo for anyone who wishes to ship cargo between those locations.
6. An example of this is that Sea Swift currently operates a Scheduled Service from Cairns to Horn Island, Thursday Island, Seisia and Weipa, departing from Cairns on Tuesday and arriving at the other locations according to a schedule that is published by Sea Swift

in advance.¹ Any customer who wishes to ship goods from Cairns to those locations can deliver goods to Sea Swift in Cairns prior to a particular cut off time on Monday for the shipment that departs on Tuesday. Regardless of whether it receives sufficient cargo to cover its costs for that journey, Sea Swift makes that voyage.

7. The second method of a supplier providing marine freight services is by the carriage of cargo through a **Charter or Project services**.
8. An example of this is a specific building project which requires a large volume of supplies to be shipped, including over-dimension items such as large machinery,² and requires those supplies to be shipped at the specific time that the customer wishes. This can involve use of a dedicated (spare or hired / chartered) vessel.³

The communities requiring marine freight services

9. The primary reason that communities in FNQ and the NT require marine freight services is that they are not accessible by road.⁴ This affects:
 - (a) island communities, where there is a significant body of water between the island and the mainland;
 - (b) remote mainland communities which do not have any significant road connecting that community with larger centres; and
 - (c) communities which have road access, but that road access is cut off during the wet season.⁵
10. If a community is accessible by road, marine freight services are unlikely to be required. This is because marine freight is usually slower and more expensive than road freight (which is carried on trucks, rather than ships).
11. Where a community is accessible by road, sea freight may still be required in the following circumstances:
 - (a) where the goods to be freighted are fragile and the road is not high quality, so that the freight “rattles”;
 - (b) where the road (including any bridges) can only support a particular maximum tonnage, and the cargo required is heavier than that tonnage; or
 - (c) where the size or unusual shape of the goods to be freighted require shipment on a ship rather than by road.

¹ First Statement of Pasquale (Lino) Bruno signed 17 September 2015 (**First Bruno Statement**) [22].

² First Statement of Fred White signed 16 September 2015 (**First White Statement**) [19(c)], First Bruno Statement [17]-[19].

³ Statement of Scott Woodward signed 16 September 2015 (**First Woodward Statement**) [4.11], [5.19]-[5.21].

⁴ First Woodward Statement [5.5]-[5.6].

⁵ First White Statement [24]-[25].

12. Some of these communities may also have air landing strip facilities, making them accessible by aircraft. However, this is not always the case.
13. In FNQ and the NT, there are a large number of communities which require marine freight services for one of the reasons set out above.⁶
14. Those communities usually fall into one of the following categories:
 - (a) a community which is predominantly (or totally) comprised of Aboriginal and Torres Strait Island peoples;
 - (b) a community based around a remote mining project.⁷
15. In many of these communities, the wharf facilities are basic or non-existent. In many instances, deliveries of marine freight are made by suppliers onto a beach ramp or the side of a river.⁸
16. The following maps show many of the communities where TML and / or Sea Swift currently operate a Scheduled Service:

Map 1 – FNQ Communities



⁶ First White Statement [24]-[25].

⁷ First White Statement [24], First Bruno Statement, Schedule "A".

⁸ First Bruno Statement, Annexure PB-44.

Map 2 – NT Communities



Customers for marine freight services

17. The following are the main types of customer for marine freight services which are located in the remote communities referred to above:
- (a) **Mining projects:** Various mining projects are located at remote locations in FNQ and the NT.⁹ Examples are Gove (where Rio Tinto has mined bauxite and alumina), Groote Eylandt (where GEMCO operates a manganese mine) and Weipa (where Rio Tinto operates a bauxite mine). These companies require the shipping of equipment and materials for mining operations as well as other supplies necessary to support their workforces.
 - (b) **Utilities:** Many communities in both FNQ and the NT obtain their power from remote power stations which run on diesel fuel.¹⁰ Fuel is regularly shipped into the community for the purpose of keeping those power stations in operation. These power stations are run by Northern Territory Power and Water Corporation (in the NT) and Ergon Energy (in FNQ). Apart from the delivery of fuel, the utilities may also require the shipment of chemicals, electrical components and building products for the purpose of maintaining or building the power stations.

⁹ First Woodward Statement [7.4(a)], First White Statement [34(a)], First Bruno Statement [161]-[163].

¹⁰ First Woodward Statement [7.4(d)], First White Statement [34(b)], First Bruno Statement [161]-[163].

- (c) Councils and community enterprises: Councils and various community enterprises¹¹ in FNQ and the NT also rely on marine freight services for the supplies necessary for their operations. This includes items such as building supplies, vehicles, food and fuel.
- (d) Supermarkets: Various supermarkets and retail stores have operations in these communities.¹² Woolworths has stores in Weipa and Gove. The Arnhem Land Progress Association (**ALPA**) runs a number of supermarkets throughout the NT. The Islander Board of Industry and Service (**IBIS**) runs a number of supermarkets throughout FNQ. All of these stores require their stock (including dry goods, refrigerated goods and fresh fruit and vegetables) to be shipped.
- (e) Other Commercial Enterprises:¹³ There are other enterprises within the communities which also require goods to be shipped in for the purpose of their business. These include hotels, resorts and pubs.
- (f) Individuals: Individuals living in the communities may also require the shipment of goods. This might include items such as clothes, books, gifts, furniture or vehicles, as well as some food and groceries.
18. In respect of Charter or Project services, customers usually obtain marine freight services pursuant to a written contract which is specific to the particular project to which the Charter or Project relates.¹⁴
19. In respect of Scheduled Services, customers can be categorised as follows, by reference to their contractual arrangements with suppliers:
- (a) Ad-hoc/Uncontracted customers:¹⁵ The supplier ships freight for these customers in accordance with standard terms and on the basis of prices set out in a list of Scheduled Rates that apply to all such customers.¹⁶
- (b) Contracted Customers:¹⁷ The supplier ships freight for these customers on the basis of a contract between the supplier and the customer. Usually, the terms of that contract, including price, are specific to that customer and are negotiated between supplier and customer for a particular term (usually 3 or 5 years).¹⁸
- (c) Custom Rate Customers: The supplier ships freight for these customers at rates lower than the Scheduled Rates, either on the basis of a discount by reference to the Scheduled Rates (e.g. a 20% discount to the Scheduled Rates) or on the basis

¹¹ First Woodward Statement [7.4(c)], First White Statement [34(d)]-[34(e)].

¹² First Woodward Statement [7.4(b)], First White Statement [34(c)], First Bruno Statement [161]-[163].

¹³ First Woodward Statement [7.22]; First Woodward Statement, Annexure SW-21.

¹⁴ First Woodward Statement [5.19]-[5.21].

¹⁵ First Woodward Statement [7.19]-[7.20], First Woodward Statement, Annexure SW-21.

¹⁶ First White Statement [50]-[51], First Bruno Statement [181].

¹⁷ First Woodward Statement [7.13]-[7.14], First Woodward Statement, Annexures SW-20 and SW-21.

¹⁸ First White Statement [190], First Bruno Statement [169]-[170].

of some other agreed price (e.g. a set price per tonne of cargo). The terms of this arrangement are often not the subject of written agreement.¹⁹

20. Customers may also fall into more than one category. For example, a utility company may have a 3 or 5 year contract for the delivery of the diesel fuel to its power stations. However, for its other sea freight requirements it does not have a contract of that variety, but negotiates the price of that sea freight as and when it arises.
21. The largest marine freight customers have a regular need for the goods that are being delivered.²⁰ For example, supermarkets require regular delivery of food to replenish their supplies, and power stations require regular deliveries of diesel fuel to keep the power stations operating.
22. Customers with a regular need for marine freight are usually (although not always) Contracted Customers – they enter into a contract with the supplier for a particular term.
23. Some customers are referred to as multi-destination customers.²¹ These customers require cargo to be delivered to more than one destination and, usually, have a contract that covers delivery to the various destinations. The utilities referred to above (Ergon Energy and Northern Territory Power and Water Corporation) are multi-destination customers because they require the delivery of diesel fuel to multiple locations.
24. Some customers are referred to as single-destination customers, as they only require delivery to a single destination.²² Woolworths in both Weipa and Gove, as well as Rio Tinto in both Weipa and Gove are effectively single-destination customers as they negotiate separate contracts – often with separate suppliers – for each destination.
25. The demand for marine freight services by mining customers can vary significantly. For example, Rio Tinto has currently suspended alumina production at its Gove mine,²³ so that the amount of cargo it requires has dropped dramatically.²⁴
26. For most other larger customers, the volume of sea freight demanded is relatively constant. This is because the cargo being delivered (diesel for power stations, supermarket stock for remote communities) consists of goods that are basic essentials.²⁵ Neither the demand for such goods or the population of the areas serviced is growing significantly.²⁶

¹⁹ First Bruno Statement [176].

²⁰ First White Statement [38].

²¹ First White Statement [35], First Woodward Statement [7.7] and [7.9].

²² First White Statement [35], First Woodward Statement [7.8] and [7.10].

²³ First White Statement [76].

²⁴ First Woodward Statement [11.5], First Woodward Statement, Annexure SW-35.

²⁵ First Woodward Statement [5.7].

²⁶ First White Statement [76].

27. In the last two years, two particular influences have led to an overall decrease in the volume of marine freight services required by customers in remote communities in the NT and FNQ:
- (a) there has been a decrease in mining work being carried out in FNQ and the NT.²⁷ This, in turn, has led to decreased demand for both Scheduled Services and Charter work to mining communities,²⁸ and
 - (b) there have been changes to the federal and state government funding of remote communities. This has meant less funding for those communities and a decrease in projects (particularly development and infrastructure projects) carried out in those communities.²⁹

Customer requirements in the marine freight services market

28. For customers who use Scheduled Services, the frequency and reliability of deliveries are a significant factor in choosing which sea freight provider the customer will use.³⁰
29. This is important for both large and small customers. For example, it is beneficial for a supermarket to have two deliveries of stock per week rather than one because this will allow it to stock fresher food, which is more attractive to the supermarket's customers. For that reason, the supermarket may be willing to pay a higher price per unit of cargo in order to receive two deliveries from its supplier per week.
30. Reliability is also important to customers in remote communities, as many of the communities' needs (including business needs) are heavily dependent on the deliveries for their essential living requirements such as food and fuel.³¹
31. Certain customers may have other specific requirements. Some common examples are:³²
- (a) Refrigerated or frozen transport: supermarket customers often require the transport of foods which require refrigeration.³³ Some examples of this are fresh dairy and meat products. This requires the operator to provide refrigerated containers.
 - (b) Dangerous cargo: customers may require the transport of hazardous or potentially hazardous material. One example is diesel fuel for service stations or for community use. Another example is chemicals required for the upkeep of power

²⁷ First White Statement [203].

²⁸ First Woodward Statement [11.5], First Bruno Statement [192].

²⁹ First White Statement [203], [195]-[196].

³⁰ First Woodward Statement [7.11].

³¹ First White Statement [30], First Woodward Statement [5.7].

³² First Woodward Statement [5.8]-[5.9].

³³ First White Statement [40].

stations. In these instances, the shipping operator is required to have the appropriate certification for the carriage of hazardous material.³⁴

- (c) **Modified cargo arrangements:** in some instances, specific equipment for the carriage of specific freight is required. For example, the transport of whole pig and beef carcasses (for use in an abattoir) requires modified containers so that those carcasses can be hung.

Suppliers of Scheduled Services – FNQ

32. **Sea Swift:** Sea Swift has provided a Scheduled Service to remote communities in FNQ for more than 30 years. Sea Swift's main depot is in Cairns, and from there it ships to the remote communities.³⁵
33. Sea Swift also competes to provide Charter or Project services in FNQ. Sometimes, Sea Swift competes on the basis that the freight for which the charter is required could be carried on its Scheduled Service. At other times, Sea Swift competes on the basis that it would provide a separate vessel (or vessels) for the purpose of the Charter or Project services.
34. **TML and its predecessors:**³⁶ Prior to 2003, Gulf Freight Services provided a Scheduled Service from Cairns to Weipa in FNQ. Perkins Shipping acquired Gulf Freight Services in 2003 and continued operating that service.³⁷ Toll acquired Perkins Shipping in 2009 and (through TML) also continued operating a Cairns to Weipa service.
35. In 2014, TML started to provide a Scheduled Service from Cairns to the various remote communities in FNQ and continues to do so. TML also competes to provide Charter or Project services in FNQ.
36. **Carpentaria Contracting:** Carpentaria Contracting provided a Scheduled Service to Weipa and Aurukun, during the wet season between December 2014 and mid-May 2015.³⁸
37. **Other operators:** No other operator in FNQ currently operates a Scheduled Service to the remote communities in FNQ. Further detail of other operators who have previously provided (or sought to provide) Scheduled Services in the FNQ market from time to time is set out below.

Suppliers of Scheduled Services – NT

38. **TML and its predecessors:** Perkins Shipping provided Scheduled Services to remote communities in the NT for over 40 years. In approximately 2002, Gulf Freight Services

³⁴ First White Statement [40]-[41].

³⁵ First Bruno Statement [82].

³⁶ First Woodward Statement [4.1] and [4.5].

³⁷ Statement of Antony Perkins signed 17 September 2015 (**Perkins Statement**) [36], First White Statement [86].

³⁸ First White Statement [144], First Bruno Statement [143(a)], Second Statement of Pasquale ("Lino") Bruno signed 4 April 2016 (**Second Bruno Statement**) [9].

operated a Scheduled Service in competition with Perkins Shipping and was acquired by Perkins Shipping in 2003. In 2009, Perkins Shipping was acquired by Toll. Since that time, Toll (through TML) has operated a Scheduled Service in the NT.³⁹ TML's main depot is in Darwin and from there it ships to the remote communities.⁴⁰

39. TML also competes to provide Charter or Project services in the NT.
40. Sea Swift: Sea Swift has provided a Scheduled Service to remote communities in the NT since 2014, when it acquired a previous operator, Tiwi Barge.⁴¹ Between 2013 and October 2014, Sea Swift serviced each of the NT communities referred to in the map at paragraph 16. In October 2014 Sea Swift ceased some of those services. On 17 December 2015, Sea Swift recommenced operating a weekly service to Elcho Island, Ramingining and Milingimbi in the NT. Sea Swift commenced this service in order to support ongoing cyclone recovery works following recent cyclones in the NT which had affected those communities.⁴²
41. Sea Swift also competes to provide Charter or Project services in the NT.
42. Ezion (Teras):⁴³ Ezion (Teras) provides a Scheduled Service between Darwin and Port Melville (in the Tiwi Islands) and to Port Keats. Teras has established a port in the Tiwi Islands and its barge service was set up in 2013 to support that development.⁴⁴ It now also ships freight for others.
43. Other operators: Barge Express (previously called Sealink) announced in February 2016 that it intends to commence a scheduled service in the NT.⁴⁵ Barge Express plans to service Elcho Island and various other communities.⁴⁶ No other operator in the NT currently operates a Scheduled Service to the remote communities in the NT. Further detail of other operators who have provided (or sought to provide) Scheduled Services in the NT market from time to time is set out below.

Other shipping operators – competitors

44. A number of other operators regularly compete with Sea Swift and Toll for Charter or Project work in the NT and FNQ.⁴⁷ These include the following:
 - (a) Ezion (Teras);
 - (b) Carpentaria Contracting;⁴⁸

³⁹ First Woodward Statement [4.1]-[4.2].

⁴⁰ First Woodward Statement [5.13].

⁴¹ First White Statement [102], First Bruno Statement [29].

⁴² First Bruno Statement [28]-[29], Second Bruno Statement [10].

⁴³ First Woodward Statement [8.6(e)].

⁴⁴ First White Statement [171], First Bruno Statement [143(d)].

⁴⁵ Second Statement of Ken Conlon signed 3 March 2016 (**Second Conlon Statement**) [5.1]-[5.3].

⁴⁶ Second Conlon Statement [5.3].

⁴⁷ First Woodward Statement [8.6].

⁴⁸ First White Statement [144].

- (c) Barge Express;⁴⁹
- (d) Bhagwan Marine;⁵⁰
- (e) Shorebarge;
- (f) Pacific Marine Group;
- (g) Silentworld (exited in 2012 but still operating in the Solomon Islands); and
- (h) Marine Industrial Port Engineering Contracting (**MIPEC**).

45. These operators are currently focused on charter operations and limited scheduled services. However, they have the potential to expand their services to provide a scheduled service (and in some instances, have already done so). This can be seen from the following:⁵¹

- (a) Ezion (Teras) provides a Scheduled Service between Darwin and the Tiwi Islands, and between Darwin and Port Keats;⁵²
- (b) Carpentaria Contracting previously provided a Scheduled Service between Cairns and Weipa/Aurukun, during the wet season;⁵³
- (c) Barge Express provides a scheduled service from Darwin to various remote locations in the NT on behalf of Toll, under a time charter arrangement.⁵⁴ Barge Express has also announced its plans to commence a weekly service between Darwin and various communities in the NT⁵⁵;
- (d) Shorebarge expanded into providing general freight services in the NT, including previously providing a scheduled service from Darwin to various remote locations in the NT;⁵⁶ and
- (e) MIPEC approached the Torres Strait Island Regional Counsel (**TSIRC**) in FNQ in December 2015 with a proposal to provide a scheduled service between Cairns and the Outer Torres Strait Islands (**OTSI**).⁵⁷

Requirements for the supply of marine freight services

46. A supplier of marine freight services requires the following equipment and infrastructure:
- (a) vessels;
 - (b) shore side equipment and assets (i.e. located onshore);

⁴⁹ First White Statement [164].

⁵⁰ First White Statement [174]-[175].

⁵¹ First Woodward Statement [8.6].

⁵² First White Statement [171], First Woodward Statement [8.6(e)], First Bruno Statement [143(d)].

⁵³ First White Statement [144], First Woodward Statement [8.6(b)], First Bruno Statement [143(a)], Second Bruno Statement [9].

⁵⁴ First Woodward Statement [8.6(d)], First Bruno Statement [143(c)].

⁵⁵ Second Conlon Statement [5.1]-[5.3].

⁵⁶ First Woodward Statement [8.6(f)], First Bruno Statement [143(b)].

⁵⁷ Second White Statement [36]-[39].

- (c) staff; and
- (d) access to the relevant wharves/landing sites.⁵⁸

47. Each of these topics is dealt with below.

(a) Vessels

48. There are three primary types of vessels which can be used for the provision of marine freight services in FNQ and the NT.
49. The first type of vessel is a line-haul / general cargo vessel. This is a vessel which is used to ship high volumes of freight across long distances. It has the ability to transit open ocean gulfs and bays at a good speed. Loading and unloading from a line haul vessel is by way of a crane that is attached to the vessel or on the wharf.⁵⁹
50. The second and third types of vessels are both types of barge – a landing craft (or motorised barge) and a dumb barge.
51. A landing craft is smaller than a line haul vessel. It has a “shallow draft”, which means that the bottom of the boat is less deep in the water than a line haul vessel. This means that it is more mobile and is able to operate in shallower waters than a line haul vessel, and can be used to deliver cargo to more remote locations. Cargo is taken on and off a landing craft by way of a ramp being lowered from the bow of the boat onto the landing area. Because of this, the landing craft is versatile – it can unload cargo on beaches, boat ramps and wharves.⁶⁰
52. A dumb barge is similar to a landing craft, but it does not have its own motor. For that reason, it is pulled by a tow boat. A dumb barge and a tow boat together is often referred to as a “tug and barge set”.⁶¹
53. TML and Swift each use a combination of line haul / general cargo vessels and landing craft in providing Scheduled Services to remote communities in FNQ and NT:
- (a) For its Scheduled Services, Sea Swift currently uses two line haul vessels and two landing craft in FNQ and four landing craft in the NT;⁶² and
 - (b) For its Scheduled Services, TML uses 3 landing craft in the NT and one landing craft and one general / multipurpose cargo vessel in FNQ.⁶³
54. An additional vessel was previously used by Toll to provide Scheduled Services in the NT but this has not been used to provide such services for some time. It has generally

⁵⁸ First Bruno Statement [54]-[59], [80]-[87], [86]-[96].

⁵⁹ First Bruno Statement [37].

⁶⁰ First Bruno Statement [37].

⁶¹ First Bruno Statement [34].

⁶² First White Statement [82], First Bruno Statement [53]-[54], Second Bruno Statement [11].

⁶³ First Woodward Statement [6.4], First Bruno Statement [53]-[54].

been laid up in Darwin but has performed some Charter work.⁶⁴ For Charter work, Sea Swift has additional landing craft and tug and barge sets available for this type of work.⁶⁵

55. To operate either a line haul vessel, a landing craft or a tug and barge set, an operator is required to hold appropriate licenses, and to ensure that the vessels are subject to certain mandatory maintenance and inspections.⁶⁶ To comply with those regulations, different types of inspection occur every year, every three years and every five years.⁶⁷
56. The regulations which apply to shipping in Australia are set down by the Australian Maritime Safety Authority (AMSA) and include matters such as minimum crew requirements for different types of vessel. For example, the regulations require a landing craft like those used by TML and Sea Swift to have a minimum crew of four persons.⁶⁸
57. The approximate value of the vessels used for marine freight services in FNQ and the NT are:
 - (a) a line haul / general cargo vessel: up to approximately \$8,000,000;
 - (b) a landing craft: up to approximately \$4,000,000; and
 - (c) a tug and barge set: up to approximately \$3,000,000.⁶⁹
58. It is also possible for an operator to charter or lease any of these vessels, either from Australian operators or internationally. There are two ways that this can be done:
 - (a) Bareboat charter: This is where the customer pays for the supplier to provide its ship, but the supplier does not provide any crew for the ship.
 - (b) Time charter: This is where the supplier provides its ship along with crew and other equipment (e.g. forklifts) for the customer's purposes.⁷⁰
59. These vessels are readily available (either in Australia or internationally) to purchase or to lease.⁷¹ The time needed to arrange for the purchase or lease of any of these vessels is between a few weeks and a few months, depending on where the boat is located.⁷²
 - (b) ***Shore side equipment and assets***
60. The shore side equipment and assets that are required to provide marine freight services are as follows:

⁶⁴ First Woodward Statement [6.5].

⁶⁵ First Bruno Statement [34]-[36].

⁶⁶ First Woodward Statement [6.12], [10.1(d)].

⁶⁷ First Bruno Statement [40].

⁶⁸ First Bruno Statement [40]-[44].

⁶⁹ See for example First Bruno Statement, Annexure PB-20 and Annexure PB-34.

⁷⁰ First Woodward Statement [5.21].

⁷¹ First Woodward Statement [6.9]-[6.10], First Woodward Statement, Annexure SW-6, First Bruno Statement [57].

⁷² First Bruno Statement [65], [66] and [68], Perkins Statement [72]-[73].

- (a) access to land for the purpose of receiving and storing cargo prior to it being shipped to remote communities; and
 - (b) mobile equipment such as forklifts and containers.⁷³
61. In FNQ:
- (a) Each of TML and Sea Swift has a large depot in Cairns;⁷⁴
 - (b) Sea Swift also has smaller depots in Thursday Island, Horn Island, Seisia and Weipa;⁷⁵ and
 - (c) TML has smaller depots on Thursday Island, Horn Island, Seisia and Weipa.⁷⁶
62. In the NT:
- (a) Each of TML and Sea Swift has a large depot in Darwin;⁷⁷
 - (b) Sea Swift has a smaller depot in Gove;⁷⁸ and
 - (c) TML also has a smaller depot in Gove.⁷⁹
63. The land that is required for an operator's depots does not need to be located waterside. It is possible to transport cargo between depot and ship by truck.⁸⁰
64. The other shore-side equipment that is necessary (such as forklifts and containers) are all readily obtainable.⁸¹
- (c) Staffing requirements**
65. An operator of either Scheduled Services or Charter Contract services must comply with various regulatory requirements, such as:
- (a) Appropriate qualifications for those who operate the vessels; and
 - (b) Minimum levels of staff on each vessel, depending on the type of vessel.⁸²
66. In the past 3–4 years, staff have been readily available to marine freight operators, particularly as demand for mining services has decreased.⁸³
- (d) Ports and wharf arrangements**

⁷³ First Bruno Statement [97].

⁷⁴ First Woodward Statement [6.41], First Bruno Statement [82]-[83].

⁷⁵ First Bruno Statement [84]-[87].

⁷⁶ First Woodward Statement [6.41].

⁷⁷ First Woodward Statement [6.40], First Bruno Statement [88]-[89].

⁷⁸ First Bruno Statement [90].

⁷⁹ First Woodward Statement [6.40].

⁸⁰ First Bruno Statement [97(a)].

⁸¹ First Woodward Statement [6.44], First Bruno Statement [98].

⁸² First Bruno Statement [103]-[106].

⁸³ First Bruno Statement [112].

67. In FNQ, access to ports in the remote communities is arranged through Ports North. An operator who wishes to deliver to a Port must obtain the appropriate permit by filling out a form and paying the required fee. None of the ports are owned by a private entity.⁸⁴
68. There are no specific fees to access most of the ports and wharves in the NT, however there is a royalty fee payable to the Northern Land Council.⁸⁵
69. The exceptions to this are:
- (a) the Port of Darwin charges an access fee;⁸⁶
 - (b) for the wharf at Gove that is operated by TML, TML charges a fee to other users to access the heavy lift wharf or landing ramp;⁸⁷ and
 - (c) to use the Gove yacht club boat ramp, the yacht club has charged Sea Swift a flat fee per use.⁸⁸

The competition for customers in marine freight services

70. The fixed costs of operating a Scheduled Service are significant relative to the revenue that an operator receives.⁸⁹ The following costs are generally fixed, based on the routes for which an operator is providing a Scheduled Service:
- (a) the cost of leasing the vessel (or the depreciation cost of owning the vessel);
 - (b) the cost of holding and maintaining onshore facilities, such as the depots in Darwin, Cairns and various remote communities;
 - (c) the cost of holding and maintaining equipment such as forklifts which are necessary to deliver and load and unload cargo;
 - (d) the staffing cost to run that voyage. Generally, the vessels are staffed by reference to the minimum number of staff allowed by regulation – it is not possible for an operator to choose to use fewer staff; and
 - (e) the fuel cost. The fuel cost for running a vessel between two locations does not differ greatly depending on whether the vessel is full or not. For so long as the vessel travels the route, it will use the fuel.⁹⁰
71. In light of this, suppliers of Scheduled Services generally wish to maximise the utilisation of their vessels by carrying as much cargo on any particular trip as they can. This is

⁸⁴ First Bruno Statement [116]-[118].

⁸⁵ First Bruno Statement [119].

⁸⁶ First Bruno Statement [119].

⁸⁷ First Woodward Statement [6.31]-[6.33].

⁸⁸ First White Statement [135], First Bruno Statement [121].

⁸⁹ First Woodward Statement [7.1] and [10.1].

⁹⁰ Second Bruno Statement, [27].

because this will increase their revenue from that voyage, without significantly increasing their costs.⁹¹

72. In both the NT and FNQ, certain routes are more profitable to service because they include larger communities and therefore generate greater volume of freight demand.⁹² These routes are:
- (a) Cairns – Weipa;
 - (b) Cairns – Horn Island/Thursday Island;
 - (c) Darwin – Gove; and
 - (d) Darwin – Groote.⁹³
73. Some large customers have single-destination contracts on these routes. An example is Woolworths in each of Gove and Weipa.⁹⁴
74. For those contracts, it may be viable for suppliers to seek to win the customer's business either:
- (a) on a Charter or Project basis, because the volume of cargo that the customer needs to ship may be sufficient for a smaller operator to dedicate a whole vessel to that service, despite that operator not operating any other Scheduled Service; or
 - (b) by the use of a Scheduled Service.
75. Other large customers have multi-destination contracts⁹⁵ which may include the above routes as well as more remote communities.⁹⁶ Those customers also have choice about how to structure their freight purchases. For example, if the customer requires deliveries to ports A, B and C, it might choose to have a smaller operator provide deliveries to port A, but choose a larger operator to provide the deliveries to ports B and C on the larger operator's Scheduled Service.
76. Ad-hoc and uncontracted customers generally rely on Scheduled Services for their needs.⁹⁷ The amount of cargo they require to be shipped is not sufficient to justify a separate vessel to be chartered.
77. Contracts with large customers (in either FNQ or the NT) are highly sought after by suppliers.⁹⁸ This is because those contracts provide an operator with a predictable "base load"⁹⁹ of cargo for the Scheduled Service to transport between locations. For this

⁹¹ First Woodward Statement [7.6].

⁹² First White Statement [182].

⁹³ First White Statement [183].

⁹⁴ First White Statement [188], First Woodward Statement [7.8] and [7.10].

⁹⁵ First White Statement [188].

⁹⁶ First Woodward Statement [7.7] and [7.9].

⁹⁷ First Woodward Statement [7.3(b)].

⁹⁸ First White Statement [188].

⁹⁹ First White Statement [78].

reason, large customers have a significant degree of power in their negotiations with marine freight service providers.¹⁰⁰

78. Customers regularly require suppliers to tender for an upcoming contract.¹⁰¹ In the past, the companies who have tendered for large customers' work have included companies who did not then provide or do not currently provide a Scheduled Service (i.e. companies other than TML and Sea Swift).

Operating a Regular Scheduled Service

79. A supplier (or potential supplier) of a Scheduled Service must consider a number of matters in determining if and how it wishes to run its Scheduled Service.
80. First, the destinations at which the service will call.¹⁰² This includes taking into account the following:
- (a) the destinations which the supplier is contractually required to deliver to (for example, by a utility company);
 - (b) the volume of cargo which is expected from regular customers at the various destinations; and
 - (c) any specific difficulty (and increased cost) arising from the conditions specific to the destination. This might include difficult tidal conditions or poor landing facilities at particular destinations.
81. Secondly, the frequency at which the operator will visit the different ports. This is largely driven by any contractual requirements, plus the operator's expectation about the volume of cargo being delivered to the destination. The higher that volume, the more likely that the operator will schedule more than one visit per week.
82. Thirdly, the vessels by which the destinations will be serviced.¹⁰³ This largely depends on:
- (a) the condition at the particular port. For example, if the water is deep, a line haul vessel may be appropriate. However, if the water is shallower or there are no wharf facilities, a landing craft or tug and barge set is likely to be required; and
 - (b) the distance required to be travelled on the route. A longer distance (such as between Cairns and Weipa) is more likely to require a line haul vessel, because a line haul vessel is able to move more quickly than a landing craft.

¹⁰⁰ First White Statement [196].

¹⁰¹ First White Statement [188].

¹⁰² First Woodward Statement [7.11].

¹⁰³ First Woodward Statement [7.11].

83. The operator takes each of these matters into account and determines the best vessel, route and frequency combination which allows the operator to meet a particular weekly schedule (including meeting any contractual requirements) as well as make a profit.¹⁰⁴

History of Scheduled Services in FNQ and the NT

84. Sea Swift has provided a Scheduled Service to remote communities in FNQ (including the Outer Torres Strait Islands) for over 30 years.¹⁰⁵
85. During that period, the following companies have sought to establish a competing Scheduled Service:¹⁰⁶
- (a) In the 1990s, a company called Jardines provided a Scheduled Service between Cairns and Thursday Island, Horn Island, Seisia and the Outer Torres Strait Islands. In the late 1990s, Jardines was acquired by Brambles Shipping. In 2002, Brambles Shipping exited the market, and various of its assets were acquired by Sea Swift.¹⁰⁷
 - (b) In 2002, some assets of Brambles Shipping were acquired by Endeavour Shipping, a company whose primary business was salvage vessels and tug and barge charter. Endeavour Shipping then established a Scheduled Service to Weipa, Thursday Island, Seisia and Horn Island, as well as chartering ships to the Outer Torres Strait Islands. That business continued until 2008 when Endeavour Shipping exited the market and Sea Swift acquired its assets.¹⁰⁸
 - (c) Gulf Freight Services (later acquired by Perkins) provided a Scheduled Service between Cairns and Weipa. Since acquiring Perkins, Toll (through TML) has provided Scheduled Service between Cairns and Weipa.
 - (d) In early 2014, TML started to provide a Scheduled Service to communities in the OTSI in FNQ.¹⁰⁹ It has continued to do so to date.
 - (e) MIPEC approached TSIRC in FNQ in December 2015 with a proposal to provide a scheduled service to the OTSI.¹¹⁰
86. In 2009, Toll acquired Perkins Shipping Group, a company which provided Scheduled Services in the NT for over 40 years. Toll (through TML) continued to carry out those services from 2009.¹¹¹

¹⁰⁴ First Bruno Statement [198]-[199].

¹⁰⁵ First White Statement [14]-[15].

¹⁰⁶ First Woodward Statement, Annexure SW-25.

¹⁰⁷ First Bruno Statement [149]-[152].

¹⁰⁸ First Bruno Statement [154]-[157].

¹⁰⁹ First White Statement [89].

¹¹⁰ Second White Statement [36]-[39].

¹¹¹ Perkins Statement [12].

87. During the period that Perkins and then Toll provided that Scheduled Service, the following companies sought to establish a competing Scheduled Service:¹¹²
- (a) In the late 1980s a company called Barge Express provided a Scheduled Service to various locations which Perkins Shipping did not service. In the early 1990s, Perkins Shipping extended its Scheduled Service so that both companies serviced the same communities. Perkins Shipping then acquired Barge Express in around 1994.¹¹³
 - (b) Gulf Freight Services was a company which, prior to 2002, provided a Scheduled Service in FNQ. In approximately 2002, Gulf Freight services sought to extend its Scheduled Service to provide services from Darwin to various remote NT communities. Gulf Freight Services continued until 2003 when it exited the market and Perkins acquired the business.¹¹⁴
 - (c) Tiwi Barge was a company that provided a Scheduled Service between Darwin and the Tiwi Islands (Nguuu, Pirlangimpi and Milikapiti) for over 30 years prior to 2014. During Tiwi Barge's existence, TML and Perkins Shipping did not provide a service to those destinations. In 2013, Sea Swift acquired Tiwi Barge.¹¹⁵
 - (d) Shorebarge is a company that, traditionally, provided services to Troughton Island and Truscott Air Base in north east Western Australia. In 2011 it began providing a Scheduled Service to various remote locations in East Arnhem and West Arnhem in the NT. In 2013, Shore Barge stopped providing those Scheduled Services and focused instead on Truscott Air Base, Trouten Island and Kulumbaru (in north east Western Australia).¹¹⁶
 - (e) Sea Swift provided a Scheduled Service to the various remote NT communities in 2013 and 2014. In approximately May 2014, Sea Swift reduced the number of locations which it services in the NT.¹¹⁷ It has recently re-commenced operating services to some of the locations which were cancelled in May 2014 to support cyclone recovery works.¹¹⁸
 - (f) Ezion (Teras) has, since 2013, provided a Scheduled Service between Darwin and the Tiwi Islands and now also provides a service between Darwin and Port Keats.¹¹⁹

¹¹² First Woodward Statement, Annexure SW-25.

¹¹³ Perkins Statement [42]-[46].

¹¹⁴ Perkins Statement [50]-[54].

¹¹⁵ Perkins Statement [48]-[49].

¹¹⁶ First White Statement [166], First Woodward Statement [8.6], Perkins Statement [47].

¹¹⁷ First White Statement [206], First Statement of Paul Readdy signed 21 September 2015 (**First Readdy Statement**) [63].

¹¹⁸ Second Bruno Statement [10].

¹¹⁹ First White Statement [171].

(g) Barge Express has announced its plans to commence providing a weekly scheduled service between Darwin and various communities in the NT.¹²⁰

88. At the times in which Sea Swift and TML have both been providing a full scheduled service to many or most of the remote communities in either FNQ or NT, neither company has been able to make that service profitable.

¹²⁰ Second Conlon Statement [5.1]-[5.3].

ANNEXURE C
SUPPLIER INFORMATION

Vessels

- 1 The table below contains details of the vessels brokers that Sea Swift utilise in identifying vessels for purchase or charter / lease, and details of suppliers used by TML to charter vessels.
- 2 The approximate cost of acquiring one of these vessels used for marine freight services in the NT and FNQ is:
 - (a) for a line haul vessel, up to \$8m;
 - (b) for a landing craft, up to \$4m;
 - (c) for a tug and barge set, up to \$3m.
- 3 The cost of chartering or leasing one of these vessels will depend upon the size and type of vessel, the type of chartering arrangement (bareboat or time) and the length of the arrangement.
- 4 As an example of charter costs, the following are the costs incurred by TML in chartering two vessels:
 - (a) for a large landing craft vessel under a bare boat charter, approximately [REDACTED] per day;¹
 - (b) for a landing craft vessel under a time charter, approximately [REDACTED] per day.²

Suppliers	Contact name	Contact details
Vessel brokers		
Pacific International Shipbrokers Pty Ltd	[REDACTED]	50 Macrossan Street Port Douglas QLD 4877 [REDACTED] [REDACTED] ships@pacificinternationalshipbrokers.com.au
Australian Workboat Brokers	[REDACTED]	Suite 6, 2 Ambitious Link

¹ Based on the annual total costs incurred by Toll in hiring the Toll Territorian under a bare boat charter for FY15. See Annexure SW-17 to the Statement of Scott Woodward (signed 16 September 2015) (**First Woodward Statement**).

² Based on the annual total costs incurred by Toll in hiring the Bima Tujuh under a time charter for FY15. See Annexure SW-17 to First Woodward Statement.

Suppliers	Contact name	Contact details
		Bibra Lake WA 6163 PO Box 126 Melville WA 6956 [REDACTED] [REDACTED] admin@awbb.com.au
Australian Independent Shipbrokers	[REDACTED]	PO Box 376 Spring Hill QLD 4000 [REDACTED] [REDACTED] brisbane@aisbrokers.com.au
Charter vessel suppliers		
Barge Express	[REDACTED]	[REDACTED]
Australian Offshore Solutions	[REDACTED]	[REDACTED]

Shore side assets

- 5 The approximate cost of acquiring the mobile equipment utilised in supplying marine freight services in the NT and FNQ is set out below:

Equipment	Approximate cost of acquiring	Approximate cost of leasing
Forklifts	\$25,000 (near new)	2.5T Forklift - \$200 per week 16T Forklift - \$1,250 per week
Dry containers	\$3,000 (near new)	\$3.00 per day
Refrigerated containers	\$25,000 (near new)	\$15.00 per day
Trucks / trailers	\$180,000 (second hand prime mover and 40' flatbed trailer)	\$2,250 per week (prime mover and 40' flatbed trailer)
Flat racks	\$4,500 (second hand)	\$3.50 per day

- 6 The table below contains details of some of the suppliers that Sea Swift and TML use for the lease and purchase of mobile equipment.

Supplier	Contact name	Contact details	Equipment supplied
United Equipment	[REDACTED]	http://www.unitedequipme	Forklifts

Supplier	Contact name	Contact details	Equipment supplied
		nt.com.au/ 4 Brooker Street Winnellie NT 0820 325 Fison Ave East, Eagle Farm QLD 4009	
Rentco		http://www.rentco.com.au/ 26 Graffin Crescent Winnellie NT 0820	Trucks and Trailers
Cronos Australia		http://www.cronos.com/ 44 Market Street Sydney NSW 2000	Refrigerated containers and Flat Racks
Royal Wolf		http://www.royalwolf.com.au/ Maconachie St, Woree QLD 4868 13 Pruen Rd, Berrimah NT 0828	Dry containers and Flat Racks
Forklift Traders		http://flt.com.au/ 45 Parramatta Rd Granville NSW 2142	Forklifts
Tradecorp International		www.tradecorpinternational.com.au 31-33 Spiller Ave Mackay QLD 4740	Dry Containers and Refrigerated Containers
Norlift		http://www.norlift.com.au/ 144 Lyons Street Bungalow QLD 4870	Forklifts
SCF		http://www.norlift.com.au/ 80 Gay St Acacia Ridge QLD 4110 56 Pruen Rd Berrimah NT 0828	Dry Containers and Flat Racks
Redfleet		http://redfleet.com.au/ 5 Angliss Road Berrimah NT 0828	Trailers

Wharves/landing facilities providers

- 7 The table below contains details of some of the various providers of access for the wharves and landing facilities in FNQ and the NT. The costs associated with accessing these facilities for the purposes of supplying marine freight services can include:

- (a) port cargo fees / harbour dues / wharfage fees;
- (b) tonnage dues / berthage fees;
- (c) pilotage fees; and
- (d) access fees to privately operated facilities.

8 A description of these fees is set out in the Industry Overview in Annexure B to the Form S.

Access provider	Locations	Contact name	Contact details
FNQ			
Ports North	Port of Cairns Port Kennedy (Thursday Island / Horn Island) Port Quintell Beach (Lockhart River)	[REDACTED] [REDACTED] [REDACTED]	Cnr Grafton & Hartley Streets PO Box 594 Cairns QLD 4870 [REDACTED] [REDACTED] [REDACTED]
North Queensland Bulk Ports	Port of Weipa	[REDACTED]	Level 1 Waterfront Place Mulherin Drive Mackay Harbour Qld 4740 [REDACTED]
Torres Shire Island Regional Council (TSIRC)	OTSI Community Ramps	[REDACTED]	PO Box 7336 Cairns QLD 4870 [REDACTED]
Department of Transport & Main Roads	Port of Seisia & Aurukun	[REDACTED]	PO Box 525 Fortitude Valley Qld 4006 [REDACTED]
NT			
Darwin Ports	Port of Darwin	[REDACTED]	Port Administration Building Darwin Business Park Berrimah NT 0828 [REDACTED]
NT Department of Transport	Port of Groote Eylandt (Milner Bay)	[REDACTED] [REDACTED]	South 32 Rowell Highway Alyangula, NT 0885 [REDACTED]
Rio Tinto Alcan	Cargo wharf	[REDACTED]	[REDACTED]

Access provider	Locations	Contact name	Contact details
TML	General wharf and ramp	[REDACTED]	[REDACTED]
Gove Yacht Club	Gove Yacht Club boat ramp	[REDACTED]	[REDACTED]
Northern Land Council	NT Communities	No contact person	Northern Land Council Head Office: 45 Mitchell Street Darwin, NT 0801 GPO Box 1222 [REDACTED]
Anindilyakwa Land Council	NT Communities including Angurugu, Umbakumba and Milyakburra	No contact person	30 Bougainvillea Drive Alyangula NT 0885 PO Box 172 Alyangula NT 0885 [REDACTED]
Tiwi Land Council	Pickataramoor, Wurrumiyanga, Pirlangimpi and Milikapiti	No contact person	Land Council Operational Headquarters, Pickataramoor: [REDACTED] Correspondence to: The Chairman PO Box 38545 Winnellie NT 0821

ANNEXURE D

SUMMARY OF CUSTOMER ARRANGEMENTS

Supplier	Customer	Region	Arrangement	Term and expiry	Exclusive	Pricing	Volumes FY15
Mining							
Sea Swift	Rio Tinto Alcan - Weipa	FNQ	Single-destination contract				
TML	Rio Tinto Alcan - Gove	NT	Single-destination contract				
TML	South 32 (formerly BHP) GEMCO	NT	Single-destination contract				
Utilities							
Sea Swift	Ergon Energy		Multi-destination contract				

Supplier	Customer	Region	Arrangement	Term and expiry	Exclusive	Pricing	Volumes FY15
Sea Swift	Caltex Australia (fuel supplier to Ergon Energy)	FNQ	Multi-destination contract				
Councils / Community Enterprises							
Sea Swift	TSIRC	FNQ	Multi-destination contract				
Sea Swift	Gumatj Corporation	NT	Standards Terms & Conditions				
Sea Swift	Seisia Enterprises	FNQ	Single-destination contract				

Supplier	Customer	Region	Arrangement	Term and expiry	Exclusive	Pricing	Volumes FY15
Sea Swift	Bamaga Enterprises	FNQ	Single-destination contract				
Sea Swift	Tiwi Islands Regional Council	NT	Standard terms and conditions				
TML		NT	Services acquired on a spot basis				
Supermarkets/Retail							
Sea Swift	Woolworths Weipa	FNQ	Single destination contract				
Sea Swift	Woolworths Gove	NT	Single-destination contract				
TML	ALPA	NT	Multi-destination contract				

Supplier	Customer	Region	Arrangement	Term and expiry	Exclusive	Pricing	Volumes FY15
TML (subcontracted certain routes to Sea Swift)	IBIS	FNQ	Multi-destination contract				
TML		NT	Services acquired on spot basis				
Other customers							
Sea Swift	BP Australia	FNQ	Multi-destination contract				
Sea Swift	Island & Cape Enterprises Retail (recently acquired by ALPA)		Multi-destination contract				
Sea Swift	Takkarina Tucker Box	NT	Standards Terms & Conditions				
Sea Swift	The Arnhem Club	NT	Standards Terms & Conditions				
Sea Swift	Kamayan Café	NT	Standards Terms & Conditions				
TML		FNQ	Single destination				

Supplier	Customer	Region	Arrangement	Term and expiry	Exclusive	Pricing	Volumes FY15
			contract				
TML		NT	Services acquired on a spot basis				
TML		NT	Services acquired on a spot basis				
TML		NT	Services acquired on a spot basis				
TML		FNQ	Services acquired on a spot basis				
TML		FNQ	Services acquired on a spot basis				
TML		FNQ	Services acquired on a spot basis				

Proposed access undertaking
Given under section 87B of the
Competition and Consumer Act 2010 by
Sea Swift Pty Limited ACN 010 889 040
for the purposes of application for
authorisation

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1 Persons giving the Undertaking

This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by Sea Swift Pty Ltd ACN 010 889 040 (**Sea Swift**), a subsidiary of Sea Swift (Holdings) Pty Limited ACN 159 387 390.

2 Background

2.1 The parties to the Proposed Transaction

- (a) Sea Swift provides coastal and community shipping services (being sea-borne delivery of freight to remote islands and communities) in certain regions in far north Queensland and in certain regions of the Northern Territory.
- (b) Toll Marine Logistics Australia (**TML**), a business unit ultimately owned by Toll Holdings Limited ACN 006 592 089 (**Toll**), also provides coastal and community shipping services in certain regions in Far North Queensland and the Northern Territory.

2.2 The Proposed Transaction

- (a) Sea Swift and Toll (together the **Parties**) have entered into an agreement under which Sea Swift will acquire certain assets of TML's sea-borne freight business in far north Queensland and the Northern Territory, conditional on clearance or authorisation (the **Proposed Transaction**).
- (b) The assets to be acquired as part of the Proposed Transaction include the lease between Perkins Properties Pty Ltd and the Arnhem Land Aboriginal Council in relation to the Gove Wharf at Melville Bay Rd, Foreshore Drive, Nhulunbuy (**Gove Wharf Lease**).

2.3 Previous undertakings relating to Gove Wharf

- (a) On 22 December 2003, the ACCC accepted an undertaking in accordance with section 87B of the *Trade Practices Act 1974* (Cth) (as it then was) from Perkins Shipping with regard to access to some of the port facilities and maintaining levels of customer service (**Original Undertaking**).
- (b) In order to avoid any potential inconsistency, while retaining the principles of the Original Undertaking, the Original Undertaking was varied with the ACCC's consent on 7 July 2005 (**Revised Undertaking**) when the ACCC granted authorisation to Perkins Shipping to provide priority use of a new heavy lift wharf at Gove Wharf to Alcan for three years.
- (c) In 2009, Toll acquired Perkins Shipping and assumed responsibility for the Revised Undertaking.
- (d) This Undertaking will replace the Revised Undertaking.

2.4 Objective of this Undertaking

- (a) The Parties consider that the Proposed Transaction would not substantially lessen competition in relation to the relevant markets for coastal and community shipping services, and would provide a number of public benefits. Without admission, Sea Swift is offering this Undertaking to the ACCC pursuant to section 87B of the Act to address any ongoing concerns with the Proposed Transaction.
- (b) The objective of this Undertaking is to require Sea Swift to provide third parties with access to services at the Gove Wharf on an open, non-discriminatory basis including a commitment to:

- (i) publish in advance on its website the non-price terms and conditions relevant to the provision of access, and provide access in accordance with the published terms and conditions;
- (ii) publish in advance on its website on a yearly basis the pricing for the provision of access, and provide access at no greater than the then published pricing;
- (iii) provide for confidentiality obligations, including restrictions on the access and use of third parties' confidential information; and
- (iv) provide for effective oversight of Sea Swift's compliance with this Undertaking.

3 Defined terms and interpretation

3.1 Definitions in the Dictionary

- (a) A term or expression starting with a capital letter:
 - (i) which is defined in the Dictionary in Part 1 of Schedule 1 (Dictionary), has the meaning given to it in the Dictionary; or
 - (ii) which is defined in the Corporations Act, but is not defined in the Dictionary, has the meaning given to it in the Corporations Act.

3.2 Interpretation

Part 2 of Schedule 1 sets out the rules of interpretation of this Undertaking.

4 Commencement

4.1 Commencement

This Undertaking comes into effect when:

- (a) the Undertaking is executed by Sea Swift; and
- (b) the Undertaking so executed is accepted by the ACCC.

(the **Commencement Date**).

4.2 Termination of the Revised Undertaking

The Revised Undertaking terminates upon the Commencement Date of this Undertaking.

4.3 Termination of this Undertaking

This Undertaking terminates at the conclusion of the Gove Wharf Lease on [insert]

4.4 Cessation of Ongoing Obligations

- (a) Withdrawal

Sea Swift may request withdrawal of this Undertaking pursuant to section 87B of the Act at any time. This Undertaking is to be taken to be withdrawn on the date the ACCC consents in writing to that withdrawal.

- (b) Waiver

The ACCC may, at any time, expressly waive in writing any of the obligations contained in this Undertaking or extend the date by which any such obligation is to be satisfied.

(c) Review and variation of Undertaking

If Sea Swift is unable to, or foresees that circumstances are such that it is unlikely to be able to, comply with its obligations under the Undertaking, Sea Swift and the ACCC agree that they will review the Undertaking and negotiate in good faith the variation or withdrawal of all or any of the terms of the Undertaking in light of such circumstances, having regard to the objective of the Undertaking (as set out in clause 2.4) and the need to avoid any substantial lessening of competition in any relevant market.

5 Open access at Gove Wharf undertakings

5.1 The Access Service and Additional Services

(a) Sea Swift undertakes to provide the following services to a third party that requests access to the Gove Wharf (**Applicant**):

- (i) access to the roll-on, roll-off landing ramp (as indicated as area A in Schedule 2A); or
- (ii) access to the lift-on, lift-off wharf (as indicated as area C in Schedule 2A),

together with:

- (iii) use and hire of the covered lay down area (as indicated as area D in Schedule 2A);
- (iv) use and hire of the lay down area (as indicated as area E in Schedule 2A); and
- (v) use of stevedoring services for the unloading and loading of cargo from a nominated vessel (at the Gove Wharf Rates specified at Schedule 3);

(the **Access Service**).

(b) Sea Swift also undertakes to offer to provide the other services specified in Schedule 3 (the **Additional Services**).

(c) Sea Swift undertakes to provide the Access Services and any Additional Services and / or Ancillary Services in accordance with the Gove Wharf Access Agreement in Schedule 2 of this Undertaking.

(d) Sea Swift must supply the Access Service and, if requested, the Additional Services, at pricing no greater than the rates set out in Schedule 3 varied from time to time in accordance with this Undertaking (the **Gove Wharf Rates**).

5.2 No discrimination or hindering access

In offering and providing the Access Services and Additional Services if requested, Sea Swift must not:

- (a) discriminate between different Applicants or in favour of itself or its Related Bodies Corporate; or
- (b) engage in conduct for the purpose of preventing or hindering an Applicant's use of the Access Service or the Additional Services.

5.3 Obligation to notify information

- (a) Sea Swift must publish on its website:
 - (i) the Access Service application form;
 - (ii) on a yearly basis, the current Gove Wharf Rates in relation to the Access Service and each of the Additional Services; and
 - (iii) the terms and conditions on which the Access Service and Additional Services are offered, as set out in the Gove Wharf Access Agreement (provided in Schedule 2).
- (b) At least 60 days before the end of each Financial Year ending 30 June, Sea Swift must:
 - (i) publish on its website the proposed Gove Wharf Rates applicable for the next Financial Year; and
 - (ii) provide written notice to each existing Applicant of the proposed Gove Wharf Rates applicable for the next Financial Year.

5.4 Annual Price review

- (a) Sea Swift may conduct an annual price adjustment of its Gove Wharf Rates in accordance with the variation formula set out in Schedule 4.
- (b) Sea Swift may otherwise only increase its Gove Wharf Rates in accordance with the Independent Price Review Process set out in Schedule 5 (**Additional Proposed Price Increase**).

5.5 Confidentiality

- (a) Sea Swift must not require an Applicant or potential Applicant to provide any Confidential Information to Sea Swift unless provision of that Confidential Information is:
 - (i) reasonably necessary for the proper operation of the Gove Wharf;
 - (ii) required by the Gove Lease or law or government authority; or
 - (iii) consented to by the Applicant.

6 Disclosure of this Undertaking

- (a) Within 5 Business Days of the Commencement Date, Sea Swift will publish a copy of this Undertaking on its website.
- (b) Sea Swift acknowledges that the ACCC may:
 - (i) make this Undertaking publicly available, including but not limited to publishing it on its Public Section 87B Undertakings Register; and
 - (ii) from time to time publicly refer to this Undertaking.
- (c) Nothing in this clause 6 prevents the ACCC from disclosing such information where disclosure is:
 - (i) required by law;
 - (ii) permitted by s 155AAA of the Act;

- (iii) necessary for the purpose of enforcement action under section 87B of the Act; or
 - (iv) necessary for the purpose of making such market inquiries as the ACCC thinks fit to assess the impact on competition arising in connection with this Undertaking.
- (d) Nothing in this clause 6 prevents the ACCC from using the information contained in this Undertaking for any purpose consistent with its statutory functions and powers.
-

7 No Derogation

- (a) This Undertaking does not prevent the ACCC from taking enforcement action at any time whether during or after the period of this Undertaking in respect of any breach by Sea Swift of any term of this Undertaking.
 - (b) Nothing in this Undertaking is intended to restrict the right of the ACCC to take action under the Act for penalties or other remedies in the event that Sea Swift does not fully implement and / or perform its obligations under this Undertaking or in any other event where the ACCC decided to take action under the Act for penalties or other remedies.
-

8 Change of Control of Sea Swift's business

- (a) In the event that a Change of Control is reasonably expected to occur before the withdrawal of this Undertaking in accordance with clause 4.4(a), Sea Swift must:
 - (i) notify the ACCC of this expectation; and
 - (ii) only implement a Change of Control to another person or entity if that person or entity has given a section 87B undertaking to the ACCC that requires it to comply with the same obligations as are imposed on Sea Swift pursuant to this Undertaking, or on terms that are otherwise acceptable to the ACCC, unless the ACCC has notified Sea Swift in writing that a section 87B undertaking under this clause is not required.
-

9 Costs

Sea Swift must pay all of its own costs incurred in relation to this Undertaking.

10 Self-Compliance Report

Within 60 days of the end of each Financial Year, Sea Swift is to provide the ACCC a report containing the following information:

- (a) for the past Financial Year:
 - (i) a copy of all Gove Wharf Access Agreements entered into by Sea Swift and a third party;
 - (ii) a copy of all termination notices given under a Gove Wharf Access Agreement; and
 - (iii) a copy of all dispute notices given under a Gove Wharf Access Agreement and a written account detailing the current status of the dispute;
 - (b) a record of prices charged for the Access Service and/or Additional Services provided under all current Gove Wharf Access Agreements during the past Financial Year;
-

- (c) the Gove Wharf Rates applicable during the current Financial Year including all underlying calculations;
- (d) the result of any determination by the Independent Price Expert of an Additional Proposed Price Increase during the previous Financial Year; and
- (e) if this Undertaking commences or expires, is withdrawn or revoked during a Financial Year, the relevant compliance report need only cover the part of that Financial Year in respect of which this Undertaking was in operation.

Executed as an undertaking

Executed by Sea Swift Pty Ltd (ACN 010 889 040) pursuant to section 127(1) of the *Corporations Act 2001* by:

Signature of director

Signature of director/company secretary
(Please delete as applicable)

Name of director (print)

Name of director/company secretary (print)

Date

Date

Accepted by the Australian Competition and Consumer Commission
pursuant to section 87B of the *Competition and Consumer Act 2010* on:

Date

And signed on behalf of the ACCC:

Chairman

Date

1 Dictionary

Additional Proposed Price Increase has the meaning given in Schedule 5 clause 3(a).

Additional Proposed Price Increase Notice has the meaning given in Schedule 5 clause 3(a).

Additional Services has the meaning given in clause 5.1(b).

ACCC means the Australian Competition and Consumer Commission.

Act means the *Competition and Consumer Act 2010* (Cth).

Access Service has the meaning given in clause 5.1(a).

Applicant has the meaning given in clause 5.1.

Business Day mean a day other than a Saturday or Sunday on which banks are open for business generally in Australia or the relevant state or territory.

Change of Control means the assignment or other transfer of the legal or beneficial ownership of some or all of the share capital of Sea Swift to any other person or entity, or the sale or transfer of any assets necessary, or which may be necessary, to enable compliance with this Undertaking in its entirety .

Commencement Date has the meaning given in clause 4.1.

Confidential Information refers to information of an Applicant:

- (a) by its nature confidential, including but not limited to information about that Applicant's cargo manifests, cargo descriptions, cargo markings, cargo mix/volumes, cargo origin and destinations, overseas and local customer details, terminal expenditure/cost information; or
- (b) designated to be confidential by the Applicant who supplied it; or
- (c) known, or ought reasonably to be known, by Sea Swift to be confidential or commercially valuable,

but excludes information that:

- (d) is comprised solely of the name, address, and contact details of an Applicant for the sole purpose of allowing Sea Swift to comply with requirements of the open access at Gove Wharf undertakings in clause 5;
- (e) is in the public domain at the time of the Applicant's request to access Gove Wharf; or
- (f) became available to Sea Swift prior to the Applicant's request to access Gove Wharf other than through a breach of confidence or breach of this Undertaking.

Corporations Act means the *Corporations Act 2001* (Cth).

Financial Year refers to the period from 1 July to 30 June in each year

Gove Wharf means the facilities located at Melville Bay Rd, Foreshore Drive, Nhulunbuy, and includes the areas set out in Schedule 2A.

Gove Wharf Access Agreement means the agreement in Schedule 2 of this Undertaking.

Gove Wharf Rates means the fees or charges payable by an Applicant to Sea Swift for the Access Service (and if the Applicant elects, the Additional Services) as set out in Schedule 3.

Gove Wharf Lease has the meaning given in clause 2.2(b).

Independent Price Expert means the person appointed under Schedule 5 clause 1(b).

Independent Price Review Process means the process set out in Schedule 5 of this Undertaking.

Original Undertaking has the meaning given in clause 2.3(a).

Parties means Sea Swift and Toll.

Price Related Dispute Resolution Process means the process set out in Schedule 5 of this Undertaking.

Proposed Transaction has the meaning given in clause 2.2(a).

Public Section 87B Undertakings Register means the ACCC's public register of section 87B undertakings, available at <http://www.accc.gov.au/>.

Related Bodies Corporate has the meaning given to it by section 50 of the *Corporations Act 2001* (Cth).

Revised Undertaking has the meaning given in clause 2.3(b).

Sea Swift means the entity referred to in clause 1.

TML means the entity referred to in clause 2.1(b).

Toll means the entity referred to in clause 2.1(b).

Undertaking is a reference to all provisions of this document, including its schedules and as varied from time to time under section 87B of the Act.

2 Interpretation

- (a) In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires:
- (i) a reference to this Undertaking includes all of the provisions of this document including its schedules;
 - (ii) headings are inserted for convenience only and do not affect the interpretation of this Undertaking;
 - (iii) if the day on which any act, matter or thing is to be done under this Undertaking is not a Business Day, the act, matter or thing must be done on the next Business Day;
 - (iv) a reference in this Undertaking to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;

- (v) a reference in this Undertaking to any company includes its Related Bodies Corporate;
- (vi) a reference in this Undertaking to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced;
- (vii) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Undertaking;
- (viii) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
- (ix) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- (x) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders;
- (xi) a reference to the words 'such as', 'including', 'particularly' and similar expressions is to be construed without limitation;
- (xii) a construction that would promote the purpose- or object- underlying the Undertaking (whether expressly stated or not) will be preferred to a construction that would not promote that purpose or object;
- (xiii) material not forming part of this Undertaking may be considered to:
 - (A) confirm the meaning of a clause is the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the competition concerns intended to be addressed by the Undertaking and the clause in question; or
 - (B) determine the meaning of the clause when the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the purpose or object underlying the Undertaking, leads to a result that does not promote the purpose or object underlying the Undertaking;
- (xiv) in determining whether consideration should be given to any material in accordance with paragraph (xiii), or in considering any weight to be given to any such material, regard must be had, in addition to any other relevant matters, to the:
 - (A) effect that reliance on the ordinary meaning conveyed by the text of the clause would, have (taking into account its context in the Undertaking and whether that meaning promotes the purpose or object of the Undertaking); and
 - (B) need to ensure that the result of the Undertaking is to completely address any competition concerns;
- (xv) the ACCC may authorise the ACCC Mergers and Adjudication Group, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the ACCC may impose;
- (xvi) in performing its obligations under this Undertaking, Sea Swift will do everything reasonably within its power to ensure that its performance of those obligations is done in a manner which is consistent with promoting the purpose and object of this Undertaking;

(xvii) a reference to:

- (A) a thing (including, but not limited to, a chose in action or other right) includes a part of that thing;
- (B) a party includes its successors and permitted assignees; and
- (C) a monetary amount is in Australian dollars.

Schedule 2 Gove Wharf Access Agreement

(See following page)

AGREEMENT FOR ACCESS AND THE SUPPLY OF SERVICES BY Sea Swift Pty Ltd (ACN 010 889 040) of 41–43 Tingira Street, Portsmith Queensland 4870 (**Sea Swift**)

Sea Swift agrees to provide, and the Shipper agrees to engage, Sea Swift to provide the services on the terms below and in the attached Service Conditions and Schedules.

1 Shipper:			
Company name:			
ABN:			
Registered address:			
Phone no:		Email address:	
Contact name:			

2 Access Service and Additional Services (if any):	<i>[to be specified]</i>
3 Wharfage volume:	<i>[insert approximate cargo volume]</i>
4 Ancillary Services (provided at election of the Shipper):	<i>[insert as applicable]</i>
5 Sea Swift's Service Conditions applicable to the Services:	<i>[Standard Stevedoring Conditions] [Standard Warehousing Conditions]</i>

6 Access Day(s):	
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7 Nominated Vessel(s):	
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8 Commencement Date:	
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9 Agreement Port:	Gove
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10 Initial Term:	
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11 Further Term:	<i>[insert if applicable]</i>
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12 Place of delivery:	Gove
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13 Special conditions:	<i>[insert if applicable]</i>
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I acknowledge that I have read the above, and the attached Service Conditions and Schedules and am authorised to accept them and to sign this agreement on the Shipper's behalf.

Name: _____ Signature: _____
Date: / /

Signed on behalf of Sea Swift Pty Ltd

Date: / /

1 Definitions and Interpretation

1.1 Definitions

'Access Days' means the specific day(s) as set out in item 6 upon which the Services will be provided to, and acquired by, the Shipper.

'Access Service' means Sea Swift's provision of:

- (i) access to the roll-on, roll-off landing ramp (as indicated as area A in Schedule 2A); or
- (ii) access to the lift-on, lift-off wharf (as indicated as area C in Schedule 2A),
for a period not exceeding 6 hours, together with:
 - (iii) use and hire of the covered lay down area (as indicated as area D in Schedule 2A);
 - (iv) use and hire of the lay down area (as indicated as area E in Schedule 2A);
and
 - (v) use of standard stevedoring services for the unloading and loading of cargo from a nominated vessel at the rates specified in the Gove Wharf Rates, for a period not exceeding 6 hours.

'Additional Services' means Sea Swift's provision of other services specified in the Gove Wharf Rates.

'Agreement' means this agreement including Sea Swift's Service Conditions applicable to the Services, as amended from time to time.

'Agreement Port' means the ports specified in item 9.

'Ancillary Services' means any services other than the Access Service or Additional Services provided or to be provided in relation to the Goods, including, without limitation, stowing services, lashing services, fumigating, transhipping, packaging, inspecting, handling and any other services incidental to the provision of the Access Service or Additional Services.

'Business Day' means a day other than a Saturday, Sunday or gazetted public holiday in the Northern Territory.

'Commencement Date' means the date in item 8.

'Dispute' has the meaning given in clause 12(a).

'Dispute Notice' has the meaning given in clause 13(b).

'Financial Year' means the period from 1 July to 30 June each year.

'Force Majeure' means anything outside of Sea Swift's reasonable control, including without limitation, fire, storm, flood, earthquake, lightning, explosion, accident, road or rail closures, rail derailment, wharf delays, war, terrorism, sabotage, epidemic, quarantine restriction, labour dispute or shortage, act or omission of air traffic control, airline pilot or any third person or public authority.

'Further Term' means the period in item 11.

'Goods' means the goods, materials, supplies, equipment, plant and other things to be transported as part of the Services.

'Gove Wharf Rates' means supply of the Access Service and, if requested, the Additional Services, at pricing no greater than the rates published by Sea Swift on its website for each Financial Year for the Access Service and Additional Services.

'GST' means a tax on goods, services and other things including any value added tax, broad based consumption tax or other similar tax introduced in any jurisdiction in Australia, and includes taxes levied under the *A New Tax System (Goods and Services Tax) Act 1999*.

'**GST Law**' includes *A New Tax System (Goods and Services Tax) Act 1999* and any other Act, order, ruling or regulation that imposes or otherwise deals with the administration or imposition of a GST in any jurisdiction in Australia.

'**Initial Term**' means the number of years or the period in item 10.

'**Item**' means an item in the table on the first page of this agreement.

'**Place of delivery**' means the place referred to in item 12.

'**Ramp**' means the roll on / roll off landing ramp at Gove (marked as area A in Schedule 2A).

'**Related Body Corporate**' has the meaning given in section 9 of the *Corporations Act 2001* (Cth).

'**Sea Swift's Service Conditions**' means the Standard Domestic Sea Carriage Conditions, Standard International Sea Carriage Conditions, Standard Freight Forwarding Conditions, Standard Stevedoring Conditions, Standard Land Transport Conditions and Standard Warehousing Conditions as amended from time to time published on the website at www.seaswift.com.au or any other website nominated by Sea Swift or attached to this agreement applicable to the services.

'**Services**' means the Access Service and such of the Additional Services referred to in item 2 as the Shipper elects to acquire, and any Ancillary Services if applicable.

'**Shipper**' means the shipper identified in item 1.

'**Term**' means the initial term and any further term.

'**Wharf Facilities**' means the facilities located at Melville Bay Rd, Foreshore Drive, Nhulunbuy, and includes the areas set out in Schedule 2A.

'**Writing**' means any representation of words, figures or symbols capable of being rendered in visible form.

1.2 Interpretation

In this agreement:

- (a) headings and clause numbers are for convenience only and do not form part of the document or affect its interpretation;
- (b) the singular number includes the plural and vice versa, unless the context requires otherwise;
- (c) a reference to a party includes that party's executors, administrators, trustees, successors and permitted assigns;
- (d) a reference to a person includes an individual, corporation, unincorporated association, partnership, joint venture or government body;
- (e) a reference to a statute, ordinance or other law includes all regulations and other instruments under it and all consolidations, amendments, re-enactments or replacements of it;
- (f) money references are in Australian dollars, unless otherwise provided;
- (g) a reference to a "month" means a calendar month; and
- (h) if a party is a corporation, a reference to that party's authorised officer includes an "officer" of the corporation as defined in the *Corporations Act 2001* (Cth), or any other person authorised to act on its behalf.

2 The services

- (a) The Shipper may acquire:
 - (i) the Access Service;
 - (ii) if applicable, Additional Services; and

- (iii) if applicable, Ancillary Services.
- (b) Sea Swift shall provide the Services at the Ramp on the Access Day(s) nominated in item 5.
- (c) Sea Swift shall use its reasonable endeavours to provide the Services to the Shipper immediately upon arrival at the Ramp subject to tide, weather conditions and use of the Ramp.
- (d) Terminal opening times are 8am to 4pm, Monday to Friday.
- (e) The provision of stevedoring services is subject to availability, and must at all times be in compliance with Sea Swift Health & Safety and Fatigue Management policies.
- (f) The Access Service will be provided for a 6 hour period, unless otherwise agreed. The provision of such services for longer than 6 hours will attract additional charges.
- (g) If sufficient labour is not available for additional hours, additional labour may be flown in from Darwin with all associated costs including but not limited to flights, accommodation, meals, transfers, and overtime, charged to the Shipper's account.
- (h) Sea Swift is not a common carrier, does not accept any liability as a common carrier and may refuse to provide the Services for any Goods for any reason.
- (i) Sea Swift may refuse to provide the Services for any Goods Sea Swift considers provide an unacceptable risk to the safety of Sea Swift's employees or its property.
- (j) Both parties agree to appoint and maintain representatives to manage the working relationship between the parties and to act as the point of first contact for the other party.
- (k) All vessels requesting access to Gove Wharf will be subject to a Sea Swift assessment and/or Inspection prior to access being granted. Shippers requesting access will be screened using some or all of the below resources to determine if the vessel/operator/owner is of a standard acceptable to Sea Swift:
 - (i) Classification Society;
 - (ii) Class Notations;
 - (iii) Vessel Flag state reports and deficiencies;
 - (iv) Vessel Port State reports and deficiencies;
 - (v) Market intelligence;
 - (vi) Vessel owner's detailed risk assessment;
 - (vii) Vessel owners/operators fleet safety statistics;
 - (viii) Vessel owners/operators fleet port state records;
 - (ix) Qualifications and experience of all staff;
 - (x) Compliance with Australian Marine Orders;
 - (xi) Compliance with Australian Navigation Act 2012; and
 - (xii) Compliance with other international conventions and acts, including but not limited to, ISPS, ISM, MARPOL, SOLAS and STCW 95.

3 Service Conditions

Sea Swift's Service Conditions referred to in item 5 form part of this agreement. If there is any conflict between the provisions contained in this document and the applicable Service Conditions, the terms of this document prevail.

4 Shipper's Obligations

- (a) The Shipper shall:
 - (i) arrive at the Ramp on the access day detailed in item 6 between the hours of 0800 hours – 1000 hours ready in all respects to commence unloading and loading of cargo;
 - (ii) ensure all containers for loading and unloading are not heavier than 12 tonne;
 - (iii) provide Sea Swift with a full manifest of cargo volumes to be handled 48 hours prior to arrival at the Ramp;
 - (iv) provide Sea Swift with a manifest of cargo to be loaded and unloaded clearly detailing dangerous goods consignments;
 - (v) immediately after arrival complete a Declaration of Security;
 - (vi) upon completion of all stevedoring operations or on the instructions of Sea Swift immediately depart the Ramp, unless otherwise agreed; and
 - (vii) ensure all cargo unloaded are picked up by the Shipper or the Shipper's nominated transport provider on the day of unloading.
 - (b) Any cargo not collected on the day of unloading may be repositioned by Sea Swift at the Shipper's cost to Sea Swift's nominated holding yard, where storage fees will apply.
-

5 Charges

- (a) The Shipper must pay Sea Swift's Gove Wharf Rates for the Services.
 - (b) The Gove Wharf Rates associated with the Access Service are payable regardless of whether or not the Shipper's nominated vessels arrive at the Ramp.
 - (c) The amount of Gove Wharf Rates for Additional Services and any Ancillary Services will depend on the equipment and personnel ordered at each visit.
 - (d) The parties agree to negotiate in good faith to determine the appropriate rates where Sea Swift is engaged to provide additional, alternate or varied services from those to be supplied under this agreement.
-

6 Payment

- (a) The Shipper must pay the Gove Wharf Rates associated with the Access Service in advance of each vessel call at the Ramp.
 - (b) The Shipper must pay the Gove Wharf Rates relating to any Additional Services or Ancillary Services within 14 days of the date of Sea Swift's invoice.
 - (c) Sea Swift will separately itemise the amounts payable for Ancillary Services on Sea Swift's invoice.
-

- (d) The Shipper must make any claim that it has been charged incorrectly for the Services or has overpaid any invoice within 6 months of the date of performance of the relevant Services or of the alleged overpayment.
 - (e) Sea Swift may refuse to provide Services to the Shipper if any invoice is not paid as required under this clause 6.
-

7 Goods and Services Tax (GST)

- (a) If GST applies to any supplies, where the parties have not agreed upon a GST inclusive price, the consideration payable or provided for that supply will be increased by an amount equal to the GST liability properly incurred by the party making the supply.
 - (b) Despite any other provision of this agreement, if either party is required to reimburse or indemnify the other party for any cost, expense or other amount, the amount to be reimbursed or indemnified must be reduced by any part which is recoverable as an input tax credit by the party which incurred it (or representative member of that party's GST group).
-

8 Termination

- (a) Either party may end this agreement at any time by giving written notice to the other party if:
 - (i) the other party breaches any of its material obligations under this agreement and has failed to remedy the breach or perform the obligation or pay compensation to the other party's reasonable satisfaction within fifteen (15) business days after receiving written notice of the breach;
 - (ii) the other party:
 - (A) is, becomes or is deemed to be, insolvent;
 - (B) makes an assignment for the benefit of, or enters into or makes any arrangement or composition with, its creditors; or
 - (C) goes into receivership or liquidation, or has appointed an administrator, official manager, provisional liquidator, liquidator, receiver, or any person having a similar function under the *Corporations Act 2001* (Cth);
 - (iii) any resolution is passed, or proceedings are commenced, for the other party's winding up, dissolution, amalgamation, or liquidation; or
 - (iv) the other party suffers any execution against any of its assets which materially restricts, prevents or has an adverse effect on, that party's ability to perform its obligations under this agreement.
 - (b) The ending of this agreement under this clause 8, will be without prejudice to any existing claims (or right to claims) either party may have against the other arising from breaches which occurred prior to the date the agreement ends.
-

9 Use of the Wharf Facilities

- (a) The Shipper must:
 - (i) repair any damage the Shipper causes to the Wharf Facilities;
 - (ii) repair any damage the Shipper causes to Sea Swift's equipment;
-

- (iii) repair any damage the Shipper causes to any adjoining property of Sea Swift;
 - (iv) comply with the reasonable directions of Sea Swift; and
 - (v) keep the Wharf Facilities in a clean and tidy condition.
- (b) The Shipper must have current insurance policies covering:
 - (i) public liability insurance for the Wharf Facilities in an amount of not less than \$20 million;
 - (ii) industrial special risk or similar policy covering Sea Swift's improvements at the Wharf Facilities for their full insurable value; and
 - (iii) any other risk that Sea Swift reasonably requires.
- (c) The Shipper uses and occupies the Wharf Facilities at its own risk.
- (d) The Shipper releases Sea Swift from all claims resulting from any:
 - (i) loss of or damage to any property in or near the Wharf Facilities;
 - (ii) death or injury of any person occurring on or near any part of the Wharf Facilities;
 - (iii) act or omission on Sea Swift's part; and
 - (iv) failure of any services at the Wharf Facilities.
- (e) The Shipper indemnifies Sea Swift against all claims resulting from:
 - (i) any damage or loss of property; and
 - (ii) the death of or injury to any person, which is or may be suffered or sustained in or near the Wharf Facilities whether occupied by the Shipper or not, in circumstances which relate in any way to the use and occupation of the Wharf Facilities by the Shipper.
- (f) Sea Swift is not liable to the Shipper for, and the Shipper indemnifies Sea Swift against any loss or damage incurred by the Shipper for:
 - (i) any damage to the Wharf Facilities;
 - (ii) the failure of any of Sea Swift's improvements to operate properly;
 - (iii) the Shipper's acts, omissions or negligence;
 - (iv) a breach of these terms by the Shipper; and
 - (v) the Shipper's access to and use or occupation of the Wharf Facilities.

An indemnity or release provided by the Shipper under these terms, does not apply to the extent that any damage, expense, loss, claim or liability is caused by Sea Swift's negligence.

- (g) The Shipper acknowledges that Sea Swift does not represent that the Wharf Facilities are suitable for Shipper's proposed use and Shipper relies on its own enquiries.
- (h) The Shipper must comply with all laws in relation to its proposed use of the Wharf Facilities.

10 Notice

- (a) Notice to a party under this agreement must be:
 - (i) in writing;
 - (ii) addressed to the address of the party specified in item 1 or on the front of this agreement as applicable or as varied by notice given under this clause; and
 - (iii) left at or sent by post, facsimile or email to that address.
- (b) A notice given in accordance with clause 10(a) will be taken to have been received:
 - (i) if delivered by hand to the recipient's address before 4:00 PM on a business day, on the date of delivery, otherwise, on the business day following delivery;
 - (ii) if sent by post, 3 working days after the posting;
 - (iii) if sent by facsimile on before 4:00 PM on a business day, on or the date of transmission, or otherwise on the business day following transmission, provided in both cases that the sender's facsimile machine records a successful transmission of the notice; and
 - (iv) if sent by email, at the time shown in the email as the time the email was sent.

11 Assignment

- (a) If the Shipper transfers or assigns the business, or any part of it, to which Sea Swift provides services then the Shipper will use its best endeavours to ensure that it is a condition of the transfer or assignment that the assignee is bound by this agreement or that Shipper procures the agreement of the assignee to the terms of this agreement.
- (b) The Shipper must not assign its rights or obligations under this agreement without Sea Swift's written consent which may be withheld in its absolute discretion.

12 Dispute Resolution

- (a) Except where a party seeks urgent interim relief, a party must not commence court proceedings in relation to any dispute or disagreement arising out of or relating to this agreement (**Dispute**) unless it has complied with the provisions of this clause 12.
- (b) A party claiming that a Dispute has arisen must notify the other party accordingly, which notice must describe the nature of the Dispute (**Dispute Notice**).
- (c) Within 5 Business Days after receipt of a Dispute Notice, each party must nominate a representative who has express authority to resolve the Dispute, and those representatives must meet to seek to resolve the Dispute by negotiation. All aspects of the negotiation must be kept confidential, and all communications between representatives during the negotiation are made on a without prejudice basis.
- (d) If the Dispute has not been resolved within 10 Business Days after receipt of the Dispute Notice, either party may refer the Dispute for mediation in accordance with, and subject to, The Institute of Arbitrators & Mediators Australia Mediation Rules, by notifying the other party accordingly.

- (e) If, within 20 Business Days after receipt of the Dispute Notice, neither party has referred the Dispute for mediation in accordance with paragraph (d), or the Dispute has not been resolved, either party may commence court proceedings in relation to the Dispute.
- (f) Notwithstanding the existence of a Dispute, each party must continue to perform its obligations under this agreement.

13 General

- (a) This agreement may only be amended in writing, signed by the parties.
- (b) Sea Swift is not bound by any waiver, discharge or release of a condition or any agreement which changes the contract, unless it is in writing and is signed by or for Sea Swift.
- (c) This agreement is the entire agreement of the parties on the subject matter.
- (d) If a clause or part of a clause is unenforceable, it must be severed from and does not affect the rest of the agreement.
- (e) Each party must do, sign, execute and deliver all deeds, documents, instruments and acts reasonably required to carry out and give full effect to this agreement.
- (f) This agreement may be executed in any number of counterparts and all of those counterparts taken together constitute one and the same instrument.
- (g) The laws of the Northern Territory apply to the agreement and the Shipper must bring any proceedings against Sea Swift in a court of the Northern Territory.

Schedule 2A – Diagram of Gove Wharf



Area	Description
A	Landing ramp (roll-on, roll-off)
B	Public wharf (only for small fishing vessels)
C	Heavy lift Wharf (lift-on, lift off)
D	Covered lay down
E	Lay down

Schedule 3 Gove Wharf Rates

	Unit	Rates (Excl GST)
ACCESS SERVICE		
Terminal Access		
Access Fee (ie fee for access to area A or area C)	6 hourly	\$7,050.00
Terminal Security	/hr	\$115.92
Wharf Mooring Gang (relevant to access to the Heavy Lift Wharf)	Visit	\$500.00
Tonnage dues / Wharfage		
General Cargo	> of T/CBM	\$16.50
Storage Services		
	> of T/CBM	\$2.80
Stevedoring		
Stevedore (4 Persons)	/hr pp	\$98.00
Supervisor (1 Person)	/hr pp	\$119.00
Fork truck, inclusive of Operator up to 4 Tnes	/hr	\$125.00
Fork truck, inclusive of Operator up to 16 Tnes	/hr	\$208.00
ADDITIONAL SERVICES		
Additional Terminal Access (for access over 6 hours)	per above	per above
Additional Stevedoring Services		
Labour		
Stevedore	/hr pp	\$98.00
Supervisor	/hr pp	\$119.00
Machinery		
Fork truck, inclusive of Operator up to 4 Tnes	/hr	\$125.00
Fork truck, inclusive of Operator up to 7 Tnes	/hr	\$148.00
Fork truck, inclusive of Operator up to 16 Tnes	/hr	\$208.00
Fork truck, inclusive of Operator up to 42 Tnes	/hr	\$284.00
Moffat Type Fork Truck 3 Tnes	/hr	\$125.00
Prime Mover Incl Driver	/hr	\$215.00
Nissan UD Type Truck	/hr	\$110.00
Semi Trailer	/hr	\$140.00

Schedule 4 Annual Price Adjustment

- 1 The Gove Wharf Rates outlined in Schedule 3 may be adjusted annually with effect on the first day of each Financial Year
- 2 The Gove Wharf Rates will be subject to indexation by application of the following indices, where:
 - (a) weightings represent the percentage of the total rates that this cost component comprises;
 - (b) when rates are adjusted, the relevant proportion of the rate will be adjusted in accordance with any movement in the relevant index or source.

Cost Component	Weight	Index / Source
Wages	37%	Annual labour rate percentage increase as set out in the Sea Swift Collective Agreement.
Equipment	30%	<i>Consumer Price Index: All groups, Australia</i> published by ABS (base index June 2015)
Maintenance	10%	<i>Consumer Price Index: All groups, Australia</i> published by ABS (base index June 2015)
Administration/Property	23%	<i>Consumer Price Index: All groups, Australia</i> published by ABS (base index June 2015)
Total	100%	

- 3 Where the Gove Wharf Rates are adjusted, the adjustment of all rates is to be in accordance with the application of the combined indices.
- 4 For example, if the rise in the *Consumer Price Index: All groups, Australia* for a particular year is 3% and the labour rate percentage increase as set out in the Sea Swift Collective Agreement for that year is 2.5% the increase in fees that Sea Swift may apply is:

$$(0.37 \times 2.5\%) + (0.63 \times 3\%) = 2.82\%$$

- 5 In that example, Sea Swift would be entitled to raise each of the Gove Wharf Rates set out in Schedule 3 by 2.82%.

Schedule 5 Independent Price Review Process

1 Appointment of an Independent Price Expert

- (a) Prior to the Commencement Date, Sea Swift must appoint an Independent Price Expert for, subject to paragraph 1(c) of this Schedule 5, the duration of this Condition.
- (b) The Independent Price Expert must have the qualifications and experience necessary to carry out its functions independently of Sea Swift and must not be:
 - (i) an employee or officer of Sea Swift or its Related Bodies Corporate or of Toll or its Related Bodies Corporate, whether current or in the past 3 years;
 - (ii) a professional adviser of Sea Swift or its Related Bodies Corporate or of Toll or its Related Bodies Corporate, whether current or in the past 3 years;
 - (iii) a person who holds a material interest in Sea Swift or its Related Bodies Corporate or of Toll or its Related Bodies Corporate;
 - (iv) a person who has a contractual relationship with Sea Swift or its Related Bodies Corporate or of Toll or its Related Bodies Corporate (other than the terms of appointment of the Independent Price Expert);
 - (v) a customer, material supplier or material customer of Sea Swift or its Related Bodies Corporate or of Toll or its Related Bodies Corporate; or
 - (vi) an employee or contractor of a firm or company referred to in paragraphs 1(b)(iii) to 1(b)(v) of this Schedule 5.
- (c) Sea Swift must, as soon as practicable, appoint a replacement Independent Price Expert who meets the requirements set out in paragraph 1(b) of this Schedule 5 in the following circumstances:
 - (i) if the Independent Price Expert resigns or otherwise stops or is unable to act as the Independent Price Expert; or
 - (ii) if Sea Swift has terminated the Independent Price Expert's terms of appointment in accordance with those terms of appointment.
- (d) Where the Independent Price Expert is unable to act for a period of time, Sea Swift may appoint a replacement Independent Price Expert to act as the Independent Price Expert for that period of time only.
- (e) Within 2 Business Days of the appointment of the Independent Price Expert under paragraph 1(a) of this Schedule 5 or replacement of the Independent Price Expert under paragraph 1(c) of this Schedule 5, Sea Swift must:
 - (i) forward to the ACCC a copy of the executed terms of appointment; and
 - (ii) publish the name and contact details of the Independent Price Expert on Sea Swift's website.

2 Conditions relating to the Independent Price Expert's functions

Sea Swift must:

- (a) procure that the terms of appointment of the Independent Price Expert include obligations on the Independent Price Expert to:

- (i) continue to satisfy the independence criteria in paragraph 1(b) of this Schedule 5 for the period of his or her appointment;
 - (ii) provide any information or documents requested by the ACCC about Sea Swift's compliance with this process directly to the ACCC; and
 - (iii) report or otherwise inform the ACCC directly of any issues that arise in the performance of his or her functions as the Independent Price Expert;
- (b) comply with and enforce the terms of appointment for the Independent Price Expert;
 - (c) maintain and fund the Independent Price Expert to carry out his or her functions;
 - (d) indemnify the Independent Price Expert for any expenses, loss, claim or damage arising directly or indirectly from the performance by the Independent Price Expert of his or her functions as the Independent Price Expert except where such expenses, loss, claim or damage arises out of the gross negligence, fraud, misconduct or breach of duty by the Independent Price Expert;
 - (e) not interfere with, or otherwise hinder, the Independent Price Expert's ability to carry out his or her functions as the Independent Price Expert;
 - (f) provide and pay for any external expertise, assistance or advice required by the Independent Price Expert to perform his or her functions as the Independent Price Expert;
 - (g) provide to the Independent Price Expert any information or documents requested by the Independent Price Expert that he or she considers necessary for carrying out his or her functions as the Independent Price Expert or for reporting to or otherwise advising the ACCC; and
 - (h) ensure that the Independent Price Expert will provide information or documents requested by the ACCC directly to the ACCC.

3 Raising an Additional Proposed Price Increase

- (a) Sea Swift may seek a price increase in excess of the Annual Price Adjustment in Schedule 4 (**Additional Proposed Price Increase**) by providing written notice to the Independent Price Expert (**Additional Proposed Price Increase Notice**).
- (b) An Additional Proposed Price Increase Notice must detail:
 - (i) the specific Access Services, Additional Services and / or Ancillary Services to which the Additional Proposed Price Increase relates;
 - (ii) the specific amount of the Additional Proposed Price Increase; and
 - (iii) Sea Swift's reasons for the Additional Proposed Price Increase.

By submitting an Additional Proposed Price Increase Notice, Sea Swift agrees to comply with this Price Related Dispute Resolution Process.

- (c) Sea Swift may at any time withdraw an Additional Proposed Price Increase Notice by written notice to the Independent Price Expert, in which case the powers and authority of the Independent Price Expert to make a determination of that Additional Proposed Price Increase Notice under paragraph 4 of this Schedule 5 shall forthwith cease.

4 Independent Price Expert Determination

- (a) Where the Independent Price Expert has received an Additional Proposed Price Increase Notice in relation to a proposed price increase, the Independent Price Expert must:
 - (i) determine whether Sea Swift's proposed price increase is reasonable and appropriate having regard to the principles listed in paragraph 5 below; and
 - (ii) decide whether to accept, reject or vary Sea Swift's proposed price increase.
- (b) The Independent Price Expert will make his or her determination within:
 - (i) 30 days of the receipt of the Additional Proposed Price Increase Notice from the Sea Swift; or
 - (ii) such further period as necessary for the Independent Price Expert to consider information requested under paragraph 4(c) of this Schedule 5, as the Independent Price Expert reasonably requires.
- (c) Sea Swift must provide the Independent Price Expert with any information he or she requires to make a determination under this paragraph 4 of this Schedule 5 within a timeframe reasonably determined by the Independent Price Expert.
- (d) In the event that more than one Additional Proposed Price Increase Notice is received in relation to a proposed new Additional Proposed Price Increase for a particular Service, the Independent Price Expert will only make a single determination about that proposed or applied price.
- (e) The Independent Price Expert's decision is final and binding on Sea Swift.
- (f) When making a determination under this paragraph 4 of this Schedule 5, the Independent Price Expert is acting as an expert and not as an arbitrator.

5 Relevant considerations

In determining whether an Additional Proposed Price Increase is reasonable and appropriate, the Independent Price Expert will have regard to the following principles:

- (a) that the Additional Proposed Price Increase should be set taking into account:
 - (i) all efficient input costs;
 - (ii) an appropriate allocation of Sea Swift's relevant overhead costs.
 - (iii) whether the "weighting factors" referred to in the calculation in Schedule 4 continue to accurately reflect the cost component weighting of these costs;
 - (iv) a rate of return that utilises a weighted average cost of capital which would be required by a benchmark efficient entity providing services with a similar degree of risk as that which applies to Sea Swift; and
 - (v) the long term interests of users.

6 Notice and Publication Of Decision

- (a) The Independent Price Expert must notify Sea Swift of the decision within seven days.
- (b) Within 30 days of receiving the decision:

- (i) Sea Swift must notify its affected Shippers of the Independent Price Expert's determination by writing to or emailing customers, or publishing the information about the determination on its website;
 - (ii) if a retrospective adjustment is necessary to comply with the Independent Price Expert's determination, Sea Swift must refund the relevant adjustment amount to the relevant Shipper(s).
- (c) Whatever the outcome, the cost of the expert determination will be borne by Sea Swift.
-

7 Date price increase takes effect

- (a) If the Independent Price Expert makes a determination under paragraph 4 of Schedule 4, then the new price increase as determined by the Independent Price Expert takes effect on the date that Sea Swift is notified under paragraph 6(a) of Schedule 4 that the new price would take effect.

SECTION 87B UNDERTAKING

Competition and Consumer Act 2010

Undertaking to the Australian Competition and Consumer Commission given for the purposes of section 87B

by

Sea Swift Pty Limited (ACN 010 889 040)

- 1 This undertaking (**Undertaking**) is given to the Australian Competition and Consumer Commission (**Commission**) by Sea Swift Pty Limited ACN 010 889 040 (**Sea Swift**) of 41-43 Tingira Street, Portsmith, Queensland 4870 under section 87B of the *Competition and Consumer Act 2010 (Act)*.
- 2 Sea Swift has made an application for authorisation in respect of an acquisition pursuant to section 95AU of the Act.
- 3 Sea Swift hereby undertakes that it will not make the acquisition the subject of the application referred to in paragraph 2 while the application is being considered by the Australian Competition Tribunal.
- 4 This undertaking comes into effect when:
 - (a) the Undertaking is executed by Sea Swift; and
 - (b) the Commission accepts the Undertaking so executed.
- 5 Sea Swift acknowledges that the Commission will make this Undertaking available for public inspection.

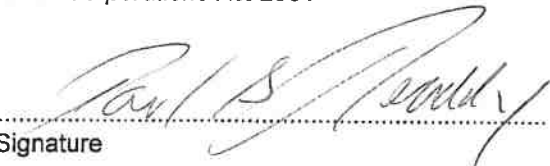
EXECUTED BY

Sea Swift Pty Limited ACN 010 889 040
pursuant to section 127 (1) of the *Corporations Act 2001*

Signature



Signature



Office Held

MD + CEO SEA SWIFT PTY LTD

Office Held

DIRECTOR

(Print) Name of Authorised Person

FRED WHITE

(Print) Name of Authorised Person

PAUL READDY

This 4th day of April 2016.

ACCEPTED BY THE COMMISSION PURSUANT TO SECTION 87B OF THE ACT

.....
Commission Chairperson