

**NOTICE OF LODGMENT**  
**AUSTRALIAN COMPETITION TRIBUNAL**

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL on 21/09/2015 4:15 pm AEST and has been accepted for lodgment under the Interim Practice Direction dated 8 May 2015. Filing details follow and important additional information about these are set out below.

**Lodgment and Details**

Document Lodged: Form S - Application by Sea Swift Pty Limited  
PUBLIC – NON-CONFIDENTIAL

File Number: ACT 9 of 2015

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: 21/09/2015 4:15 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 8 May 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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## Application to the Australian Competition Tribunal for Merger Authorisation - Form S

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

**21 September 2015**



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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.

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## 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).

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 mining operators, businesses, government agencies and individuals on remote islands and in mining and 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.<sup>1</sup>

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

1.6 The related bodies corporate of Sea Swift are:<sup>2</sup>

- (a) Sea Swift (Holdings) Pty Limited (ACN 159 387 390);
- (b) Sea Swift (Finance) Pty Limited (ACN 159 387 550); and
- (c) Sea Swift (NT) Pty Limited (ACN 010 889 040).

**(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.

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<sup>1</sup> White [19]-[20].

<sup>2</sup> Readdy [14] and Readdy Annexure PSR-2.

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## 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 whom 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).<sup>3</sup>

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.<sup>4</sup>

**(ii) Place of incorporation of the body corporate**

2.5 Each of the Toll Entities is incorporated in Australia.<sup>5</sup>

**(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.<sup>6</sup>

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<sup>3</sup> Martin [5.1].

<sup>4</sup> Martin [5.2].

<sup>5</sup> Martin [5.4].

<sup>6</sup> Martin, Annexure ATM-1 at Table ATM-2.

**(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.<sup>7</sup>
- 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.<sup>8</sup>
- 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**).<sup>9</sup>
- 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.<sup>10</sup>

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<sup>7</sup> Woodward [4.3]-[4.4], [4.8], [4.11].

<sup>8</sup> Woodward [5.7]-[5.8].

<sup>9</sup> Readdy [83].

<sup>10</sup> Readdy [84]-[90].

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**).<sup>11</sup>

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
- (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.<sup>12</sup>

2.15 A summary of the assets proposed to be transferred to Sea Swift in each of FNQ and NT is contained in Annexure SW-18 to the statement of Scott Woodward.

**(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 <sup>13</sup>	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

<sup>11</sup> Readdy [85].

<sup>12</sup> Readdy [91].

<sup>13</sup> Martin, Annexure ATM-1 at Table ATM-1.



**(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.

**(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.

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### **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.**

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.<sup>14</sup>

3.2 Completion of 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.<sup>15</sup>

3.3 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

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<sup>14</sup> Readdy [82].

<sup>15</sup> Readdy [96].

renegotiate the Original Proposed Transaction to extend the sunset date and make other changes.<sup>16</sup>

- 3.4 On 26 June 2015, the parties executed an Amended Asset and Share Sale Agreement (**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.<sup>17</sup> A copy of the Amended Sale Agreement is contained in Annexures PSR-14 and PSR-15 to the statement of Paul Readdy.
- 3.5 On 9 July 2015, the ACCC advised that it would not grant informal clearance.<sup>18</sup>
- 3.6 On 21 September 2015, the parties executed a side deed amending certain clauses of the Amended Asset and Share Sale Agreement (taken together, the **Proposed Transaction**). 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 statement of Paul Readdy.<sup>19</sup>
- 3.7 Under the Proposed Transaction, Sea Swift is to provide Toll with the following consideration:
- (a) [REDACTED] (including upfront and deferred consideration) plus the value of fuel held on each vessel; and
  - (b) 20% of the issued securities in Sea Swift (Holdings) Pty Limited.<sup>20</sup>
- 3.8 Sea Swift requests that the Tribunal grant authorisation of the Proposed Transaction on the conditions set out in **Annexure A (the Conditions)**. The following is a summary of those conditions:
- (a) 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,

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<sup>16</sup> Readdy [98]-[105].

<sup>17</sup> Readdy [112].

<sup>18</sup> Readdy [130] and [132].

<sup>19</sup> Readdy [133].

<sup>20</sup> Readdy [115]-[118].

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

(b) 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 of the Conditions; and
- (ii) maintain an up-to-date shipping schedule of services on its website,

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

(c) Sea Swift will:

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

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

3.9 The effect of the Remote Community Price Condition is that for all non-contracted or custom rate customers, Sea Swift would commit to charging no more than:

- (a) Sea Swift's current scheduled rates as at 1 August 2015 in FNQ; and
- (b) TML's current scheduled rates as at 1 August 2015 in the NT,

subject to publicly indexed cost price increases.

3.10 The Conditions set out an Independent Price Review process for any price increase that Sea Swift might seek above these publicly indexed cost price increases.

3.11 The Remote Community Service and Price Conditions are intended to ensure that the most vulnerable customers of marine freight services in the NT and FNQ are not subject to arbitrary price increases. These Customers will remain able to negotiate custom rates or discounts on prices.

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

- (a) to release the two charter vessels it 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*, 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**

3.13 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] [REDACTED] and [REDACTED] [REDACTED].<sup>21</sup>

3.14 The commercial rationale of 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 profitability. 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.<sup>22</sup> 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.<sup>23</sup> A copy of the White Paper prepared by Champ Ventures (the majority shareholder of Sea Swift) which sets out the business case for the acquisition of TML is contained in Annexure PSR-3 to the statement of Paul Readdy.

3.15 The commercial rationale of the Proposed Transaction for Toll is that, given the 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.<sup>24</sup> It also provides Toll with the ability to achieve an orderly exit which minimises potential disruption for its customers and ensures continuity of services.<sup>25</sup> 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.

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<sup>21</sup> Kruger [4.3].

<sup>22</sup> White [211], Readdy [73]-[74].

<sup>23</sup> White [214], Readdy [73].

<sup>24</sup> Kruger [6.4], [7.1]-[7.4].

<sup>25</sup> Kruger [7.4], Woodward [13.7].

3.16 As referred to above in section 3(a), partway through the ACCC informal merger clearance process the Sale Agreement was renegotiated and extended. At that time, Sea Swift was aware that TML had indicated to its customers that its intention was to exit its operations in the NT and FNQ if the transaction did not proceed.<sup>26</sup> In February 2015, TML sent a letter to its customers which stated that TML was left with two choices. These were to pursue the transaction with Sea Swift, or wind up the business and sell its assets. A copy of this letter is contained in Annexure PSR-16 to the statement of Paul Readdy.<sup>27</sup>

3.17 At that time, Sea Swift considered whether to just let TML exit by allowing the Sale Agreement sunset date to lapse. However, Sea Swift elected to amend and extend the Sale Agreement, subject to a revised and reduced consideration, as:

- (a) it had not yet received a decision from the ACCC and significant effort and cost had been spent getting the deal to that point;
- (b) there remained a risk (particularly given Toll's size and the fact that it had been recently purchased by Japan Post), that if the deal did not go ahead, Toll would continue to subsidise the TML business and incur losses for a period, in which case Sea Swift's unsustainable position would be subject to continuing uncertainty;
- (c) as with the Original Proposed Transaction, the revised deal gave Sea Swift the certainty of TML's recurring revenue stream (in the case of TML exiting, it was not certain that Sea Swift would obtain the TML assets or customers); and
- (d) there was value to Sea Swift in the handover of the assets of the TML business being orderly, rather than if TML exited the market without such a deal.<sup>28</sup>

3.18 The value that Sea Swift attributed to the orderly handover of the assets that formed part of the TML business was 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;

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<sup>26</sup> Readdy [112]-[120].

<sup>27</sup> Readdy [120].

<sup>28</sup> Readdy [121].

- (c) TML's 20% 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) acquiring the contracts and vessels as a package gives Sea Swift's business greater certainty of securing additional funding in the short term, which would not be available if Sea Swift were to obtain the assets in a wind-up scenario.<sup>29</sup>

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

3.19 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.<sup>30</sup>

3.20 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]<sup>31</sup>

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## 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.

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<sup>29</sup> Readdy [122].

<sup>30</sup> Woodward [6.51].

<sup>31</sup> White [218], Readdy [122].

- 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 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 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.<sup>32</sup> 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.<sup>33</sup>

#### 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.<sup>34</sup>
- 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

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<sup>32</sup> Bruno [22].

<sup>33</sup> White [24]-[25].

<sup>34</sup> Bruno [82].

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.<sup>35</sup> Since approximately October 2014 it has ceased some of those services.

4.11 Sea Swift also competes to provide charter/project services in the NT.

#### Toll'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.<sup>36</sup> TML's main depot is in Darwin, and from there it ships to the remote communities.<sup>37</sup> Toll also competes to provide charter/project services in the NT.<sup>38</sup>

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.<sup>39</sup>

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 FNQ and continues to do so.<sup>40</sup> TML also competes to provide charter/project services in FNQ.<sup>41</sup>

#### **(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:

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<sup>35</sup> White [119].

<sup>36</sup> Woodward [4.1]-[4.2].

<sup>37</sup> Woodward [5.13].

<sup>38</sup> Woodward [4.11]-[4.12].

<sup>39</sup> White [86].

<sup>40</sup> Woodward [4.8], [5.4], [5.13].

<sup>41</sup> Woodward [4.11]-[4.12].



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
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.<sup>42</sup>

4.17 Sea Swift and TML currently both provide a scheduled service in NT, although Sea Swift's service has recently been reduced. 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
Maningrida	Weekly	Weekly
Milikapiti	Weekly	-
Milingimbi	-	Weekly
Nguiu	Twice weekly	-
Numbulwar	-	Weekly
Paru	Twice weekly	-
Port Keats	Weekly (wet season only)	-
Ramingining	-	Weekly
Umbakumba	Weekly	Fortnightly

4.18 In the NT, Sea Swift and TML both have depot facilities in Darwin and Gove.<sup>43</sup>

<sup>42</sup> Bruno [82]-[87], Woodward [6.40].

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.<sup>44</sup> TML also competes to provide charter/project services in both FNQ and the NT.<sup>45</sup>

**(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.<sup>46</sup>

4.21 As noted above, in 2013 Sea Swift acquired the Tiwi Barge business in the NT.<sup>47</sup> Sea Swift also acquired certain assets of Silentworld Shipping in FNQ in 2012.<sup>48</sup>

4.22 In addition, in 2013 Bhagwhan Marine acquired Workboats Northern Australia in the NT.<sup>49</sup>

**(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;<sup>50</sup>
- (b) Sea Swift has chartered TML's *Biquele Bay* vessel for a temporary period due to the docking of one its own vessels;<sup>51</sup>

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<sup>43</sup> Bruno [88]-[90], Woodward [6.41].

<sup>44</sup> Bruno [33]-[34],

<sup>45</sup> Woodward [4.11].

<sup>46</sup> Woodward [4.1].

<sup>47</sup> White [102].

<sup>48</sup> White [158].

<sup>49</sup> White [175].

<sup>50</sup> Woodward [6.32].

<sup>51</sup> Woodward [6.5].

- (c) Toll has subcontracted to Sea Swift the performance of a customer contract held by the TML business in FNQ, with IBIS;<sup>52</sup>
- (d) Toll 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,<sup>53</sup> and
- (e) Toll 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 backup for unforeseen events and allows for remote ports to continue receiving essential supplies.<sup>54</sup>

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

4.24 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.<sup>55</sup>

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## 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:

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<sup>52</sup> Woodward [7.29].

<sup>53</sup> Woodward [14.2].

<sup>54</sup> Woodward [14.2(e)].

<sup>55</sup> Woodward [14.3(f)].

- (i) FNQ; and
  - (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;<sup>56</sup>
- (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;<sup>57</sup> 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;
  - (iii) depot-to-depot (rather than depot-to-door) services; and

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<sup>56</sup> White [31], [62]-[63], [65].

<sup>57</sup> Bruno [114], White [32].

- (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.<sup>58</sup> 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 suggest that the relevant product market includes all coastal and community marine freight services.<sup>59</sup>

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,<sup>60</sup> including:

- (a) in FNQ, Weipa, Thursday Island, Bamaga and Seisia, 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.<sup>61</sup> The NT region is 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.<sup>62</sup>

5.6 The potential for suppliers to redeploy vessels and equipment between regions and to access or establish facilities in different regions<sup>63</sup> provides competitive constraint on operators in either region. A supplier in FNQ provides a constraint on a supplier in the NT

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<sup>58</sup> White [62].

<sup>59</sup> Bruno [143], [144].

<sup>60</sup> Bruno [200].

<sup>61</sup> Bruno [114].

<sup>62</sup> Woodward [5.22].

<sup>63</sup> Bruno [143]-[144].

and vice versa. A good example of this is the entry by Toll 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.<sup>64</sup>
- 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,<sup>65</sup> 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.

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## 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

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<sup>64</sup> Bruno [160].

<sup>65</sup> White [190]-[191].

(d) staff.<sup>66</sup>

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.<sup>67</sup>

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

#### 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 *Cossak* and *Comal III*; and

(b) three vessels in the NT, all landing craft: the *Tiwi Islander*, *Malu Trader* and *Malu Explorer*,<sup>68</sup>

(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,<sup>69</sup>

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<sup>66</sup> Bruno [54]-[59], [80]-[87], [86]-[96].

<sup>67</sup> Bruno [57, Woodward [5.21].

<sup>68</sup> Bruno [53]-[55].

<sup>69</sup> Bruno [80]-[81], [91]-[96].



- (d) various landing facilities which are largely common user facilities (Sea Swift only operates a private landing facility in Darwin, and currently has exclusive access to a further landing facility in Gove, being the Gove Yacht Club boat ramp);<sup>70</sup> and
- (e) staff.<sup>71</sup>

6.5 A detailed description of these Sea Swift inputs is set out in the Statement of Lino Bruno at paragraphs 37 to 140.

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 FY15.<sup>72</sup> The percentages add up to greater than 100% as the business is currently loss making.

Sea Swift costs as a % of total revenue for FY15		
Description	FNQ	NT

<sup>70</sup> Bruno [82]-[90].

<sup>71</sup> Bruno [103]-[111].

<sup>72</sup> Ferguson [149] and Confidential Annexure NAF-4.

Sea Swift costs as a % of total revenue for FY15

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.<sup>73</sup>
- (a) two vessels in FNQ, the *Toll Fourcroy* and *Toll Warrender*, and three vessels in the NT, the *Toll Coral Bay* and the chartered *Toll Territorian* and *Bimah Tujuh*, which comprise landing craft and general cargo vessels;
  - (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 (Toll only operates private wharf facilities in Darwin and at Gove in the NT); and
  - (d) staff.
- 6.8 An additional vessel owned by the TML business, 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. Sea Swift recently chartered this vessel on a temporary basis due to one of its vessels being docked.<sup>74</sup>
- 6.9 A detailed description of these TML assets and inputs in the NT and FNQ is set out in the Statement of Scott Woodward at paragraphs 6.1 to 6.51.

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<sup>73</sup> Woodward [4.10] and Section 6.

<sup>74</sup> Woodward [6.5].

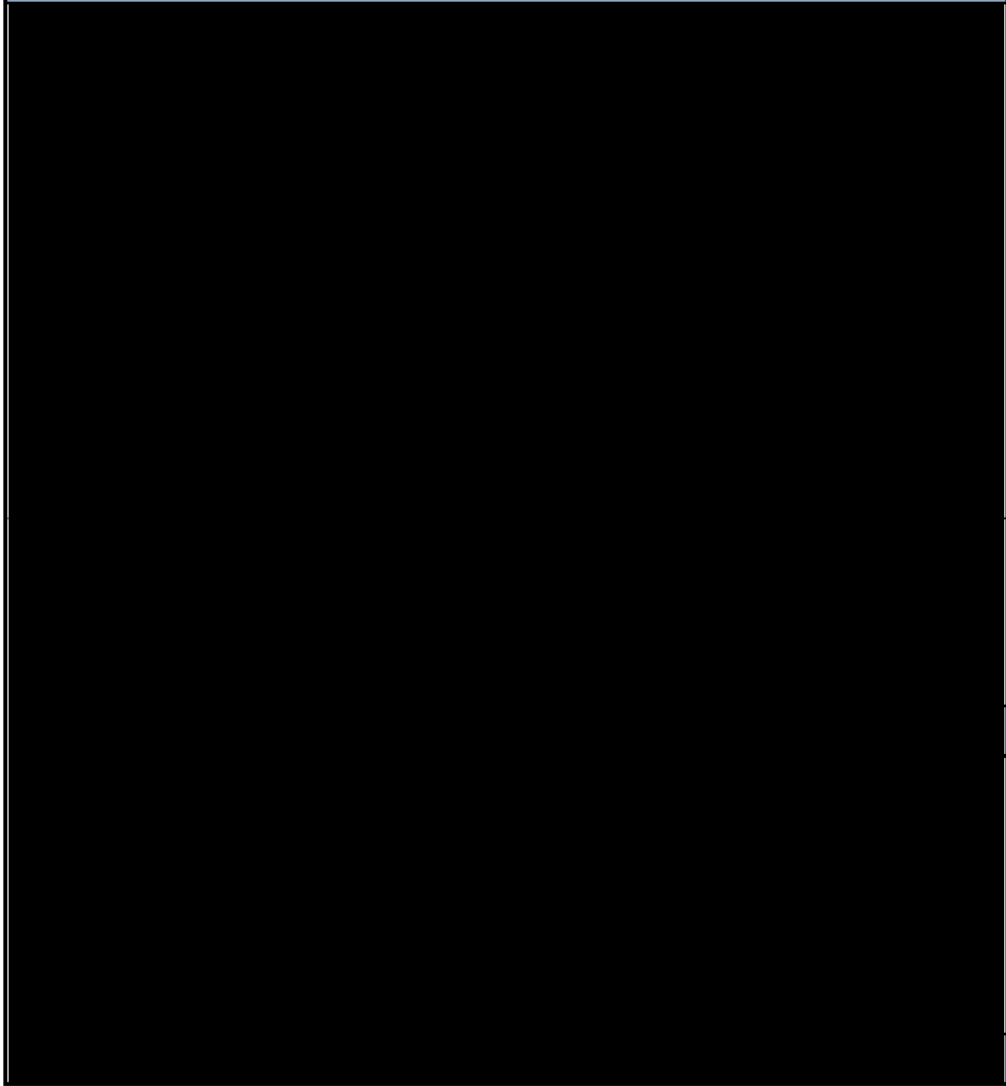
6.10 The table below sets out the various costs of the vessels and landside assets as a proportion of total revenue for TML's combined FNQ and NT operations in FY15.<sup>75</sup> The percentages add up to greater than 100% as the business is currently loss making.

TML's costs as a % of Total Revenue for FY15	
Direct - Vessel Costs (excl. Depreciation)	

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<sup>75</sup> Woodward [6.9].

**TML's costs as a % of Total Revenue for FY15**



**(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;<sup>76</sup>
- (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;<sup>77</sup> 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.<sup>78</sup>

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.<sup>79</sup>

- (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 Sea Swift currently charters two vessels:

- (a) In FNQ, Sea Swift is currently chartering the *BBC Holland* under a two month time charter (which involves the lease of the vessel and crew) to replace the *Newcastle Bay* which is currently docked;<sup>80</sup> and
- (b) in the NT, Sea Swift is currently chartering the *Biquele Bay*, a Toll vessel, under a bareboat charter arrangement due to conclude on 30 September 2015.<sup>81</sup>

6.14 These arrangements are short term, and will not continue post-acquisition, although Sea Swift will be acquiring the *Biquele Bay* as part of the Proposed Transaction. [REDACTED]

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<sup>76</sup> Bruno Annexure PB-38 and PB-39.

<sup>77</sup> Bruno Annexure PB-40.

<sup>78</sup> Bruno Annexure PB-45.

<sup>79</sup> Bruno [111].

<sup>80</sup> Bruno [57].

<sup>81</sup> Bruno [57].

[REDACTED]  
[REDACTED]<sup>82</sup>

6.15 Toll 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. Toll also currently charters the *Territorian* from Australian Offshore Solutions under a bareboat charter. Toll 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.<sup>83</sup>

#### Owned vessels

6.16 Post-acquisition, three Toll vessels (*Biquele Bay*, *Coral Bay* and *Fourcroy*) will be transferred to Sea Swift. [REDACTED]

[REDACTED]  
[REDACTED]<sup>84</sup>

6.17 Post-acquisition, as noted above, Toll is proposing to commit to implementing a process to sell its remaining vessel, the *Warrender*, [REDACTED]  
[REDACTED] Toll intends to sell the *Warrender* in a timely manner and at fair market value and accordingly [REDACTED]

[REDACTED]  
[REDACTED]<sup>85</sup>

#### Landing facilities

6.18 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.<sup>86</sup> [REDACTED]

[REDACTED]<sup>87</sup>

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<sup>82</sup> White, Confidential Annexure FW-32.

<sup>83</sup> Woodward [6.7].

<sup>84</sup> White, Confidential Annexure FW-32.

<sup>85</sup> Woodward [6.7].

<sup>86</sup> Bruno [117], [119].

<sup>87</sup> White [135], [220].

6.19 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.<sup>88</sup> There will be no transfer of any access rights to these facilities as part of the Proposed Transaction. Toll will simply cease to access the landing facilities to provide scheduled services post-acquisition.<sup>89</sup>

6.20 In Darwin, Toll 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.<sup>90</sup> [REDACTED]

6.21 In Gove, Toll operates on land which is leased to it. That lease includes the wharf at Gove. The Gove Lease will be transferred to Sea Swift as part of the Proposed Transaction.<sup>91</sup>

Shore side infrastructure and equipment

6.22 TML operates certain shore side infrastructure (such as depots, storage or laydown areas) 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.<sup>92</sup>

6.23 The warehousing and depot infrastructure and mobile equipment used by the TML business 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 statement of Scott Woodward.

6.24 [REDACTED]

(a) [REDACTED] and [REDACTED]

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<sup>88</sup> Woodward [6.15].

<sup>89</sup> Woodward [6.20].

<sup>90</sup> Woodward [6.21].

<sup>91</sup> Woodward [6.23].

<sup>92</sup> Woodward [6.38]-[6.41].

(b) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>93</sup>

Staff

6.25 No employees are to be transferred as part of the Proposed Transaction.<sup>94</sup>

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## 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; and
- (c) Silentworld Shipping (exited in 2012 but still operating in the Solomon Islands).<sup>95</sup>

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

- (a) Barge Express;
- (b) ShoreBarge;
- (c) Ezion/Teras; and
- (d) Bhagwan Marine.<sup>96</sup>

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

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<sup>93</sup> White Confidential Annexure FW-32.

<sup>94</sup> Woodward [6.47], Raddy [84].

<sup>95</sup> White [142]-[146] and [151]-[160], Woodward [8.6].

<sup>96</sup> White [161]-[181], Woodward [8.26].



scheduled service (and in some instances, have already done so). This can be seen from the following.<sup>97</sup>

- (a) Ezion/Teras provides a scheduled service between Darwin and the Tiwi Islands and between Darwin and Port Keats;
- (b) Carpentaria Contracting provides a scheduled service between Weipa and Aurukun during the wet season;
- (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,<sup>98</sup>
- (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.

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:<sup>99</sup>

- (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.<sup>100</sup> Other large customers have multi-destination contracts which may include the above routes as well as more remote communities.<sup>101</sup>

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<sup>97</sup> Woodward [8.6].

<sup>98</sup> Woodward [6.6].

<sup>99</sup> White [183].

<sup>100</sup> White [184].

<sup>101</sup> White [186].

- 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.<sup>102</sup>
- 7.7 For these reasons, the full service operators (currently, Toll and Sea Swift) are constrained by operators that do not currently operate a full service business. The full service operators are constrained because the 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.<sup>103</sup>
- 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.<sup>104</sup>

**(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.

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<sup>102</sup> White [182]-[197].

<sup>103</sup> White [203]-[205].

<sup>104</sup> White [193].

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## 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.

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.<sup>105</sup>

Customer	Supplier	Region	Contact details	Value (FY15 Revenue)
Rio Tinto Alcan - Gove	Toll	FNQ		
Rio Tinto Alcan - Weipa	Sea Swift	NT		
South 32 (formerly BHP) GEMCO	Toll	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.<sup>106</sup>

Customer	Supplier	Region	Contact details	Value (FY15 Revenue)
Ergon Energy	Sea Swift	FNQ		

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<sup>105</sup> Woodward [7.4(a)], White [34(a)], Bruno [161]-[163].

<sup>106</sup> Woodward [7.4(d)], White [34(b)], Bruno [161]-[163].

Customer	Supplier	Region	Contact details	Value (FY15 Revenue)
Caltex Australia (fuel supplier to Ergon Energy)	Sea Swift	FNQ		
PUMA (fuel supplier to NT Power and Water Corporation)	Toll	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.<sup>107</sup>

Customer	Supplier	Region	Contact details	Value (FY15 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 Council	Sea Swift	NT		

<sup>107</sup> Woodward [7.4(c)], White [34(d)] – [34(e)].

Customer	Supplier	Region	Contact details	Value (FY15 Revenue)
	Toll	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.<sup>108</sup>

Customer	Supplier	Region	Contact details	Value (FY15 Revenue)
Woolworths – Weipa	Sea Swift	FNQ		
Woolworths – Gove	Sea Swift	NT		
ALPA	Toll	NT/FNQ		
IBIS	Toll	FNQ		
	Toll	NT		

<sup>108</sup> Woodward [7.4(b)], White [34(c)], Bruno [161] -[163].

Customer	Supplier	Region	Contact details	Value (FY15 Revenue)

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.<sup>109</sup>

Customer	Supplier	Region	Contact details	Value (FY15 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		
Kamayan Café	Sea Swift	NT		
	Toll	FNQ		
	Toll	NT		

<sup>109</sup> Woodward [7.22] and Annexure SW-21.

Customer	Supplier	Region	Contact details	Value (FY15 Revenue)
	Toll	NT		
	Toll	NT		
	Toll	FNQ		
	Toll	FNQ		
	Toll	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 statement of Scott Woodward.

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

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## 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 estimate charter / project services.

### Far North Queensland

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



Operator	Area	FY2011	FY2012	FY2013	FY2014	FY2015
TML	OTSI					
	TI/HI/NPA					
	WEIPA					
Other operators	OTSI					
	TI/HI/NPA					
	WEIPA					
Basis for estimate		Sea Swift was the primary provider of scheduled services to the OTSI, TI/HI & NPA	Sea Swift grows its Weipa business	Sea Swift continues to grows its Weipa business	Sea Swift secures major contracts in Weipa – RTA & WoW TML entry into OTSI, TI/HI & NPA	TML secures IBIS contract

### 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	-	-			
	Groote	-	-			
	ROM	-	-			
Basis for estimate		No estimate, as Sea Swift was not operating	No estimate, as Sea Swift was not operating	Sea Swift acquires Tiwi Barge	Sea Swift secures WoW Gove contract, BP contract and Caltex fuel haulage contract	Sea Swift rationalises fleet and focuses on communities in Gove & Groote  TML wins PUMA fuel haulage contract

## 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.<sup>110</sup>
- 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.<sup>111</sup>
- 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.<sup>112</sup>

### 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.<sup>113</sup> As a result, customers who are dissatisfied with the services provided following the Proposed Transaction will have ample opportunity to change providers (or threaten to change providers) if they wish.<sup>114</sup>
- 10.7 These larger customers include:

- (a) Woolworths;

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<sup>110</sup> Bruno [71]-[78], [97]-[102], [112]-[113] and [140].

<sup>111</sup> Bruno [71]-[76], Woodward [8.10].

<sup>112</sup> White [182]-[197].

<sup>113</sup> White [190]-[192].

<sup>114</sup> White [194].

- (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.<sup>115</sup>

10.9 The consent of TML's customers is needed to assign and novate their customer agreements as part of the Proposed Transaction.<sup>116</sup> 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. This 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 publicly indexed cost price increases, with any 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.<sup>117</sup>

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<sup>115</sup> Bruno [176], [179].

<sup>116</sup> Woodward [7.31].

<sup>117</sup> White [227].

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## 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.

- (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.

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## 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.

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## 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.<sup>118</sup>

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,<sup>119</sup> 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.<sup>120</sup>

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<sup>118</sup> White [142]-[186] and [193], Bruno [143]-[144].

<sup>119</sup> Woodward [8.3]-[8.4], Woodward Annexure SW-25.

<sup>120</sup> Bruno [71], [91] and [97].

- 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.<sup>121</sup>
- 13.4 The key inputs that a new entrant, being someone who is not already an existing provider of charter services or partial 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 available to purchase or lease at short notice and at a wide range of costs depending on size and age;<sup>122</sup>
  - (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;<sup>123</sup>
  - (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;<sup>124</sup>
  - (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;<sup>125</sup>
  - (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

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<sup>121</sup> White [190]-[192].

<sup>122</sup> Bruno [37],[70]-[78], Woodward [6.8]-[6.11].

<sup>123</sup> Bruno [39]-[51].

<sup>124</sup> Bruno [97]-[102], Woodward [6.44].

<sup>125</sup> Bruno [112]-[113].

of TML's facility in Gove, where alternative landing facilities are available.<sup>126</sup> Fees for landing facilities vary considerably but are not overly expensive,<sup>127</sup> 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.<sup>128</sup>

**(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 and 7.2 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 and Carpentaria Freight; and
- (b) **in the NT:** Barge Express, ShoreBarge, Ezion / Teras and Bhagwan Marine.<sup>129</sup>

13.6 In the past, a number of suppliers and potential suppliers in the FNQ and NT markets have bid for or won 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;<sup>130</sup>
- (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;<sup>131</sup>

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<sup>126</sup> Woodward [6.14]-[6.20].

<sup>127</sup> Bruno [114]-[141].

<sup>128</sup> White [200]-[205], Woodward [8.6].

<sup>129</sup> Woodward [8.24]-[8.25].

<sup>130</sup> White [166]-[168].

<sup>131</sup> White [101].



- (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;<sup>132</sup>
- (d) in 2013 Workboats Northern Australia (recently acquired by Bhagwan Marine) bid against Sea Swift and Toll for the Rio Tinto contract in Weipa FNQ, though it was unsuccessful;<sup>133</sup>
- (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;<sup>134</sup> and
- (f) in 2014 Barge Express bid against Sea Swift, Toll and others for the Puma subcontract to provide fuel services to remote power stations operated by NT Power & Water.<sup>135</sup>

13.7 The Australian government has announced plans to reform coastal shipping to allow international operators to participate in the domestic shipping industry, including by providing coastal and community freight services in FNQ and the NT. The *Shipping Legislation Amendment Bill 2015* implementing this change was introduced on 25 June 2015 and was referred to the Senate Rural and Regional Affairs and Transport Legislation Committee for inquiry and report by 12 October 2015.<sup>136</sup>

**(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**

13.8 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.

13.9 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 █████ of the available volume, Sea Swift was unable to make its

<sup>132</sup> Woodward [8.6], White [169]-[173].

<sup>133</sup> White [174].

<sup>134</sup> White [142]-[146].

<sup>135</sup> White [161]-[164].

<sup>136</sup> Woodward [8.13]-[8.14].

scheduled service economically sustainable, and over the course of 2014 reduced its services in the NT to a 3 vessel operation, such that it is now only providing scheduled services to some communities in NT.<sup>137</sup>

13.10 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.<sup>138</sup> Apart from one contract (subcontracted to Sea Swift), Toll does not have any other larger customer contracts in FNQ and its FNQ operations are heavily loss making.<sup>139</sup>

13.11 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 maintain a sustainable operation and sold certain assets and transferred certain contracts to Sea Swift in 2012.<sup>140</sup>

13.12 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.

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## 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.<sup>141</sup>

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## 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

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<sup>137</sup> White [102], [114], [115], [118]-[119], [138], [203]-[205]; Ferguson [160]-[167].

<sup>138</sup> Woodward [9.2]-[9.3].

<sup>139</sup> Woodward [7.29], [9.8]-[9.10].

<sup>140</sup> White [157]-[158].

<sup>141</sup> White [74]-[77], Bruno [191]-[196].

- 15.1 TML is not a vigorous and effective competitor because its operations 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.<sup>142</sup>
- 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.<sup>143</sup> 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 business.<sup>144</sup> 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.<sup>145</sup>
- 15.5 Toll's intention is that it will exit the relevant markets as soon as possible following a decision by the Tribunal not to grant authorisation.<sup>146</sup> As part of this exit, Toll intends to [REDACTED]  
[REDACTED]  
[REDACTED] When TML's 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 assets will be to other suppliers in FNQ or the NT. The assets may well be sold overseas.
- 15.6 Proceeding with a wind up of the TML business in the absence of the Proposed Transaction has already been discussed, in principle, by the Toll Board in or around

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<sup>142</sup> Woodward [13.1], [13.8]-[13.10], Jackson [8.1], Kruger [7.1]-[7.4].

<sup>143</sup> Kruger [7.1].

<sup>144</sup> Woodward [13.1], [13.3]-[13.4].

<sup>145</sup> Woodward [13.1], Jackson [8.1].

<sup>146</sup> Woodward [13.4].

<sup>147</sup> Woodward [13.4]-[13.9].

August 2014, when it considered and made a recommendation as to pursuing discussions with Sea Swift regarding the Proposed Transaction.<sup>148</sup>

15.7 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] in FY2015.<sup>149</sup>

15.8 Although Toll has not prepared a full year forecast for the TML business in NT and FNQ for the 2016 financial year, losses are forecast to continue for so long as the TML business continues to operate, with a forecast EBITDA, until 30 November 2015, of [REDACTED].<sup>150</sup>

15.9 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.<sup>151</sup>

15.10 [REDACTED]  
[REDACTED].<sup>152</sup>

15.11 As a result of TML's poor financial performance, Toll has implemented a range of restructuring measures over the last few years designed to improve the profitability of the TML business. There are no further cost-cutting or efficiency-improving measures available to Toll that could meaningfully affect profitability.<sup>153</sup>

15.12 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.

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<sup>148</sup> Kruger [5.7]-[5.14].

<sup>149</sup> Woodward [11.8].

<sup>150</sup> Woodward [11.9].

<sup>151</sup> Woodward [11.11].

<sup>152</sup> Woodward [11.12]-[11.24].

<sup>153</sup> Woodward [12.1]-[12.7].

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## 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 TML<sup>154</sup> 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.

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;<sup>155</sup>
- (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;<sup>156</sup> and
- (c) the 'Catalina' ramp, located approximately 14km from the town of Nhulunbuy.<sup>157</sup>

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<sup>154</sup> Bruno [120].

<sup>155</sup> Woodward [6.36], White [127].

<sup>156</sup> Woodward [6.36], White [127], [131].

<sup>157</sup> Woodward [6.36].

- 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 that wharf when it commenced operations in Gove. Rather, Sea Swift operated 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 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.

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## 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 two categories, contracted and uncontracted.
- 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.<sup>158</sup>
- 17.3 For uncontracted customers, TML and Sea Swift generally offer scheduled rates. These rates are offered to customers seeking services on a spot basis, [REDACTED]  
[REDACTED]<sup>159</sup> Scheduled rates are generally set according to the type of freight to be shipped (i.e. dry freight, refrigerated freight, or vehicles) and the delivery destination.
- 17.4 Details of Sea Swift's scheduled rates for 2010–2015 are set out in Confidential Annexure PB-73 to the statement of Pasquale Bruno.<sup>160</sup> Sea Swift's average general freight rates for FY2012–FY2015 are set out in Schedule A to the statement of Nancy Ferguson.

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<sup>158</sup> White [191], Woodward [7.24].

<sup>159</sup> Bruno [177]-[178], Woodward [7.23].

<sup>160</sup> Bruno [180].

17.5 Details of TML's current scheduled rates as at 1 September 2015 are set out in Confidential Annexure SW-22 to the statement of Scott Woodward. Toll's general freight rates over the past five years are set out in Confidential Annexure SW-23 to the statement of Scott Woodward.<sup>161</sup>

**(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)**

17.6 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.

17.7 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 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.<sup>162</sup>

17.8 Both parties also incur administration and overhead costs associated with providing the services.<sup>163</sup>

17.9 A breakdown of Sea Swift's consolidated and divisional costs is set out in Confidential Annexure NAF-7 to the statement of Nancy Ferguson.

17.10 A breakdown of TML's costs in FY2015 in the NT and FNQ is set out in Confidential Annexure SW-17 to the statement of Scott Woodward.<sup>164</sup>

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<sup>161</sup> Woodward [7.25].

<sup>162</sup> Ferguson [21].

<sup>163</sup> Ferguson [32]-[149], Woodward [10.1]-[10.4].

<sup>164</sup> Woodward [10.2].

**(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)**

17.11 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 publicly indexed cost price increases).

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

17.12 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**

17.13 Sea Swift is currently operating a reduced service in the NT on a break-even basis, and has been operating a full service in FNQ on a negative EBIT basis.<sup>165</sup> Following the Proposed Transaction, Sea Swift expects that its operations will return to a sustainable

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<sup>165</sup> Ferguson [22]-[23].



position given the additional revenue stream and only marginal increase in its costs to run the additional services.<sup>166</sup>

17.14 A breakdown of Sea Swift's consolidated and divisional profits and losses for FY2012–2016 are set out in Confidential Annexures NAF-1 and NAF-2 to the statement of Nancy Ferguson.

17.15 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;
- (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.

17.16 TML's operations in the NT and FNQ have generated significant cash losses in recent years.<sup>167</sup> The Proposed Transaction will allow Toll to realise value from this loss-making business.

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## 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**

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<sup>166</sup> White [214].

<sup>167</sup> Woodward [11.10].

**competitors to compete, including foreclosure of access to distribution by the merged entity's competitors**

18.3 Not applicable.

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## **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 unlikely to be any lessening of competition as a result of the Proposed Transaction. The Proposed Transaction is unlikely to 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.

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## **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.

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## **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 Toll'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.<sup>168</sup>

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.<sup>169</sup>

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.<sup>170</sup> 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 Toll 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]

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<sup>168</sup> White [210], Woodward [7.31].

<sup>169</sup> White [218], Woodward [13.6]-[13.7].

<sup>170</sup> White [218].

<sup>171</sup> Woodward [13.5]-[13.6]

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 uncontracted customers

21.7 The remaining customers, being uncontracted 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:<sup>172</sup>

- (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 customers that are uncontracted, and 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 provides a public benefit because certainty of supply is highly valued by these remote communities.

21.10 Sea Swift's commitments to service and pricing are of real public benefit in circumstances where, if the Proposed Transaction does not go ahead, Toll will exit the markets in any case (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.

21.11 Under the Remote Community Pricing Condition, the maximum rates that Sea Swift can charge for its services will be capped at:

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<sup>172</sup> White [227], see also the Conditions set out in Annexure A to this Application.

- (a) for customers in the NT, the current scheduled rates of TML; and
  - (b) for customers in FNQ, the current scheduled rates of Sea Swift,
- subject to publicly indexed cost price increases.

21.12 If Sea Swift wishes to increase its prices above publicly indexed cost price increases, 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.

21.13 Under this condition, the most vulnerable communities in both the NT and FNQ are protected by a price cap for their marine freight services for the term of the Conditions.<sup>173</sup>

#### Public benefits arising from the orderly exit of Toll

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;<sup>174</sup>
- (b) TML's customers will face minimal disruption to their services,<sup>175</sup> and
- (c) Toll will minimise the potential for damage to its reputation and customer relationships.<sup>176</sup>

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.<sup>177</sup>

21.16 Allowing Toll 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.

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<sup>173</sup> White [227].

<sup>174</sup> Woodward [13.7].

<sup>175</sup> Kruger [7.4], Woodward [7.31], [13.7].

<sup>176</sup> Kruger [7.4], Woodward [7.31], [13.7].

<sup>177</sup> Kruger [7.4], Woodward [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.<sup>178</sup>

21.18 As a result of the Proposed Transaction, the costs associated with running two full services 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.<sup>179</sup> This is also a public benefit which relates to the international competitiveness of the Australian marine freight industry. Proposed changes to legislation would lead to the possibility of international companies entering into the market. A sustainable (and therefore internationally competitive) Australian provider is a public benefit in light of those potential changes.

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## 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 commence implementing steps to wind up the TML business in the NT and FNQ and exit the relevant markets as soon as possible (as set out in section 15 above).<sup>180</sup>

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.

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<sup>178</sup> White [214], Readdy [73].

<sup>179</sup> White [215], Readdy [74].

<sup>180</sup> Woodward [13.1], [13.8]-[13.10], Jackson [8.1] and Kruger [7.1]-[7.4].

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## 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.

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## 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.<sup>181</sup>

**(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.

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<sup>181</sup> Martin [5.2].

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## 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.

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## 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.

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## 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](mailto:lwoodward@gtlaw.com)



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## 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 21/09/2015

Signed by/on behalf of the Target



(Signature)

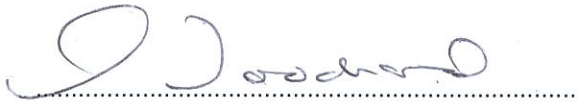
Geoff Carter, Partner, Minter Ellison  
(Full Name) (for and on behalf of Toll Holdings Ltd)

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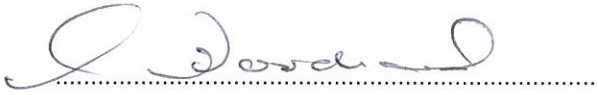
## 29 Declaration

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 (on behalf of the Applicant)



Solicitor of the applicant



Name of authorised person

Date: 21 September 2015