

NOTICE OF LODGMENT
AUSTRALIAN COMPETITION TRIBUNAL

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL on 04/04/2016 4:13 pm AEDT 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: APP – ANNEXURE E TO FORM S – UNDERTAKING - PUBLIC

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 AEDT



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.



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, transshipping, 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).
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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 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.
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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.