From: Ben Cooper [mailto:bcooper@livingstones.com.au]
Sent: Thursday, 4 August 2016 1:13 PM
To: Chambers - Watson VP
Cc: AMOD
Subject: AM2016/5

Dear Associate

We attach by way of filing:

- The Further Statement of Lino Bruno (including Attachments A and B); and
- The Further Affidavit of Ben Cooper (including Attachment BC4(A).

Sincerely

Ben Cooper

Ben Cooper
Associate Director

Livingstones
EMPLOYMENT • RELATIONSHIP • ADVISORS
action positive

Employment & Industrial Relations
Human Resources & Relationships
Organisational Advisors & Psychologists

M 0410 695 088 I QLD 07 3833 1216 I NSW 02 8078 6908
www.livingstones.com.au

FAIR WORK COMMISSION

MATTER NO: **AM2016/5**

TITLE OF MATTER: **APPLICATION BY SEA SWIFT PTY LTD FOR VARIATION OF *PORTS, HARBOURS AND ENCLOSED WATER VESSELS AWARD 2010*, *SEAGOING INDUSTRY AWARD 2010*, and *MARINE TOWAGE AWARD 2010* (s.156)**

FURTHER STATEMENT OF LINO BRUNO

I, Lino Bruno of 41-45 Tingira Street, Portsmith, Cairns QLD 4870 make the following statement:

1. On 24 November 2014, Sea Swift entered into a commercial contract to acquire the freight assets of Toll Marine Logistics' remote community sea freight business in the Northern Territory and Far North Queensland (**Proposed Acquisition**).

2. Sea Swift will acquire the following marine assets from Toll Marine Logistics:

Name	Type	Gross Tonnes	Length	Nominal TEU
Biquele Bay	Landing Craft	1064	58m	60
Fourcroy	Landing Craft	482	47m	30
Coral Bay	Landing Craft	355	37m	20

3. On 1 July 2016, the Australian Competition Tribunal approved the proposed acquisition (**the Determination**), subject to a range of conditions and restrictions. A copy of the Determination is attached and marked "**A**".

4. It is a condition of the Determination that the Proposed Acquisition be completed by 30 September 2016. It is also a condition of the Determination that Sea Swift comply with a range of community service obligations in relation to the provision of services to remote communities in FNQ and NT, and comply with price controls in relation to those services.

5. Sea Swift anticipates that the Proposed Acquisition will be completed on a date in late August 2016, and that Toll Marine Logistics will cease to conduct the operations of its remote community sea freight business from that date.

6. Sea Swift anticipates carrying out those operations the day after Toll Marine Logistics ceases to provide them. It will do so by leveraging its existing operations, resources and infrastructure and with its own pool of casual and part-time employees and will not be transferring the employment of any TML employees to Sea Swift. The staffing resources currently engaged by Sea Swift are set out in the attachment marked "**B**".

.....
Lino Bruno

3/8/2016
.....
Date

00332652.DOCX

Attachment A

AUSTRALIAN COMPETITION TRIBUNAL

Application by Sea Swift Pty Limited [2016] ACompT 9

File number:	ACT 2 of 2016
Tribunal:	**FARRELL J, DEPUTY PRESIDENT** **MR R C DAVEY, MEMBER** **PROFESSOR D K ROUND, MEMBER**
Interveners:	Toll Holdings Limited Maritime Union of Australia
Date of Reasons for Determination:	28 July 2016
Catchwords:	**AUTHORISATION** – *Competition and Consumer Act 2010* (Cth) – application under s 95AU for a grant of authorisation under s 95AT – acquisition of shares in, and assets of, applicant's major competitor in the supply of scheduled marine freight services to remote communities in Far North Queensland and the Northern Territory – whether s 95AZH(3) applied to prevent the grant of authorisation – whether there are net public benefits **COMPETITIVE DETRIMENT** – consideration of the future "with" and "without" the proposed acquisition – where "with" or "without" the proposed acquisition the applicant's major competitor will exit the market in the short term – where "with" or "without" the proposed acquisition applicant likely to acquire its major competitors leased facilities at Gove – where future "with" the proposed acquisition includes a s 87B undertaking offered by applicant as a condition of authorisation addressing potential competitive detriment **BENEFITS** – where condition of authorisation preventing applicant from enforcing clauses in contracts novated to it by its major competitor relating to exclusivity, minimum volumes and rights of first refusal allows other service providers to compete for the contracts during their term – where conditions of authorisation mandate minimum frequency of services to specified remote disadvantaged communities and maximum prices that applicant may charge uncontracted customers in the communities – where condition of authorisation mandates applicant's leased facilities at Gove be subject to a s 87B undertaking providing for better prices and access than its major competitor's existing s 87B undertaking in relation to those

	facilities – where Tribunal satisfied that public benefits justify authorisation
Legislation:	*Competition and Consumer Act 2010* (Cth) ss 4, 42, 50, 90 Pt VII Div 3 *Trade Practices Act 1974* (Cth) s 90(9) (repealed)
Cases cited:	*Application by Medicines Australia Inc* [2007] ACompT 4 *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1 *Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317; [2003] FCA 1525 *Hospital Benefit Fund of Western Australia Inc v Australian Competition and Consumer Commission* (1997) 76 FCR 369; (1997) 157 ALR 105; (1997) ATPR 41-569 *Re Australian Association of Pathology Practices Incorporated* (2004) 206 ALR 271; (2004) ATPR 41-985; [2004] ACompT 4 *Re Qantas Airways Limited* [2004] ACompT 9 *Re VFF Chicken Meat Growers' Boycott Authorisation* (2006) ATPR 42-120; [2006] AComptT 2
Date of hearing:	6-10, 14-17 June 2016
Date of last submissions:	30 June 2016
Category:	Catchwords
Number of paragraphs:	347
Counsel for the Applicant:	Mr N Young QC and Ms R Orr QC with Mr A d'Arville
Solicitor for the Applicant:	Gilbert + Tobin
Counsel for the Australian Competition and Consumer Commission:	Mr J Burnside QC with Ms N Sharp and Ms C van Proctor
Solicitor for the Australian Competition and Consumer Commission:	DLA Piper
Counsel for Toll Holdings Limited:	Mr J Lockhart SC with Mr C Colquhoun
Solicitor for Toll Holdings	Minter Ellison

Limited:

Counsel for the Maritime Union of Australia:	Mr R Scruby
Solicitor for the Maritime Union of Australia:	W.G. McNally Jones Staff

IN THE AUSTRALIAN COMPETITION TRIBUNAL

ACT 2 of 2016

RE:	**APPLICATION FOR MERGER AUTHORISATOIN OF THE PROPOSED ACQUISITION OF CERTAIN ASSETS OF TOLL MARINE LOGISTICS AUSTRALIA'S MARINE FREIGHT OPERATIONS**
BY:	**SEA SWIFT PTY LIMITED** Applicant
TRIBUNAL:	**FARRELL J (DEPUTY PRESIDENT)** **MR R C DAVEY (MEMBER)** **PROFESSOR D K ROUND (MEMBER)**
DATE OF DETERMINATION:	**1 JULY 2016**

THE TRIBUNAL DETERMINES THAT:

1. Subject to the conditions in the Annexure to this determination, Sea Swift Pty Limited (ACN 010 889 040) ("Sea Swift") is granted authorisation pursuant to ss 95AT and 95AZJ of the *Competition and Consumer Act 2010* (Cth) to acquire:

   (a) shares in:

      (i) Perkins Maritime Pty Ltd (ACN 009 616 960); and

      (ii) Perkins Lady Jan Pty Ltd (ACN 064 110 247); and

   (b) assets from:

      (i) Perkins Shipping Pty Ltd (ACN 009 597 835);

      (ii) Perkins Properties Pty Ltd (ACN 009 592 885); and

      (iii) Gulf Freight Services Pty Ltd (ACN 010 755 683)

   as set out in a Deed of Amendment dated 17 March 2016 and the appended Amended and Restated Asset and Share Sale Agreement between the following parties:

   Vendors:

   Perkins Industries Pty Ltd (ACN 009 593 257)

   Perkins Shipping Pty Ltd (ACN 009 597 835)

   Perkins Properties Pty Ltd (ACN 009 592 885)

Gulf Freight Services Pty Ltd (ACN 010 755 683)

Vendor Guarantor:

Toll Holdings Limited (ACN 006 592 089)

Purchaser:

Sea Swift Pty Limited (ACN 010 889 040)

Purchaser Guarantor:

Sea Swift (Holdings) Pty Limited (ACN 159 387 390)

2. This determination includes the Annexure and all Schedules thereto.

ANNEXURE TO THE DETERMINATION DATED 1 JULY 2016

CONDITIONS OF THE TRIBUNAL'S AUTHORISATION

TRANSFERRED CONTRACTS CONDITION

1 Transferred Contracts Condition

(a) The authorisation is subject to the condition that Sea Swift will not give effect to, or rely on, any provision in the Transferred Contracts which requires the Customer to:

(i) exclusively use the marine freight services of Sea Swift; or

(ii) allow Sea Swift a Right of First Refusal; or

(iii) ship a minimum volume of freight with Sea Swift,

(together the Transferred Contracts Condition).

(b) For the purposes of the Transferred Contracts Condition:

(i) Transferred Contracts means the contracts listed in Schedule 2; and

(ii) Sea Swift must ensure that its obligations under the Transferred Contracts Condition are published on Sea Swift's website and communicated to Customers within 30 days of the Completion Date.

REMOTE COMMUNITY SERVICE CONDITION

2 Remote Community Service Condition

(a) The authorisation is subject to the condition that Sea Swift will:

(i) maintain a minimum level of scheduled services to the locations and at the frequencies set out in the Remote Community Service Schedule contained in Schedule 3; and

(ii) maintain an up-to-date shipping schedule of services on its website, (together the Remote Community Service Condition).

(b) Sea Swift's obligations under the Remote Community Service Condition are suspended to the extent that it is prevented from carrying out those obligations by an event or circumstance, or combination of events or circumstances, that are beyond the reasonable control of Sea Swift, including but not limited to:

(i) fire, lightning, explosion, flood, earthquake, storm or any other act of God or force of nature;

(ii) damage to vessel(s) or port facilities;

(iii) civil commotion, sabotage, war, revolution, radioactive contamination, or toxic or dangerous chemical contamination;

(iv) strikes, lock-outs, industrial disputes, labour disputes, industrial difficulties, labour difficulties, work bans, blockades or picketing;

(v) the impact of public holidays or necessary vessel maintenance or refit; or

(vi) any event or circumstance that prevents or jeopardises the safe operation of any scheduled service.

REMOTE COMMUNITY PRICE CONDITION

3 Remote Community Price Condition

(a) The authorisation is subject to the condition that Sea Swift will:

(i) charge no greater than the Maximum Charge for the destinations and services listed in the Remote Community Service Schedule, except as allowed by Condition 4 or in accordance with the Independent Price Review Process set out in Schedule 5;

(ii) publish on its website the Maximum Base Price for the Services, as well as the applicable rate of GST, Consignment Note Fee, Dangerous Goods Surcharge and Minimum Freight Charge, for each Financial Year,

(the Remote Community Price Condition).

(b) For the purposes of the Remote Community Price Condition:

(i) Subject to clause 3(b)(ii) below, Maximum Charge means:

(A) for Vehicle Freight Services, the Maximum Base Price multiplied by the number of units carried; and

(B) for all other Services, the Maximum Base Price multiplied by total tonnes or total cubic metres carried (whichever is greater);

(the Maximum Base Freight Charge),

plus additional charges that may include:

(C) the Fuel Surcharge Fee;

(D) applicable GST;

(E) the Consignment Note Fee;

(F) the Port, Council and Royalty Charges;

(G) the Dangerous Goods Surcharge (if applicable); and

(H) Other Charges (if applicable).

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

(A) the Maximum Base Freight Charge;

(B) the Fuel Surcharge Fee;

(C) the Consignment Note Fee;

(D) the Port, Council and Royalty Charges; and

(E) the Dangerous Goods Surcharge (if applicable);

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

(F) the Minimum Freight Charge;

(G) applicable GST; and

(H) Other Charges (if applicable).

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

Maximum Base Price = Base Price x (1 + CI)

where:

CI = CPI + LRI

Base Price *is determined as follows:*

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

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

CPI *is determined in accordance with the following formula:*

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

where:

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

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

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

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

LRI *is determined in accordance with the following formula:*

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

where:

LRI^{n} = the annual labour rate percentage increases as set out in the Sea Swift Collective Agreement.

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

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

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

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

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

(v) Port, Council & Royalty Charges means any charges or statutory fees levied by the applicable port, government or council bodies on the

cargo that is imported and exported to/from a wharf, barge ramp or any other landing site in respect of the Service being provided to the customer.

(vi) Fuel Surcharge Fee is calculated as a percentage of the Maximum Base Freight Charge for a Service. The percentage surcharge and fee are calculated (on a monthly basis) as follows:

Fuel Surcharge percentage = $[(F^n – F^b) / F^b] \times WF^F$

Fuel Surcharge Fee = Fuel Surcharge percentage x Maximum Base Freight Charge

where:

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

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

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

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

(vii) Other Charges means any charges for voluntary additional services that a customer requests to be provided in conjunction with the service. These charges are notified to and accepted by the customer prior to the service being provided.

(viii) Dangerous Goods Surcharge is applied as a percentage of the Maximum Base Freight Charge for all goods that are classified as dangerous goods under the Australian Dangerous Goods Code or the International Maritime Dangerous Goods Code. During the term of this Condition, the Dangerous Goods Surcharge percentage will be no higher than 25%.

(ix) Minimum Freight Charge means a specified minimum charge to consolidate and transport a single consignment of freight. The Minimum Freight Charge is as follows:

(A) for destinations listed in the Remote Community Service Schedule in the Northern Territory: $50.00.

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

4 Price Reviews

(a) Sea Swift may increase the Maximum Base Price for the Services from or on 1 July each Financial Year in accordance with the formulas set out in Clause 3(b)(iii) above (Annual Price Review).

(b) Sea Swift may increase the Fuel Surcharge Fee on a monthly basis in accordance with the formula set out in Clause 3(b)(vi) above (Monthly Fuel Surcharge Review).

(c) Sea Swift may increase the applicable GST at any time but only in accordance with changes legislated by the Australian Federal Government.

(d) Sea Swift may only:

(i) increase its Base Price above the Maximum Base Price determined using the formula in Clause 3(b)(iii); or

(ii) increase the Additional Fees above the amounts set out in or determined according to Clause 3(b)(iv)-3(b)(viii);

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

5 Period for Which Sea Swift Must Comply With the Conditions

(a) Subject to paragraphs (b), (c) and (d) below, Sea Swift must comply with the Conditions until the earliest of:

(i) five years from the Completion Date;

(ii) a determination is made by the Tribunal that it is no longer necessary for Sea Swift to comply with the Conditions (including in circumstances where the ACCC has accepted an undertaking under

section 87B of the Act in substantially the same terms as the Conditions); and

(iii) if the parties do not complete the Proposed Acquisition, when Sea Swift notifies the Tribunal of the non-completion of the Proposed Acquisition (and provides a copy of the notice to the ACCC).

(b) Sea Swift will be relieved of its obligation to comply with the Transferred Contracts Condition in respect of each of the Transferred Contracts on the date that the Current Term of that Transferred Contract expires.

(c) Subject to sub-clause 5(d) below, Sea Swift will be suspended of its obligation to comply with the Remote Community Service Condition if another operator commences operating a weekly (or more frequent than weekly) Scheduled Service, and operates that Scheduled Service for a period of 12 consecutive weeks or more:

(i) along one of the following routes, in which case the suspension applies to that route and any destination transhipped through that route:

(A) Cairns – Weipa;

(B) Cairns – Thursday Island/Horn Island;

(C) Darwin – Gove; or

(D) Darwin – Groote Eylandt,

or

(ii) to any specific destination set out in the Remote Community Service Schedule contained in Schedule 3, in which case the suspension applies in respect of that destination.

(d) If Sea Swift is suspended of its obligations to comply with the Remote Community Service Condition under sub-clause 5(c) above, because another operator commences operating a weekly (or more frequent than weekly) Scheduled Service along one of the routes listed in sub-clause 5(c)(i) or a specific destination under sub-clause 5(c)(ii), and that operator subsequently ceases to provide that Scheduled Service, Sea Swift must re-commence that Scheduled Service in accordance with the Remote Community Service

Condition as soon as practicably possible, but no later than 28 days after that operator ceases to provide the Scheduled Service.

(e) Sea Swift may subcontract any or all of its obligations under the Remote Community Service Condition to another qualified supplier, but will remain responsible for satisfying the Remote Community Service Condition, subject to clause 5(c) above, at prices that comply with the Remote Community Price Condition.

SELF-COMPLIANCE REPORTING

6 Annual Reporting

Within 30 days of the end of each Financial Year comprising the Term of these Conditions, Sea Swift is to provide the ACCC with a report containing the following information:

(a) in relation to each of the Services to destinations listed in the Remote Community Service Schedule:

(i) the Base Prices that it charged for the previous Financial Year;

(ii) the Base Prices that it is charging in the current Financial Year, including details of all inputs and calculations underlying any increase to the Base Prices from the previous Financial Year that have been made in accordance with Clause 3(b)(iii);

(iii) the Fuel Surcharge Fee for each calendar month of the past Financial Year, including all underlying calculations;

(iv) the result of any Independent Price Review process during the previous Financial Year, including all documents prepared for the purpose of, or resulting from, the Independent Price Review; and

(v) details of any instances of non-compliance by Sea Swift with the Remote Community Price Condition during the relevant Financial Year, or confirmation that there has been no instance of non-compliance.

(b) the current schedule of Services and the frequency of those Services to each of the destinations set out in the Remote Community Service Schedule.

(c) details of any instances of non-compliance by Sea Swift with the Remote Community Service Condition (including failure to provide services in accordance with Schedule 3) during the relevant Financial Year.

Sea Swift must provide the ACCC with any information or documents that the ACCC reasonably requests to verify the accuracy of the report.

7 Event Reporting

Within 30 days of the occurrence of an event listed below which occurs during the Term of these Conditions, Sea Swift is to provide the ACCC with a report containing the following information:

(a) for any suspension of Sea Swift's obligation to comply with the Remote Community Service Condition under clause 2(b):

(i) the nature and duration of these circumstances; and

(ii) the resulting changes that Sea Swift has made to its Scheduled Service schedule and the expected duration of those changes.

(b) for any suspension of Sea Swift's obligation to comply with the Remote Community Service Condition under clause 5(c):

(i) details of the Scheduled Service route(s) and destination(s) that Sea Swift has ceased or intends to cease servicing; and

(ii) details of the other operator who has commenced operating a Scheduled Service in relation to the relevant routes(s) or destinations(s) including the frequency and continuous duration of the Scheduled Service provided by that operator.

(c) for any obligations under the Remote Community Service Condition that are subcontracted by Sea Swift to another qualified supplier under clause 5(e):

(i) the details of the Scheduled Service route(s) and destination(s) that Sea Swift has subcontracted; and

(ii) a copy of the subcontract agreement between Sea Swift and the qualified supplier.

8 Review Event

(a) If a Review Event occurs, Sea Swift may apply to the Tribunal to vary or suspend (for a period of time) one or more of the Conditions to the extent the variation or suspension is necessary to deal with the effect of the Review Event on Sea Swift.

(b) Review Event means an event or circumstance that has the result that Sea Swift:

(i) is unlikely to be able to comply with its obligations under the Conditions; or

(ii) believes that it is necessary to seek some variation due to changed circumstances (including any relevant market change, such as the loss of major contracts to competing coastal and community marine freight suppliers, or overall market contraction, or changes within the relevant regulatory environment, any of which that has a material impact on service viability).

GOVE LEASE UNDERTAKING

9 Gove Lease Undertaking

The authorisation is subject to the condition that Sea Swift:

(a) by the Completion Date has executed and given to the ACCC in respect of the Gove Lease an undertaking pursuant to section 87B of the Act in the same form as Annexure E to Sea Swift's Application for Authorisation filed on 4 April 2016;

(b) complies with the Gove Lease Undertaking in all material respects unless and until released from it by the ACCC; and

(c) does not transfer the Gove Lease without the approval of the ACCC.

TOLL COMMITMENTS

10 Toll Commitments

The authorisation is subject to the condition that Toll:

(a) releases back to their owners two vessels it currently uses in the Northern Territory, being the *Toll Territorian* and the *Bimah Tujuh* as soon as reasonably practicable after the Completion Date;

(b) sells the *Warrender* as soon as reasonably practicable after the Completion Date; and

(c) does not sell the *Warrender* to Sea Swift, any Officer of Sea Swift, any Related Entity of Sea Swift or any Officer of such Related Entities, or any person acting under the direction or for the benefit of any of those persons or Related Entities.

11 Time limit on Proposed Acquisition

The authorisation is subject to the condition that the Proposed Acquisition is completed by 30 September 2016.

12 Defined Terms and Interpretation

A term or expression starting with a capital letter in the conditions:

(a) which is defined in the Dictionary in Schedule 1 of the Annexure (Dictionary), has the meaning given to it in the Dictionary; or

(b) which is defined in the Corporations Act, but is not defined in the Dictionary, has the meaning given to it in the Corporations Act.

SCHEDULE 1

DICTIONARY

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

ACCC means the Australian Competition and Consumer Commission.

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

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

Annexure means the Annexure to the Tribunal's determination dated 1 July 2016 including all Schedules to the Annexure.

Annual Price Review has the meaning given in clause 4.

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

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

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

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

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

Current Term of a Transferred Contract includes any option to renew or extend the term of the Transferred Contract.

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

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

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

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

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

Gove Lease means the lease between Perkins Properties Pty Ltd and the Arnhem Land Aboriginal Council in relation to the Gove Wharf at Melville Bay Rd, Foreshore Drive, Nhulunbuy, to be acquired by Sea Swift as part of the Proposed Acquisition.

Gove Lease Undertaking has the meaning given in clause 9(a).

GST means the Goods and Services Tax.

Independent Price Expert means the person appointed under Schedule 5.

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

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

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

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

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

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

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

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

Proposed Acquisition means the proposed acquisition by Sea Swift of:

(a) shares in:

  (i) Perkins Maritime Pty Ltd (ACN 009 616 960); and

  (ii) Perkins Lady Jan Pty Ltd (ACN 064 110 247); and

(b) assets from:

  (i) Perkins Shipping Pty Ltd (ACN 009 597 835);

  (ii) Perkins Properties Pty Ltd (ACN 009 592 885); and

  (ii) Gulf Freight Services Pty Ltd (ACN 010 755 683)

as set out in a Deed of Amendment dated 17 March 2016 and the appended Amended and Restated Asset and Share Sale Agreement.

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

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

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

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

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

Review Event has the meaning given in clause 8.

Right of First Refusal means a clause in any of the Transferred Contracts that may have the purpose or effect of requiring a Customer to allow Sea Swift to match any price proposed by a competitor.

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

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

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

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

(a) Dry Freight Services;

(b) Refrigerated Freight Services; and

(c) Vehicle Freight Services,

but excluding charter services.

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

TML means the entity trading as Toll Marine Logistics Australia.

Toll means Toll Holdings Limited (ACN 006 592 089)

Transferred Contracts means the contracts listed in Schedule 2.

Transferred Contracts Condition has the meaning given in clause 1.

Tribunal means the Australian Competition Tribunal.

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

SCHEDULE 2

TRANSFERRED CONTRACTS

Item	Customer
1.	IBIS
2.	Boral
3.	Gemco (BHP) (Groote Eylandt)
4.	Pacific Aluminium (Rio Tinto) (Gove)
5.	ALPA
6.	PUMA
7.	Allied Pickfords Pty Ltd
8.	Alyangula Recreation Club
9.	Aminjarrinja Enterprises Aboriginal Corporation
10.	Kun Huy Kag t/a Angurugu Chinese Takeaway
11.	Anindilyakwa Land Council
12.	B Kumar & P Kumar & P Kumar & R Kumar t/a Country Fried Chicken
13.	The Trustee for Dugong Beach Resort t/a Dugong Beach Resort Pty Ltd
14.	Groote Eylandt & Bickerton Island Enterprises Aboriginal Corp
15.	Gove Unit Trust t/a Gove Motors
16.	Gove Tackle & Outdoors
17.	Groote Eylandt Aboriginal Trust
18.	Ericann Pty Ltd t/a Groote Retravision & Homeware
19.	Hasting Deering (Aust) Ltd
20.	Scoffee Pty Ltd t/a The Coffee Shop
21.	Three C's Café
22.	Walkabout Lodge & Tavern
23.	Bradley Carey t/a BC Autos
24.	Fulton Hogan Industries Pty Ltd
25.	Miwatj Health Aboriginal Corporation
26.	Best Bar Pty Ltd
27.	Outback Stores Pty Ltd
28.	Maningrida Progress Association

SCHEDULE 3

REMOTE COMMUNITY SERVICE SCHEDULE

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

* Unless otherwise specified.

SCHEDULE 4

BASE PRICES

NORTH QUEENSLAND

Schedule of rates (excludes GST) [1]

Freight (ex-Cairns) [2]	Bamaga / Seisia (NPA), Thursday Island, Horn Island, Weipa	OTSI, Lockhart, Aurukun
Dry (m^3 or tonnes) [3]	275.54	413.31
Refrigerated (m^3 or tonnes) [4]	482.20	723.29
Passenger vehicles (each) [5]	984.07	1,476.10

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

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

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

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

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

NORTHERN TERRITORY

Schedule of rates (excludes GST) [1]

Freight (ex-Darwin) [2]	Dry (m³ or tonnes) [3]	Refrigerated (kg) [4]	Passenger vehicles (each) [5]
Port Keats [9]	189.55	1.30	974.84
Milingimbi / Ramingining	279.74	1.40	2,008.64
Maningrida	217.79	1.40	1,555.96
Lake Evella	329.92	1.40	2,356.88
Gove	250.00	1.61	1,000.00
Groote Eylandt	369.99	1.62	1,000.00
Garden Pt (Pirlangimpi)	156.07	1.37	1,114.14
Goulburn	218.96	1.40	1,564.66
Elcho	302.07	1.40	2,158.82
Snake Bay (Milikapiti) [8]	132.14	0.83	649.90
Croker	208.15	1.40	1,486.36
Nguiu [6] / Paru [7]	119.15	0.75	541.58
Black Point	208.15	1.44	-
Bickerton / Numbulwar / Umbakumba	401.84	1.44	2,809.52

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

[2] Dry freight will be charged either per cubic metre or per tonne, whichever measure is the greatest for a given consignment. Refrigerated freight will be charged per kg. Note that where freight is outside standard slot dimensions (20ft container size 6m x 2.4m x 1.8m) or

weighing more than 20 tonnes, this schedule of rates will not apply and the Remote Community Price Condition does not apply to that service. Sea Swift will provide an individual quote to customers for such freight.

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

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

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

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

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

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

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

Additional Fees Information

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

SCHEDULE 5

INDEPENDENT PRICE REVIEW CONDITION PROCESS

1 Appointment of Remote Communities Independent Price Expert

(a) Within 28 days of the Completion Date, Sea Swift must appoint a Remote Communities Independent Price Expert for, subject to paragraph 1(c) of this Schedule 5, the duration of this Condition.

(b) Remote Communities Independent Price Expert must have the qualifications and experience necessary to carry out its functions independently of Sea Swift and must not be:

(i) an employee or officer of Sea Swift or its Related Bodies Corporate or of Toll or its Related Bodies Corporate, whether current or in the past 3 years;

(ii) a professional adviser of Sea Swift or its Related Bodies Corporate or of Toll or its Related Bodies Corporate, whether current or in the past 3 years;

(iii) a person who holds a material interest in Sea Swift or its Related Bodies Corporate or of Toll or its Related Bodies Corporate;

(iv) a person who has a contractual relationship with Sea Swift or its Related Bodies Corporate or of Toll or its Related Bodies Corporate (other than the terms of appointment of the Remote Communities Independent Price Expert);

(v) a customer, material supplier or material customer of Sea Swift or its Related Bodies Corporate or of Toll or its Related Bodies Corporate; or

(vi) an employee or contractor of a firm or company referred to in paragraphs 1(b)(iii) to 1(b)(v) of this Schedule 5.

(c) Sea Swift must, as soon as practicable, appoint a replacement Remote Communities Independent Price Expert who meets the requirements set out in paragraph 1(b) of this Schedule 5 in the following circumstances:

(i) if the Remote Communities Independent Price Expert resigns or otherwise stops or is unable to act as the Remote Communities Independent Price Expert; or

(ii) if Sea Swift has terminated the Remote Communities Independent Price Expert's terms of appointment in accordance with those terms of appointment.

(d) Where the Remote Communities Independent Price Expert is unable to act for a period of time, Sea Swift may appoint a replacement Remote Communities Independent Price Expert to act as the Remote Communities Independent Price Expert for that period of time only.

(e) Within 2 Business Days of the appointment of the Remote Communities Independent Price Expert under paragraph 1(a) of this Schedule 5 or replacement of the Remote Communities Independent Price Expert under paragraphs 1(c) or 1(d) of this Schedule 5, Sea Swift must:

(i) forward to the ACCC a copy of the executed terms of appointment; and

(ii) publish the name and contact details of the Remote Communities Independent Price Expert on Sea Swift's website.

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

Sea Swift must:

(a) procure that the terms of appointment of the Remote Communities Independent Price Expert include obligations on the Remote Communities Independent Price Expert to:

(i) continue to satisfy the independence criteria in paragraph 1(b) of this Schedule 5 for the period of his or her appointment;

(ii) provide any information or documents requested by the ACCC about Sea Swift's compliance with this Independent Price Review Condition Process directly to the ACCC; and

(iii) report or otherwise inform the ACCC directly of any issues that arise in the performance of his or her functions as the Remote Communities

Independent Price Expert or in relation to any matter that may arise in connection with this Independent Price Review Condition Process;

(b) comply with and enforce the terms of appointment for the Remote Communities Independent Price Expert;

(c) maintain and fund the Remote Communities Independent Price Expert to carry out his or her functions;

(d) indemnify the Remote Communities Independent Price Expert for any expenses, loss, claim or damage arising directly or indirectly from the performance by the Remote Communities Independent Price Expert of his or her functions as the Remote Communities Independent Price Expert except where such expenses, loss, claim or damage arises out of the gross negligence, fraud, misconduct or breach of duty by the Remote Communities Independent Price Expert;

(e) not interfere with, or otherwise hinder, the Remote Communities Independent Price Expert's ability to carry out his or her functions as the Remote Communities Independent Price Expert;

(f) provide and pay for any external expertise, assistance or advice required by the Remote Communities Independent Price Expert to perform his or her functions as the Remote Communities Independent Price Expert;

(g) provide to the Remote Communities Independent Price Expert any information or documents requested by the Remote Communities Independent Price Expert that he or she considers necessary for carrying out his or her functions as the Remote Communities Independent Price Expert or for reporting to or otherwise advising the ACCC; and

(h) ensure that the Remote Communities Independent Price Expert will provide information or documents requested by the ACCC directly to the ACCC.

3 Raising an Additional Proposed Price Increase

(a) Sea Swift may seek an Additional Proposed Price Increase by providing written notice to the Remote Communities Independent Price Expert (Price Increase Notice).

(b) A Price Increase Notice must detail:

(i) the specific Service and location (within the Northern Territory or Far North Queensland) to which the Additional Proposed Price Increase relates;

(ii) the specific amount of the Additional Proposed Price Increase; and

(iii) Sea Swift's reasons for the Additional Proposed Price Increase. By submitting a Price Increase Notice, Sea Swift agrees to comply with this Independent Price Review Condition Process.

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

4 Remote Communities Independent Price Expert Determination

(a) Where the Remote Communities Independent Price Expert has received a Price Increase Notice in relation to an Additional Proposed Price Increase, the Remote Communities Independent Price Expert must:

(i) determine whether Sea Swift's proposed price increase is reasonable and appropriate having regard to the principles listed in paragraph 5 below; and

(ii) decide whether to accept, reject or vary Sea Swift's proposed price increase.

(b) The Remote Communities Independent Price Expert will make his or her determination within:

(i) 30 days of the receipt of the Price Increase Notice from the Sea Swift; or

(ii) such further period as necessary for the Remote Communities Independent Price Expert to consider information requested under paragraph 4(c) of this Schedule 5, as the Remote Communities Independent Price Expert reasonably requires.

(c) Sea Swift must provide the Remote Communities Independent Price Expert with any information he or she requires to make a determination under this

paragraph 4 of this Schedule 5 within a timeframe reasonably determined by the Remote Communities Independent Price Expert.

(d) In the event that more than one Price Increase Notice is received in relation to a proposed new Additional Proposed Price Increase for a particular Service, the Remote Communities Independent Price Expert will only make a single determination about that Additional Proposed Price Increase.

(e) The Remote Communities Independent Price Expert's determination is final and binding on Sea Swift.

(f) When making a determination under this paragraph 4 of this Schedule 5, the Remote Communities Independent Price Expert is acting as an expert and not as an arbitrator.

5 Relevant considerations

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

(a) that the Additional Proposed Price Increase should be set taking into account:

(i) all efficient input costs;

(ii) an appropriate allocation of Sea Swift's relevant overhead costs;

(iii) expected volumes over the period Sea Swift has used to calculate the proposed price increase;

(iv) whether the "weighting factors" (WF^{CPI}, WF^{WPI} and WF^{F}) referred to in the calculation of Maximum Base Price continue to accurately reflect the cost component weighting of general costs, labour and fuel;

(v) a rate of return that utilises a weighted average cost of capital which would be required by a benchmark efficient entity providing services with a similar degree of risk as that which applies to Sea Swift; and

(vi) the long term interests of customers of the Service.

6 Notice and Publication of Determination

(a) The Remote Communities Independent Price Expert must notify Sea Swift of the determination within seven days of making a determination.

(b) Within 30 days of receiving the determination:

(i) Sea Swift must notify its affected customers of the Remote Communities Independent Price Expert's determination by writing to or emailing customers, or publishing the information about the determination on its website;

(ii) if a retrospective adjustment is necessary to comply with the Remote Communities Independent Price Expert's determination, Sea Swift must refund the relevant adjustment amount to the relevant customer(s).

(c) Whatever the outcome, the cost of the Remote Communities Independent Price Expert's determination will be borne by Sea Swift.

7 Date price increase takes effect

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

8 Sea Swift must notify the ACCC

Sea Swift must notify the ACCC at the time it initiates an Independent Price Review Process and must notify the ACCC of the results of each review, in each case within 5 business days of the relevant event occurring

REASONS FOR DETERMINATION

THE TRIBUNAL:

1 Unless otherwise indicated, all references to legislation are references to the *Competition and Consumer Act 2010* (Cth).

2 On 4 April 2016, Sea Swift Pty Limited ("Sea Swift") filed a Form S with the Australian Competition Tribunal ("the Tribunal")("Application"). Sea Swift thereby applied under s 95AU for the grant of an authorisation under s 95AT(1) in relation to its proposed acquisition of shares in two companies and most of the assets associated with the general marine freight business of Toll Marine Logistics ("TML") in Far North Queensland ("FNQ") and the Northern Territory ("NT") from subsidiaries of Toll Holdings Limited ("Toll") ("Proposed Acquisition"). Annexure A to the Application set out conditions ("Proposed Conditions") on the basis of which the Tribunal might grant authorisation. Sea Swift also indicated that, if required by the Tribunal, it was prepared to give an undertaking to the Australian Competition and Consumer Commission ("ACCC") pursuant to s 87B relating to arrangements for accessing the wharf facility at Gove that was to be acquired from TML as part of the Proposed Acquisition ("Gove Lease Undertaking"); the proposed form of the undertaking was set out in Annexure E to the Application. The Application also set out commitments that Toll was willing to make if the Tribunal were to grant authorisation ("Toll Commitments").

3 Toll was given leave to intervene in the proceedings on an unrestricted basis. While Toll was an intervener in these proceedings, both Sea Swift and Toll sought approval of the Proposed Acquisition.

4 The Maritime Union of Australia ("MUA") was given leave to intervene on the basis that its intervention would be limited to making submissions, adducing evidence and cross-examining other witnesses on the topic of any detriment to the public by reason of any risk to the employment or prospective employment of its members by Sea Swift or Toll in the NT or FNQ in relation to the Proposed Acquisition.

DETERMINATION

5 On 1 July 2016, the Tribunal announced that it had determined to authorise the Proposed Acquisition subject to the conditions set out in the determination ("Determination"). Shortly before making the determination, the Tribunal circulated to the ACCC, Sea Swift and Toll a

draft of the Determination containing conditions which it intended to impose and invited submissions in relation to them. Changes to the Proposed Conditions required by the Tribunal, including conditions relating to the provision of the Gove Lease Undertaking and the Toll Commitments are mentioned below.

6 It is a condition of the Determination that the Proposed Acquisition be completed by 30 September 2016.

7 These are the Tribunal's reasons for making the Determination.

CONFIDENTIALITY REGIME

8 On 15 April 2016 Justice Middleton (now the President of the Tribunal) issued a set of directions for the use and management of confidential information provided to the Tribunal in respect of the proceedings ("Confidentiality Regime"). "Confidential Information" was defined as "all information filed with the Tribunal in these proceedings in respect of which a claim of confidentiality has been made and not refused by the Tribunal, including the Sea Swift Pricing Information". External legal advisers, consultants and independent experts retained by Sea Swift, Toll, and the ACCC (and their support staff) received unrestricted access to Confidential Information provided that the names of those persons had been notified to Sea Swift, the ACCC, any intervener and the Tribunal. The ACCC and its staff as well as the Tribunal and staff of the Tribunal and Federal Court of Australia assisting the Tribunal were also given access to Confidential Information as necessary. Mr Scruby, counsel for the MUA and Mr Nathan Keats, the MUA's legal representative, were given access to some Confidential Information on the same basis.

9 Information which remains subject to the Confidentiality Regime has been redacted. Prior to publication, the Tribunal circulated a final draft of the reasons to the ACCC and external legal advisors to Sea Swift, Toll and the MUA to facilitate maintenance of confidentiality claims.

INTRODUCTION

10 Both Sea Swift and TML operate "full service" marine freight businesses providing scheduled services for delivery of freight by sea to islands and remote coastal communities in FNQ (including the Outer Torres Strait Islands ("OTSI")) and the NT. Those services will be referred to as "scheduled services", distinct from ad hoc charter (sometimes called "project")

freight services described more fully below. Sea Swift and TML are each other's nearest competitors in FNQ and the NT.

11 Sea Swift has provided a scheduled service to remote communities in FNQ for over 30 years; its main depot has been in Cairns since 1987. In 2009, TML was established following Toll's acquisition of Perkins Industries Pty Ltd and its subsidiaries ("Perkins Group"). For ease of reference in these reasons, the Tribunal will refer to Perkins Group without distinction between individual companies since nothing turns on the distinction. Perkins Group had been providing shipping services predominantly in the NT, including to remote NT communities, for at least 40 years. Perkins Group's operations in FNQ were less extensive and, since some time before 2003, they were largely limited to servicing contracts with Alcan (later Rio Tinto) and Woolworths on the Cairns-Weipa route.

Sea Swift

12 Sea Swift is a subsidiary of Sea Swift (Holdings) Pty Ltd ("Sea Swift Holdings") which became majority owned by private equity firms CHAMP Ventures Funds ("Champ Ventures") in November 2012. HarbourVest Partners 2007 Direct Fund LP and various individuals (including members of Sea Swift's management) invested at the same time.

13 Sea Swift describes itself as a marine logistics company providing shipping and associated services in FNQ and the NT. The main products and services that Sea Swift supplies are:

(1) **General cargo services:** Sea Swift operates both charter and scheduled services for cargo including food, fuel and other goods to customers such as businesses, government agencies, mining projects and individuals on remote islands and in coastal communities;

(2) **Fishery support:** Sea Swift provides mothershipping 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;

(3) **Charter and project logistics**: Sea Swift provides these 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;

(4) **Passenger cruise:** Sea Swift provides limited services transporting passengers and their vehicles to various locations across FNQ and the Torres Strait Islands; and

(5) **Fuel retail**: Sea Swift retails a small volume of fuel to regional communities at depots located in FNQ and the Torres Strait Islands.

14 Sea Swift operates the Humbug Wharf in Weipa on behalf of RTA Weipa Pty Ltd and has utilised the Gove Boat Club facility at Gove since early 2014. It operates depots at Darwin (Hudson Bay), Cairns, Weipa, Seisia/Bamaga (without a lease), Horn Island, Gove and Thursday Island.

TML

15 From 2009 until August 2014, in addition to charter and scheduled services provided to island and coastal communities in FNQ and the NT, TML ran Perkins Group's international liner service on the Darwin-Dili-Singapore route. That international part of the service was sold as part of a planned restructure and turnaround of the performance of the TML business as a whole. TML no longer provides any international liner services into or out of Australia. It continues to provide marine logistics services to the oil and gas sector in Queensland and Western Australia. Toll became a subsidiary of Japan Post Co Ltd in May 2015.

16 To conduct its scheduled service business in the NT and FNQ, TML currently employs the following assets.

17 **Vessels** – TML uses two vessels in FNQ and three vessels in the NT. The two vessels in FNQ are both owned by TML: the *Fourcry* and the *Warrender*. The vessels used in the NT to provide scheduled services have changed from time to time, but currently include: the *Coral Bay* owned by TML, the *Bimah Tujuh* chartered from Barge Express and the *Territorian* also on charter. TML also owns the *Biquele Bay* which is currently used for ad hoc charter work (not scheduled services).

18 **Landing facilities** – TML uses various landing facilities in the NT and FNQ, all of which are common user facilities apart from its private landing facilities in Darwin and the facilities that it operates at Gove.

- Toll currently has a lease over wharf facilities in Melville Bay, located on the Gove Peninsula, about 13 kilometres from the community of Nhulunbuy in the NT; it is owned by the Arnhem Land Aboriginal Land Trust ("Gove Lease"). The wharf is land based, on the lee side of Gove Harbour. The facilities include a public wharf, a "heavy lift" ("lift-on/lift-off") wharf and a "roll-on/roll-off" landing ramp. The landing ramp is suitable for discharge of freight from barges. An aerial photograph of

this facility identifying each of the wharves appears at Annexure 8 to these reasons. Access to the heavy lift wharf (but not the landing ramp) is the subject of an undertaking to the ACCC under s 87B. The undertaking was first given by Perkins Group in December 2003 after it acquired Gulf Freight Services Pty Ltd ("Gulf Freight Services"); it was modified in 2005 to allow a priority user arrangement with Alcan during the expansion of its alumina refinery at Gove; and it was continued when Toll acquired Perkins Group in 2009. TML provides stevedoring services on the heavy lift wharf and the roll-on/roll-off landing ramp.

- TML's private landing facility in Darwin at Frances Bay is on land which is partly owned and partly leased by Toll. If the Proposed Acquisition is authorised, Toll will be required to allow Sea Swift to use this facility for an interim period. The evidence of Toll's officers is that whether or not the Proposed Acquisition was authorised, the Frances Bay facility will be closed and (subject to necessary approvals) the land will be re-zoned and sold for residential development.
- TML uses other common user facilities in the NT including the Groote Eylandt Mining Company Pty Ltd ("GEMCO") facility at Groote Eylandt and various landing ramps in the remote communities.
- In FNQ, the landing facilities used by TML at Cairns, Seisia/Bamaga, Thursday Island and Horn Island are all common user facilities managed by Ports North. In Weipa, TML uses a common user facility managed by North Queensland Bulk Port Corporation.
- TML has no infrastructure or equipment in the remote communities where customers typically collect their freight from the landing point (usually a beach) when the barge arrives.

19 **Staff** – TML employs staff across the NT and FNQ, including management and administrative staff in Darwin, terminal managers and support staff in Darwin and Cairns, material handling officers and other staff to operate depots and handle freight, and crew to operate the vessels used to provide the services (other than the *Bimah Tujuh* which is manned by the vessel owner, Barge Express). Based on evidence given by Mr Scott Woodward (the General Manager of Toll Energy which incorporates TML), TML employed 128 staff of whom 17 live in remote communities and are employed as depot/terminal staff. Vessel crews are subject to an enterprise bargaining agreement between Toll, the Australian Maritime

Officers Union and the MUA. None of TML's staff will be transferred to Sea Swift under the Proposed Acquisition.

20 **Large contracts** – There are only a limited number of contracts which provide "base load" volume for scheduled services in the NT and FNQ. The routes (and therefore remote communities served) and the frequency of the scheduled services that TML provides is typically determined by the requirements of its base load customers. Due to the nature of much of the freight (for example, fresh produce and other perishable items and fuel) and customer requirements, TML services most destinations on a weekly basis. The exceptions are that TML services some destinations in the NT on a fortnightly basis and services remote communities in OTSI on a schedule "TBA" basis, due to low levels of demand in those locations.

21 At the time of the hearing, TML's five largest contracts which provide base load for the provision of scheduled services ("Largest Contracts") were:

(1) GEMCO (60% owned by South 32), which has manganese mining operations on Groote Eylandt in the NT;

(2) Rio Tinto, which has mining operations in Gove in the NT and Weipa in FNQ. TML has a contract with Rio Tinto in relation to Gove (Sea Swift has the contract for Weipa). In mid-February 2016, lest authorisation not be granted to the Proposed Acquisition, Rio Tinto put the Gove and Weipa contracts out to tender [redacted];

(3) Arnhem Land Progress Aboriginal Corporation ("ALPA"), which operates retail stores in over 25 remote locations in the NT and FNQ. TML only provides scheduled services to ALPA in the NT;

(4) Puma Energy Australia ("PUMA"), which supplies fuel to remote communities in the NT, including under contract from the Northern Territory Power & Water Corporation ("NT Power & Water"); and

(5) Islanders Board of Industry and Service ("IBIS"), which operates stores and fuel depots in 15 remote communities in FNQ. This is the only large customer contract that TML has in FNQ.

22 The customers party to the Largest Contracts will be referred to as the "Largest Customers".

23 TML charters the *Bimah Tujuh* and a crew from Barge Express to provide services under the ALPA and PUMA contracts to communities at Garden Point, Maningrida, Ramingining, Milingimbi, Goulburn Island and Croker Island. It has subcontracted the performance of its services in the FNQ under the IBIS contract to Sea Swift.

24 [redacted] some have exclusivity provisions or rights of first refusal.

25 A full list of the customer contracts which TML will transfer to Sea Swift under the Proposed Acquisition is set out in Schedule 2 of the Annexure to the Determination; there are 28 in all ("Transferred Contracts").

Competition between Sea Swift and TML

26 From 2013, there was a period of intense competition in the NT and FNQ with both Sea Swift and TML adopting a strategy of aggressive pricing in an attempt to gain market share in the territory in which the other was dominant. This resulted in reduced prices and improved service levels on some routes.

27 In January 2013, Sea Swift acquired a NT-based marine freight service provider, Tiwi Barge, and with the support of Caltex it commenced offering a full service scheduled service in competition with TML in the NT. It pursued a strategy of expanding its business in the NT by competing for TML's contracts. In 2013, Caltex awarded a contract to Sea Swift previously held by TML in relation to the carriage of fuel in support of the contract Caltex had with NT Power & Water. TML also lost the Woolworths contract at Gove, the Rio Tinto Weipa contract and the Woolworths Weipa contract to Sea Swift, resulting in TML incurring heavy losses.

28 TML retaliated by expanding into the Torres Strait in FNQ in early 2014. TML won the IBIS contract from Sea Swift but it was not otherwise successful in winning large contracts in FNQ.

29 In October 2014, TML recovered the contract to carry fuel in the NT when PUMA won the NT Power & Water contract from Caltex.

30 As a result of aggressive competition, both TML and Sea Swift made heavy losses in the financial years 2014 and 2015. They both subsequently undertook cost-cutting measures, including abandoning or subcontracting some routes.

31 In March 2014, Toll's senior management considered the various options for the TML business, including restructuring and cost cutting, divestment or merger and exiting the market. Mr David Jackson (CEO of Toll's Resource and Government Logistics division, the division in which TML sits) says that he doubted that cost cutting would be effective because of TML's underlying cost base, including enterprise bargaining agreements that resulted in a high cost of labour compared to other operators. Mr Jackson says that in taking a decision to exit the market, Toll would seek to minimise costs and disruption to TML's customers. This was important because Toll wished to maintain its reputation with customers who were customers of the broader Toll group; it was therefore important to maintain continuity of supply and for the contracts to be performed on their current (or no less advantageous) terms. He was also aware of the social dimensions of the business conducted in the NT and FNQ.

32 On this basis, Toll made contact with CHAMP Ventures to see if there was interest in a merger between TML and Sea Swift. In August 2014, the Toll Board considered the options of winding up the business or selling to Sea Swift. Mr Jackson was authorised to pursue negotiations. In light of all of the factors and the scale of the losses incurred by TML, Mr Kruger (Toll's Managing Director) and Mr Jackson were of the view that Sea Swift was the only realistic purchaser as only Sea Swift would be able to generate sufficient costs synergies to offset TML's substantial operating losses. In Mr Jackson's view, it would be a waste of time and money to seek another purchaser and Mr Kruger agreed that there was no other likely purchaser. Mr Scott Woodward also holds that view.

Timetable concerning the Proposed Acquisition

33 The Proposed Acquisition and the associated regulatory process developed as follows:

(1) On 8 September 2014, Sea Swift and Toll entered into a terms sheet in relation to a proposed transaction.

(2) On 24 November 2014, Sea Swift, Sea Swift Holdings, Toll and the relevant subsidiaries entered into an Asset and Share Sale Agreement ("Original Agreement") relating to the shares and assets to be sold to Sea Swift. The Original Agreement contained a condition that Sea Swift obtain either formal or informal merger clearance from the ACCC or merger authorisation from the Tribunal before a sunset date of 31 May 2015.

(3) On 5 December 2014, Sea Swift and Toll sought informal merger clearance from the ACCC.

(4) By letter dated 26 February 2015, Toll advised its customers that if the transaction with Sea Swift was not approved, Toll would commence winding up TML's operations in the NT and FNQ.

(5) The Original Agreement was varied on 26 June 2015 following renegotiation of the sunset date and to address concerns raised by the ACCC during the informal clearance process. A side deed was also executed.

(6) On 9 July 2015, the ACCC advised that it would not grant an informal clearance.

(7) On 21 September 2015, the Original Agreement (as amended) was varied and Sea Swift filed an application pursuant to s 95AU with the Tribunal seeking authorisation under s 95AT. Sea Swift withdrew that application on 16 November 2015 after it became apparent that there were issues surrounding the accuracy of its financial statements.

(8) By letter to its customers dated 21 October 2015, Toll reiterated its intention to exit the markets in the NT and FNQ and advised customers that it anticipated that if the Tribunal did not authorise Sea Swift's acquisition of TML's marine freight business in the NT and FNQ, it would cease providing scheduled services within approximately 60 days and wind up its operations.

(9) The Original Agreement was further varied on 17 March 2016 when a Deed of Amendment was executed. The Amended and Restated Asset and Share Sale Agreement ("ARASSA") giving rise to the Proposed Acquisition was set out in Schedule 1 to the Deed of Amendment.

(10) A further application under s 95AU seeking authorisation under s 95AT was filed by Sea Swift on 4 April 2016.

(11) The Tribunal issued a memorandum as to the validity of the application under s 95AW on 8 April 2016.

(12) On 22 April 2016, the ACCC filed the "ACCC Issues List" in relation to the Proposed Acquisition and on 16 May 2016 it provided its Report to the Tribunal pursuant to s 95AZEA ("ACCC Report").

34 Details of the Proposed Acquisition are summarised at [79]-[84].

LEGAL PRINCIPLES

35 There was no contention between the parties as to the principles applicable to the Tribunal's decision whether to grant authorisation.

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

37 The Tribunal may grant authorisation to a person to acquire shares in the capital of a body corporate or acquire the assets of another person and it may do so subject to such conditions as are specified in the authorisation, including a condition that a person must make and comply with an undertaking to the ACCC under s 87B: ss 95AT(1) and 95AZJ. Section 50 does not prevent an acquisition in accordance with an authorisation, so long as the conditions of any authorisation are complied with before, during and after the acquisition: ss 95AT(2) and (3).

Test to be applied – s 95AZH

38 The Tribunal must not grant an authorisation "unless it is satisfied in all of the circumstances" that the proposed acquisition would result, or be likely to result, in "such a benefit to the public that the acquisition should be allowed to occur": s 95AZH(1).

39 Section 95AZH(2) specifies certain matters to which the Tribunal must have regard in determining what amounts to a public benefit. None of the matters set out in s 95AZH(2) is relevant to Sea Swift's application.

"Net public benefits" test

40 This is the second time the Tribunal has had to consider s 95AZH. However, as noted by the Tribunal in *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1 ("*Mac Gen*") at [156], it has, on a number of occasions, considered the expressions "benefit to the public" and "detriment to the public" appearing in s 90 which continue to apply to the evaluation of non-merger authorisations. Section 90(9) of the *Trade Practices Act 1974* (Cth), which is in substantially the same terms as s 95AZH, was considered at some length in *Re Qantas Airways Limited* [2004] ACompT 9 ("*Re Qantas*").

41 Unlike s 90, s 95AZH does not refer to detriment to the public as a factor in the Tribunal's decision whether to authorise a proposed acquisition. Nonetheless, the Tribunal in *Mac Gen*

found that in applying the test under s 95AZH(1), it must examine the likely anti-competitive effects of a proposed acquisition on the one hand and the likely public benefits flowing from it on the other and weigh them against each other: *Mac Gen* at [160]. This Tribunal adopts that position.

42 A public benefit arises from a proposed acquisition if the benefit would not exist without the acquisition or if the acquisition removes or mitigates a public detriment which would otherwise exist. If a claimed public benefit exists, in part, in a future without the proposal, the weight accorded to the benefit may be reduced appropriately. Public benefit is a wide concept and may include anything of value to the community generally so long as there is a causal link between the proposed acquisition and the benefit: see *Application by Medicines Australia Inc* (2007) ATPR 42-164; [2007] ACompT 4 ("*Medicines Australia*") at [107], [118]-[119]. Benefits not widely shared may nevertheless be benefits to the public: *Hospital Benefit Fund of Western Australia Inc v Australian Competition and Consumer Commission* (1997) 76 FCR 369 at 375-377. However, the extent to which the benefits extend to ultimate consumers is a matter to be put in the scales: *Mac Gen* at [168].

43 A public detriment includes the reduction of competition arising from an acquisition as well as other matters contrary to the goals pursued by society, including the goal of economic efficiency; public detriment may not be confined to competitive detriment: see *Medicines Australia* at [108] and [115]; see also *Re Australian Association of Pathology Practices Incorporated* (2004) 206 ALR 271; ATPR 41-985; [2004] ACompT 4 at [93]-[94]; and *Re VFF Chicken Meat Growers' Boycott Authorisation* (2006) ATPR 42-120; [2006] ACompT 2 at [66]-[67].

Future "with and without"

44 In assessing relevant public detriments and public benefits associated with a proposed acquisition, the Tribunal looks to hypothetical futures, one where the acquisition takes place and is in effect and one where it does not take place, the so called "with and without" test. The test is not to compare the present situation with the future situation: it is not a "before and after" test: *Medicines Australia* at [117]-[119].

Degree of satisfaction required

45 The Tribunal must be satisfied that a claimed benefit or detriment is such that it will, in a tangible and commercially practical way, be a consequence of a proposed acquisition if the

acquisition is allowed to occur and that the applicant is commercially likely to act in a way which brings about the benefit or detriment. The benefit or detriment must be sufficiently capable of exposition (but not necessarily quantitatively so) rather than "ephemeral or illusory": see *Re Qantas* at [156].

46 For a benefit or detriment to be taken into account, it must "be of substance and have durability". Any estimate as to their quantification should be robust and commercially realistic. The assumptions underlying the estimates should be spelled out in such a way that they can be tested and verified. Care must be taken to distinguish between one-off benefits and those of a more lasting nature. The options for achieving claimed benefits should be explored and appropriate weighting given to future benefits not achievable in any other less anti-competitive way. The Tribunal must be satisfied that "there is a real chance, and not a mere possibility" of the benefit or detriment eventuating. While it is not necessary to show that the benefits or detriments are certain to occur, or that it is more probable than not that they will occur, claims that are purely speculative in nature should not be given any weight: see *Mac Gen* at [163]-[164] and the cases there cited.

47 The Tribunal's decision must be based in the real world and not rest on speculation or theory alone: see *Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317; [2003] FCA 1525 ("*AGL v ACCC (No 3)*") per French J (as he then was) at [348]. While French J was considering the test in s 50, the parties accept that this proposition is equally applicable to the assessment which the Tribunal is required to make under s 95AZH(1).

48 In summary, the Tribunal is called upon to make a robust and commercially realistic judgment of the claimed public benefits and public detriments, exposed by its reasoning process: see *Mac Gen* at [172]; cf *Re Qantas* at [206]-[210].

Does s 95AZH(3) bar the grant of an authorisation?

49 An authorisation cannot be granted for an acquisition that has occurred: s 95AZH(3).

50 For completeness, the Tribunal mentions that shortly before the "readiness" case management conference held on 3 June 2016, it was drawn to the Tribunal's attention that Sea Swift's Application had been made on 4 April 2016, more than 14 days after the ARASSA was adopted by Sea Swift and Toll when they entered into the Deed of Amendment on 17 March 2016. This was relevant because of the combined effect of s 50(4) and s 4(4). While the

Tribunal was satisfied that it had jurisdiction to hear the application which had been validly made, it sought submissions as to whether it was in a position to grant an authorisation if it was satisfied that the Proposed Acquisition resulted (or would be likely to result) in "such a benefit to the public that the acquisition should be allowed to occur": see s 95AZH(1).

51 Section 50(4) provides:

> Where:
>
> (a) a person has entered into a contract to acquire shares in the capital of a body corporate or assets of a person;
>
> (b) the contract is subject to a condition that the provisions of the contract relating to the acquisition will not come into force unless and until the person has been granted a clearance or an authorization to acquire the shares or assets; and
>
> (c) the person applied for the grant of such a clearance or an authorization before the expiration of 14 days after the contract was entered into;
>
> *the acquisition of the shares or assets shall not be regarded for the purposes of this Act as having taken place in pursuance of the contract before*:
>
> (d) the application for the clearance or authorization is disposed of; or
>
> (e) the contract ceases to be subject to the condition;
>
> whichever first happens.
>
> [Emphasis added]

52 Section 4(4):

> In this Act:
>
> (a) a reference to the acquisition of shares in the capital of a body corporate shall be construed as a reference to an acquisition, whether alone or jointly with another person, *of any legal or equitable interest in such shares*; and
>
> (b) a reference to the acquisition of assets of a person shall be construed as a reference to an acquisition, whether alone or jointly with another person, of *any legal or equitable interest in such assets* but does not include a reference to an acquisition by way of charge only or an acquisition in the ordinary course of business.
>
> [Emphasis added]

53 At the case management conference on 3 June 2016, Mr Burnside QC referred the Tribunal to *AGL v ACCC (No 3)* at [338]-[339] in which these provisions were considered by French J:

> … Acquisitions of shares are defined by what amounts to a deeming provision in s 4(4)(a) of the Act. A reference to such an acquisition 'shall be

> construed as a reference to an acquisition, whether alone or jointly with another person, of any legal or equitable interest in such shares'. On that definition, one transaction may give rise to successive acquisitions for the purposes of s 50. A corporation which enters into a contract to purchase the shares of a body corporate may acquire an equitable interest prior to settlement and thereby acquire the shares pursuant to s 4(4). This will not necessarily attract the prohibition in s 50. Where the acquisition of the legal interest has not been completed and no right subsists in the acquirer as a shareholder in the target body corporate then forging any link to a substantial lessening of competition would be problematic.
>
> In the case of a contract subject to a condition precedent, as in the present case, no interest is conveyed until satisfaction of the condition. *Broken Hill Pty Co Ltd v Trade Practices Tribunal* (1980) 47 FLR 384; (1980) 31 ALR 401 concerned an acquisition of shares conditional upon authorisation by the Trade Practices Commission. It conveyed no direct beneficial interest in the shares. A direct beneficial interest was acquired only when the contract became specifically enforceable by an order to convey or transfer. Prior to the condition being satisfied, the purchaser could seek an order to require the vendor to do what it must under the contract to secure fulfilment of the condition…

54 Clause 2 of the ARASSA states that the contract is conditional on the Tribunal authorising the Proposed Acquisition. Sea Swift and Toll submitted that Sea Swift's only entitlement under the ARASSA was to specific performance of any steps required to fulfil the condition; no "acquisition" occurred as a result of entry into that agreement. It was further submitted that if it were to be found that Sea Swift had acquired a legal or equitable interest in the relevant shares or assets upon entry into the Deed of Amendment, Sea Swift did not seek authorisation of that interest; it sought authorisation of the acquisition of assets and shares that would occur if and when the agreement is completed. Accordingly, Sea Swift did not seek to rely on s 50(4).

55 The ACCC did not seek to contradict those submissions. As submitted by Mr Burnside QC at the case management conference, if s 50(4) operated as a time bar it would also have profound implications for the ACCC's informal clearance process.

56 Having regard to s 42 and relying on the reasoning and authority of *AGL v ACCC (No 3)* at [338]-[339], the presidential member found that s 95AZH(3) does not prevent the grant of an authorisation in this matter.

WITNESSES AND OTHER EVIDENCE

Matters the Tribunal must take into account

57 Section 95AZG(2) sets out the matters that the Tribunal is required to take into account in making its determination which include:

(1) any submissions in relation to the application made to it within the period specified by the Tribunal. In addition to written and oral submissions received from Sea Swift, Toll, the ACCC and the MUA, the Tribunal received submissions from Mr Peter Ah Loy of See Hop Trading Pty Ltd trading in the Thursday Islands; Mr Mark Hedley of Weipa; the Torres Strait Island Regional Authority; the Honourable Warren Entsch MP, Federal Member for Leichhardt based in Cairns; the Department of Prime Minister and Cabinet ("Department of PM & C"); and the Department of the Chief Minister of the NT. One submission was received from an entity which was not prepared to allow the parties access to the submission. As the entity did not respond to a request from the Tribunal to provide the submission to the parties' lawyers or experts under the Confidentiality Regime so that they would have an opportunity to respond to it, the Tribunal has treated that submission as withdrawn and has not considered it;

(2) any information received pursuant to a notice issued by the Tribunal under s 95AZC; a notice was issued to Sea Swift and a response received;

(3) any information received pursuant to a notice issued by the Tribunal under s 95AZD; notices were issued to, and responses received from: Toll; TML; PUMA; ALPA; Barge Express; Mr Ken Conlon, the Managing Director of Barge Express; and Mr Stephen Muller, the Chief Executive Officer of MIPEC Pty Ltd ("MIPEC");

(4) any information obtained from consultations under s 95AZD(2);

(5) any report by the ACCC given to the Tribunal under s 95AZEA. The Tribunal received the ACCC's Report on 16 May 2016; and

(6) any information or evidence provided to the Tribunal in the course of the ACCC assisting it under s 95AZF.

Lay witnesses

58 The Tribunal received one or more statements or evidence by way of affidavit from each of the lay witnesses set out in Annexure 1 to these reasons other than Mr Slimming (who attended the hearing in response to a summons issued by the Tribunal pursuant to s 105(2) at the request of the ACCC). As is evident from Annexure 1, the lay witness included officers and employees of Sea Swift and Toll, their competitors (both for scheduled and charter services), CHAMP-Ventures, remote community based organisations and current or former customers of TML and Sea Swift. Those lay witness who gave oral evidence appeared before

the Tribunal in person or by video-conference facilities from Cairns or Darwin. The Tribunal thanks each of them for their assistance.

Expert evidence

59 Seven expert witnesses were engaged by the ACCC or Sea Swift and each provided a report. No expert evidence was tendered by either Toll or the MUA. Of the experts who provided a report, only Professor Stephen King was not called to give evidence at the hearing.

60 Experts who were asked to provide a report by the ACCC were:

- Dr Philip Williams of Frontier Economics Pty Ltd;
- Professor Stephen King, Department of Economics, Monash University; and
- Mr. John Lindholm, a partner in Ferrier Hodgson specialising in insolvency and turnarounds.

61 Experts asked to provide a report by Sea Swift were:

- Mr George Siolis, a partner in RBB Economics;
- Mr Simon Bishop, a partner in and co- founder of RBB Economics;
- Mr Stephen Meyrick, an associate of Synergies Economic Consulting; and
- Mr John-Henry Eversgerd, a partner in PPB Advisory. Mr Eversgerd is the partner in charge of the disputes and valuation practice.

62 Professor King was asked by the ACCC to provide an opinion on the Proposed Conditions, as contained in Annexure A to Sea Swift's Application, in terms of the conceptual and/or practical issues that could arise in relation to the implementation and enforcement of behavioural undertakings. He was also asked to assess whether the Proposed Conditions and the Gove Lease Undertaking set out in Annexure E to Sea Swift's Application were likely to be effective in addressing the anti-competitive detriments alleged by the ACCC to be the likely consequence of the Proposed Acquisition. While he did not give oral evidence, Professor King's opinions were the subject of submissions by the parties and addressed to some extent in concurrent evidence given by the other expert economists.

63 Mr Siolis was asked by Sea Swift to answer the following questions in respect of the operations of Sea Swift and TML in the NT and FNQ**:**

(1) Are one or both parties currently profitable in the relevant market?

(2) Could one or both parties become profitable in the relevant market if they succeeded in winning some major (large multi-destination) customers?

(3) What are the likely costs of a single operator operating in the relevant market?

64 To enable Mr Siolis to answer these questions, Sea Swift and TML provided him with data relating to their operations in the NT and FNQ.

65 Mr Lindholm was asked by the ACCC to respond to the following questions:

(1) What would you advise Toll to do with its marine logistics business in the NT and FNQ if the proposed acquisition of TML's assets by Sea Swift does not proceed?

(2) If, at February 2016, Sea Swift had a right to terminate the ARASSA, at that time, would you have advised Sea Swift to exercise that right or to amend the ARASSA, and why?

(3) What amount of the total consideration to be paid by Sea Swift under the ARASSA is attributable to goodwill?

66 Mr Eversgerd was instructed by Sea Swift to review and comment on Mr Lindholm's opinions, but, due to time constraints in the lead up to the hearing, he was not asked to perform his own analysis of the questions put to Mr. Lindholm.

67 Messrs Lindholm and Eversgerd gave concurrent evidence at the hearing. Concurrent evidence is sometimes colloquially referred to as a "hot tub".

68 Messrs Bishop and Meyrick were each asked by Sea Swift to address the following questions:

(1) Is the Proposed Acquisition likely to substantially lessen competition in the relevant markets?

(2) What public benefits, if any, are likely to arise as a result of the Proposed Acquisition?

(3) Is the Proposed Acquisition likely to result in a public benefit that outweighs any likely public detriment constituted by any lessening of competition?

69 Dr Williams was asked by the ACCC to respond to the following questions:

(1) Identify and assess any public detriments that are likely to arise as a result of the Proposed Acquisition, including in particular any competitive detriments.

(2) Comment on whether the public benefits of the Proposed Acquisition claimed by Sea Swift and Toll have a real chance of happening; would be a result of the Proposed Acquisition; and whether they are of substance, durable, quantifiable and of a lasting nature.

(3) Comment on whether the claimed public benefits of the Proposed Acquisition outweigh any public detriments that are likely to arise as a result of the Proposed Acquisition.

(4) Review and comment upon the reports of Mr George Siolis, Mr Stephen Meyrick and Mr Simon Bishop.

70 Dr Williams and Messrs Bishop and Meyrick (who are together referred to as the "expert economists") also gave concurrent evidence.

71 Before the hearing, the Tribunal asked each of the two groups of experts who would give concurrent evidence to produce a document that outlined areas of agreement, and perhaps more importantly, areas where they could not agree. Two very helpful documents were provided to the Tribunal and those documents were of assistance in formulating the questions put to the witnesses by the parties' counsel and the Tribunal.

72 The expert economists agreed on 16 of the 30 propositions considered by them. Of the 14 propositions about which there was disagreement, nine related to barriers to entry, expansion and exit, and two to the closely related issue of potential competition. Of particular note were the disagreements on whether sunk costs; reputational advantages; the timing of tenders for big contracts; the availability of assets (especially vessels and depots); and access to wharf facilities at Gove constituted barriers to entry.

73 Linked to these considerations was disagreement about whether the market was contestable in any acceptable manner; whether the Proposed Acquisition would increase the market power of Sea Swift beyond what would happen in the counterfactual; whether goodwill can be a reliable indicator of market power; and whether the reshaping of the market represented an integral part of the on-going competitive process in the market for scheduled marine freight services in the NT and FNQ.

74 In their joint document, Messrs Eversgerd and Lindholm concurred on seven of the nine propositions relating to the first question asked of Mr. Lindholm, two of the three propositions under the second question, and two of the five propositions under the third

question (Mr Lindholm stated that he had not been asked by the ACCC to provide an opinion on one of the propositions under the third question). They disagreed strongly on three key matters:

(1) how to assess the present value of the consideration that Sea Swift proposes to pay Toll for the purchase of its operations if not by reference to the face value attributed to it by Sea Swift and Toll;

(2) the best commercial option for Toll to pursue, given its decision to exit the NT and FNQ markets, and to whom it might seek to sell its assets; and

(3) the estimated goodwill value included in the purchase price.

75 It should be noted that neither of Messrs Lindholm or Eversgerd was asked to provide a formal valuation of the consideration Toll would receive under the ARASSA.

76 The Tribunal would like to thank all the experts for their contributions. They developed their arguments carefully and clearly; they engaged on the disputed issues with civility. That the Tribunal has accepted some of the experts' assessments and rejected others casts no reflection on the work or diligence of the experts whose arguments were not accepted by the Tribunal.

Annexures

77 Annexures 2-7 to these reasons were prepared by the parties as a joint response to the Tribunal's request for information dated 15 June 2016. The information in these annexures is derived from information in Sea Swift's Application, witness statements, annexures to witness statements, oral evidence given at the hearing and exhibits. Footnotes (other than explanatory footnotes), which appeared in the joint response have been omitted and minor grammatical amendments have been made.

78 Annexure 8 is an aerial photo of the Gove Wharf. It was included as a schedule to Sea Swift's proposed s 87B undertaking in respect of the Gove Lease which was filed as Annexure E to Sea Swift's Application.

THE PROPOSED ACQUISITION

79 The Proposed Acquisition is constituted under a Deed of Amendment dated 17 March 2016 which appends the ARASSA. The Proposed Acquisition will take effect subject to the Conditions set out in the Determination.

Shares and assets to be acquired

80 In summary, Sea Swift sought authorisation to acquire:

(1) all of the shares in Toll's subsidiaries Perkins Maritime Pty Ltd and Perkins Lady Jan Pty Ltd;

(2) three vessels, *Toll Coral Bay, Toll Fourcroy* and *Toll Biquele Bay*;

(3) by novation, the Transferred Contracts including the five Largest Contracts;

(4) the Gove Lease; and

(5) a small number of leases or freehold title to depots and residential houses which are used as staff accommodation in various locations and rights to various containers and equipment (such as forklifts, container handlers, vehicles and demountable buildings) and miscellaneous small assets.

Excluded assets

81 Some specific assets are not the subject of the Proposed Acquisition, including:

(1) one of Toll's vessels, the *Warrender*, and two vessels which TML charters (the *Bimah Tujuh* and the *Toll Territorian*); and

(2) TML's Frances Bay terminal facility in Darwin. Sea Swift will have access to the Frances Bay facility for a limited transition period.

82 As mentioned above, Sea Swift will not employ TML's employees as part of the Proposed Acquisition.

83 The Proposed Acquisition does not include TML's marine logistics work for the oil and gas sector in Queensland or Western Australia or TML's scheduled or charter services outside of the NT and FNQ. These parts of TML's business are not subject to the [redacted] mentioned in the next paragraph.

Consideration

84 As consideration for the shares and assets Toll's subsidiaries will receive:

(1) at completion, approximately [redacted] cash, the agreed value of the tangible assets (other than bunker oil) being transferred;

(2) deferred consideration in the form of a note issued by Sea Swift with a face value of [redacted], an interest rate of [redacted] per annum and a term of [redacted]

commencing at completion ( ). The vendor note will rank after external lenders but before loan notes to other shareholders;

(3) of the issued securities in Sea Swift Holdings. Toll and its affiliates will be subject to a ; and

(4) a reimbursement amount of . This amount was also payable (subject to conditions) if the authorisation was not granted.

PROPOSED CONDITIONS

85 The Proposed Conditions as set out in Sea Swift's Application were modified as a result of issues raised by the Tribunal at the hearing and in consultation relating to the draft Determination. For reasons which appear below, the Tribunal did not accept that the Proposed Conditions (other than the Gove Lease Undertaking) were required to address competitive detriments arising out of the Proposed Acquisition.

86 It was the Tribunal's view that the Proposed Conditions as modified by the Tribunal (described below) resulted in public benefits that justified authorisation. The Gove Lease Undertaking requires special comment and it is dealt with elsewhere in these reasons.

Transferred Contracts Condition

87 As set out in Sea Swift's Application, this Proposed Condition prohibited Sea Swift from relying on or giving effect to any exclusivity or minimum freight volume clauses in the Transferred Contracts during their term. As noted previously, there are 28 Transferred Contracts, including TML's five Largest Contracts.

88 of the Largest Contracts contained rights of first refusal. Although Sea Swift submitted that this right did not impair the contestability of these contracts because it would be open to the customers to terminate the contracts on notice, the Tribunal accepted the ACCC's submission that from the perspective of a new entrant, these provisions would have a similar effect to an exclusivity clause because it gives the incumbent service provider the right to match competitive offers on price or service conditions. Sea Swift accepted the

Tribunal's position that the Transferred Contracts Condition should preclude reliance on rights of first refusal.

89 Sea Swift also accepted the Tribunal's position that the list of Transferred Contracts should not remain confidential and confirmed that references in the Condition to the "term" of a contract referred to the initial term and all periods by which the term might be extended or renewed at the option of the customer. The Transferred Contracts are listed in Schedule 2 of the Annexure to the Determination so that this information is available to Sea Swift's competitors.

90 When the Tribunal provided the parties with a consultation draft of the Determination, the ACCC submitted that although the Condition prohibited Sea Swift from relying on a provision which required the customer to consign a minimum volume of freight with Sea Swift, it should be amended so that it also applied to clauses which provided for price discounts when specified volumes of freight were exceeded. The Tribunal did not accept the ACCC's submission because price discounts set at different levels of volume are a normal aspect of competition in a market; they reflect the fact that the greater the volume the easier it is for a provider to meet its fixed costs and derive a profit. The Tribunal did not accept that the suggested amendment was required to support contestability of the Transferred Contracts.

Remote Community Service Condition

91 As set out in Sea Swift's Application, this Proposed Condition requires Sea Swift, for a period of five years after the completion of the Proposed Acquisition, to maintain a minimum level of scheduled services to the locations currently serviced by Sea Swift or TML as set out in Schedule 3 of Annexure A to Sea Swift's Application, and maintain an up-to-date shipping schedule of services on its website. This Proposed Condition covers 38 remote locations; Sea Swift will undertake to service 35 of these locations on a weekly basis, two on a fortnightly basis and one once per month. The services may not be provided following a specified "force majeure" event.

92 As framed in Sea Swift's Application, Sea Swift would be relieved of this Condition if another operator provided services on a route for eight consecutive weeks. Having regard to the needs of remote communities, the Tribunal raised with Sea Swift its concern that this was not a sufficient time to test whether the competitor would provide the service as a real substitute to Sea Swift. As a result, Sea Swift offered to amend the Proposed Condition by substituting a period of 12 weeks for eight weeks and undertaking to re-enter the route within

28 days after it became aware that the other operator had ceased to provide at least a weekly service. Sea Swift submitted that if it lost one of the base load contracts which secured the viability of a route, it would be inappropriate for it to be required to service the communities along that route for a long period, but it accepted that it would prejudice those communities greatly if the other operator operated in the market for only a relatively short period and then withdrew. The Tribunal accepted that crafting the Condition by reference to the base load contracts could give rise to undue complexity.

93 The Condition as imposed by the Tribunal was amended to include the 12 week period offered by Sea Swift, a requirement that Sea Swift resume services within 28 days of an alternative provider withdrawing from that route and a requirement that Sea Swift's yearly report contain any instances of non-compliance with this Condition.

Remote Community Price Condition

94 By this Proposed Condition, Sea Swift undertakes to charge no greater than a specified "Maximum Charge" for a period of five years in relation to "dry freight", "refrigerated freight" and "vehicle freight" to the remote communities, and it will comply with specified requirements for any price increase. Mr Bruno, Sea Swift's Chief Operating Officer, says that these are the types of freight most usually carried for uncontracted customers. It does not cover "liquid commodities", such as bulk fuel in containers such as 200 litre drums, other bulk goods in containers across sizes of 5-20 feet, bulka bags or integrated bulk containers, or other items such as boats, trailers, gas bottles and machinery.

95 The "Maximum Charge" specified in the Remote Community Price Condition is set by reference to the "Base Price" identified in Schedule 4 of the Annexure to the Determination. For customers in FNQ, the Base Price is based on Sea Swift's scheduled rates as at 1 August 2015. For customers in the NT, it is based on TML's scheduled rates as at 1 September 2015 (except for destinations not currently serviced by TML, in respect of which Sea Swift's scheduled rates apply). The Maximum Charge will be subject to annual price increases based on publicly available price indexes – being the Consumer Price Index and the annual labour rate percentage increases in Sea Swift's collective bargaining agreement. Schedule 4 also sets out how Sea Swift will impose the other components of its pricing for these services such as a fuel surcharge fee, a consignment note fee, a port and council fee, a dangerous goods surcharge, a minimum freight charge and charges for any additional services a customer may require. Apart from indexed increases, Sea Swift may only increase prices affected by this

Condition if the increase is approved by an independent pricing expert or the Tribunal determines that it is no longer necessary for Sea Swift to comply with this Condition. Sea Swift must notify the ACCC at the time it initiates an Independent Price Review Process as well as the results of any review. It is also required to report annually to the ACCC the Base Prices charged in the previous financial year and the Base Prices it is charging in the current financial year (including details of the inputs and calculations underlying any increase to the Base Prices).

Gove Lease Undertaking

96 Sea Swift submitted that access to the facilities operated by TML as part of the Gove Lease is not a significant barrier to entry for suppliers in the NT because there are other facilities available at Gove. Sea Swift argued that it entered the market without use of the facilities at the Gove Lease (see [148] below). Nonetheless, Sea Swift offered to accept as a condition of authorisation that it enters into the Gove Lease Undertaking. Sea Swift submitted that the prices reflected in the Gove Lease Undertaking are less than those currently charged by TML and that the undertaking is in a form that had previously been accepted by the ACCC when offered by the Perkins Group. Further, Sea Swift submitted that the undertaking will extend to the roll-on/roll-off ramp which is not covered by the existing s 87B undertaking.

Toll Commitments

97 Toll offered to make the following commitments to the Tribunal if authorisation was granted:

(1) to release back to their owners two vessels it currently uses in the NT, being the *Toll Territorian* and the *Bimah Tujuh*;

(2) to sell its line haul vessel, the *Warrender*, in a timely manner and at a fair market value. The *Warrender* is currently used by TML to provide scheduled services on the Cairns-Weipa route. Toll offered undertakings in relation to how the value would be determined; and

(3) to not sell the *Warrender* to Sea Swift.

98 The Tribunal is unconcerned about the price at which Toll sells the *Warrender*, but considered that the other aspects of these commitments should comprise a Condition of any authorisation, a position accepted by Sea Swift and Toll.

Reporting

99 Sea Swift is required to submit documentation to the ACCC in relation to its compliance with the Conditions at the end of each financial year and to provide the ACCC with the details of any suspension of its obligations in accordance with the Conditions or any subcontract it enters into for the performance of its obligations. The reporting requirements proposed by Sea Swift were amended by the Tribunal to require Sea Swift to report any failure to comply with the Remote Community Service Condition as well as the Remote Community Price Condition and to provide any information to the ACCC which it requires and reasonably requests in relation to matters raised in the report.

SEA SWIFT AND TOLL'S POSITIONS IN SUMMARY

100 Sea Swift and Toll claimed that the Proposed Acquisition results in public benefits which justify authorisation having regard to the Proposed Conditions. They claimed that there are no public detriments having regard to the "counterfactual" that TML will withdraw from the NT and FNQ in any event, leaving Sea Swift as the only full service provider and the most likely provider to TML's Largest Customers. They submitted that if the Tribunal finds that the Proposed Acquisition does result in competitive detriments, the Proposed Acquisition should be authorised because it results in net public benefits which justify authorisation.

101 The public benefits that Sea Swift and Toll contend will result from the Proposed Acquisition are, in summary:

(1) Subject to the customers' consent to transfer the Transferred Contracts to Sea Swift, Sea Swift will honour the Transferred Contracts for their term, including the prices negotiated under those contracts. Absent the Proposed Acquisition the customers under the Transferred Contracts would have to seek an alternative provider and the customers would be likely to lose the benefit of the prices negotiated during the heat of competition between Sea Swift and TML.

(2) The Transferred Contracts Condition allows customers to "try before they buy" because Sea Swift will not rely on exclusivity or minimum volume clauses in those contracts. This means that customers would not suffer disruptions in service while providing them with the opportunity to investigate and test the capabilities and terms of alternative providers. Sea Swift said that the Transferred Contracts are regularly contested by actual and potential competitors through tender processes conducted on a periodic basis and the effect of the Proposed Condition is to enhance the contestability

of the contracts, thereby improving conditions for entry and expansion into the relevant markets. It also imposes an additional competitive discipline on Sea Swift which may not exist if authorisation is refused and the TML business in the NT and FNQ is wound up.

(3) The proposed Remote Community Service Condition and the Remote Community Price Condition are designed to "protect the most vulnerable communities" in the NT and FNQ by providing assurance as to the minimum frequency of services and imposes a limitation on price increases for uncontracted customers in remote communities. Without the Proposed Acquisition there would be a risk of declining frequency of services on routes and no protection against arbitrary price rises. Indeed it may not be in the commercial interest of Sea Swift or any other service provider to service some of these routes so that routes might be rationalised.

(4) The Proposed Acquisition allows an orderly exit for TML, minimising disruption to TML's customers and the potential for damage to its reputation and customer relationships. It also allows TML's assets to be more efficiently deployed in the market as some of TML's vessels will remain in the NT and FNQ for use in the provision of scheduled services. Toll will realise better value for its assets than it would in a wind up scenario, the funds from which it will be able to allocate or deploy in its other business activities. Sea Swift and Toll submitted that this lowers barriers to entry because new providers will be more likely to enter the market (or existing providers are more likely to expand their operations) if they know that an orderly exit is possible. This will result in a competitive environment that is more conducive to new entry over a longer period than if the TML business is wound up.

(5) Sea Swift will be able to access additional revenues, vessels and equipment which would allow it to rationalise and reduce the combined fixed costs of both its scheduled services and charter services; this will enable Sea Swift to maintain these services on a more reliable, efficient and sustainable basis in the long term. It allows the industry to move towards its most efficient cost structure.

102 Sea Swift and Toll say that the Proposed Acquisition results in no public detriment because:

(1) As TML will exit the markets with or without the Proposed Acquisition, it will not result in any public detriment arising from any lessening of competition. Sea Swift contends that the movement towards one full service operator of scheduled services in

FNQ and the NT will occur with or without the Proposed Acquisition. There is insufficient demand to support more than one full service provider across all routes in the relevant markets. The sustainable and most efficient market structure is one with a single full service operator with peripheral competition from other barge operators.

(2) Barriers to entry are low; the markets are relatively unsophisticated with low levels of innovation, technological change and product and service differentiation. There is a range of potential entrants who could win key contracts or routes. In support of these propositions, Sea Swift and Toll say that:

(a) The inputs used in supplying coastal and community freight services are readily obtainable by other operators; the inputs are non-specialised, commonly available and inherently re-deployable. Specifically, the four main requirements for a supplier to be able to supply a scheduled service (vessels, landing facilities, depots/equipment and employees) remain unaffected by the Proposed Acquisition. TML's vessels are not specialised and Sea Swift will acquire some vessels for convenience only. The employment of TML's staff will not be transferred to Sea Swift so that they remain available to competitors. There are alternatives to the Gove Lease for landing facilities at Gove, noting in particular that Sea Swift established itself there without needing to access the facilities operated by TML at the Gove Lease.

(b) Large customer contracts sufficient to underpin entry into the market have terms of three to five years and they are often subject to termination at the customer's convenience or are non-exclusive; a new entrant can readily compete for those contracts. These conditions demonstrate that major customers have substantial countervailing power and can react if prices become too expensive or if the quality of service reduces by awarding contracts to new providers in order to sponsor entry.

(c) There are many other providers of charter services in the NT and FNQ who are able to commence scheduled services without substantial investment. Sea Swift submitted that, with the exception of Barge Express, the other competitors in FNQ and NT that currently provide charter services are unlikely to be in a position to commence servicing TML's Largest Contracts within the 60 day period in which TML will wind up its operations. It submitted that in due course Ezion/Teras ("Teras"), Shorebarge, Carpentaria

Contracting, Pacific Marine Group and MIPEC may seek to provide scheduled services "should they consider it economically worthwhile".

103 In response to the MUA's contention that public detriment arises from the fact that TML's workforce will no longer be employed if the Proposed Acquisition proceeds, Sea Swift submitted that the position of TML's employees is the same whether or not the Proposed Acquisition is approved.

THE ACCC'S POSITION IN SUMMARY

104 The ACCC opposed the grant of authorisation on the basis that the claimed public benefits from the Proposed Acquisition are minimal and do not outweigh the substantial detriments likely to result from the lessening of competition if the Proposed Acquisition proceeds so that it does not meet the "net public benefits" test.

105 The ACCC's position can be summarised in the letter of instructions dated 12 May 2016 given to Professor Stephen King by the ACCC's solicitors in connection with seeking his opinion of the Proposed Conditions:

> 1. Please assume the following in relation to Sea Swift's and Toll Marine Logistics' (**TML**'s) current scheduled marine freight service operations in the Northern Territory (**NT**) and Far North Queensland (**FNQ**):
>
> 1.1 New entrants face barriers to entry and/or mobility.
>
> 1.2 The barriers to entry and/or mobility are:
>
> 1.2.1 Incumbent scheduled marine freight service providers have advantages over potential entrants when competing for customer contracts, which represent a substantial proportion of available volume and revenue on many routes. This is because:
>
> (a) Reputational factors (in particular a track record of providing a reliable service in a region) lead to customer loyalty towards incumbent scheduled marine freight service providers.
>
> (b) There are economies of scale in the provision of scheduled marine freight services, and the staggered timing of tenders for customer contracts provides incumbents with a competitive advantage when bidding for incremental customer contracts as they individually come up for retendering.
>
> 1.2.2 There is a lack of access on reasonable terms and conditions to the roll-on-roll-off ramp at Gove. There may also be similar access issues in relation to other ports and other common user landing facilities.

1.2.3 Sea Swift has previously engaged in strategic behaviour, including low pricing, in response to attempted entry.

1.2.4 Potential new entrants are likely to incur sunk costs which are not recoverable on exit, including losses incurred during the establishment phase after entry and the costs of acquiring and relocating suitable vessels. There are cost disadvantages from not being able to access already 'fit-for-purpose' vessels that are appropriate for the purpose of providing scheduled marine freight services.

2. Please assume that the detriments that are likely to result from the Proposed Acquisition include:

2.1 The Proposed Acquisition will remove Sea Swift's largest and closest competitive constraint (i.e. TML) and lessen the level of competitive constraint from other existing and potential suppliers of scheduled marine freight services.

2.2 If the Proposed Acquisition does not proceed, TML will seek to maximise its profits/minimise its losses from its exit from the relevant market(s). This is likely to involve TML seeking to see its business as a going concern – either in part or as a whole (for instance, by selling its business operations in the NT). If it is unable to do so, it will seek to sell its assets and is likely to seek to sell them in bundles, including by way of assisting to assign existing customer contracts to third parties that acquire some of its physical assets. It is also possible that in the process of TML seeking to sell its business in whole or in part or seeking to sell its assets, one or more customers may choose to put their contracts out to tender in the market such that TML will not be able to assign those contracts. These alternatives all have the potential to reduce the identified barriers to entry/mobility in a way that will provide a greater competitive constraint on Sea Swift in the future than would be the case if the Proposed Acquisition proceeded.

2.3 It will be more difficult for potential entrants to win customer contracts from Sea Swift if the Proposed Acquisition proceeds because of customer stickiness: reputation of (and past dealings with) suppliers matter for customers of scheduled marine freight services. This is especially the case given existing TML customers will have already been transferred to a new supplier (i.e. Sea Swift) if the Proposed Acquisition proceeds.

2.4 If the Proposed Acquisition proceeds, potential entrants will not be able to bid for TML's assets and the market will lose the benefit of:

2.4.1 competition from potential entrants for TML's assets and customer contracts;

2.4.2 potential entrants obtaining contracts and/or assets such as fit-for-purpose, proven vessels that will enable them to better compete with Sea Swift for customers in the future (including when contracts come up for renewal); and

2.4.3 Sea Swift being forced to compete for TML's customers at a time when TML would be seeking to sell its assets and

assign contracts to potential acquirers of its assets.

2.5 Sea Swift will acquire the lease with the Arnhem Land Aboriginal Land Trust in relation to the Gove heavy lift wharf and roll-on roll-off ramp at Melville Bay Rd, Foreshore Drive, Nhulunbuy, in circumstances where there is not suitable alternative landing facility at Gove.

(collectively, the **'Competitive Detriments').**

106 While the ACCC accepted that the most likely outcome is that TML will not continue its operations in the NT and FNQ, it submitted that:

(1) It is very unlikely that TML would abruptly withdraw from the market in breach of its customer contracts and any benefit flowing to TML's contracted customers from having their contracts novated to Sea Swift would be limited in scope and duration.

(2) The claimed benefits relating to issues including lowered costs of entry for competitors, cost savings and dynamic efficiencies should be given little to no weight.

107 Based on the reports by Mr Lindholm and Dr Williams, the ACCC submitted that the fact that Sea Swift did not take advantage of TML's exit announcements on 26 February and 21 October 2015 and instead elected to enter into the renewed agreement on 17 March 2016 and pay a "substantial premium" over the value of tangible assets to be acquired demonstrates that it is buying market power by paying to ensure that TML's assets are not obtained by its competitors, resulting in a substantial lessening of competition. If the Proposed Acquisition did not proceed, it would be open to Toll to maximise profit and minimise reputational damage resulting from TML's exit by selling its NT business as a going concern or selling its vessels together with the assignment of contracted customers along "trunk" routes (see [164] below) in the NT. The ACCC submitted that these are counterfactuals that the Tribunal should take into account on the basis that there is a "real chance" that they might occur.

108 The ACCC submitted that TML's exit in the absence of the Proposed Acquisition is the most pro-competitive outcome because it presents a "unique opportunity" to lower barriers to entry or expansion for Sea Swift's competitors by making TML's major customer contracts contestable at the same time, not in the usual staggered way, so that the factor of incumbency is removed. This opportunity would be lost if the Proposed Acquisition is authorised. The ACCC said that large customers do not have sufficient countervailing power to constrain Sea Swift from increasing prices after the Proposed Acquisition because very few of them are in a position to sponsor a new entrant. Even if the threat of sponsoring a new entrant is effective for large customers, it would not constrain prices for uncontracted customers.

109 The ACCC submitted that if the Proposed Acquisition proceeds, the likelihood of marine freight operators entering or expanding to provide scheduled services in competition with Sea Swift will be limited. In closing submissions, the ACCC submitted that as a result of the high barriers to entry, "hit and run" entry would not be credible. This view was based on a number of matters which the ACCC identified as constituting significant barriers to entry or expansion by Sea Swift's competitors, including:

(1) the need to secure regular freight volumes;

(2) difficulties overcoming the advantages held by an incumbent supplier which would include customer loyalty, the perceived "quality" of the product through reputation, economies of scale and the staggered timing of contracts coming up for renewal;

(3) the lack of suitable access to landing facilities, particularly at the Gove Lease;

(4) the risk of strategic responses by incumbents to new entry; and

(5) sunk costs of entry, including losses incurred while establishing a reputation and the costs of acquiring and repositioning suitable vessels.

110 Based on Professor King's report, the ACCC submitted that:

(1) the Transferred Contracts Condition does not address the advantages of incumbency that Sea Swift would enjoy when competing against other potential rivals for customer contracts in the future;

(2) the Gove Lease Undertaking would not mitigate Sea Swift's incentive and ability to price discriminate against its competitors;

(3) the outcomes to be derived from the commitments offered by Toll are, in respect of some of its vessels, likely to occur in any event should the Proposed Acquisition not proceed;

(4) the Remote Community Price Condition would be ineffective and inadequate in scope; for example, it does not apply to some major freight categories, such as fuel, and it does not reflect the discounts which a substantial proportion of the market currently receives. Due to the complexity of the calculations, it will be difficult for customers to monitor whether Sea Swift is complying with this Condition;

(5) the Remote Community Service Condition would provide little or no benefit to customers because it is likely that all communities will continue to be serviced with or without the Proposed Acquisition. The Condition does not maintain current service

levels as services to some remote communities will drop back from twice weekly to once weekly;

(6) the Remote Community Service Condition and Remote Community Price Condition suffer from the following shortcomings:

(a) they are limited in duration and are therefore incapable of remedying the effects of a significant structural change arising from the Proposed Acquisition;

(b) they are unlikely to reflect prices or service frequencies that would be set in a competitive market in the future in the absence of the Proposed Acquisition;

(c) there is a real prospect that Sea Swift would be able to circumvent or mitigate the extent of its obligations under these Conditions; and

(d) these Conditions are not subject to independent monitoring or oversight or any other enforcement mechanism; and

(7) there is a significant risk that the Proposed Conditions will lead to market distortions.

111 The ACCC was concerned that the information that Sea Swift was obliged to provide under the Remote Community Price Condition and the Remote Community Service Condition was inadequate.

112 The ACCC had a range of comments in relation to the Gove Lease Undertaking, including those put forward by Professor King and that it did not reflect its current practice in relation to other ports. In its 29 June 2016 response to the Tribunal's draft Determination, the ACCC said that the undertaking should include standard provisions for independent audit employed in infrastructure access undertakings such as the one imposed by the Tribunal in *Mac Gen*. This was the first time the ACCC gave the Tribunal any draft provisions to support its submissions on the content of the Gove Lease Undertaking.

POSTION TAKEN BY THE MUA

113 The MUA was concerned that if the Proposed Acquisition was authorised, Sea Swift would hold all of the major contracts for the provision of scheduled services in the NT and FNQ such that it would be "highly unlikely" that other service providers will have any need for additional labour. It submitted that the downturn in mining and project work in recent times means other employment prospects in the industry are poor.

114 The MUA contended that the employment prospects of TML's employees were "significantly improved" in the future without the Proposed Acquisition because of the "greater likelihood" that other service providers would increase their activities in FNQ and the NT by acquiring some of TML's customer contacts and/or vessels. The MUA relied particularly on the evidence of Mr Hamilton of Shorebarge and Mr Conlon of Barge Express.

115 The MUA submitted that it was Sea Swift's evidence that it will use its existing workforce who are currently employed on a casual or part-time basis to fill additional labour requirements and would otherwise consider using independent contractors. On that basis and whether or not former TML employees were members of the MUA, the "practical effect" of the Proposed Acquisition from the point of view of the TML employees was equivalent to a restraint on trade. As put by Mr Scruby in oral closing submissions "the TML employees are shut out of even competing for jobs and it is not simply a matter that they're not going to get them".

MARINE FREIGHT SERVICES INDUSTRY IN NT AND FNQ

Description of marine freight services

116 Broadly, marine freight services involve the carriage of cargo by ship or barge and fall into two categories, charter services and scheduled services.

Charter services

117 Charter (sometimes called project) marine freight services are one-off or short-term services for specific (usually large) customers which sometimes require an entire vessel for a particular shipment, often in the mining, construction and electricity businesses. Those services more likely involve the carriage of different (usually bulky) goods which cannot easily be supplied on regular scheduled services and are generally carried from point to point with no intermediate stops.

118 The parties agree that the companies which provide these services in addition to Sea Swift and TML in the NT are: Barge Express (formerly Sealink), Bhagwan Marine, Teras, Offshore Marine Services and Shorebarge; and in FNQ they are: Carpentaria Contracting, Carpentaria Freight Services, MIPEC and Pacific Marine Group and Palm Island Barge.

Scheduled services

119 Scheduled services are regular services between two or more locations according to a regular schedule and voyages take place irrespective of whether there is sufficient cargo to cover the cost of that journey. The supplier carries cargo for anyone who wishes to ship it between those locations; some customers are regular or contracted (such as supermarkets or mining companies) and others only require ad hoc services for freight for items ranging from vehicles to household items. For example, Sea Swift currently operates a scheduled service from Cairns to Horn Island, Thursday Island, Seisia and Weipa, departing from Cairns on Tuesday and arriving at the other locations according to a schedule that is published by Sea Swift in advance. 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.

Communities served

120 The island and coastal communities in FNQ and the NT that require marine freight services generally fall into two categories, communities built around mining projects and communities predominantly comprised of Aboriginal and Torres Strait Island people. The services are essential to these communities because road access to them is impossible (because the community is on an island) or limited (often due to the state of the road or they are impassable during the wet season). Some roads to coastal areas are being improved but they are generally not yet sufficiently reliable to provide a year-round alternative to scheduled marine freight services. Air freight is prohibitively expensive for bulk requirements and the size of planes used means air freight is not suitable for other items, such as heavy equipment or vehicles.

121 Annexures 3 and 4 to these reasons are maps demonstrating the routes for scheduled services currently operated in the NT and FNQ by Sea Swift, TML and their competitors. As can be seen, the routes cover long distances. The provision of services to some communities can be restricted by tides, strong currents and reefs so that navigation is only safe at certain times of the day or month.

122 The routes are generally very sparsely populated. A submission from the Department of PM & C indicates that of the approximately 35,515 people living in the communities serviced by Sea Swift and TML, 25,401 are Aboriginal or Torres Strait Islanders. That figure does not include people living on outstations or smaller satellite communities who depend on the

larger communities for goods and services. The affected communities have high rates of unemployment and welfare dependence.

123 The largest communities to which cargo is delivered are, usually, the centres which revolve around mining: Gove, Groote Eylandt and Weipa.

Reliance on scheduled services

124 The consistent evidence of the witnesses from the remote communities is that they need scheduled services to be regular and reliable. This is because they carry essentials such as groceries, fuel, pharmaceuticals, mining consumables and building materials. Many of these customers require "depot to door" services, where the freight is not just delivered to a particular wharf, but to a business or other premises. Many communities require weekly scheduled services, because they do not have storage capacity for large quantities of fuel and stocks of perishable foods.

125 Witnesses from the remote communities emphasised the importance of scheduled services arriving at or near the scheduled times, since many landing facilities in remote communities are not manned or are tide-dependent. Perishable goods may spoil or their shelf life may be limited if a landing is not made at a scheduled time so that the facility is unattended; it is also costly for customers to arrange for staff to deal with stock landed at non-scheduled times.

126 Many communities have benefited from the competition between Sea Swift and TML due to obtaining better prices, additional weekly services (twice weekly where they previously only had one) and more reliable arrival at scheduled times. Two scheduled services at different times in the week allow quick "catch up" for perishable goods, fuel or other supplies, for instance, where weather has prevented a scheduled delivery or where a consignor has missed the time for loading on a provider's vessel. For this reason, many of the witnesses from remote communities have stressed that they would prefer to continue to receive two scheduled services from competitors. However, a number of witnesses did not appear to be aware at the time they gave their witness statements, or even when they were cross examined at the hearing, that TML had announced that it will cease to provide scheduled services if authorisation was refused.

Is there a static level of demand?

127 There has been a significant downturn in demand for the carriage of freight over the past 18 months due to the end of the project construction phase of the mining boom, reductions in

government spending and lower prices received for many commodities. This has affected both scheduled services and charter services. There has been a drop in population in some areas; for instance, by reason of the closure of the aluminium smelter at Gove, Rio Tinto's workforce has reduced from 1,200 to 400.

128 The ACCC submitted that the downturn in the mining and resources industries is cyclical and there are other areas of growth such that the Tribunal should not accept Sea Swift's proposition that there is a relatively static level of demand for scheduled services in the NT and FNQ. For instance, the Amrun (South of Embley) project is being developed by Rio Tinto 40 kilometres south of Weipa (the mine at Weipa is nearing the end of its productive life), GEMCO plans to spend US$139 million in expanding its mine on Groote Eylandt, there is some population growth in Arnhem Land and there are building projects around Maningrida, which has been identified by the NT Government as one of the major NT growth towns. Other communities are aiming to develop offerings for fishing industries (for instance, at Gove) and tourism (for instance, in FNQ). There is a whole of government plan for the Torres Strait Islands involving an investment of $169 million in capital works between August 2013 and September 2019.

129 The Tribunal accepts that the mining and resources industries are cyclical and therefore the profitability of service providers to those industries will also have cyclical features. Sea Swift's board papers prepared in 2014 reflect this fact. However, while it would not be appropriate to take a short-term view, there is no evidence of when the current cyclical downturn will end or to what level those industries might be expected to recover. Further, even if there is likely to be some population growth in the NT and FNQ due to infrastructure development, the population is nonetheless sparse and suggestions that there may be significant growth are speculative.

130 The Tribunal accepts Mr Bruno's evidence that the market for scheduled services is constrained by relatively static year-on-year volumes of freight shipped to and from remote communities in FNQ and the NT.

Services provided by Sea Swift and TML in the NT and FNQ

131 Sea Swift and TML are the only providers of scheduled services in FNQ. They each have depot facilities in Cairns, Thursday Island, Horn Island, Seisia/Bamaga and Weipa. Of the 21 communities receiving scheduled services in FNQ, 18 were serviced by both Sea Swift and

TML. Seventeen of these communities were serviced by both providers on a weekly (or more frequent) basis.

132 In the NT, Teras has been providing a scheduled service between Darwin and Port Melville and Port Keats since 2013 and for a number of years TML has subcontracted some of its scheduled services in the NT to Barge Express. Sea Swift and TML compete with each other and approximately ten others in both FNQ and the NT for charter and project services.

133 Of the 17 routes operated in the NT at the time of the hearing, Sea Swift was servicing 12 and TML was servicing 13. Eight of the routes were being serviced by both Sea Swift and TML; seven of these were on a weekly (or more frequent) basis.

134 There are arrangements between TML and Sea Swift on an ad hoc basis apparently directed at ensuring uninterrupted services to communities in the NT and FNQ. A reciprocal slot arrangement between Sea Swift and TML allows for each of them to carry the other party's freight in the event of an emergency or breakdown. For a temporary period in 2015, due to the dry-docking of one of its own vessels, Sea Swift charted a vessel owned by TML. On the rare occasion, Sea Swift also accesses TML's Gove Lease facilities.

REQUIREMENTS TO BE ABLE TO PROVIDE A SERVICE

135 There are four basic logistical requirements for a person who wishes to supply marine freight services: vessels, access to landing facilities in the various remote communities, depots and equipment and employees. For the reasons set out below, the Tribunal accepts that these four requirements (save for landing facilities at Gove) can be met easily by a market entrant with the necessary funds.

Vessels

136 The types of vessel suitable to transport cargo by ship to remote communities are line haul vessels and barges/landing craft; these are required to have relevant registration.

137 Any operator with sufficient funds is currently able to buy or charter these types of vessels domestically. The evidence given by Mr Bruno and officers of Sea Swift's competitors discloses that following the end of the downturn in the mining and resources industries, there are numerous suitable vessels available for purchase or charter in Australia, including in Darwin and Western Australia at relatively modest cost and in a relatively short time frame of up to a month. Vessels can also be obtained internationally, but this would take a little longer

and would cost more to ensure that the vessel meets Australian registration standards. Although Mr Johnson of Teras gave evidence that it had once taken him eight months to secure registration of a vessel he obtained from overseas, he explained to the Tribunal at the hearing that this was not a typical vessel and the problem occurred in the early days of a new registration system.

138 The Tribunal accepts that Sea Swift will acquire the proposed vessels from TML under the Proposed Acquisition for convenience. While they are known to be suitable for the routes operated by TML, acquiring those vessels confers no competitive advantage because of that factor.

139 The Tribunal also accepts that, although a charter service is different from a scheduled service, the vessels used by an operator providing a scheduled service are typically the same types of vessels that are used by charter operators or can easily be modified to be "fit for purpose". For instance, Mr Kannikoski of Bhagwan Marine gave evidence that he would consider initiating a scheduled service if he cannot find buyers for three barges which it currently has available for sale.

Access to landing facilities in the various remote communities

140 Landing facilities are required to be able to load and unload vessels. There are three methods of handling cargo which were discussed during the proceedings:

(1) "roll-on/roll-off" which requires a shore side ramp and a landing ramp on the vessel to enable cargo to be loaded/unloaded by a fork lift;

(2) "lift-on/lift-off" which employs one or more cranes. A crane may be on a "geared" vessel and/or deployed on the wharf. This method is used mostly with line haul vessels although it can be used with barges; and

(3) "fork-on/fork-off" (sometimes called "fork to fork") which employs a fork lift on the vessel and a fork lift on the wharf.

141 The method employed will depend on the nature of the cargo, the nature of the landing facility, the type of vessel in use and tides affecting the degree of incline between the vessel and landing facility. Roll-on/roll-off and fork-on/fork-off methods are most commonly used by barges; they are generally as efficient and of equivalent cost, although carriage of a fork lift takes up some space on a barge. For instance, Sea Swift employs the fork-on/fork-off

method at the Humbug Wharf which it operates at Weipa and the roll-on/roll-off method is generally used by TML at Gove.

142 The wharves and landing facilities in FNQ are "common user facilities" which any operator can access by filling out a booking form and, in some instances, obtaining a permit.

143 Most of the wharves and landing facilities in the NT outside of Darwin are owned by the NT Government and they are open for access to all users. All that is required is an application to the Northern Land Council, which oversees the various ports. The three ports where Sea Swift and TML do not use the NT Government-owned facilities are Darwin, Groote Eylandt and Gove.

Darwin

144 Both companies use their own private landing facilities in Darwin. Mr Perkin's evidence is that there are a number of areas in Darwin where other operators could do the same.

Groote Eylandt

145 GEMCO operates its own wharf to handle the manganese it mines. Adjacent to it is a roll-on/roll-off ramp and GEMCO provides third party access to the ramp and a lay down area without charge; barge operators must provide their own stevedores to load and unload cargo.

Gove

146 There are several facilities at Gove.

147 The first are the facilities at the Gove Lease as described in [18] above currently operated by TML which (subject to Toll and Sea Swift obtaining the appropriate approvals) will be transferred to Sea Swift and operated in accordance with the Gove Lease Undertaking.

148 Sea Swift has provided marine freight services through Gove since February 2014 using a boat ramp operated by the Gove Boat Club. The Commodore of the Club, Mr Bradley Smith stated that that facility will not be available to Sea Swift or any other commercial operator after 30 June 2016.

149 Rio Tinto owns and operates a wharf at Gove, commonly referred to as the "limestone wharf". The limestone wharf is an "island" wharf at the end of a pier extending 284 metres into Gove Harbour. Until Rio Tinto closed its smelting operations, this wharf was used to land and load limestone used in the aluminium smelter to process bauxite.

150 The ACCC submitted a letter dated 15 June 2016 from Mr Rob McDonald, Rio Tinto's Superintendent of Port Operations and Infrastructure, Gove Operations. The letter informed the Tribunal that the western side of the limestone wharf is available for use since Rio has closed its smelting operations but it has been used only once in the year to date. The eastern side is used by Rio Tinto to moor two tugs, a pilot launch and a dumb barge. However, prior to any significant commercial use, the western side of the limestone wharf will require capital works at an estimated cost of $250,000 and Rio Tinto would expect users to contribute "appropriately" to that cost. In the past 18 months, three or four parties have approached Rio Tinto about use of the wharf. They were advised about the proposed contribution to capital works. None of the parties pursued this option further.

151 Despite evidence from Mr Lonsdale (Toll Energy West and National Marine Manager, Toll Energy) that the platform of the limestone wharf can be used for lay down facilities, that is suboptimal given its exposed nature. Mr Lonsdale gave evidence that in his assessment, wind and tidal factors would not prevent use of the fork to fork method of unloading cargo at the limestone wharf during some periods. Mr Kahler of Rio Tinto also said that it would be possible to use the fork to fork method at the wharf (even though he had never seen the method in operation). However, Rio Tinto through Mr McDonald has the view that during April to October each year the wharf is only suitable for use by geared vessels (which have a crane installed) because it is unsafe to use the fork to fork method during that time and the design of the wharf is not suitable to install a substantial crane on it. It might be expected that Rio Tinto will behave in accordance with those beliefs.

152 The Tribunal has formed the view that the limestone wharf does not offer a commercially realistic alternative as a base for scheduled services without an operator being willing to make an appropriate contribution to significant capital works and it is subject to restrictions as to the type of unloading method (and therefore, the type of vessel) which may be employed during half of the year. That would not preclude use of the limestone wharf on an ad hoc basis, with the permission of Rio Tinto, perhaps making it suitable for a charter operator but not a scheduled service operator.

153 The Catalina Wharf at Drimmie Head was used for Catalina flying boats during the Second World War. It is connected to Gove through a causeway that is now covered by a concrete ramp. It is generally accepted that this facility is not suitable for scheduled services in its current state. While two witnesses suggested that they could invest in upgrading that facility

if required, one indicated that he required bank funding to buy a vessel and the other operator's parent company is currently looking to sell it due to its financial circumstances and the witness had not been to Gove. The Tribunal gives very little weight to their evidence.

154 Mr Helms, CEO of the Gumatj Corporation Limited/Gumatj Aboriginal Corporation acknowledged that appropriate alternatives to the Gove Lease site for the operation of scheduled services are limited. He says that the Corporation would support any barge operator wishing to operate regular services to find a landing site, provided they were interested in operating a regular scheduled service and investing in the community infrastructure. That would be consistent with the Gumatj Corporation's desire to develop Gove as a hub for fishing vessels. Having regard to the fact that Rio Tinto has closed its smelting operations thereby significantly reducing the population in Gove, the general downturn in the resources industry, and the nature of the evidence given by marine freight service operators at the hearing, the Tribunal believes that it is unlikely that there will be investment in new port infrastructure at Gove in the near future.

155 The Tribunal has formed the view that the Gove Lease is the most suitable facility for the provision of scheduled services at Gove. With investment, a new entrant would be in a position to establish suitable facilities, but until then, exclusive access to the Gove Lease by one scheduled services provider would be a restraint on competition for scheduled services.

Depots and equipment

156 Depots need to be located at major ports (Darwin or Cairns) and in the larger remote communities to which delivery is made as they operate as distribution centres. Establishing a depot requires a lease over suitable land so that a safe and secure storage facility can be set up and equipment such as forklifts, trucks, light vehicles, side loaders and trailers can be parked.

157 The Tribunal accepts that obtaining a lease is not difficult in most locations, because local councils are willing to assist, including by accommodating those seeking access to allow them to operate without a lease if necessary or in addressing contentious land rights claims between local indigenous communities. It is not controversial that obtaining the necessary equipment is not difficult. Some expenditure would be required to build refrigeration or fuel farm facilities where necessary.

158 The Tribunal also accepts Mr Bruno's evidence that Sea Swift proposes to acquire some depots and equipment from TML as a matter of convenience, and that it would not be difficult for a new entrant to acquire established facilities of this kind.

Employees in the central depots and on the vessels

159 Employees of a sea freight provider employed on a vessel are required to have various maritime qualifications in order for the operator to satisfy its regulatory requirements. It is Mr Bruno's evidence that it is not difficult to obtain employees qualified to serve on a vessel. Mr White, the Managing Director and Chief Executive Officer of Sea Swift, gave evidence that if the Proposed Acquisition is authorised, Sea Swift intends to staff the vessels which it will acquire from TML with current employees who are covered by casual or part time employment contracts, in the first instance. Sea Swift may use independent contractors and would advertise if it required more staff. Former employees of TML would be able to respond to advertisements and may be employed as a result. The Tribunal accepts this evidence.

160 The main qualification for employees located on land is that they hold a forklift licence and in some circumstances a heavy truck licence. There is no evidence that it would be difficult to recruit staff with the necessary qualifications.

CUSTOMERS

161 The other requirement to run a scheduled service is, of course, customers.

162 The customers of marine freight services in FNQ and the NT fall into three different pricing categories:

(1) Contracted customers where the price is negotiated at the commencement of each contract (often through tenders in the case of large contracts) and they are protected by those contractual arrangements.

(2) Custom rate customers (who are not a party to a contract) where the price is negotiated with the provider on the basis of standard terms and conditions. It is common for the customer and supplier to have a longstanding relationship such that the supplier agrees to provide a discount from the scheduled rates.

(3) Uncontracted or ad hoc customers where the price is determined by the supplier based on the supplier's scheduled rates, depending on the type of freight to be shipped.

163 The main customers currently serviced by Sea Swift, TML and other competitors in the market for scheduled services in FNQ and the NT include mining projects such as those operated by Rio Tinto and GEMCO; utilities and energy companies such as Caltex and PUMA (and through PUMA, NT Power & Water); councils such as Torres Strait Island Regional Council ("TSIRC"), community enterprises and supermarkets which run grocery stores on a for profit or not for profit basis such as Woolworths, IBIS, ALPA, Seisia Enterprises and Bamaga Enterprises, and, to a lesser extent, other commercial enterprises such as hotels and resorts.

164 These customers provide the base load volume that underwrites the provision of services to the more remote communities which provide incremental income. As a result, many (but not all) services operate on a "hub and spoke" model. There are high volume routes over longer distances (sometimes known as "trunk routes") where larger ships make deliveries to hubs. There are lower volume routes over shorter distances (sometimes known as "branch routes") where smaller ships and barges transport goods from the hubs to the more remote locations. Annexure 5 to these reasons sets out TML's Largest Contracts, the equivalent contracts held by Sea Swift and the services to remote communities on the routes which are supported by those contracts.

165 The Tribunal accepts that it is generally only possible to provide scheduled services to remote communities profitably where the provider has one or more base load customers, because scheduled services in FNQ and the NT are expensive to operate due to the high fixed cost components such as the vessels, fuel, crew and port charges. Routes are long and sparsely populated and scheduled services must operate whether or not there is sufficient freight to cover the costs of any voyage. Service to remote communities on the route provides incremental income. Messrs Dodd, Hamilton, Slimming and Johnson, all competitors of TML and Sea Swift, each gave evidence to the effect that the viability of routes depends on having base load contracts of sufficient size and price to support the route.

166 Base load customers have significant negotiating power as a result of that factor. The large customer contracts which were provided to the Tribunal show that, in general, they are for periods of three to five years (some with provision for extension at the customer's option) and made on the customer's terms and conditions; they often provide no guaranteed minimum volume and many are either non-exclusive or allow the customer to test the market as to price. Most large customers put their work out to tender when contracts fall due, though

not always. The evidence of officers of a number of these customers is that they generally do business with the provider with whom they have entered into a contract during its term even when the contract is non-exclusive, although these comments were made by customers whose contracts are subject to first rights of refusal or minimum volume requirements and it is likely that this accounts for that factor at least to some extent.

167 Large customers engage other providers for charter services for goods not suitable for scheduled services and some use other scheduled services where there is a time constraint and the alternate service is more convenient, or to test prices. The evidence of most officers of large customers was that the customer would not be willing to sponsor a competitor although some, such as Mr Elu who is the Chairman of the Torres Strait Regional Authority and Seisia Enterprises (among other organisations), indicated that he would be willing to band with other customers to support a new entrant if a provider put up prices unduly or dropped services.

168 The Tribunal also accepts the evidence given by officers of service providers and TML's Largest Customers that cost is not the only factor in the selection of a scheduled service provider; reliability is a highly significant and sometimes determinative factor. The customers will want to have had experience of service provision before they will appoint an operator to supply scheduled services, although the experience can be obtained through chartered services or through ad hoc use. They will not award a contract to a provider unless they are satisfied that it is (or will be) in a position to provide the service at the time the contract is awarded.

HISTORICAL POSITION OF ENTRY AND EXIT FROM THE NT AND FNQ MARKETS

169 Annexures 6 and 7 to these reasons provide histories of the entry and exit of scheduled service providers and charter service providers in the NT and FNQ since the late 1980s represented in the form of a bar graph with related narrative chronologies. The bar graphs have been updated by the parties from similar graphs which appear in the ACCC's Report and the chronologies have been agreed.

170 The Tribunal accepts the ACCC's contention that there has been more than one operator on some routes historically in both FNQ and the NT. The bar graphs demonstrate that there has been frequent entry and exit by operators of chartered and scheduled services over time. The

bar graphs and chronologies also demonstrate that there has typically been only one larger operator in each region with smaller competitors operating on some routes.

171 Mr Perkins' uncontested statement was that for a number of years leading up to the late 1980s, a company known as Barge Express (not the company by that name currently controlled by Mr Conlon) serviced some remote locations in the NT that the Perkins Group did not service. Then, in the early 1990s, the Perkins Group expanded its services into those areas of the NT being serviced by Barge Express. It won some volume from Barge Express. Both companies suffered losses before Barge Express decided to exit the market and it was acquired by Perkins Group. Once the Perkins Group was able to ship 100% of the volumes to those locations, those routes became profitable for it.

172 Similarly, in 2002, Gulf Freight Services sought to expand its operations into the NT and beyond the Cairns-Weipa route in FNQ. It is Mr Perkins evidence that Gulf Freight Services quoted low prices in an attempt to gain business. Mr Perkins considered that the prices quoted were unsustainable. In 2003, Gulf Freight Services decided to exit the market before it was acquired by Perkins Group. The acquisition was considered by the ACCC which accepted a s 87B undertaking from Perkins Group that provided for access to and maintaining levels of customer service at the Gove Lease.

173 Tiwi Barge previously serviced (and only serviced) the Tiwi Islands. Although Perkins Group considered whether to expand scheduled services to these islands, it decided not to do so because there was not sufficient volume to support two operators. The Tribunal notes that TML and Teras have both operated services on this route since 2013.

174 The evidence from competitors such as Mr Dodd of Pacific Marine Group and customers such as Mr Alistair King of ALPA is that two large operators of scheduled services are generally unlikely to be economically viable in either the NT or FNQ because of insufficient demand and the high fixed costs involved in providing that service. That was also Mr Perkins' view when, in 1996, he contemplated competing in the FNQ market.

175 On the basis of the history of FNQ and the NT and their own financial performance in the 2014 and 2015 financial years, Sea Swift and Toll contended that it is not possible to have more than one profitable full service operator in the NT or FNQ. That view was supported by Mr Siolis.

176 The ACCC submitted that expert evidence given by Mr Siolis should not be accepted because it was hard to isolate the financial performance of TML's marine freight businesses in the information given to Mr Siolis as the data included information relating to TML's charter services and road business operations. The ACCC further contended that Mr Siolis did not take into account the improvement in Sea Swift's forecast 2016 numbers (to which he did not have access) nor did he consider the possibility that another provider with a different business model might compete profitably. The ACCC noted that Sea Swift's EBIT margin in the FNQ in 2015 was [redacted] and that improved further in 2016 to a forecast [redacted]. Sea Swift's EBIT performance in the NT also improved in 2016 to a forecast [redacted], since it scaled back scheduled routes.

177 The Tribunal notes that EBIT margin is not indicative of economic profitability and both Sea Swift and TML have found it necessary to scale back services or subcontract them in order to avoid the dramatically negative performance each experienced in the 2014 financial year. The ACCC did not suggest what alternate model Mr Siolis should have taken into account. Further, while one competitor [redacted] gave evidence of its proposals for innovation in services which might improve the cost base for its operations, it has not yet obtained agreement from a customer to supply those services and it is not clear when or if it will obtain that agreement or be sustainable when it does. Leaving to one side the difference between TML and Sea Swift's cost structure resulting from the latter's employees not being subject to the same work place agreements as those negotiated by Toll, there was simply no evidence before the Tribunal of a cost structure for the provision of scheduled services different from that employed by TML or Sea Swift.

178 All parties accept that a key feature of the market in both FNQ and the NT is that there are a small number of base load customers whose significant volumes either alone or in some combination are the key to the profitable operation of a route. The Tribunal accepts that the markets are relatively unsophisticated with low levels of innovation, technological change and product and service differentiation. The result is that the areas of competition are price, reliability of service and frequency of service, with a need for cargo volume to offset high fixed costs.

179 The history of both the NT and FNQ markets demonstrates that entry has been relatively easy. Entry occurs sometimes by acquisition of a small scheduled service operator on one or more routes or of a charter service operator, with the support of a large customer (for

instance, Caltex's role in Sea Swift's entry into the NT following Sea Swift's acquisition of Tiwi Barge), but sustainability of two full service operators has been difficult to attain usually due to the consequences of a period of fierce price competition. The result has been that one of the two competitors will either acquire the other (so that sustainable pricing can be achieved) or one competitor exits the market. It is not always the incumbent provider which survives, rather it is the one with the most endurance, financially speaking. TML's exit is consistent with historical patterns. The Tribunal accepts that it is to be expected that each of the NT and FNQ will be characterised by a single full service provider with peripheral competition on certain routes from time to time and this is likely to be the case absent the Proposed Acquisition.

180 Having said all of that out of deference to the submissions made, the Tribunal accepts that the question of whether it is possible to have two profitable full service operators in either of the NT or FNQ or what the most efficient structure might be is not ultimately determinative of the question that the Tribunal is called upon to consider in this case. The relevant question is a relative one: whether there is a net public benefit in the future with the Proposed Acquisition compared to the likely future without the Proposed Acquisition having regard to any relevant counterfactuals.

MARKET DEFINITION

181 Markets are areas of close competition in supply and demand, that is, they are areas of competitive constraint. Market definition is not an end in itself but a means to assess the likely future consequences for competition of the conduct that is at issue; it is a tool for analysing the extent of competitive constraints that apply to the entities operating in the market.

182 In its Application, Sea Swift outlined three alternative market delineations that could be used to assess the Proposed Acquisition's effect on competition. The first was the market for the supply of coastal and community marine freight services in FNQ and the NT collectively. The second (effectively identifying two separate markets) was the market for the supply of "coastal and community marine freight services" in FNQ and the NT individually. The third alternative (also effectively identifying two separate markets) was the market for the supply of "scheduled coastal and community marine freight services" in each of FNQ and the NT.

183 The parties and their experts all agreed that a precise definition was not needed and would not be determinative in this matter.

184 The Tribunal observes that the expert economists who commented on market definition, while having slightly divergent or nuanced preferred definitions of the boundaries of the relevant market(s), were essentially in agreement that whatever delineation is adopted will not change the final assessment of the net public benefits arising from the Proposed Acquisition. That is, precise market definition is not determinative in this matter so long as all the relevant demand-side and supply-side substitution factors are taken into account in the analysis, as well as the possibility that different patterns of competition may exist across different shipping routes.

Supply side substitution

185 With respect to supply-side substitution, it is especially important to consider entry barriers and mobility/expansion barriers (which represent barriers to intra-market expansion), and entry or mobility possibilities from any relevant geographically adjacent market (in this matter, the NT or FNQ) or from different routes within these markets.

Demand side substitution

186 Broadly speaking, the product dimension of the market relates to the provision of scheduled services (sometimes referred to as a "full service") and charter services in the NT and FNQ as discussed above. For the reasons given above, road and air freight are not substitutes for these services.

187 It was agreed that on the demand side of the market there could be no substitution between scheduled services and charter services as scheduled services provide regular deliveries of essentials including fuel and food which need to be delivered fresh or replenished according to a known schedule. Charter services are usually provided on an ad hoc basis. A user of a scheduled service could not, without costly investment (for example, the installation of larger bulk fuel storage facilities), or without the inconvenience of irregular service, switch to an ad hoc charter service in response to a significant and sustained price increase in the service that they currently use. As a result there will be little if any demand-side substitution between the two types of marine freight services provided in the two geographic areas.

188 Accordingly, two separate markets may be distinguished in terms of demand-side substitutability for the carriage of marine freight – a market for scheduled services, and a market for charter services.

Geographic dimension

189 To determine the geographic dimension of the market in this matter, the Tribunal must consider whether there are two separate geographic markets, one for the NT and one for FNQ, or whether these two geographic areas can be aggregated meaningfully into a single geographic market.

190 Notwithstanding a proposal (best described as in its infancy) by one marine freight operator that might at some distant point in the future lead to a contrary view, a scheduled service on a route in FNQ cannot be used by a customer requiring goods to be delivered to a location in the NT (or vice versa) because the distances involved make it uneconomic to do so. They are not demand-side substitutes and so do not belong in the same market into the likely future.

191 The types of vessels used in the carriage of freight in the NT and FNQ are largely the same and they are mobile. With relatively little expense, they can be moved from one area to another in response to a perceived profitable opportunity. In other words, there is supply-side substitutability between the vessels typically used in both areas, such that an aggregated geographic market covering both the NT and FNQ could exist.

Submissions

192 Sea Swift submitted that the relevant market is the market for the supply of coastal and community marine freight services in FNQ and the NT (that is, both scheduled and charter services), as operators have the ability to shift vessels relatively easily and quickly between these geographic areas. Toll agreed that supply-side substitution exists between the NT and FNQ. It further submitted that in the context of the Proposed Acquisition, the market definition should include charter services.

193 The ACCC noted that the area of contention mainly concerns the extent of supply-side substitutability. It said that from a supply-side perspective, market definition was not determinative in this matter provided that due regard was given to the degrees of substitutability in any particular market that might be delineated. Ultimately, the ACCC accepted that it should not matter if the relevant market is bounded by the particular routes on which the parties operate or extends across most of northern Australia, or whether the market extends beyond scheduled services to include charter services, provided that supply-side substitution is treated as a matter of degree.

194 The ACCC submitted that the key question was the level of competitive constraint. It says that an incumbent in a market may be constrained by another operator in that market, or by a potential competitor that is in a position to commence providing scheduled services relatively quickly if the incumbent were to raise prices and/or reduce its service levels. However, the ease with which a potential competitor may start providing services will depend on the extent of the competitive advantages enjoyed by an incumbent provider. If the market is defined narrowly, the level of constraint on an incumbent will be influenced by barriers to entry. If the market is defined more broadly, the level of constraint will be influenced by barriers to expansion.

195 The ACCC observed that there will be a higher degree of supply-side substitution for destinations along the same route, with the result that an incumbent servicing a particular destination is most competitively constrained by a rival servicing the same destination or different destinations on the same route. There will be a lesser degree of supply-side substitutability between destinations in different geographic regions, resulting in a weaker degree of competitive constraint.

196 The ACCC also submitted that providers of charter services provide a relatively weak competitive constraint on providers of scheduled services compared to other providers of scheduled services, mainly because charter operators seeking to switch to supplying scheduled services will need to obtain the necessary volumes to underwrite a scheduled service, which must run regardless of whether the operator receives sufficient revenue to cover the costs of a particular voyage. The ACCC submitted that charter operators must overcome the first mover advantages enjoyed by an incumbent provider of scheduled services, especially reputation and the difficulty of obtaining large customer contracts to underwrite a regular service. It relied on the evidence of Mr Dodd of Pacific Marine Group to the effect that if a charter operator were to win a scheduled services contract of sufficient size it would need to be in a position to compete on "price, but it would also be reliability and back up" because, customers are concerned "about surety as well as price". It would ordinarily be necessary to price below the incumbent or provide something perceived as better value than the service provided by the incumbent. The ability to win customers from an incumbent depends upon "reliability, your ability to deliver when they want, your ability to overcome obstacles, your financial depth, your backup provisions…" Further, some charter operators do not have vessels suitable to provide regular scheduled services, although

the Tribunal is satisfied that suitable vessels are readily available to any operator who wished to provide such a service.

The Tribunal's position

197 The Tribunal accepts the expert economists' position that the structural and behavioural characteristics of each geographic area, while not identical, are such that any analysis of the competitive process, competitive detriment and public benefits would be the same no matter which of the possible markets were to be taken into account.

198 While the Tribunal accepts that entry barriers, properly identified, can be a major and lasting source of competitive advantage for an incumbent operator, they must be carefully distinguished from the costs of entry. Costs of entry are faced by all operators, including the incumbents when they first set up operations in the market. Such costs are a commercial reality and do not *per se* reflect a barrier to entry or expansion or mobility. This factor is discussed further below.

199 Given this, the Tribunal will assess the Proposed Acquisition in terms of the supply of scheduled services in one or more of the three possible geographic aggregations as outlined in [182] above. Where it is necessary to distinguish between the three possibilities it is noted in these reasons.

THE COUNTERFACTUAL

Toll's stated intentions

200 As mentioned above, TML first advised its customers of its intention to leave the market in the NT and FNQ in its letter of 26 February 2015. In its letter dated 21 October 2015, it advised its customers in the NT and FNQ that:

> As we have stated previously, our business in the NT/FNQ is losing a substantial amount of money. Market conditions have been very challenging and we are not getting the freight volume required to sustain our operations. After operating in the market for some time now, it is our firm belief that there is simply not enough freight volume to underpin two competing full service providers incurring the substantial fixed costs of operating vessels on regular scheduled routes.
>
> Despite our best efforts to reduce costs and enter new markets to increase the revenue base and turn around our profitability, the financial position is such that Toll was left with two choices:
>
> 1. Pursue the transaction with Sea Swift; or
> 2. Wind up the business and sell our assets individually.

201 Toll told TML's customers that if the Tribunal did not authorise the Proposed Acquisition then:

> Toll will commence winding up the business in NT and FNQ. We anticipate this will be completed in approximately 60 days.
>
> Toll will meet with contracted customers to discuss options and to assist them to find alternative arrangements.
>
> Toll will communicate a date for final services.
> Uncontracted customers and Communities will need to make alternative shipping arrangements.
>
> Toll will advertise its vessels for sale in Australia and International markets to achieve the maximum sale price. There is no guarantee Toll's vessels will remain in NT/FNQ markets.
>
> Toll's terminals will be closed following the last sailing.

202 The evidence given by Mr Woodward is that if the Proposed Acquisition does not proceed TML's exit from the market would involve the following steps:

(1) Vessels: Toll will use a broker to sell the ships it owns. They would be laid up in Darwin until they are sold. It is not clear whether they would be sold to an Australian or international buyer. Toll will cease its charter arrangements for other vessels.

(2) Employees: Toll will either re-deploy staff within the Toll Group or make them redundant.

(3) Depots and real estate: Toll will look at whether these assets can be used by other businesses in the Toll Group. If not, Toll will sell the properties (including seeking to re-zone its Frances Bay land in Darwin prior to sale) or terminate the leases.

(4) Other equipment: Toll will use auction houses to sell equipment it owns and terminate the leases of equipment that it leases.

(5) Customer contracts: Toll will seek to transfer customer contracts to other suppliers, with the agreement of the customer and the alternative supplier. If a replacement supplier cannot be found, Toll would not contemplate continuing to operate in the market. It would be [redacted].

(6) Gove Lease: Toll may also seek to sell or sub-lease the Gove Lease subject to the consent of the landlord, although another, but less preferable, option may be to continue to operate the facilities at the Gove Lease for a period of time.

What Sea Swift did not know on 17 March 2016

203 Sea Swift submitted, and the Tribunal accepts, that it did not know at the time it entered into the Deed of Amendment (and therefore the ARASSA) on 17 March 2016 that:

(1) TML would consider sub-contracting to Sea Swift the performance of its obligations under the Rio Tinto and GEMCO contracts if it had not made other arrangements by the time TML exits the markets;

(2) [redacted];

(3) [redacted] and GEMCO had consented to the novation of TML's contracts to Sea Swift;

(4) with certainty, TML would not continue to subsidise its marine freight business for any significant period if the Proposed Acquisition did not proceed;

(5) two vessels which Toll charters would be returned to their owners irrespective of whether the Proposed Acquisition is authorised;

(6) TML would not contemplate selling the NT business as a going concern;

(7) TML would contemplate [redacted]; and

(8) Toll would not only close its depots following the last sailing, but it would seek to re-zone and sell the Frances Bay depot site for residential development.

The ACCC's view

204 As noted previously, the ACCC accepts that TML would likely exit the market in the NT and FNQ if authorisation was refused. What it cavilled with is how that would occur.

205 The ACCC said that it was not clear that TML would leave the market in the NT in 60 days. Despite Toll's statements to customers and the Tribunal, there is in fact no hard and fast deadline. Based on the evidence of Mr Lindholm as to what he would advise TML to do and on the evidence of Toll's executives that Toll will seek to maximise its return and maintain its reputation with customers by minimising disruption to their services, the ACCC submitted that there is a "real chance" that what Toll might do if authorisation was refused is:

(1) seek to sell its NT business as a going concern; or

(2) seek to sell vessels together with the assignment of contracted customers along trunk routes in the NT.

206 The ACCC says that the Tribunal does not have to be satisfied that these outcomes are the "most likely" to occur, only that that there is a "real chance" that they might occur so that they are counterfactuals which the Tribunal must take into consideration. It says that the Tribunal's obligation cannot be "usurped by the categorical declarations by the executive of a company" of what the future without the Proposed Acquisition would look like.

207 The ACCC submitted that TML's exit in the absence of the Proposed Acquisition presents a "unique opportunity" to lower barriers to entry or expansion for Sea Swift's competitors by making major contracts contestable at the same time, so that contracted customers may make their own arrangements to secure a new operator, for instance by way of tender.

208 One of the ACCC's major contentions was that an incumbent enjoys a significant competitive advantage because it is difficult for new entrants to win customers because few contracts are large enough to cover the high fixed costs of providing a scheduled service and customers are often reluctant to switch suppliers due to the essential nature of the service.

209 The ACCC said that the evidence shows that potential competitors are interested in purchasing TML's vessels, plant and equipment and the opportunity to compete for TML's customer contracts. In this, the ACCC was relying primarily on the evidence of Mr Hamilton of Shorebarge, Mr Johnson of Teras and Mr Wallin of Carpentaria Contracting.

210 The ACCC rejected Sea Swift's submission that, having regard to TML's stated intentions, it would be the likely provider to TML's Largest Customers in the future without the Proposed Acquisition. The ACCC contended that the fact Sea Swift was willing to pay a significant price for the "certainty" of having the Toll contracts transferred to it shows that it is not clear that Sea Swift would win those contracts if the acquisition was not authorised. In saying this, the ACCC relied on the evidence of Mr Readdy (an executive of CHAMP Ventures and non-executive director of Sea Swift) that Sea Swift considers the certainty of picking up TML's Largest Contracts to be a benefit of the Proposed Acquisition. The ACCC asserted that Sea Swift was prepared to pay a "substantial premium" despite TML's announcement that it would exit the market in the short term if the Proposed Acquisition was not authorised because it avoided the risk posed by competitive forces which would exist if the Proposed Acquisition did not proceed.

211 In theory, a vendor would usually seek to sell a business as a going concern or to sell contracts with related assets because that is the most likely way of maximising value

compared to the sale of individual assets: both Messrs Lindholm and Eversgerd accepted that position. In theory, such an exit may also provide a "unique" opportunity for competitors to acquire TML's major customer contracts, but that depends on the will and capacity of the competitors to compete for those contracts on terms likely to be acceptable to those customers. In theory, the payment of a consideration greater than the value of a company's tangible assets may indicate that the purchaser is paying for a market share that could result in a significant lessening of competition. However, in the Tribunal's consideration of Sea Swift's Application, theory must give way to fact.

Why Toll would choose to exit quickly if authorisation is refused

212 Mr Woodward's evidence as to the amount of TML's losses on an EBITDA basis in FNQ and the NT in 2015 and in the period to March 2016 is set out in his statement dated 25 May 2016. This information, broken down to exclude revenues and costs relating to TML's charter service and road freight businesses and with greater definition in relation to the allocation of costs and overheads, was not available to Mr Lindholm when he made his report.

213 Mr Woodward said that Toll decided not to seek expressions of interest for TML's businesses in the NT and FNQ because its financial performance meant that it would likely only be attractive to Sea Swift because it would provide Sea Swift with an additional revenue stream having regard to the assets which it had already deployed. He says that TML's business in the NT is not profitable on a stand-alone basis and this would be "immediately apparent to any prospective purchaser". Mr Readdy agreed with that view on the basis that TML's EBITDA for 2015 had been [redacted]

214 Mr Woodward further said that, given the size of the ongoing losses suffered by the TML in the NT and the period for which they have been sustained, Toll would not contemplate running a going concern sale process if authorisation was refused. In his view selling the NT business or, alternatively, selling that business in parts would be a waste of time and resources; nobody would be interested in these unprofitable operations and no new bidder would be revealed.

215 Mr Woodward said that there are no or few obvious pairings of vessels and contracts, among other reasons, because only one of the three vessels proposed to be transferred to Sea Swift is in fact used by TML to provide scheduled services in the NT. The other two vessels are either used as a back-up or in FNQ. TML's other services in the NT are provided using

charter vessels. The only merit in trying to bundle a loss-making contract with a vessel would be if it was being offered to a provider of an existing service which would benefit from the incremental volume and cost synergies, such as Sea Swift. In the 18 months since the Proposed Acquisition was announced, no other operator has proposed to Toll any of the courses of action suggested by the ACCC; one person has made a telephone enquiry with a view to buying a vessel for use outside of the NT and FNQ.

216 Messrs Kruger and Jackson had the same view as Mr Woodward. Their evidence is that Toll's commercial imperative is to avoid ongoing losses and "wind up the business as quickly as we can".

Expert evidence in relation to Toll's options

217 Mr Lindholm's evidence was that he formed the view that there may be a purchaser for TML's NT business or some routes in the NT based on a consideration of "gross margin after direct costs", being the costs of operating vessels (excluding shore side costs), and the fact that the business had close to [redacted] of that market. He thought that a possible purchaser would reach its own conclusions on what costs it would have to incur, link that with its own fixed overhead structure and then decide whether it would want to make an offer or not. He had not considered a hypothetical purchaser's shore-side costs or indirect overheads. He had therefore formed no view as to what a theoretical purchaser's cost structure might be.

218 Mr Eversgerd did not share Mr Lindholm's view. Mr Eversgerd observed (among other things) that:

(1) Toll's management is likely to be in a unique position to assess the options with respect to the NT business due to their understanding of the TML business and the industry in which it operates;

(2) Mr Lindholm may have overstated the profitability of the NT business due to a number of factors, including the additional expenses that might be incurred by a buyer as a result of separating TML's NT and FNQ operations;

(3) the focus on gross margin and EBITDA in Mr Lindholm's report instead of on free cash flow does not truly reflect the underlying profitability of the business;

(4) recent earnings suggest there is minimal value in the NT and FNQ businesses on a "business as usual" basis;

(5) historical earnings (2011-2013) are no longer comparable to the business going forward having regard to TML's loss of major customers to Sea Swift and stagnant demand resulting from the decline in resource-related and government construction projects and Rio's closure of its Gove refinery. Therefore, reference to the historical earnings in Mr Lindholm's analysis may be misleading;

(6) the outcome of a sale on a going concern basis is uncertain and the sale process was likely to result in TML incurring additional costs and trading losses;

(7) the successful assignment of customer contracts to another buyer is not guaranteed; and

(8) separating the NT and FNQ operations into independent businesses may be challenging and costly.

219 Mr Lindholm's evidence does not provide a sound basis for the ACCC's proposed counterfactual as to how Toll would behave if authorisation was not granted. The Tribunal accepts the reasoning of Mr Eversgerd. Further, it is highly relevant that no competitor of Sea Swift has approached Toll to purchase the whole or some part of TML's business as a going concern and the only enquiry was from someone investigating the possibility of buying one of its vessels for use outside the NT and FNQ. While Mr Johnson of Teras gave evidence that he felt constrained from approaching Toll due to the various regulatory processes on foot in respect of the Proposed Acquisition, that evidence was not convincing. Toll's decision that TML would exit the market with or without regulatory clearance of the Proposed Acquisition and the exigencies of the regulatory process which the transaction has faced has been played out in public over a long period.

220 With respect and in fairness to him, Mr Lindholm's view was theoretically based within the limits of his instructions and the information provided to him. He readily admits that his view was formed without the benefit of discussion with Toll's executives or on the basis of detailed knowledge of TML's costs of providing the services other than vessel costs. He had therefore formed no view whether TML's cost structure was inflated and he was not in a position to say whether it was a realistic assessment of the cost that any other provider of those services might also have to bear. He does not challenge the truthfulness of the evidence given by Mr Woodward or Mr Jackson, nor does he contend that they are wrong in their approach. He accepts that they are in a better position than him to make these assessments. He was not in a position to identify with any particularity what cost savings might be made

by a hypothetical other buyer of the various bundles of TML's assets which he suggested might lead to a profitable outcome.

221 The Tribunal accepts that absent authorisation, TML would exit the market in the NT and FNQ in accordance with the intentions it announced to customers and the evidence given by Mr Woodward.

Toll's reputational risk

222 Two of the Largest Customers (Rio Tinto and GEMCO) are confident that if the Proposed Acquisition was not authorised, Toll would make the necessary arrangements so that they would not suffer disruption. That confidence appears to be well-founded, based on Mr Woodward's evidence and the fact that they are otherwise substantial customers of Toll and have the means to pursue enforcement of terms which are commercially beneficial to them.

223 As both contracts require the scheduled services supplier to meet specific performance standards [redacted], Sea Swift is the most obvious provider able to meet this requirement. If the Proposed Acquisition did not proceed, it is Mr Woodward's evidence that TML would seek to subcontract the performance of these contracts to Sea Swift. [redacted]. The Tribunal recognises that this might well not be an expression of preference but rather that it would not be reasonable to withhold consent to assignment of the contract to Sea Swift as a full service provider. Having said that, in case the Proposed Acquisition was not authorised, Rio Tinto commenced a tender process in relation to the Gove and Weipa routes; [redacted] For the reasons given by Toll in its closing submissions, the Tribunal is highly sceptical that [redacted]. Mr Luttrell of GEMCO indicated that he would have [redacted]. Accordingly, the need to preserve Toll's reputation with these customers does not lead to the conclusion that TML will remain in the market in the NT.

224 Based on Mr Woodward's evidence, some of the Largest Customers cannot enjoy the same commercial certainty as Rio Tinto and GEMCO. Those customers include large suppliers of essential services to the remote communities, such as IBIS, ALPA and NT Power and Water (through PUMA).

225 Those customers understand that they do not have any assurance that TML will not wind up its business in the timeframe it says it will. For this reason, although Mr King's primary position is that the best outcome for the communities ALPA serves is for the Tribunal to grant authorisation and for the Proposed Acquisition to proceed, he considered his options with alternate providers from the time the Proposed Acquisition was announced. He contacted a number of operators he believed he could use if the Proposed Acquisition was not authorised and the ALPA contract was not novated to Sea Swift. After testing the market, his preferred option is to [redacted]. Mr King's evidence is also clear that he would not consider [redacted]. He would not do this because it would allow a provider to [redacted].

226 PUMA's primary position is also that the Tribunal should authorise the Proposed Acquisition to secure the pricing which underpins its contract with NT Power & Water and for the benefit of the remote communities it serves. The Tribunal accepts that the evidence suggests that ALPA and PUMA, as multi-destination remote community contracts, go "hand in hand" and neither contract is likely to sustain a scheduled service on its own. Sea Swift currently operates the Port Keats route making deliveries for PUMA. It is therefore very likely that the PUMA contract would follow the ALPA contract and Sea Swift will be best placed to secure that contract in the short term.

227 Of the Largest Contracts, only the IBIS contract relates to FNQ. It is Mr Woodward's evidence that TML is unlikely to continue to subcontract the IBIS contract to Sea Swift: it is most likely that TML would [redacted]. IBIS' primary position is that it prefers to secure the benefits to its communities of its existing contract with TML through authorisation of the Proposed Acquisition. If the Proposed Acquisition did not proceed, having regard to the fact that IBIS' contract with TML is already performed by Sea Swift by way of subcontract (and has been since TML won the contract), it appears likely that IBIS would contract with Sea Swift, at least in the short term, but it is not clear on what terms.

228 While Toll might incur some reputational loss with the clients from whom TML walks away, it is a business issue for Toll how it evaluates that risk against ongoing losses incurred by the provision of the service and the extent to which it is willing to pay a client to be released

from its contract. The Tribunal has no evidence as to the quantum of any damages for which TML might be liable. [redacted] is not inconsistent with Mr Jackson's concern to ensure consistent supply of scheduled services to the remote communities: Toll wants TML to transfer these contracts to the other full service provider on their current terms, and [redacted]. If the Tribunal were to refuse authorisation, ALPA, PUMA and IBIS have had a long period of notice in which to make other arrangements and could have acted to minimise any losses they might claim from TML.

229 The Tribunal accepts that TML gave letters dated 26 February and 21 October 2015 to customers containing notice of its intention to exit the markets in FNQ and the NT even though some of the witnesses gave evidence that they were not aware of whether their organisation had received the letters.

230 The Tribunal does not accept that it should act on the basis that it will be necessary for TML to remain operating in the NT and FNQ contrary to its stated intentions in order to minimise reputational risk. The Tribunal accepts that there is a real chance, and it is the most realistic prospect, that Sea Swift would be the provider to TML's Largest Customers in the without scenario, at least in the short term.

"Unique opportunity" and the position of the competitors

231 The parties agree that the current competitors of Sea Swift and TML in relation to the provision of scheduled services are those set out in Annexure 2 to these reasons. Representatives of all of these companies (other than Palm Island Barge) gave evidence.

232 While, in theory, TML's exit may present a "unique opportunity" for its competitors to win customer contracts in the short term by making them contestable at the same time, the evidence is that this is not a realistic proposition. This is because the evidence establishes that:

(1) The remote communities require at least weekly services but the provision of that service must be underwritten by a base load contract to make the route financially viable;

(2) TML would cease providing services within approximately 60 days of authorisation being refused and Sea Swift will be the provider to TML's Largest Customers at least in the short term with or without the Proposed Acquisition; and

(3) The negotiation of the base load contracts takes some time, especially if a tender process is undertaken, which is the usual (though not exclusive) method of awarding these contracts. TML's Largest Customers usually require that operators agree to their standard terms and that the provider be in a position to provide the service at the time the contract is awarded. Those customers are in a strong negotiating position (particularly on price) because they provide base load volume. While Rio Tinto has gone out to tender at this time, [redacted]. ALPA would also [redacted] having sought out alternatives.

Position of competitors

233 The Tribunal accepts as a fair summary of the evidence given by officers of the competitors that, with the possible exception of Barge Express, in the absence of the Proposed Acquisition Sea Swift is the only operator which is currently both able and willing to take over scheduled services operated by TML if TML does as it says it will and exits the market. For the reasons set out below in relation to each individual contractor, the Tribunal has formed the view that none has taken realistic, concrete steps to be able to compete for and win Transferred Contracts in the short term if the Proposed Acquisition is not authorised. Their best opportunity to compete effectively in the long term is if the Proposed Acquisition is authorised and proceeds subject to the Transferred Contracts Condition: see [251]-[252] below.

234 Shorebarge: The ACCC relied on the evidence of Mr Hamilton that he could "straightaway" provide all of the services that TML currently provides to PUMA, and that he did not require any new facilities to do so. He said he could also provide all services to ALPA, GEMCO and Rio Tinto within 30 to 40 days. Mr Hamilton explained that if he was approached by a large customer he could secure an additional barge within an agreed period of time. He said "[t]here are many barges available in the Northern Territory and Australian waters looking for work." He also said, "leasing the barges is not hard, the transportation is usually four – say five to six days to actually bring them to Darwin. The crewing is reasonably easy". He then conceded that: "there would be problems, there's no doubt about that, however, they are not insurmountable".

235 However, the Tribunal did not find Mr Hamilton to be a convincing witness or his aspirations to be credible in the short term. Toll correctly pointed out that Mr Hamilton's actions to date are limited to a "brief discussion" with Mr King of ALPA. Mr King says [redacted]. There is no evidence that Mr Hamilton has discussed providing scheduled services to [redacted], there is only evidence of "discussions … [that] … have not progressed" in relation to charter services. [redacted] confirms that discussions about scheduled services have not occurred. [redacted]. Sea Swift correctly points out that, while Shorebarge would like to commence scheduled services in the NT and Mr Hamilton says that it could do so within 30 to 40 days, [redacted] That matter alone makes it unlikely that Shorebarge would be in a position to take on TML's contracts in the time required following TML's exit, especially if the contracts were put out to tender. The Tribunal accepts that Mr Hamilton's confidence about how fast he could start a service should be treated with caution given that there are some inconsistencies between his evidence and Mr Johnson's evidence that Teras is still providing scheduled services on the Darwin to Port Keats route (a contract said to have been won by Shorebarge) because Shorebarge was not able to perform.

236 Teras: The ACCC relied on Mr Johnson's evidence that Teras could take on all of TML's business within 30 to 60 days if TML's customers adopted Teras' standard terms of charter while negotiating longer term agreements. In addition, he did not rule out signing up and commencing a full service on terms stipulated by TML's major customers within 30 to 60 days.

237 The Tribunal formed the view that Mr Johnson's expressed interest was theoretical at this stage and that he had not undertaken any form of detailed planning or taken any concrete steps to be in a position to compete immediately for some or all of TML's Largest Contracts. While Mr Johnson explained that he had not thought it proper to approach potential customers before the Tribunal's process concluded, he appeared challenged by the need to adopt the standard terms required by TML's Largest Customers. He expected to be able to negotiate them, but that would necessarily take time given that TML's Largest Customers are

usually successful in contracting on their own terms. In his statement, Mr Johnson said that it is unlikely that Teras could immediately service all of TML's customers and may not want to gain all of them. He later explained that he may not want any of them: they would have to "make commercial sense for me to do it".

238 The Tribunal infers from this evidence that Mr Johnson has not yet undertaken an assessment of the basis on which Teras would establish a scheduled service of the kind operated by TML and the likely prices he could achieve with customers. Although Mr Johnson expressed a willingness to take up the ALPA and NT Power & Water contracts, he gave no details of how this would occur (including any plans to acquire further vessels and depots). He also did not provide details of how such plans would be financed, given that Teras' parent company (AusGroup Limited) is [redacted]

239 Bhagwan Marine: The Tribunal takes from Mr Kannikoski's evidence that Bhagwan Marine does not currently provide scheduled services and it has no current plans to provide a scheduled service and no real appetite to do so. It has access to landing barges and the expertise to provide a coastal community landing barge service if it wished to do so. However, Mr Kannikoski's evidence is that he would only contemplate a scheduled service if he was unable to sell his three barges which are currently for sale.

240 Carpentaria Contracting: Mr Wallin's evidence is that Carpentaria Contracting has no plans to provide a scheduled service in FNQ and that it would need to make upfront capital investments to be able to tender for the large contracts which it is not in a position to do without the certainty that it will be successful in securing those contracts. He said that Carpentaria Contracting would need three to six months to take over "some" of TML's customer contracts. Ms Ahwang (of TSIRC) said that Carpentaria Contracting is not capable of servicing its requirements.

241 MIPEC: MIPEC's business is based in Gladstone and it provides marine, port, engineering and contracting charter services to the mining, industrial, marine and oil and gas sectors in the Queensland region. It does not provide scheduled services but is considering doing so following the downturn in the mining and resource industries. MIPEC has gained "preferred status" with TSIRC along with Sea Swift, but it has not yet carried out any work under that contract. [redacted]

[redacted] The Tribunal's view is that it is unlikely that MIPEC could take over TML's contracts in the NT in the short term following TML's exit.

242 Pacific Marine Group: While Mr Dodd does not consider that it would be difficult for Pacific Marine Group to provide scheduled services in FNQ if there was a chance of securing profitable work, the force of his evidence is that there is not sufficient demand for more than one operator and the high fixed costs associated with that business make it unattractive.

243 Barge Express: Mr Conlon says that he has no objection to the Tribunal authorising the Proposed Acquisition and he will implement his plans when the Tribunal has made its decision. Previously called Sealink, Barge Express has provided a charter service to customers in the NT since 2005. It has a fleet of four landing craft, one of which (the *Bimah Tujuh*) is currently chartered to TML to carry out TML's scheduled services to six remote communities in the NT (Garden Point, Maningrida, Ramingining, Milingimbi, Goulburn Island and Croker Island). Earlier this year, Barge Express advertised the commencement of a scheduled service in the NT between Darwin and Elcho Island, stopping at Maningrida, Goulburn Island and Croker Island, but the service has not yet commenced; Mr Conlon says that he [redacted] Barge Express also plans to expand its services beyond those destinations. Mr Conlon considers Barge Express to be "in a great position to compete in the market", and it would seek to cover 60-80% of the services in the NT that TML currently provides. Mr Conlon considers that Barge Express has what it needs in order to do this.

244 The Tribunal accepts that Barge Express is the competitor of Sea Swift most likely to be in a position to provide scheduled services in competition with Sea Swift in the near future should Mr Conlon determine to do so. However, Mr Conlon has no objection to the Tribunal granting the authorisation and considers that the Transferred Contracts Condition will remove any 'paper barrier' his company may face as an alternative supplier to Sea Swift. The Tribunal got no sense of urgency from Mr Conlon; it is plain that he will only do business on his own terms, especially as to price. He has spoken to TML's Largest Customers who have approached him, although the evidence does not suggest that Barge Express is likely to win their work in the short term; it appears that he has been told more than once to [redacted]

Summary of findings

245 The evidence given by Toll's executives about why the Proposed Acquisition and winding up the businesses in the NT and FNQ were the alternatives Toll pursed after mid 2014 is reasoned, based on actual knowledge of TML's cost structure and profitability and supported by written statements made twice during 2015 to TML's customers as to what it would do if the authorisation was not granted. TML's Largest Customers know TML's position and most have taken some steps to deal with it.

246 The Tribunal does not accept that the evidence of Toll's executives amounts to "categorical declarations" of a kind which it should reject. The Tribunal accepts that Toll's executives have made a commercial judgment of the best course open to it to deal with TML's operating losses and that the only counterfactual with a "real chance" is that Toll will act on its stated intentions as set out above. The Tribunal prefers the evidence of Toll's executives to the theoretically based speculation by the ACCC as to what Toll or some other person might or should do in the circumstances.

247 The Tribunal does not accept that if the Proposed Acquisition did not proceed there is a "real chance" that TML would remain in the NT market for a period materially exceeding 60 days for the profit maximising or reputational risk management reasons suggested by Mr Lindholm.

248 The Tribunal accepts that the relevant counterfactual is that if the Tribunal did not grant authorisation of the Proposed Acquisition, TML would exit the markets in the NT and FNQ in approximately 60 days and Toll would deal with TML's assets in the manner described by Mr Woodward set out in [202] above. The Tribunal does not accept that there is a "real chance" that Sea Swift's competitors will be able or (if able) willing to compete on terms acceptable to TML's Largest Customers at least in the short term. The Tribunal has formed the view that Sea Swift will become the provider to those customers, either by subcontract or as a result of winning a new contract, if authorisation was not granted.

249 These factual findings fatally undermine much of the ACCC's theory of harm. On this basis, the Tribunal does not consider that it is necessary to deal with the ACCC's submission that Sea Swift was willing to enter into the ARASSA on 17 March 2016 and pay a "substantial premium" to avoid the risk of failing to capture the revenue streams from TML's Largest Contracts. Suffice it to say that as there was no evidence given to the Tribunal of the present value of the vendor note or the shares in Sea Swift which Toll will receive as consideration

under the Proposed Acquisition, the foundation for the ACCC's contention that there was a "substantial premium" was not made out. Further, Sea Swift's perceptions of risk without full knowledge of TML's intentions or the intentions of TML's Largest Customers, and the amount that it was willing to pay for TML's assets as a result, is irrelevant to the Tribunal's evaluation of the impact on competition with and without the Proposed Acquisition.

250 The ACCC did not establish why payment for goodwill is necessarily a proxy for the acquisition of market power, especially in a situation where the multiple of earnings to be paid is in the middle of the ordinary range having regard to Mr Eversgerd's evidence. It is true that it might be difficult to see why a purchaser would pay much for the transfer of a contract with a customer when the purchaser is likely to attain their custom anyway. However, whether or not that transfer puts the purchaser in a position to exert market power is a factual matter which depends significantly on the nature of the rights the purchaser obtains and it is to be compared with the position the purchaser would enjoy in the counterfactual.

251 Despite some of the things which have been said to the ACCC and at the hearing by officers of operators other than Sea Swift and TML, their evidence does not demonstrate any immediate willingness or capacity to compete for or take on TML's base load contracts in the short term on the conditions (especially as to cost) which some of the Largest Customers require. The Tribunal has rejected the submission that there is a real chance that those customers would choose to use those other operators in the short term and therefore the "unique opportunity" posited by the ACCC does not exist. The ACCC's contention that a new entrant would not face the same position in all material respects in the without scenario is therefore misconceived.

252 Indeed, in the without scenario, there is a high prospect that Sea Swift's position would be entrenched with TML's Largest Customers in the long term, either as a subcontractor of TML or under new contracts entered into as a result of TML's exit from the markets in the NT and FNQ. New contracts would likely be for a period of three to five years and they may contain exclusivity, minimum volume or rights of first refusal clauses.

WILL THE PROPOSED ACQUISITION RESULT IN A SUBSTANTIAL LESSENING OF COMPETITION OR OTHER PUBLIC DETRIMENTS?

Barriers to entry and expansion posited by the ACCC

253 A key difference between Sea Swift and the ACCC is their view about the height of barriers to entry and expansion. The ACCC contended that these barriers are high and will be increased if the Proposed Acquisition proceeds. The barriers identified by the ACCC are, in summary:

(1) The benefits of incumbency arising from reputational factors (in particular a track record of providing a reliable service in a region) leading to customer loyalty, economies of scale, and staggered timing of tenders when bidding for incremental customer contracts.

(2) A lack of access on reasonable terms and conditions to the Gove Lease facilities.

(3) Strategic behaviour by incumbents, including low pricing, in response to attempted entry.

(4) Potential new entrants are likely to incur sunk costs which are not recoverable on exit, including losses incurred during the establishment phase after entry and the costs of acquiring and relocating suitable vessels.

254 As mentioned above, the ACCC submitted that TML's exit offers a "unique opportunity" to lower the barriers to entry and expansion.

255 The Tribunal rejects the ACCC's position for the following reasons.

Incumbency

256 The ACCC's position is based on the proposition that an incumbent enjoys a significant competitive advantage as it is difficult for new entrants to win customers because few contracts are large enough to cover the high fixed costs of providing the service and customers are often reluctant to switch suppliers due to the essential nature of the service and the reputation obtained through their experience of the incumbent's service.

257 Despite the intuitive attraction of the ACCC's proposition, the Tribunal does not accept that incumbency is a material factor in this matter so that it is unnecessary to consider whether or not that factor rises so high as to constitute a "barrier to entry".

258 First, the proposition that it is "easier … to retain a customer as opposed to win a customer" can readily be accepted but only so long as the incumbent maintains the level of service demanded by a customer and does not raise prices unreasonably.

259 However, until Sea Swift has been operating under the Transferred Contracts for some time, Sea Swift will not enjoy the trust implied by the word "incumbency"; it takes time for the customer's experience of reliable service to build that trust. Sea Swift is not an "incumbent" under the Transferred Contracts, except in relation to those contracts where it is currently providing services as a subcontractor (for instance, IBIS in FNQ and Port Keats deliveries under the PUMA contract) and that is a form of incumbency it will have without the Proposed Acquisition. Otherwise, at the time the Transferred Contracts are transferred to it, Sea Swift will only have such reputation as may have been derived from the market or from customer experiences of employing Sea Swift's scheduled or charter services while TML was in the market. It will therefore be on the same reputational footing as its competitors. That is not, in any relevant sense, incumbency such as might create a barrier to entry, even if reputation should be treated as a barrier to entry, which is doubtful. That is the force of Mr Meyrick's evidence, which the Tribunal accepts.

260 Second, the Transferred Contracts Condition obliges Sea Swift not to enforce any provisions in the Transferred Contracts relating to minimum volume, exclusivity or rights of first refusal. Although the ACCC suggested that this benefit is illusory, it is the Tribunal's view that this makes the Transferred Contracts contestable now and during the term of those contracts.

261 While it is true that some of the Transferred Contracts do not contain exclusivity or minimum price conditions, most of TML's Largest Contracts do contain exclusivity provisions and contracts which were not exclusive did contain rights of first refusal to match a competitor's bid. With the Transferred Contracts Condition, TML's former customers and Sea Swift's competitors will know that the Transferred Contracts will be contestable as a result of authorisation. They will know, aside from other reasons, because officers of the customers and competitors were told that during the hearing, if not before. Sea Swift must also ensure that its obligations under the Transferred Contracts Condition are published on Sea Swift's website and communicated to customers within 30 days of the Completion Date under the ARASSA.

262 Officers of TML's Largest Customers said that operational capability, regularity, reliability and price are key considerations for customers in choosing a scheduled service provider. However, none of them said that incumbency of a service provider on a particular route is a key consideration; all are prepared to consider non-incumbent service providers on the customers' routes when a contract expires.

263 It is true that the officers of two of the Largest Customers gave evidence that they generally do not seek scheduled services from operators other than those with whom those organisations have contracts during a contract's term. Mr Hamilton gave evidence that customers would be reluctant to change again once the contracts had been transferred to Sea Swift. The ACCC relied on the fact that Sea Swift budgeted on retaining the revenue to be derived from the Transferred Contracts and Mr Readdy said that a "higher level of certainty" of achieving this was one of his reasons why Sea Swift entered into the Deed of Amendment on 17 March 2016.

264 However, the officers of TML's Largest Customers also gave evidence that they do use other scheduled service providers when it is convenient, for instance, when it is necessary to consign freight urgently, after the regular provider's service had sailed or for charter services. These are opportunities for those other operators to become known to these customers and to build a reputation for reliability so that they can compete for the Transferred Contracts.

265 Further, officers of TML's Largest Customers also gave evidence of how they will behave in the knowledge of the Proposed Conditions. They clearly thought this situation was different from the normal circumstance where they have chosen a service provider and entered into a contract with them. Mr King from ALPA explained that if the Proposed Acquisition was authorised, he will be able try out Sea Swift, and switch to another operator if Sea Swift does not meet his requirements. Rio Tinto has already sought alternatives by way of tender in case the Proposed Acquisition was not authorised, [redacted]. Mr Copeland of IBIS confirmed that, if it was not happy with Sea Swift's service under the contract after it is transferred by TML, then he would have no hesitation in speaking with other providers with a view to obtaining some or all of his requirements from another provider. All of this points to the fact that Sea Swift does not enjoy the benefits of "incumbency" yet.

266 Third, as submitted by Toll, customers can and have switched from an incumbent provider. Examples of this include:

(1) TML, as incumbent, lost the Caltex contract; the Woolworths Gove contract; the Woolworths Weipa contract; the Rio Tinto Weipa contract; and Rio Tinto Gove charter work, all to Sea Swift. TML also lost work relating to Port Keats, including Caltex's work, to Shorebarge;

(2) Sea Swift, as incumbent, lost the IBIS contract to TML and was only reappointed as one of two preferred suppliers under the TSIRC contract;

(3) Teras, as incumbent, lost the Northline work to Shorebarge, however it is not clear which of Teras or Shorebarge is currently operating that service; and

(4) Shorebarge, as incumbent, lost Caltex's work for Port Keats to Sea Swift.

267 Mr Conlon does not perceive any true advantage to incumbency.

268 As mentioned above it has not always been the incumbent which has survived in a price war. It is difficult to see the prospect of a price war as a barrier to entry since it may be the entrant which instigates it by undercutting the incumbent.

269 Fourth, TML's Largest Customers have and will continue to have countervailing power. The evidence is that these customers are sophisticated and understand that they control critical volumes and conditions of supply. These customers have the ability to undertake competitive tender processes to award work and otherwise test the market (and generally do so), either formally or informally. They have the ability to threaten other options to constrain their service providers and they can and do talk to other operators as a back-up or as a "stalking horse". They can and have sponsored, supported or encouraged new entry in a range of ways that do not involve financial investment in a service provider. For example, Caltex encouraged Sea Swift's entry and expansion into the NT market by entering into a base load contract with it.

270 Fifth, the ACCC submitted that the Transferred Contracts Condition does not address the ways in which an incumbent may provide an incentive to its customers to ship all of their freight with the incumbent, such as volume discounts. As mentioned above, the ACCC suggested that the Transferred Contracts Condition should be amended to deal with volume discounts. However, the Tribunal considers that volume discounts are a normal and appropriate incident of competition which can also be offered by competitors. In any event, the Condition is not required to address any substantial lessening of competition which would not exist but for the Proposed Acquisition because the Tribunal has already accepted that the

outcome of TML's exit is that Sea Swift will become the provider to TML's Largest Customers for reasons given elsewhere.

271 Finally, the Tribunal accepts that economies of scale derived from having a number of customer contracts enhances incumbency and the staggering of the time contracts coming up for renewal may contribute to that enhancement. In the Tribunal's view, Sea Swift's likely position in the without scenario will inhibit competition in both the short run and the long run compared to the position if the Proposed Acquisition is authorised subject to the Transferred Contracts Condition (as revised by the Tribunal). This is because the Transferred Contracts will be contestable during their term (including extensions at the option of the customer) which will give other operators time to calibrate a competitive proposition that they are currently either not able or (in the case of Barge Express) not willing to make to the TML's Largest Customers on terms likely to be acceptable to those customers.

272 The customers party to the Transferred Contracts will benefit because they will experience little disruption from TML's exit while being freed from restrictive contractual provisions such as exclusivity, rights of first refusal or minimum volume provisions; they will be able to "try before you buy" not only Sea Swift's services, but also services provided by other operators, albeit that in the short term it is likely that most client relationships will be built by Sea Swift's competitors through the provision of charter services. This encourages incremental entry which imposes a competitive discipline on Sea Swift which is unlikely to exist in the counterfactual. That is so even though in the meantime, Sea Swift will have been put in a position to build a relationship with the customer that it does not currently have.

Gove Lease Undertaking and strategic conduct

273 As indicated at [155] above, the Tribunal accepts that, absent the Gove Lease Undertaking, a competitive detriment would result from the Proposed Acquisition as Sea Swift would have exclusive control of the roll-on/roll-off ramp which is the most efficient facility at Gove for scheduled service operations.

274 At the time of the hearing, Toll had not decided what it would do with the Gove Lease if the Proposed Acquisition was not authorised. Toll had little appetite to operate the facility if it was not using it to provide schedule or charter services and Toll indicated that it might either sell the lease (which would require the consent of the lessor) or surrender it.

275 Mr Readdy's evidence was that, from Sea Swift's perspective, access to the Gove Lease is an important part of the Proposed Acquisition.

276 Mr Helms of the Gumatj Corporation gave evidence that he is supportive of the Gove Lease going to Sea Swift. He has recommended to the Northern Land Council that it approach Toll to relinquish the lease at Gove and pass it on to Sea Swift if authorisation is not granted.

277 There is no evidence that anyone other than Sea Swift has developed a proposal to acquire the Gove Lease or to operate the facilities on it. It appears likely that Sea Swift is the entity both able and willing to operate the facilities at the Gove Lease either with or without the Proposed Acquisition.

278 The ACCC submitted that the Gove Lease Undertaking is insufficient to address its concerns.

279 The first issue is pricing. The Tribunal accepts that following the transfer or surrender of the Gove Lease it can be expected that any operator of the wharf is likely to impose charges sufficient to make a return on the costs of operating and maintaining the wharf. The evidence suggests that many operators found TML's charges uncommercial; indeed this is the reason why Sea Swift sought alternate wharf facilities at the Gove Boat Club.

280 However, based on Mr Woodward's unchallenged evidence, [redacted]. While those charges are higher than fees charged by operators of wharves in other places (as set out in the submission of the Department of the Chief Minister of the NT), the Tribunal has no evidence of the cost of providing the services in those other places. Mr Hamilton stated that the terms of the Gove Lease Undertaking do not make access to those facilities commercially viable for Shorebarge.. However, there is no evidence that any other operator of the facilities at the Gove Lease would be able to charge less than the rates Sea Swift now says it will charge under the Gove Lease Undertaking.

281 Given Mr Woodward's evidence, it may well be that running the Gove Lease is only attractive to an operator of a scheduled service or some other person who handles a substantial quantity of freight through Gove. Although Mr Hamilton said he saw virtue in an independent stevedoring company holding the lease for the roll-on/roll-off ramp at Gove, he did not give evidence that anyone was attempting to put such an arrangement in place. Rio Tinto's officers made no suggestion that it had any interest in doing so either, albeit that that question was not put to any of those officers.

282 As part of the privatisation of the port of Darwin, the *Ports Management Act 2015* (NT) was passed. This Act introduced a regulatory scheme for the operation and management of ports in the NT, including price regulation and third party access. It is open to the NT government to apply this scheme to the Gove Lease. While this fact has been given little weight by the Tribunal, it is another avenue for regulation of Sea Swift's conduct.

283 Another of the ACCC's concerns is that, as operator of the facilities at the Gove Lease, Sea Swift will have the opportunity to interfere with other operators' cargo activities. The ACCC's Report suggests that the facility should not be operated by Sea Swift because it will have the "incentive and ability to discriminate against its competitors who use the facility".

284 Sea Swift operates the Humbug Wharf in Weipa. Since December 2013, it has provided access to TML; it also provides access to Pacific Marine Group and Carpentaria Contracting. As to these operators:

(1) It is Mr Woodward's evidence that TML has not had any difficulty obtaining access to the wharf and had not experienced disruption to berthing schedules outside of normal weather issues.

(2) Pacific Marine Group's evidence is that it uses the Humbug Wharf daily, and Sea Swift has been "helpful and amenable".

(3) Mr Wallin of Carpentaria Contracting suggested in his witness statement that it had experienced delays in accessing the Humbug Wharf at times. It needed to use the wharf to take delivery of goods following their discharge at the wharf by Sea Swift. This is not evidence of obstruction by Sea Swift, it is reflective of commercial timing.

285 Other allegations of strategic conduct were made by the ACCC in the course of the proceedings. The Tribunal has no doubt that Sea Swift is an aggressive competitor, however, many of the allegations were based on conduct that witnesses said they had heard about or thought might be a risk, but of which they had no direct experience. It is puzzling why so much hearsay was relied on. The Tribunal is not satisfied that the ACCC made out its allegations of strategic conduct for the reasons given by Sea Swift in its closing submissions.

286 The ACCC has not established that Sea Swift has engaged in the kind of behaviour which grounds this concern and its submissions do not provide a basis for the Tribunal to regard the undertaking as inappropriate. Evidence of conduct inconsistent with Sea Swift providing access in accordance with the non-discrimination provisions in the Gove Lease Undertaking

should form the basis of enforcement action by the ACCC if it occurs. If the ACCC considers that its remedies in relation to that undertaking or for breach of the conditions of authorisation are inadequate, that is a matter for it to take up with the Federal Government.

287 Next, the ACCC has related concerns that:

(1) the undertaking is a behavioural undertaking which, according to Professor King, is a poor substitute for market forces in achieving competitive price and service outcomes;

(2) the undertaking is less robust or comprehensive that other port undertakings that the ACCC has accepted in the recent past, which included "ring fencing" of competitor information, independent price and non-price dispute resolution processes for terminal users, independent monitoring (including on an ad hoc basis at the request of a terminal user) and periodic review of the undertaking; and

(3) following provision of the draft Determination to the parties on 28 June 2016, the ACCC submitted that the undertaking should be subject to independent third party audit provisions as adopted in *Mac Gen*, and for the first time provided the Tribunal with draft clauses.

288 The Tribunal accepts that since the original s 87B undertakings were given by the Perkins Group, regulatory practice may have moved on. However, while the ACCC's Report and submissions referred to the matters set out in (1) and (2) above, the ACCC's concerns were expressed as concepts without drafting suggestions and on the primary basis that authorisation should not be granted. None of the ACCC's submissions addressed whether there was any difference in the significance of the ports in relation to which it had adopted the new and significantly more detailed style of undertaking. There is no evidence that the ACCC engaged at all with Sea Swift about drafting to accommodate provisions of the kind which the ACCC thought appropriate and found acceptable in other matters, nor did it provide any such drafting to the Tribunal for its consideration.

289 It would have been appropriate for the ACCC's concerns to have been aired at the hearing in a more concrete form which allowed the Tribunal to assess the suitability of an undertaking which conforms to the ACCC's current practices and addressed its concerns. The first drafting proposal provided by the ACCC was on 29 June 2016 when it provided draft provisions relating to third party audit used in relation to nationally significant infrastructure. As submitted by Sea Swift, it is not apparent why the expense of complying with provisions

of this kind would be justified having regard to the size and the scope of the facilities operated at the Gove Lease compared with, say, an international terminal.

290 All the Tribunal had before it at the time it was making the decision to grant authorisation was a form of undertaking which had been previously accepted by the ACCC in relation to the Gove Lease, with provisions which would improve the price at which competitors could get access to those facilities compared to that charged by TML and which would, for the first time, cover the roll-on/roll-off landing ramp, the most appropriate facility for use by scheduled service operators.

291 The Tribunal considered that it was appropriate to authorise the Proposed Acquisition because of its view of the counterfactual and the desirability of securing the range of benefits to remote communities which would be conferred by the Proposed Conditions (amended as required by the Tribunal) as well as the improved conditions of the Gove Lease Undertaking compared with those of the existing s 87B undertaking. The Tribunal considered it appropriate to impose a condition that Sea Swift execute and provide the Gove Lease Undertaking to the ACCC.

292 Correspondence from the ACCC's lawyers dated 29 June 2016 suggested that if the Tribunal were, as specifically provided for by s 95AZJ(2), to make the Determination with a condition that Sea Swift execute and give to the ACCC an undertaking under s 87B in the form proposed by Sea Swift, it remained a matter for the ACCC in the exercise of its independent discretion as to whether it would accept such an undertaking. The Tribunal was therefore put in a position where it might, acting pursuant to s95AZJ(2), impose a condition of authorisation which could literally be fulfilled by Sea Swift executing and proffering the Gove Lease Undertaking to the ACCC, but its purpose could be frustrated because the ACCC might not accept the undertaking. While such an outcome would appear to the Tribunal to be inconsistent with the scheme envisaged by s 95AZJ(2), the Tribunal asked the ACCC to advise, in unequivocal terms, whether it would accept the undertaking if given in that form. Following a meeting of the Commission hastily convened on 1 July 2016, the Tribunal was advised that it would.

293 The Tribunal is grateful that the ACCC took the steps necessary to be able to give the required advice to the Tribunal. The Tribunal nonetheless has concerns that the ACCC's role of *assisting* the Tribunal was, in this case, impeded by its advocacy of a position in relation to whether or not authorisation should be granted.

Sunk costs

294 The ACCC submitted that the prospect of losses from sunk costs, such as initial trading losses while a business establishes itself in a market and in operating a route during the time taken to establish a reputation, is more likely to deter entry where a potential entrant perceives it has a limited prospect of recouping that investment over time following its entry. It says that in this matter, this is likely because of:

(1) the need to hold multiple contracts in order to cover the cost of providing scheduled marine freight services. This is due to the existence of fixed costs and economies of scale over some ranges of output;

(2) the staggered and infrequent timing with which major contracts come up for tender;

(3) the importance of customer inertia, customer loyalty, reputation and switching;

(4) the expressed customer need for demonstrated reliability; and

(5) a history of aggressive pricing behaviour by market incumbents – including the recent price war that has driven a major competitor such as TML out of the market.

295 Interestingly, the ACCC did not accept Sea Swift's submission that the prospect of orderly exit (demonstrated if the Proposed Acquisition was authorised) has the effect of lowering a barrier to entry by lessening the fear of sunk costs because recovery of those costs is more likely in an orderly exit.

296 The Tribunal is troubled by the propositions put by both the ACCC and Sea Swift.

297 The ACCC's method of identifying "sunk costs" as a barrier to entry does not derive from the significance or magnitude of the costs themselves but rather from other factors relevant to the prospects of an entrant's success. Those factors primarily relate to whether incumbency is a barrier to entry, which is dealt with above.

298 The concepts of barriers to entry and the costs of entry must be carefully distinguished. Costs of entry are those inevitable costs of entry, without which entry could never hope to be successful. Even the incumbent firm will have had to bear those costs when it entered the market. A barrier to entry, one way or the other, will raise its rival's costs such that it will be hard to compete, whereas a cost of entry is a commercial reality that is neither artificial nor the result of conscious strategic actions taken by the incumbent to deter entry.

299 If any business venture fails it will, to some extent, not be able to recover the value of some of its assets and investments in things like marketing, licence fees and so on. But this is how business works – entrepreneurs have to take risks and sink capital into the assets necessary to operate. This is the very essence of the competitive process in which success is not guaranteed.

300 To be considered a barrier rather than a cost of entry, a barrier to entry must give an incumbent firm a lasting commercial advantage over a potential entrant such that the would-be entrant hesitates to sink the costs necessary to enter the market for fear of not being able to recoup them should it be forced to exit the market because it cannot overcome the inherent advantages possessed by the incumbent firms.

301 More often than not these sunk costs will be fixed costs. In this matter, an example might be the acquisition of land-based facilities. The Tribunal accepts that the costs of establishing a facility at Gove may constitute sunk costs that might constitute a barrier to entry. For example, a new entrant might baulk at using the limestone wharf because it would be required to contribute to the $250,000 cost of making the wharf suitable for use. However, most of the costs of obtaining the requirements to conduct a scheduled service can be minimised by leasing land for depots, using common user facilities and chartering vessels. If entry occurs but the venture fails, these assets will be simply handed back to the owners at the end of the lease period. All that has been incurred is the annual cost of leasing and operating and some possible break fees, which are costs of doing business and should not be regarded as barriers to entry.

302 In the Tribunal's view, set-up costs in this matter can be regarded as costs of entry that even the incumbent firm had to incur when it entered the market, even though the dollar cost might have changed over time. If all firms, both existing and a potential entrant, face these costs then it is incorrect to regard them as constituting a barrier to entry.

303 While the difference between the concepts of costs of entry and barriers to entry is of course a matter of degree, the Tribunal finds that the ACCC conflated the two, and made little attempt to demonstrate what, if any, of the costs of entry did in fact constitute barriers to entry. Further, the Tribunal has accepted that Sea Swift will most likely be the service provider to TML's Largest Customers in the counterfactual and the Proposed Acquisition would most likely enhance the capacity of Sea Swift's competitors to compete for TML's

Largest Contracts. Accordingly, if sunk costs were a barrier to entry, this barrier would exist both with and without the Proposed Acquisition.

Detriment claimed by the MUA

304 The Tribunal accepts that the loss of employment by a class of people as the result of the Proposed Acquisition is capable of constituting a public detriment.

305 The MUA submitted that as Sea Swift will not employ TML's employees in the Proposed Acquisition, that is a public detriment which could be avoided or mitigated in the without scenario because TML's employees who are not redeployed by Toll may find jobs with other operators, because Sea Swift's competitors might pick up some of the Transferred Contracts and therefore would need to employ additional crew. The MUA relies on statements by Messrs Johnson of Teras and Mr Hamilton of Shorebarge to the effect that if those companies were to pick up some of TML's contracts they may employ some of TML's former employees. It also relies on a suggestion by Mr Hamilton that if the Gove Lease became available, Shorebarge would support the establishment of an independent stevedoring company to employ indigenous staff. The MUA says that this benefits the remote communities because TML's crew includes members of those remote communities who have few opportunities for employment.

306 Toll and Sea Swift submit that the position of TML's employees will be the same in the with and without scenarios because:

(1) As the MUA accepts, TML employees will be made redundant or redeployed in both the with and without scenarios. As Mr Woodward stated at the hearing, that process is already occurring.

(2) Sea Swift is likely to obtain TML's Largest Contracts in both scenarios, and accordingly it will have the same or similar employee requirements in both cases. While the additional [redacted] shore side staff and [redacted] maritime staff are likely to be sourced from Sea Swift's casual or part-time employees who were made redundant or part-time when Sea Swift cut back services in order to reduce costs, Sea Swift has not ruled out employing former TML employees if it needs to advertise for staff.

307 For reasons previously given, the Tribunal does not accept that Teras or Shorebarge would acquire one of TML's Largest Contracts in the near term if authorisation was refused. Accordingly, their expressions of interest in employing TML's employees carry little weight.

Of course, in the longer term, the Transferred Contracts are contestable and it might be that they would then be in a position at some time to employ former TML staff to the extent they have not been redeployed by Toll.

308 Insofar as Mr Hamilton suggested that he would support the establishment of an independent stevedoring company to operate the Gove Lease, it is only a suggestion and despite the fact that the Proposed Acquisition (in some form) has been in prospect since November 2014 and it has been known to face regulatory hurdles, there is no evidence that either a consortium of barge operators or anyone else has made a concrete proposal to take over the Gove Lease and operate it independently. Toll has indicated that it is not interested in operating the facilities at the Gove Lease if it does not provide services through the facility; the force of Mr Woodward's evidence is that as a stand-alone operation, the Gove Lease facility is expensive to run. Mr Helms has indicated that the Gumatj Corporation supports the transfer of the Gove Lease to Sea Swift. In all of those circumstances, the Tribunal has formed the view that there is no current proposal for the development of an independent stevedoring company which would warrant the Tribunal declining authorisation on that basis.

309 It is a cause of regret that TML's exit will result in the loss of employment in an area of Australia where it may be difficult to find employment, especially for the remote communities. However, the Tribunal accepts the submissions made by Sea Swift and Toll: authorisation of the Proposed Acquisition will not result in any public detriment arising from the retrenchment of TML's staff who will not be redeployed by Toll in the counterfactual.

Finding

310 Having considered the future with the Proposed Acquisition and without it and having regard to the counterfactual and the Tribunal's factual findings, the Tribunal finds that there is no competitive detriment or other public detriment resulting from authorisation of the Proposed Acquisition which is not addressed by the Gove Lease Undertaking.

PUBLIC BENEFITS

311 The Tribunal accepts that the following are key aspects of the market for scheduled services in the NT and FNQ which are relevant to considering whether there is a public benefit to be derived from one or more of the Proposed Conditions:

(1) the fact that there are no road or air services at an affordable cost or reliability which are substitutable for scheduled services to remote communities;

(2) the importance to customers of reliability and frequency of scheduled services due to the essential or perishable nature of much of the cargo carried;

(3) having regard to the disadvantage faced by a significant proportion of these communities, the submission made by the Department of PM & C that "actions which are likely to cause further disadvantage to these communities should be avoided";

(4) the limited (and relatively static) demand for scheduled services;

(5) the high fixed costs of providing scheduled services;

(6) the importance of trunk routes for a scheduled service operator;

(7) the counterfactual; and

(8) Sea Swift is most likely to be the provider of scheduled services to TML's Largest Customers on the trunk routes with or without the Proposed Acquisition. That will occur either by Sea Swift being appointed by those customers under new arrangements or by TML subcontracting the performance of its obligations for the term of the contracts.

312 There were a number of witnesses called by the ACCC who expressed concerns about the loss of services or price rises if there was a reversion to one full service provider to the remote communities and those witnesses gave evidence that they did not favour authorisation. These communities were clearly better off during the period of fierce competition between two full service providers. However it was readily apparent that these witnesses generally did not know that TML was going to exit the NT and FNQ whether or not authorisation was granted. When they were made aware of this at the hearing, some of the witnesses conceded that their communities would be better off with the benefit of the Proposed Conditions.

Professor King's critique of the Conditions

313 Based on a report by Professor Stephen King, the ACCC challenged the appropriateness and utility of the Proposed Conditions insofar as they rely on behavioural undertakings without structural remedy, noting that such undertakings are a "poor alternative to actual competition".

314 Professor King's consideration of the Proposed Conditions was based on the instructions he received from the ACCC's solicitors: see [105] above. As is apparent from the reasons, the Tribunal does not accept most of the factual assumptions or assertions as to competitive

detriments set out in his letter of instruction. That undermines the extent to which the Tribunal can place reliance on Professor King's opinions.

315 Sea Swift submitted that the purpose of the Proposed Conditions was not to bring about a position that is equivalent to what might occur were a regulator to regulate the price and availability of a particular service. Rather, they were designed to provide:

(1) greater access for competitors, through the Transferred Contracts Condition and, if required by the Tribunal, the Gove Lease Undertaking; and

(2) public benefits for remote communities through the Remote Community Price Condition and the Remote Community Service Condition.

316 The Tribunal accepts Sea Swift's submission save that it holds the view that the Gove Lease Undertaking is required to ameliorate or remove a competitive detriment which arises as a result of Sea Swift being the operator of the facilities under the Gove Lease. The Tribunal accepted the undertaking offered by Sea Swift for reasons set out at [273]-[293] above.

Transferred Contracts Condition

317 The ACCC submitted that any benefit conferred by this Proposed Condition is "uncertain, very limited in scope and will be of short duration" and "unlikely to result in any meaningful benefit to the community" and that it is incorrect to assume that transfer of the Transferred Contracts to Sea Swift will result in the preservation of prices determined in a period of intense competition.

318 It submitted that there is no evidence that favourable pricing for large corporations such as PUMA, Rio Tinto, and GEMCO is likely to flow through to the community. Of the not-for-profit organisations, the ALPA contract commenced in 2011, before the intense competition between Sea Swift and Toll. The ACCC conceded that evidence suggests that IBIS was able to negotiate favourable pricing. The ACCC submitted that these companies may be able to seek remedies for breach of contract if TML chooses to walk away and consequently their financial position is unlikely to be materially different with or without the Proposed Acquisition.

319 The ACCC also submitted that of the smaller customers, almost 40% of contracts were entered into before the period of intense competition. Of the remainder, the ACCC said it is "meaningful" that Mr Tourish of Gove & Beyond Pty Ltd (the company which operates Walkabout Lodge and Tavern at Nhulunbuy) and Mr Totten of the Maningrida Progress

Association expressed concerns about the merger notwithstanding their contractual situation, fearing that it would result in higher prices and lower services, as has happened previously when there was a single provider.

320 The Tribunal does not accept these submissions.

321 First, in relation to GEMCO and Rio Tinto, the public benefit achieved by the Transferred Contracts Condition is that any exclusivity or right of first refusal in those contracts cannot be relied on by Sea Swift. Without authorisation subject to this Condition, there would be no assurance of the terms under which Sea Swift might be engaged or subcontracted to perform TML's obligations, possibly limiting the contestability of contracts with the Largest Customers for an indeterminate period.

322 Second, in relation to PUMA, Mr Donnan has expressed a strong preference for authorisation. It is Mr Donnan's evidence that the favourable pricing that PUMA secured under its contract with TML was achieved in a tender process lasting 18 months. The pricing enabled PUMA to secure the contract with NT Power & Water because it includes the cost of freight secured by the contract with TML. NT Power & Water is a government instrumentality which provides diesel and gas driven electricity generation and distribution services throughout the remote communities and water and sewerage services in the NT.

323 The Tribunal accepts that NT Power & Water need suffer no price detriment in the long run, even if [redacted] with PUMA. However, that does not mean that the remote communities served under the NT Power & Water contract would not suffer disruption while a new provider is engaged. Unless PUMA can make arrangements with an alternate supplier quickly, disruption may occur to services to the remote communities for fuel and the equipment necessary to supply electricity in those communities. Even though other providers may be willing to enter the market, PUMA would be at a negotiating disadvantage in those circumstances. It would certainly not be in a position to take the time and care it did during the 2014 tender process. It is most likely that PUMA would use Sea Swift as the full service provider most closely resembling TML, even though Teras and Barge Express might be suitable for some routes. While PUMA may have a cause of action against TML for any price difference, that may not compensate it in relation to other terms it might be required to accept, for instance in relation to exclusivity or length of contract. Authorisation enables an orderly transition for the remote communities of a scheduled service

which supports continuity of electricity supply, while making the PUMA contract contestable.

324 Third, in relation to ALPA, Mr King has expressed a strong preference for the Tribunal to authorise the Proposed Acquisition having regard to the degree of disadvantage in the communities ALPA serves. While it is the case that the current contract was negotiated before the price war, Mr King expressed concern that if TML walks away, he will need to find another provider and that may not be possible on the same terms as to price or service levels as ALPA now enjoys. He is concerned that any disruption to services would threaten the regular supply of necessary food and other goods at sustainable prices to the disadvantaged communities which ALPA serves. He has indicated that if authorisation was not granted, he has a preference to [redacted], even though it might be able to provide the services he needs. However, he can have no assurance about the terms on which Sea Swift or any other provider might agree to contract and there is no assurance that that contract would be contestable during its term in the future without the Proposed Acquisition.

325 Fourth, Mr Woodward has indicated that TML would be unlikely to subcontract the IBIS arrangement to Sea Swift because of the losses TML would incur. IBIS is then in a similar situation as ALPA. That contract was negotiated during the price war and the Tribunal accepts the evidence of Mr Copeland of IBIS that the savings secured under its contract with TML are substantial and they are passed on to the communities IBIS services in the Torres Strait and FNQ.

326 Fifth, while it is true that if TML [redacted] contracts with IBIS or ALPA or other similar organisations they may have legal remedies against TML which would preserve some of the price benefit which the customers enjoy. However, pursuing legal remedies while they seek out one or more other providers would involve executive time, disruption and expense which may be difficult to either afford or justify given the priorities of these organisations which are important to the well-being of the disadvantaged remote communities that they serve.

327 Finally, in relation to the Transferred Contracts with smaller community groups and businesses, the ACCC estimates that 60% have secured advantageous prices during the price war which they may not have otherwise secured. Of the other 40%, it is quite possible that many would take the same attitude as Mr King; it is a rational approach as it will give them

price and service protection. At the same time, the contracts will be contestable so that the customer will be free to negotiate a better arrangement with another provider if that becomes feasible.

328 The Tribunal is satisfied that the assignment of the Transferred Contracts will minimise disruption to the remote communities who benefit from those contracts. For many of those communities it will also preserve costs for scheduled services at a level which they can manage or which was achieved during the price war, for periods up to seven years (depending on the contract). The communities value this benefit highly. Having regard to the need to ensure that remote communities obtain regular and timely supplies of essential commodities at the best price available, that is a substantial benefit. These are benefits of which they have no assurance in the future without the Proposed Acquisition following TML's withdrawal of its services. The Tribunal does not accept that a period up to seven years is short; there is every prospect that in such a timeframe a significant competitor to Sea Swift might emerge.

329 It is the Tribunal's view that the Transferred Contracts Condition confers public benefits.

Remote Community Service Condition

330 The ACCC's objections to the Remote Community Service Condition and the Remote Community Price Condition are summarised at [110]-[111] above.

331 It is common ground that the frequency and reliability of freight deliveries are very important matters for remote communities and that a reduction in the frequency of services would have consequences for those communities. There is a substantial body of evidence that these communities are also highly sensitive to the price of services because of the disadvantage suffered by a high percentage of their populations.

332 The ACCC correctly points out that the Remote Community Service Condition only establishes minimum frequency requirements. There are no commitments proposed with respect to other aspects of service, including but not limited to the days and times of delivery, the waiting time for freight or the condition of delivered goods. Sea Swift also did not specify the capacity or type of vessels which will provide scheduled services post-acquisition.

333 While the defects identified by the ACCC are real, they apply whether or not the Proposed Acquisition was authorised. The Tribunal does not accept that the Remote Communities Service Condition will distort the market or lacks value. If Sea Swift does not provide an adequate service to the remote communities, that will provide an entry opportunity for

another operator since the Condition does not preclude other operators from initiating a service should they wish to do so. If, some time later, that operator ceases to provide a service during the five-year period of the Condition, Sea Swift must resume the service.

334 The ACCC contends that all remote communities will continue to receive services in the future with or without the Proposed Acquisition because:

(1) other operators are ready, willing and able to provide services;

(2) the major contracts require service to all destinations; and

(3) the government is likely to step in if there were interruptions to scheduled services.

335 There is some force to this submission in that PUMA, ALPA, IBIS and Ergon Energy (a Sea Swift customer) do require service to nominated destinations under their current contracts. However, if the Proposed Acquisition is not authorised and TML walks away from some or all of its contracts, it will be a matter for negotiation with Sea Swift or another operator whether all of those communities are serviced, the frequency with which they will be serviced and at what price. In any event, not all of these contracts are for a period of five years during which the Condition will apply.

336 It is true that other operators (such as Shorebarge, Teras and Barge Express) have indicated interest in providing services to some communities if they obtain one or more of the Largest Contracts. However their evidence indicates that this interest is in contracting very much on their own terms (including price) and Shorebarge and Barge Express, as well as Sea Swift, have walked away from unprofitable routes in the past when it became necessary to cut costs. While a government may subsidise an essential service to a remote community where no commercial provider is willing to provide it, there is no guarantee of how long it might be before that would occur or the frequency or prices of any service it might provide.

337 With the Remote Community Service Condition, the remote communities are assured that, at a minimum, the services specified in Schedule 3 of the Annexure to the Determination will be provided by Sea Swift or another operator for a period of five years. Even if the ACCC is right in its assessment, the assurance has value to vulnerable and disadvantaged communities for a period of five years. That benefit is sufficiently durable and substantive.

338 If Sea Swift does not comply with this Condition it is open to the remote communities to make the ACCC aware of that fact and the ACCC has remedies under s 50 and s 95AZM(6). From its submissions, the ACCC appears to consider these remedies inadequate, among other

reasons, because the remedies cannot have the effect of unwinding any structural changes effected by a merger once it has occurred. However, the Proposed Acquisition will not effect structural change which would not substantially occur in any event since TML is exiting the market and the base load customers will most likely utilise Sea Swift's services in preference to its competitors, at least in the short term for reasons previously given.

339 While the Condition is not as extensive as the ACCC contends it might or should be, the Tribunal is satisfied that it will result in a benefit to the public due to the assurance it gives to disadvantaged remote communities and is one which is available only with authorisation.

Remote Communities Price Condition

340 The Remote Community Price Condition is designed for the benefit of uncontracted customers. It is summarised at [94]-[95] above.

341 The ACCC has a number of criticisms of this Proposed Condition including that:

(1) it does not cover some important items such as fuel or building materials;

(2) the calculation of the Maximum Charge is so complex that it is difficult for affected communities to discern breach with the result that it gives them little certainty;

(3) the prices which Sea Swift could charge under the Proposed Condition are significantly above what many customers of Sea Swift and TML already pay because of discounts given to regular customers;

(4) it is not likely to constrain Sea Swift's scheduled prices to competitive levels;

(5) it is of limited duration;

(6) it does not give "effective, balanced and non-manipulable protection for non-contract customers from any substantial lessening of competition post-acquisition"; and

(7) the ACCC is not is a position to monitor compliance adequately.

342 The Tribunal accepts that the application of the Maximum Charge is complex which may make it difficult for customers to establish whether it is being complied with. It also affords Sea Swift latitude to increase prices since the capacity to raise prices is based on the broadly based national Consumer Price Index, rather than that which might apply locally and there are a range of other charges which Sea Swift can increase.

343 It is notable that the condition does not cover some essential commodities, primarily fuel. However, many remote communities derive significant price protection in relation to fuel and

a range of other essentials because of the contracts held by PUMA, ALPA and IBIS, the benefit of which will be preserved when they are transferred to Sea Swift under the Proposed Acquisition so this "gap" in the protection afforded by the Remote Community Price Condition is not as significant as it might at first appear. Further, there is no indication that Sea Swift intends to cease its practice of giving discounts to regular or volume customers; the Tribunal accepts Mr Bruno's evidence that that would be commercially short-sighted.

344 The Tribunal accepts that the Remote Community Price Condition would be inadequate if the intention was to establish a competitive pricing regime. That is not the intention; it is instead designed to set a cap on price rises that Sea Swift may instigate for a period of five years. Although it is not a tight "cap", the Tribunal has formed the view that the Remote Community Price Condition has some benefit which would not exist but for the Proposed Acquisition. On a stand-alone basis, this Condition might not confer a benefit sufficient to justify the grant of authorisation but as part of a package of Conditions it should be taken into account.

Toll Commitments

345 The Tribunal accepts that the Toll Commitments give rise to minimal public benefits. However, the Toll Commitments were offered to the Tribunal as part of the basis on which authorisation might be granted. The Tribunal considered that it was appropriate to make it a condition of authorisation that TML's assets be made available to the market in the manner in which it told the Tribunal that it would.

Other asserted benefits

346 In forming its view that the Proposed Acquisition should be authorised, the Tribunal gave no weight to the other benefits asserted by Sea Swift and Toll. The Tribunal was unpersuaded that TML's orderly exit would have the effect of lowering barriers to entry. While there may be benefit to Toll's shareholders in exiting via an acquisition, that is not a benefit which justifies authorisation. The Tribunal also saw no public benefit which would justify authorisation in the suggestion that the Proposed Acquisition would "foster dynamic efficiency in supporting the evolution of the market to a more efficient structure"; the Tribunal did not have to form a view on what the most efficient structure of the market is in the NT and FNQ.

CONCLUSION

347 The Tribunal was satisfied that authorisation of the Proposed Acquisition was justified having regard to the particular facts of this matter and an aggregation of circumstances including:

(1) the counterfactual of TML's exit from the NT and FNQ in a short timeframe and the Tribunal's view that Sea Swift would become the provider to base load customers in the short term so that its competitors were unlikely to compete effectively for those customers in that timeframe. Accordingly, save for competitive detriment addressed by the Gove Lease Undertaking, there is no competitive detriment with the Proposed Acquisition which would not exist without it;

(2) the public benefit being the pro-competitive effect of the Transferred Contracts Condition by ensuring that those contracts remain contestable by Sea Swift's competitors during their term. It also addresses the entrenchment of Sea Swift as the provider to TML's Largest Customers in the counterfactual so that in the long term, competition is enhanced;

(3) the public benefit of preservation of price and other terms of the Transferred Contracts which service providers to remote communities consider to be highly desirable because they will flow through to communities which are subject to substantial social and economic disadvantage;

(4) the public benefit of assurance to the remote communities that, for a period of five years, they will continue to receive a regular scheduled service and there will be a cap on prices charged for the most common items carried for uncontracted customers provided by the Remote Communities Service Condition and the Remote Communities Price Condition; and

(5) the public benefit of the maintenance of the Gove Lease Undertaking with provision for lower prices than those currently charged by TML and extension of the undertaking to the roll-on/roll-off ramp, the facility most useful to scheduled service operators at Gove.

I certify that the preceding three hundred and forty seven (347) numbered paragraphs are a true copy of the Reasons for Determination herein of the Honourable Justice Farrell (Deputy President), Mr RC

Davey (Member) and Professor DK Round (Member).

Associate:

Dated: 28 July 2016

ANNEXURE 1

List of Lay Witnesses

*Indicates the witness was not called for cross-examination at the hearing.

Lay Witnesses			
	Witness	**Statement filed by**	**Category**
1	**Brian Kruger** Managing Director Toll Holdings Ltd	Toll	Corporate
2	**David Jackson** Chief Executive Officer Toll Resources & Government Logistics	Toll	Corporate
3	**Scott Woodward** General Manager Toll Energy	Toll	Corporate
4	**Trent Lonsdale** Toll Energy West and National Maritime Manager Toll Energy	Toll	Corporate
5	**Adam Martin*** Group General Manager of Legal Toll Group	Toll	Corporate
6	**Darren Rowland*** Commercial Manager Toll Resources & Government Logistics	Toll	Corporate
7	**Fred White** Managing Director & Chief Executive Officer Sea Swift Pty Limited	Sea Swift	Corporate
8	**Pasquale 'Lino' Bruno** Chief Operating Officer Sea Swift Pty Limited	Sea Swift	Corporate

9	**Paul Readdy** Executive CHAMP Ventures Pty Limited & non-Executive Director Sea Swift Pty Limited	Sea Swift	Corporate
10	**Ken Conlon** Managing Director Conlon Murphy Pty Ltd (trading as Barge Express)	Toll	Competitor
11	**Loui Kannikoski** Managing Director Bhagwan Marine	Sea Swift	Competitor
12	**Terry Dodd** Managing Director Pacific Marine Group & Director Sealink Travel Group	Sea Swift	Competitor
13	**Arthur Hamilton** Managing Director Shorebarge Pty Ltd	ACCC	Competitor
14	**Larry Johnson** Chief Executive Officer Teras Australia Pty Ltd	ACCC	Competitor
15	**Stephen Muller** Chief Executive Officer MIPEC Pty Ltd	ACCC	Competitor
16	**Vance Wallin** Director Weipa Hire Pty Ltd trading as Carpentaria Contracting	ACCC	Competitor

17	**David Slimming** Managing Director Silentworld Shipping & Logistics Pty Ltd	Summons issued by the Tribunal pursuant to s 105(2) at the request of the ACCC	Competitor
18	**Antony Perkins*** Director of Project Development Qube Ports & Bulk	Sea Swift	Former Director Perkins Shipping
19	**Alistair King** Chief Executive Officer Arnhem Land Progress Aboriginal Corporation	Toll	Customer
20	**Ian Copeland** Chief Executive Officer Islanders Board of Industry and Service	Toll	Customer
21	**Arthur Wong** General Manager, Chief Executive Officer and Director Seisia Enterprises Pty Ltd	Sea Swift	Customer
22	**Bruce Donnan** Key Account Manager NT, SA & Kimberley Puma Energy Australia	Sea Swift	Customer
23	**Christopher Foord** General Manager Bamaga Enterprises Ltd	Sea Swift	Customer
24	**Duncan Griffin** Senior Manager NT Power and Water Corporation	Sea Swift	Customer
25	**Greg Williams** Operations Manager NQ Civil Engineering Contracting	Sea Swift	Customer

26	**Joseph Elu** Chairman Torres Strait Regional Authority Councillor Northern Peninsula Area Regional Council (member for Seisia) Chairperson Seisia Enterprises and Seisia Community Torres Strait Island Corporation	Sea Swift	Customer
27	**Klaus Helms** Chief Executive Officer Gumatj Corporation Limited / Gumatj Aboriginal Corporation	Sea Swift	Customer
28	**Dania Ahwang** Chief Executive Officer Torres Strait Island Regional Council	ACCC	Customer
29	**Gordon Smith** Regional Manager Service Delivery West Arnhem Regional Council	ACCC	Customer
30	**John Japp** Chief Executive Officer East Arnhem Regional Council	ACCC	Customer
31	**John Tourish** Sole Director Gove and Beyond Pty Ltd	ACCC	Customer
32	**Alexandra Gibson*** Legal Advisor Northern Land Council	ACCC	Customer
33	**Ken Kahler** Procurement & Supply Superintendent Rio Tinto Gove Operations	ACCC	Customer

34	**Michael Luttrell** Supply Lead Groote Eylandt Mining Company Pty Ltd	ACCC	Customer
35	**Robert Totten** Store Manager Maningrida Progress Association Inc	ACCC	Customer
36	**Vince Lavery** Service Delivery Manager Rio Tinto, Weipa & Gove Operations	ACCC	Customer
37	**Bradley Smith*** Commodore Gove Boat Club	ACCC	Facility provider
38	**Thomas Mayor*** Branch Secretary Northern Territory Branch of the Maritime Union of Australia	MUA	Intervener

ANNEXURE 2

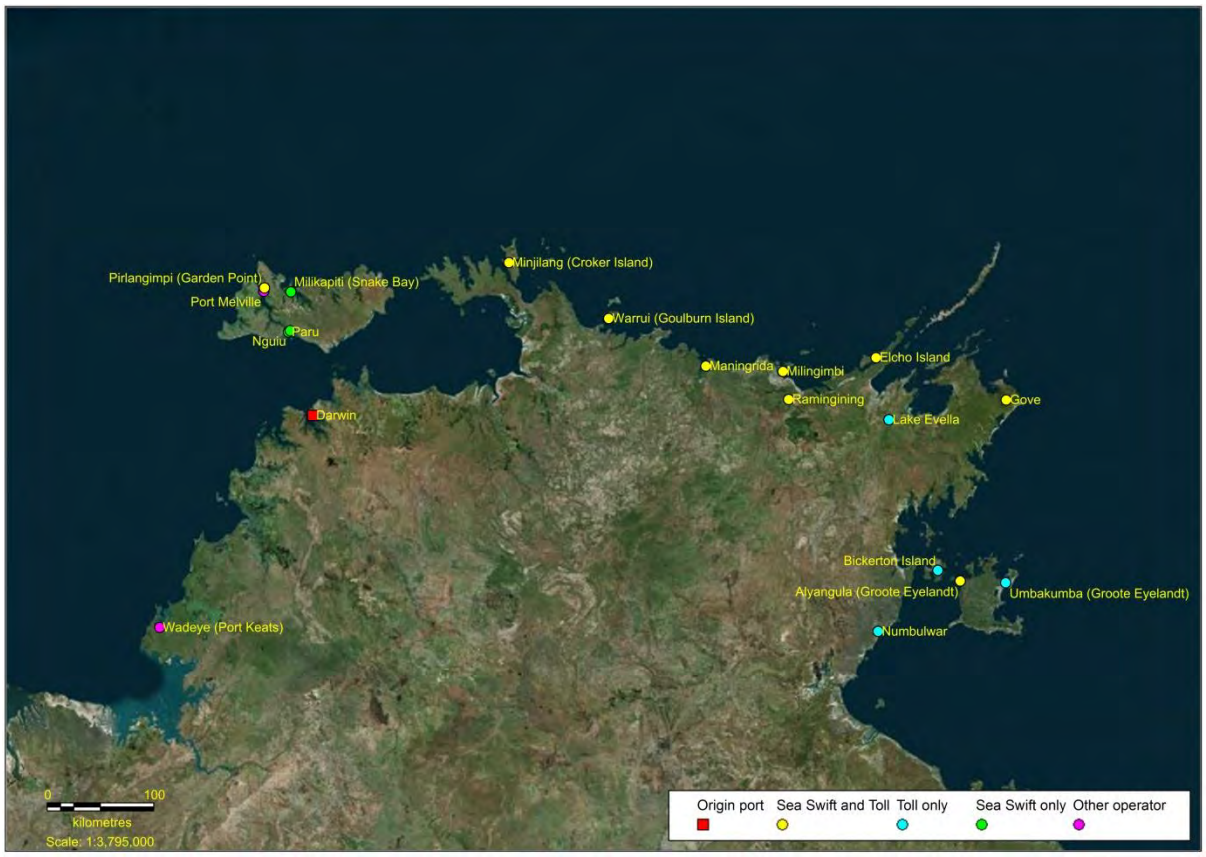
Details of Competitors

Far North Queensland				
Company	**Scheduled Services**	**Charter Services**	**Landing facilities & depot in home port**	**Number of vessels suitable for coastal and community services**
Carpentaria Freight	Provides regular weekly services to Mornington Island	Provides charter services	Karumba and Cairns	2 landing craft vessels: the Torres Venture and Carpentaria Venture
Palm Island Barge	Provides regular passenger and freight services to Palm Island	Provides charter services	Lucinda	2 landing craft vessels: MV Olympic and Lady Fraser
Carpentaria Contracting	Provided a weekly scheduled service between the communities of Weipa and Aurukun from January 2015 until May 2015 Provided a scheduled service from Cairns to Cape Flattery for one year in 2011 under sub-contract to Silentworld Shipping	Provides charter services	Cairns (adjacent to Sea Swift)	3 dumb barges (non-motorised), 4 tugs
MIPEC	Does not currently provide scheduled marine freight services, but has been awarded "preferred supplier" status by the Torres Strait Island Regional Council to provide a scheduled service	Provides charter services	Gladstone	4 tugs, 2 dumb barges and 3 landing craft: Kaleen, Karribi and Kogarah
Silentworld Shipping	Provided services from Cairns to Thursday Island and Horn Island in the Torres Strait; and also to Weipa and Townsville from 2011 to 2013	Provides charter services	Operational base in the Solomon Islands	Tug and barge set

Northern Territory				
Company	**Scheduled Services**	**Charter Services**	**Landing facilities & depot in home port**	**Number of vessels suitable for coastal and community services**
Ezion / Teras	Provides twice weekly services from Hudson Creek (Darwin) to Tiwi Islands. Provides regular scheduled services to Port Keats, but may have lost that contract to Shorebarge in May 2016	Provides charter services	East Arm at Darwin	3 landing craft vessels: Lauren Hanson, Bandicoot and Centaur II
Shorebarge	Provides scheduled services to north east WA from its base in Darwin. Previously provided scheduled services across East and West Arnhem. May have won a contract to provide a regular scheduled service to Port Keats in May 2016	Provides charter services	East Arm at Darwin	2 landing craft vessels: MV Jane Virgo and MV Coomacooma
Barge Express (previously Sealink)	Provides services to the NT communities on behalf of TML pursuant to a time charter arrangement. Previously provided regular service to Port Keats	Provides charter services	East Arm at Darwin	4 landing craft vessels including MDT Trader, Sealink Darwin, Bimah Tujuh
Bhagwan Marine		Provides charter services	East Arm at Darwin	4 landing craft; numerous tugs and barges

ANNEXURE 3

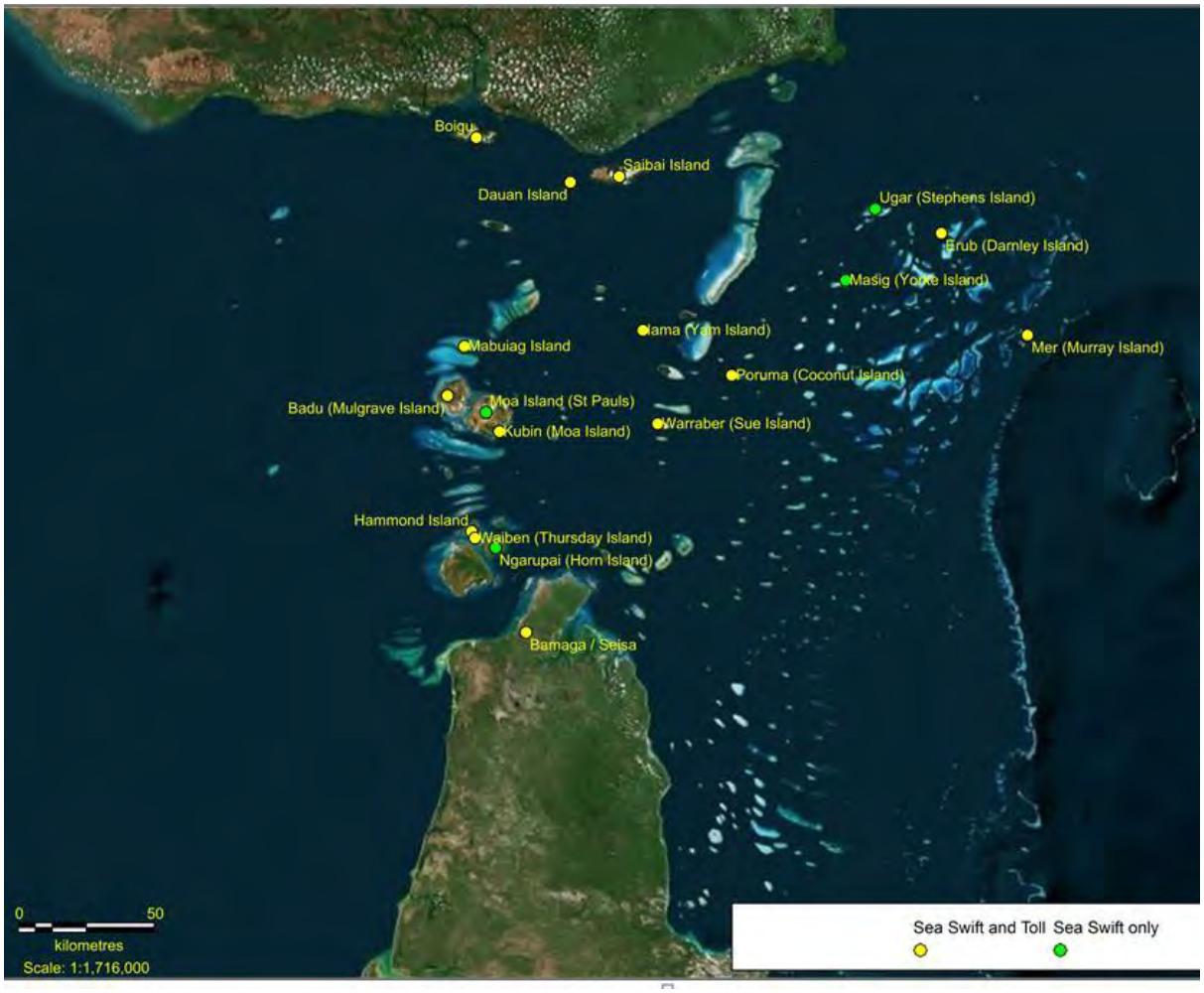
Map of NT Scheduled Marine Freight Services



ANNEXURE 4

Maps of FNQ and OTSI Scheduled Marine Freight Services

Map of FNQ - Zoomed In



ANNEXURE 5

List of destinations serviced by Sea Swift or TML and applicable large customer contracts

Northern Territory

Destination	Puma Energy/ NT Power and Water Corporation[1]	ALPA	GEMCO	Rio Tinto / Woolworths
Bickerton Island (Milyakburra)	**X**			
Croker Island (Minjilang)	**X**	**X**		
Elcho Island (Galiwinku)	**X**	**X**		
Garden Point (Pirlangimpi)	**X**	**X**		
Goulburn Island (Warruwi)	**X**	**X**		
Gove				**X**
Groote Eylandt (Alyangula)			**X**	
Lake Evella (Gapuwiyak)	**X**	**X**		
Maningrida	**X**			
Milikapiti (Snake Bay)	**X**			
Milingimbi	**X**	**X**		

[1] Puma Energy is contracted to provide fuel to NT Power and Water Corporation, and TML currently holds a contract with Puma Energy for the delivery of fuel to NT Power and Water sites.

Nguiu (Bathurst Island)	**X**			
Numbulwar (Rose River)	**X**	**X**		
Paru[2] (see Nguiu above)				
Port Keats (Wadeye)	**X**			
Ramingining	**X**	**X**		
Umbakumba	**X**	**X**		

Far North Queensland

Destination	Caltex / Ergon Energy[3]	IBIS	TSIRC	Rio Tinto/ Woolworths
Aurukun	**X**			
Badu Island	**X**		**X**	
Bamaga/Seisia	**X**	**X**		
Boigu Island	**X**	**X**	**X**	
Coconut (Poruma) Island	**X**	**X**	**X**	
Darnley (Erub) Island	**X**	**X**	**X**	
Dauan Island	**X**	**X**	**X**	

[2] Paru is not listed in the Puma Energy or ALPA contracts but is situated approximately 1.3km from Nguiu.
[3] Caltex is contracted to provide fuel to Ergon Energy, and Sea Swift currently holds a contract with Caltex for the delivery of fuel to Ergon Energy sites. Sea Swift also holds a contract with Ergon Energy for the delivery of other freight services, however that contract is not a key contract.

Hammond Island	**X**		**X**	
Horn Island (Wasaga)	**X**	**X**		
Kubin (Moa Island)	**X**	**X**	**X**	
Lockhart River	**X**			
Mabuiag Island	**X**	**X**	**X**	
Murray (Mer) Island	**X**	**X**	**X**	
Palm Island[4]	**X**			
Saibai Island	**X**	**X**	**X**	
St Pauls (Moa Island)		**X**	**X**	
Stephen (Ugar) Island	**X**	**X**	**X**	
Thursday Island	**X**	**X**	**X**	
Warraber Island	**X**	**X**	**X**	
Weipa				**X**
Yam (Iama) Island	**X**	**X**	**X**	
Yorke (Masig) Island	**X**	**X**	**X**	

[4]Note: Deliveries to Palm Island are only as required, typically every 4-6 weeks.

ANNEXURE 6 - History of Scheduled Service Providers in the Northern Territory

Large scheduled coastal and community services (multiple routes)	Specific scheduled coastal and community services (single route) *Note several destinations may be serviced on a single route	Charter / project services

1950s	1960s	1970s	Late 1980s	Early 1990s	Late 1990s	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
		Barge Express *Darwin - Croker Island / Maningrida / Tiwi Islands and Ramingining*																		
						Gulf Freight Services *Darwin - some West Arnhem Communities*														
Perkins *Darwin - Lake Evella, Gove, Umbukumba, Numbulwar, Groote Eylandt*						*Darwin - West Arnhem Communities / Gove / Groote Eylandt / Port Keats*								**TML** *Darwin - Communities / Gove/ Groote Eylandt* [1]						EXIT
															Shorebarge *Darwin - Port Keats*	*Darwin - Port Keats / Communities* [2]	*Darwin - Kalumbaru (WA)* [3]			*Darwin - Kalumbaru (WA) / Port Keats* [4]
		Tiwi Barge *Darwin - Tiwi Islands*																**Sea** *Darwin - Tiwi Islands /*		**Swift** *Communities / Gove / Groote Eylandt* [5]
						Top End Barge *Project / Charter*											**Ezion / Teras** *Darwin - Port Melville*			*Darwin - Port Melville / Port Keats* [6]
																	Bhagwan Marine *Project / Charter*			
									Barge Express [7] *Project / Charter*											*Proposed service* [8]

[1] TML has not serviced Port Keats since around 2012.
[2] Shorebarge serviced some specific communities.
[3] This service goes to Truscott, Troughton Island and Kalumbaru in northern Western Australia.
[4] It is not clear whether Shorebarge or Teras currently operates the service to Port Keats.
[5] Sea Swift reduced the number of communities serviced in late 2014 / 2015.
[6] It is not clear whether Shorebarge or Teras currently operates the service to Port Keats.
[7] Note: Barge Express commenced as a freight business in 1998, however mainly providing road freight services.
[8] Barge Express proposes to service Elcho Island, Maningrida, Goulburn Island and Croker Island.

Recent history – Northern Territory

Perkins Shipping Group Pty Ltd (Perkins Shipping) was the predominant operator of NT coastal freight services for 50 years, other than the Tiwi Island Service which was owned by the Tiwi Island traditional owners. Apart from Perkins Shipping, other barge operators that have been present include an operator named Barge Express in the late 1970's to early 1990's, Gulf Freight Services in the late 1990's. (Note that the "Barge Express" referred to here is a separate company to the "Barge Express" currently operated by Mr Ken Conlon).

Perkins provided coastal and community shipping services to remote communities and coastal towns, including:

(a) regular barge services to remote Aboriginal communities in the NT, FNQ and WA;

(b) regular fixed-day shipping services to the resource industry townships of Gove and Groote Eylandt.

For a number of years leading up to the late 1980s, Barge Express serviced some of the NT locations that Perkins Shipping did not service. Barge Express operated in respect of some locations and Perkins Shipping in respect of other locations:

(a) Barge Express went to Minjilang (Croker Island), Maningrida, the Tiwi Islands and Ramingining;

(b) Perkins Shipping went to Gapuwiyak (Lake Evella), Nhulunbuy (Gove), Umbakumba, Numbulwar and Alyangula (Groote); and

(c) both companies went to Galiwin'ku (Elcho Island).

In the early 1990s, Perkins Shipping expanded its scheduled service into the areas previously serviced only by Barge Express. Following Perkins Shipping's entry into the further routes, Barge Express decided to exit and was acquired by Perkins Shipping in approximately 1994. Barge Express' decision to exit appears to have been the result of it suffering losses due to Perkins entering its ports, and the deteriorating volume would not financially support its continued operation.

During the time Perkins Shipping was operating, a company called Tiwi Barge provided regular sea freight services to the Tiwi Islands (Bathurst Island and Melville Island). Perkins

Shipping did not provide scheduled services to the Tiwi Islands (although Perkins did carry out spot work to the Tiwi Islands).

In approximately 2002, Gulf Freight Services, which operated a service out of Karumba in the Gulf of Carpentaria to the Gove Peninsula and then back to Weipa, sought to expand its operations to provide scheduled deliveries to some of the remote NT communities out of Darwin (including Maningrida, Elcho Island, Gove and Ramingining). It appears that Gulf Freight had been able to obtain some contracted work for delivery to those communities.

In around 2003, Gulf Freight Services decided to exit and was acquired by Perkins Shipping. It appears that the prices quoted by Gulf Freight Services were or may have been too low to be sustainable, i.e. too low to cover the costs of operating the barges (including vessel costs, labour and fuel) and all the associated costs involved in providing a liner barge service. Following its acquisition of Gulf Freight, Perkins Shipping commenced providing the coastal freight service to Weipa from Karumba (or from Cairns during the wet season if the road to Karumba was closed). In about the mid-2000's, Perkins Shipping relocated the origin of its Weipa service, initially from Karumba to Townsville, then ultimately to Cairns in order to provide an uninterrupted weekly scheduled service to Weipa.

On 1 July 2009, Toll acquired Perkins. It was later renamed TML.

From 2009 until around January 2014, TML provided coastal and community shipping services predominantly in the NT. Its operations in FNQ were predominantly limited to servicing the Cairns-Weipa route pursuant to two contracts that it inherited through the acquisition of Perkins. TML expanded its services in FNQ, beyond the Cairns-Weipa route into parts of the OTSI in around early 2014 (on an ad-hoc basis). TML provides scheduled services on both coastal mainland or 'trunk' routes and to a wide range of remote islands and communities, in the NT and FNQ.

In around 2011, Shorebarge (a provider of charter services) expanded into scheduled services to Troughton Island and Truscott Air Base (in which it has an interest) in north east WA, which it provided from Darwin. For a short period from mid-2011, Shorebarge provided scheduled services to Port Keats and to remote communities across East and West Arnhem in the NT. After Sea Swift entered the NT in 2013, Shorebarge redeployed its vessels to provide scheduled services to Truscott, Troughton Island and Kalumbaru in north east WA, again from Darwin. The only scheduled service that Shorebarge currently provides is a

fortnightly service from Darwin to Kalumburu, Troughton Island and Truscott in the Kimberley region of WA. It plans to commence a weekly scheduled service from Darwin to Port Keats through an arrangement with Northline. Although Shorebarge won that contract, there is a dispute between Mr Johnson and Mr Hamilton about whether that route is currently being serviced by Shorebarge or Teras.

Also in around 2011, Ezion/Teras ("Teras") was formed. It acquired Top End Barge. To support development of the Port Melville port, Teras started running two small barges from the Tiwi Islands to Darwin to provide coastal and community shipping services. Teras says that it currently operates weekly scheduled services on two routes: the Darwin-Port Melville route and the Darwin-Port Keats route. As mentioned above, there is a dispute between Mr Johnson and Mr Hamilton about whether the Darwin-Port Keats route is currently being serviced by Shorebarge or Teras.

In late 2013, Sea Swift entered the NT through the acquisition of Tiwi Barge. Tiwi Barge had operated in the NT for around 40 years providing a scheduled service to the Tiwi Islands. Sea Swift's expansion in the NT in 2013 was supported and assisted by Caltex, which awarded its NT Power & Water contract to Sea Swift. (Note that the ACCC does not agree with the statement that "Sea Swift's expansion in the NT in 2013 was supported and assisted by Caltex").

Around 2013, Bhagwan Marine established operations in Darwin when it acquired Workboats Northern Australia in the NT. Bhagwan Marine was originally established in 1998 from Geraldton in WA with a single vessel. Bhagwan Marine primarily services the oil and gas industry with project freight work. It does not provide any scheduled freight services and has no intention of doing so, unless there was no other opportunity for Bhagwan's barges to be used, in which case it would consider providing scheduled services.

In 2016, Barge Express (formerly Sealink NT) indicated plans to commence a scheduled service in the NT in competition with Sea Swift irrespective of the outcome of Sea Swift's Application to the Tribunal. Barge Express has not commenced any scheduled service despite stating in March 2016 that it intended to commence a service that month. (Note that this "Barge Express" is to be distinguished from the Barge Express operating in the 1980s).

ANNEXURE 7 – HISTORY OF SCHEDULED SERVICE PROVIDERS IN FAR NORTH QUEENSLAND

Large scheduled coastal and community services (multiple routes)	Specific scheduled coastal and community services (single route) *Note several destinations may be serviced on a single route	Charter / project services

Early 1980s	Late 1980s	Early 1990s	Late 1990s	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
		Jardines/ Brambles *Multiple destinations*																
			Endeavour Shipping *Cairns - Weipa / Thursday Island / Seisia*															
	Sea Swift *Cairns - Weipa / OTSI / Lockhart River / Weipa - Aurukun* [1]																	
											Silentworld Shipping *Cairns-Thursday Island* [2]								
			Gulf Freight Services *Cairns - Karumba - Weipa* [3]			**Perkins** *Cairns - Weipa*						**TML** *Cairns - Weipa*				*Cairns -*	*Weipa / OTSI*	EXIT
									Palm Island Barge *Lucinda - Palm Island*									
							Carpentaria Contracting *Charter / project*										*Weipa - Aurukun* [4]	*Charter / project*
											Carpentaria Freight *Karumba - Mornington Island / Sweers / Bentinick Islands*							
																	MIPEC *Charter / project*	*Potential OTSI* [5]
			Pacific Marine Group *Charter / project*															

[1] Sea Swift does not service Mornington Island, Sweers, Bentinick Island or Palm Island.
[2] Silentworld did not have any vessels. It bought space on TML's vessels to move freight from Cairns to Thursday Island. It effectively acted as a freight forwarder.
[3] Gulf Freight Services used to operate trucks from Cairns to Karumba and then shipped the freight to Weipa.
[4] Wet season only.
[5] MIPEC has been awarded preferred supplier status by TSIRC but has not announced the start of any scheduled services to the OTSI to service TSIRC.

Recent history – Far North Queensland

Over the last thirty years, a number of operators have provided marine freight services in FNQ.

Sea Swift has operated in FNQ for over thirty years. Having relocated from Karumba to Cairns in 1987, it commenced transporting fuel to the Torres Strait. Sea Swift acquired further vessels over time and, in 1990, commenced trans-shipments to the OTSI. It was the first operator to provide scheduled services to the OTSI.

Jardines Shipping operated in FNQ for some time in the 1990s, providing scheduled services to various FNQ communities until it was acquired by Brambles Shipping in 1999. Brambles Shipping entered FNQ in 1999 with its acquisition of the business of Jardines Shipping. Whilst in operation in FNQ, Brambles Shipping serviced Cairns to Thursday Island, Horn Island, Seisia and the OTSI. In May 2002, Sea Swift acquired some of the assets associated with Brambles Shipping's cargo business, which included vessels, plant and machinery, as well as the lease of a Horn Island facility.

Pacific Marine Group, a marine contracting company based in Townsville, commenced operating in 1991, and continues operating today. Pacific Marine Group specialises in marine contracting, commercial diving and vessel and barge hire, and regularly undertakes contract freight work throughout the coastal areas of FNQ.

Endeavour Shipping, an offshoot of Perrot Salvage and Tug, was established in about 1998 and progressively built up a cargo and charter shipping business in FNQ. Although Endeavour Shipping had established a line-haul service to the key destinations of Thursday Island, Seisia and Weipa, it did not establish a scheduled service to all OTSI communities. In 2008, Sea Swift acquired Endeavour Shipping’s assets.

Gulf Freight Services is another operator that provided coastal shipping services to Weipa (from either Karumba or Cairns) for a long period. As outlined above, in approximately 2002, it sought to expand its operations to provide scheduled services to some of the NT communities, however, in 2003 it was acquired by Perkins Shipping.

As a result of its acquisition of Gulf Freight, Perkins Shipping commenced providing coastal shipping services to Weipa from Karumba. Toll later acquired Perkins Shipping in 2009. Until January 2014, Toll’s FNQ operations were limited to the Cairns-Weipa route. Toll then

expanded into the OTSI in around January 2014 after securing the IBIS contract, which it has since subcontracted to Sea Swift.

Another operator, Carpentaria Contracting, a privately owned Weipa business, began operating services in FNQ in 2005. To date, it has primarily operated in Cairns, the Torres Strait and the Gulf of Carpentaria. Carpentaria Contracting operated a scheduled freight service from Weipa to Aurukun for around four months in early 2015.

Palm Island Barge Company, established in 2007, provides a daily return vehicle, passenger and cargo freight service from Lucinda (south of Cairns) to Palm Island. In 2007, Palm Island Barge Company expanded its services to Palm Island to include a superior cold chain and dry goods logistical service directly from Townsville to Palm Island.

Carpentaria Freight, is an operator which commenced a freight service to the Gulf of Carpentaria Islands of Mornington, Sweers and Bentinick prior to 2008. It is currently a road freight and barge service operator located in Karumba.

In addition, Silentworld Shipping entered FNQ in 2010 and provided a scheduled service from Cairns to Thursday Island. Silentworld Shipping ceased operating that scheduled service in late 2012, and Sea Swift acquired one of its tugs and a barge set.

ANNEXURE 8

Diagram of Gove Wharf

Area	Description
A	Landing ramp (roll-on, roll-off)
B	Public wharf (only for small fishing vessels)
C	Heavy lift Wharf (lift-on, lift-off)
D	Covered lay down
E	Lay down

Attachment B

SEA SWIFT MARINE STAFF RESOURCES

	Total number of employees in category	Total number of casual employees in category
Master	30	13
Engineer	41	20
Mate	43	27
Deckhand	62	52
Cook	7	4
Cadet	10	0

FAIR WORK COMMISSION

Fair Work Act 2009

APPLICATION FOR VARIATION OF PORTS, HARBOURS AND ENCLOSED WATER VESSELS AWARD 2010, SEAGOING INDUSTRY AWARD 2010, and MARINE TOWAGE AWARD 2010 (s.156) – AM2016/5

FURTHER AFFIDAVIT OF BEN COOPER

I, Ben Cooper, of Level 14, 340 Adelaide Street, Brisbane, in the State of Queensland make oath and say:

1. Further to my Affidavit filed on 10 May 2016, I attached hereto and mark "BC4(A)" a revised comparison of the salaries paid and leave ratios applying under the *Self-propelled Barge and Small Ships Industry Award 2001* (notionally updated to 2009 and 2016 based upon rates of increases to the *Maritime Industry Seagoing Award 1999* prior to the termination of that award) and the *Seagoing Industry Award 2010*.

2. The revised comparison corrects an error in the extrapolation of increases to the rates applicable under the *Self-propelled Barge and Small Ships Industry Award 2001* in 2008 and 2010 resulting from the application of the increases in those years on a fortnightly rather than weekly basis, and incorporates the 1 July 2016 increase to the rates applicable under the *Seagoing Industry Award 2010*.

Sworn ~~/ Affirmed by~~ the deponent

at (place) Brisbane

on (date) 4 / 8 / 2016

Ben Cooper

Signature of deponent

Before me: CHERYL-ANNE LAIRD

Signature of witness

Full name of witness: CHERYL-ANNE LAIRD

Qualification of witness: JP (QUAL.)

JUSTICE OF THE PEACE (QUALIFIED) Reg No. 95194 DEPT OF JUSTICE & ATTORNEY-GENERAL

Comparison of SBSSA, MISA and SIA

"BC4(A)"

Self-propelled Barge and Small Ships Industry Award 2001 (Including wage adjustments 2008 -2015)			Seagoing Industry Award 2010 (as at 1 July 2016)		
Classification	**Annual salary - Vessels less than 500 tonnes dead weight**	**Annual salary - Vessels more than 500 tonnes dead weight**	**Classification**	**Annual salary - Vessels manned at 18 or below**	**Annual salary - All other vessels**
Master	69201	74390	Master	92561	90346
Chief Officer	64985	69660	1st Mate	78890	77078
Second Officer		64579	2nd Mate	72982	71346
			3rd Mate	69943	68395
Chief Engineer	66836	72084	Chief Engineer	91041	88872
			1st Engineer	78890	77078
Second Engineer		69660	2nd Engineer	72982	71346
			3rd Engineer	69943	68395
Bosun		59136	Chief Integrated Rating	66149	64707
AB	55729	57563	Integrated Rating/Asst.	60242	58960
Ordinary Seaman		57563			
Seaman/Cook		57563	Chief Cook	66149	64707
			2nd Cook	60436	60436

Increases applied:

2008	$21.66 per week
2009	$0
2010	$26.00 per week
2011	3.40%
2012	2.90%
2013	2.60%
2014	3%
2015	2.50%
2016	2.40%