

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: INT (Toll) – Statement of DAVID CHARLES JACKSON – PUBLIC (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 'r' 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.



IN THE AUSTRALIAN COMPETITION TRIBUNAL

ACT of 2015

RE PROPOSED ACQUISITION OF CERTAIN ASSETS OF THE TOLL MARINE LOGISTICS BUSINESS IN THE NORTHERN TERRITORY AND FAR NORTH QUEENSLAND

STATEMENT OF DAVID CHARLES JACKSON

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STATEMENT OF DAVID CHARLES JACKSON

I, David Charles Jackson, of Level 7, 380 St. Kilda Road, Melbourne in the state of Victoria, say as follows:

1. Introduction

- 1.1 I am Chief Executive Officer (**CEO**) of the Toll Resources and Government Logistics division (**TRGL**) of the Toll Group of Companies, of which Toll Holdings Ltd (**Toll**) is the ultimate Australian parent company. Toll Marine Logistics (**TML**) is a business within the TRGL division. I am authorised to make this statement on behalf of Toll.
- 1.2 I make this statement from my own knowledge as CEO of TRGL and from having consulted relevant staff and the records of TRGL, TML and Toll.

2. Job title and position

- 2.1 I commenced working at Toll in November 1996. I have held the role of CEO of TRGL (previously known as Toll Global Resources or TGR) for the past 6 and a half years.
- 2.2 TRGL includes the following major business units operating both within and outside Australia:
- (a) Toll Energy (which now includes TML);
 - (b) Toll Liquids;
 - (c) Toll Mining Services;
 - (d) Toll Offshore Petroleum Services;
 - (e) Toll Remote Logistics; and
 - (f) Toll Transitions.
- 2.3 As CEO of TRGL, I am responsible for managing TRGL (including the TML business) and setting its strategic direction to maximise the profitability and financial return to Toll.
- 2.4 Prior to working in my current role, I worked in various other roles at Toll including as CEO of Toll New Zealand (which was listed on the New Zealand Stock Exchange) for 5 years and as the General Manager of the Toll SPD business for 7 years. I also worked in a number of roles as at K&S Corporation Limited for 8 years.

3. TML

- 3.1 Toll acquired Perkins Shipping Group Pty Ltd in mid 2009 and since then the business has traded under the name Toll Marine Logistics (**TML**).
- 3.2 At the time of the acquisition, the business included the provision of coastal and community shipping services in the NT, and a service in FNQ on the Cairns – Weipa route (but not to the outer Torres Strait Islands) (**TML NT FNQ**). The services were supplied on a scheduled basis and, on occasion, as project or charter services. The services support many remote Aboriginal communities in the NT and FNQ, including the islands off the coast of the NT.
- 3.3 TML's business also included an international liner service on the Darwin-Dili-Singapore route. Toll sold that part of the business in August 2014 to ANL because of its poor performance. TML continues to provide marine logistics services for the oil and gas sector in Queensland and Western Australia.

4. Sea Swift entry

- 4.1 Sea Swift acquired Tiwi Barge in or around early 2013 and began supplying coastal and community shipping services in the NT. This had an immediate impact on TML's business. TML lost a number of large customer contracts to Sea Swift in the NT, including Caltex / NT Power & Water and, in early 2014, Woolworths (Gove). In November 2013, just prior to losing the Woolworths (Gove) contract to Sea Swift, Rio Tinto (one of our other larger customers) also announced the closure of its refinery in Gove. TML also lost its two large customer contracts in FNQ to Sea Swift, namely Rio Tinto (Weipa) in or around July 2013 and Woolworths (Weipa) in or around November 2013. After we lost this Woolworths contract, we had no other larger customer contracts in FNQ.
- 4.2 As a consequence of Sea Swift's entry, and the loss of these larger customer contracts, TML NT FNQ experienced immediate financial pressure. This is because the business has significant fixed costs and the loss in revenue impacts the business immediately.

5. TML's strategic options

- 5.1 In early 2014, in conjunction with Troy Reddell, Chief Financial Officer (**CFO**) of TRGL, I began considering potential strategies and options for dealing with the financial stress being experienced by TML NT FNQ. The options included restructuring and cost cutting, divestment or merger, or exiting the market.

- 5.2 Around this time, I was also considering potential strategies and options for TML's loss making Asia business, as well as finalising the sale of TML's international liner business.
- 5.3 I doubted that cost reduction measures could feasibly be undertaken by Toll in order to restore profitability. TML NT FNQ is a high fixed costs business which operates in markets with variable freight demand and accordingly variable revenue. The underlying cost base of TML NT FNQ, including the existence of enterprise bargaining agreements and high cost of labour compared to other operators, is a key factor affecting profitability.
- 5.4 I knew that if a decision were made for TML NT FNQ to exit the market, it was important to minimise costs and disruption for our customers. This was for two reasons. First, Toll is a global logistics company and maintaining our reputation and relationships with customers is critical. Several customers of TML NT FNQ are customers of the broader Toll group and accordingly, wherever possible, we want to ensure those customers, as well as our other customers, have continuity of supply. This includes seeking to ensure that any customer contracts continue to be performed on their current, or no less advantageous, terms. A purchaser with the capacity and willingness to take over all these contracts would minimise potential reputational risks for Toll. Second, I was also very aware of the important social dimension to the business of TML NT FNQ, in serving the needs of remote Aboriginal communities. I considered that Toll had a social responsibility to ensure that those communities would continue to receive shipping services on a cost-effective and sustainable basis.
- 5.5 At that time, I believed that the only realistic potential purchaser of TML NT FNQ in its entirety was Sea Swift. A key consideration was the scale of the losses incurred, and forecast to be incurred, by TML NT FNQ. In my view, these losses substantially affected the attractiveness of the business to potential purchasers. I believed that only Sea Swift would be able to generate sufficient cost synergies through the merger of the businesses to offset TML NT FNQ's operating losses, in order to deliver a profitable and sustainable business in the long term. For that reason, I decided that there was no point in expending time and resources conducting a formal competitive sale process for TML NT FNQ.
- 5.6 On a date I cannot recall, but I believe in about March 2014, I called Greg Smith at Champ Ventures (the private equity owners of Sea Swift). I knew Greg from another transaction Toll had been involved in. I asked Greg whether Champ would have any interest in a merger transaction with TML NT FNQ. No specifics were discussed. Greg told me that it was not his area, but that he would speak to the relevant people.

- 5.7 At the Board meeting on 24 June 2014, Troy Reddell and I provided an update to the Board in relation to TML NT FNQ and TML's Asia businesses, and informed the Board that we were looking at strategies and options for exiting the sectors in which these businesses were operating.
- 5.8 The TML NT FNQ business suffered heavy losses in FY2014. The financial statements show that TML's earnings before interest, tax, depreciation and amortization (**EBITDA**) with respect to its NT and FNQ operations was [REDACTED] in FY2014.
- 5.9 Before the August 2014 board meeting, I gave an update to Brian Kruger about the discussions being held with Sea Swift. This update is included in Brian Kruger's August Report to the Board, an extract of which is annexed to his statement as BGK-4. I also assisted with the preparation of a confidential Board memorandum which Brian Kruger provided to the Board on 28 August 2014. The memorandum is annexure BGK-5 to the statement of Brian Kruger.
- 5.10 On 8 September 2014, following several months of discussions, Toll (through Perkins Group Holdings Pty Ltd) and Sea Swift Holdings Pty Ltd (**Sea Swift Holdings**) entered into a term sheet for the proposed transaction. It was around this time that we informed TML management responsible for the day to day management of TML NT FNQ, in particular Scott Woodward, General Manager of TML, of the proposed transaction.
- 5.11 At the Board meeting on 24 September 2014, Scott Woodward and I presented a Board paper titled '*TRGL Marine Logistics Asia and Australia Update*'. This presentation provided an update on the proposed divestment of TML NT FNQ to Sea Swift, including that a term sheet had been signed. The presentation informed the Board that an application for ACCC approval of the sale of the TML NT FNQ business was expected to be made in late October. Now shown to me and marked **DCJ-1** is a true copy of the relevant extract of this board presentation.
- 5.12 The financial performance of TML NT FNQ continues to involve incurring heavy losses. The business recorded an EBITDA of [REDACTED] in FY2015. The partial forecast profit and loss statement for FY2016 also foreshadows a forecast EBITDA, until 30 November 2015, of [REDACTED].

6. The proposed transaction

- 6.1 Discussions, due diligence and negotiations with Champ continued during October and November 2014. An Asset and Share Sale Agreement for the proposed transaction was executed in November 2014 by the relevant TML NT FNQ Toll entities, Toll, Sea Swift

and Sea Swift Holdings (**Original ASSA**). Toll announced the proposed transaction in an ASX announcement on 25 November 2014. Now shown to me and marked **DCJ-2** is a true copy of this announcement.

- 6.2 The proposed transaction documented in the Original ASSA was conditional on ACCC informal clearance. Toll and Sea Swift sought informal clearance from the ACCC in December 2014.
- 6.3 The Original ASSA prescribed a sunset date of 30 May 2015 for the satisfaction of the condition precedent relating to ACCC informal clearance. The ACCC's informal clearance process was not completed by this date and in June 2015 the parties commenced discussions to renew and vary the proposed transaction.
- 6.4 The Original ASSA was varied by the parties on 26 June 2015 by an Amended and Restated Asset and Share Sale Agreement (**Revised ASSA**). The variations included an amendment and restatement of the shareholders' deed which forms part of the proposed transaction documentation (**ARSD**).
- 6.5 The consideration payable to Toll under the Revised ASSA involves the following three components:
- (a) an upfront cash purchase price of [REDACTED]
 - (b) deferred consideration [REDACTED] and [REDACTED]
 - (c) an equity holding of 20% in Sea Swift Holdings.
- 6.6 This represents a reduction to the consideration payable under the Original ASSA which involved the following three components:
- (a) an upfront cash purchase price of \$40 million;
 - (b) deferred consideration of \$5 million (payable 12 months from Completion); and
 - (c) an equity holding of 20% in Sea Swift Holdings.
- 6.7 The equity stake of 20% in Sea Swift Holdings remained unchanged between the Original ASSA and the Revised ASSA.
- 6.8 [REDACTED]
[REDACTED]

[REDACTED]

6.9

[REDACTED]

7. Toll interim undertaking

7.1 As part of the ACCC's review of the proposed transaction, it required that Toll provide an interim section 87B undertaking as a condition of extending its anticipated decision date so as to allow consideration of the revised proposed transaction under the Revised ASSA (**Toll Interim Undertaking**).

7.2 The Toll Interim Undertaking requires Toll (on an interim basis) to:

- (a) maintain the TML Business, including maintaining the supply of coastal and community services by TML NT FNQ in a manner consistent with the supply of those services as at 11 June 2015; and
- (b) refrain from entering into an agreement pursuant to which any of the coastal and community shipping services provided by TML NT FNQ as at 11 June 2015 will be provided by Sea Swift, except in limited circumstances where Toll is unable to meet ad hoc or short term customer service requirements itself.

7.3 The Toll Interim Undertaking includes an acknowledgment by the ACCC that there may be legitimate circumstances where it is appropriate for Toll to outsource or subcontract services to Sea Swift. The undertaking includes mechanisms for Toll to seek the consent of the ACCC in these circumstances.

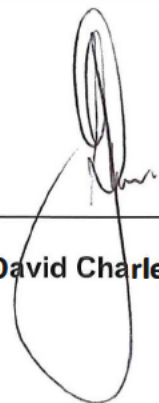
7.4 Now shown to me and marked **DCJ-3** is a true copy of the Toll Interim Undertaking.

8. If the proposed transaction does not proceed

8.1 If the proposed transaction does not proceed, I believe that the TML business in the NT and FNQ should be wound up as soon as practicable, to stem the losses. I have made that recommendation to Toll's Managing Director, Brian Kruger.

I verify that I have read the contents of this statement and the documents referred to in it and that I am satisfied that to the best of my knowledge, information and belief, it is true and correct in every particular.

DATED *11 September 2015*



David Charles Jackson

9. INDEX OF ANNEXURES TO STATEMENT OF DAVID CHARLES JACKSON

Annexure	Title	Confidentiality
DCJ-1	Extract of board presentation 24 September 2014	Restriction of publication of whole document claimed
DCJ-2	ASX announcement on 25 November 2014	
DCJ-3	Toll Interim Undertaking	