

# AUSTRALIAN COMPETITION TRIBUNAL

## Application by Sea Swift Pty Limited [2016] ACompT 9

File No: ACT 2 of 2016

Re: Application for merger authorisation of the proposed acquisition of certain assets of Toll Marine Logistics Australia's marine freight operations

Applicant: Sea Swift Pty Limited

Tribunal: Justice Farrell, Deputy President  
Mr R Davey, Member  
Professor D K Round, Member

Date: 1 July 2016

### **BACKGROUND TO THE TRIBUNAL'S DETERMINATION (To be read with the Tribunal's Determination dated 1 July 2016)**

This background to, and summary of, the Tribunal's Determination made on 1 July 2016 does not form part of the Determination nor is it part of the Tribunal's statement of its reasons for the Determination. The only authoritative statement of the Tribunal's reasons will be those that are contained in the Reasons for Determination to be published on the Tribunal's web site: [www.competitiontribunal.gov.au](http://www.competitiontribunal.gov.au)

#### **The Application**

On 4 April 2016, Sea Swift Pty Limited ("Sea Swift") made an application to the Tribunal under section 95AU of the *Competition and Consumer Act 2010* ("the Act") for an authorisation under section 95AT(1) to acquire shares in, and the assets of, the Toll entities listed in paragraphs 1(a) and (b) of the Determination ("Proposed Acquisition").

Each of those entities is a subsidiary of Perkins Industries Pty Ltd, which is wholly owned by Perkins Group Holdings Pty Ltd, which in turn is wholly owned by Toll Holdings Ltd ("Toll"), the ultimate Australian parent company for the Toll Group.

Both Sea Swift and Toll provide scheduled marine freight services and marine freight charter services in the Northern Territory and Far North Queensland (including Thursday Island and the Outer Torres Strait Islands). The Toll entities trade as Toll Marine Logistics ("TML") Australia.

Sea Swift and Toll offer scheduled services in those areas from bases in Darwin and Cairns, and carry marine freight to a large number of destinations in these areas, often through a 'hub and spoke' system (e.g. Thursday Island serves as a 'hub' from which services are provided to 'spokes', being the communities living on the Outer Torres Strait Islands). The scheduled services deliver essential items such as food, fuel, and medical and educational supplies to remote communities along these routes.

Sea Swift and Toll also provide charter marine freight services in those areas. Those services mainly involve the carriage of different, and usually bulky, goods such as construction and mining equipment, which cannot easily be supplied on regular scheduled services and are generally carried from point to point with no intermediate stops.

While some remote communities in the areas serviced by Sea Swift and Toll are accessible by road, others are not, and even when roads exist they may be unusable in the (roughly) six months of the wet season in the top end of Australia. Accordingly, those remote communities are very much dependent on scheduled marine freight services.

### **The law**

Section 50 of the Act prohibits a corporation from acquiring shares in the capital of a body corporate, or any assets of a person, if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

However, the Tribunal may authorise an acquisition if it is satisfied that the acquisition would result in, or would be likely to result in, such a benefit to the public that the acquisition should be allowed to occur (see sections 95AT and 95AZH of the Act).

### **Toll to exit the market**

By letter dated 21 October 2015 Toll informed its customers of its intention to pursue the transaction with Sea Swift, but if the transaction was not authorised, it would wind up its marine logistics business in the Northern Territory and Far North Queensland.

This position was maintained by Toll at the hearing.

### **Time allowed for the Tribunal's Determination**

When a corporation applies to the Tribunal for an authorisation the Tribunal must make a Determination granting or refusing the application within 3 months from the date the application was given to the Tribunal. If the Tribunal does not determine the application within the 3 months, it is taken to have refused to grant the authorisation (see sections 95AZG and 95AZI of the Act).

While the Act allows the Tribunal to extend the period in which it may make the Determination, commercial exigencies call for it to make and publish its Determination relatively quickly. A speedy resolution of the application also gives remote communities

certainty in respect of the provision of essential supplies by way of regular scheduled services as Toll exits the market.

Accordingly, the Tribunal has made and published its Determination granting the authorisation sought by Sea Swift in advance of publishing its reasons. The parties had no objection to the Tribunal taking this course.

### **The Conditions**

The Tribunal's authorisation of Sea Swift's acquisition of the Toll entities imposes conditions on Sea Swift. The acquisition is only protected from the operation of section 50 of the Act if it takes place in accordance with these conditions. If Sea Swift fails to observe these conditions, the Australian Competition and Consumer Competition can apply to the Tribunal to have the authorisation revoked (see section 95AZM(6) of the Act) and seek remedies for breach of section 50. The detail of the conditions, summarised below, appear in the Annexure to the Tribunal's Determination.

### **Transferred Contracts Condition**

As part of the Proposed Acquisition, a number of TML's customer contracts will be transferred to Sea Swift. It is a condition of the Tribunal's authorisation that Sea Swift does *not* enforce any provision in these contracts that requires the customer to:

- use Sea Swift's services exclusively;
- allow Sea Swift a right of first refusal (i.e. to match the bid of a competitor seeking to supply a service to the customer); or
- ship a minimum volume of freight with Sea Swift.

A list of the contracts to which this condition applies is set out in Schedule 2 of the Annexure to the Tribunal's Determination.

### **Remote Community Service Condition and Remote Community Price Condition**

For a period of 5 years following the completion of the Proposed Acquisition:

- Sea Swift is required to maintain a minimum level of scheduled services to remote communities in the Northern Territory and Far North Queensland (including Thursday Island and the Outer Torres Strait Islands). The list of communities is set out in Schedule 3 of the Annexure to the Tribunal's Determination.
- In servicing those remote communities, Sea Swift must also observe pricing conditions for certain categories of freight and may not charge more for that freight than the prices specified in Schedule 4 of the Annexure to the Tribunal's

Determination. Changes to those prices are to be determined in accordance with formulas in the Annexure to the Tribunal's Determination and an Independent Price Review Process that is subject to scrutiny by the ACCC.

### **The Gove Lease Undertaking**

The assets to be acquired as part of the Proposed Acquisition include the lease between Perkins Properties Pty Ltd and the Arnhem Land Aboriginal Council in relation to the Gove Wharf at Melville Bay Road, Foreshore Drive, Nhulunbuy.

The conditions of the authorisation provide, in effect, that Sea Swift must:

- give to the ACCC an undertaking pursuant to section 87B of the Act specifying the terms and conditions upon which it will give other marine freight operators access to the Gove Wharf; and
- allow other marine freight operators access to the Gove heavy lift wharf *and* the roll-on/roll-off facilities (the undertaking previously given by Perkins Industries Pty Ltd and its wholly owned subsidiaries, Perkins Shipping Pty Ltd and Perkins Properties Pty, to the ACCC in respect of the Gove Wharf did not include access to the roll-on/roll-off facility).

The form that the section 87B undertaking will take appears on the Tribunal's website ([www.competitiontribunal.gov.au](http://www.competitiontribunal.gov.au)) as Annexure E to the Form S filed as part of Sea Swift's application to the Tribunal on 4 April 2016.

### **Toll's Commitments**

The authorisation also requires Toll to:

- hand back to their owners two vessels (the *Toll Territorian* and the *Bimah Tujuh*) that it has on charter in the Northern Territory; and
- sell its vessel the *Warrender*.

This condition will make those vessels available to potential competitors of Sea Swift.

### **History of the application for authorisation**

Sea Swift and Toll first entered into an asset and share sale agreement in November 2014. This agreement contained a sunset clause that required Sea Swift to obtain either formal or informal merger clearance from the ACCC, or merger authorisation from the Tribunal, by the end of May 2015.

In December 2014, Sea Swift made a confidential application for informal clearance from the ACCC. However, in late May 2015 it became apparent that the ACCC might not reach a decision by the sunset date and the parties subsequently renegotiated the agreement.

By June 2015, the parties had executed an Amended Asset and Share Sale Agreement (as well as a side deed to that agreement) that, amongst other things, extended the sunset clause date to 30 November 2015.

On 9 July 2015, the ACCC informed the parties that it would not grant informal clearance.

The parties executed a further side deed to the Amended Asset and Share Sale Agreement and, on 21 September 2015, Sea Swift filed an application with the Tribunal under section 95AU of the Act seeking authorisation of this agreement. That application was, however, withdrawn.

As a result of further negotiation between the parties, on 17 March 2016 they executed a Deed of Amendment. On 4 April 2016 Sea Swift made an application to the Tribunal for authorisation of the Amended and Restated Asset and Share Sale Agreement which was appended to the Deed of Amendment dated 17 March 2016.

At the hearing of the application, the ACCC assisted the Tribunal pursuant to section 95AZF of the Act. Toll and the Maritime Union of Australia were granted leave to intervene. The parties called over 40 witnesses including competitors, customers and officers of bodies which represent remote communities or provide services to them. The Tribunal also received submissions in writing from the Department of Prime Minister and Cabinet, the Department of the Chief Minister of the Northern Territory, the Torres Strait Island Regional Authority, the Hon. Warren Entsch MP, a Thursday Island trader, and a resident of Weipa.

**End**