

Trade Practices Act 1974

Undertakings to the Australian Competition & Consumer Commission given for the purpose of Section 87B

by

Mr Mark Rowsthorn

Recitals

- A. On 11 March 2006, the Commission accepted Undertakings from Toll Holdings Limited ACN 006 592 089 ("**Toll**") under section 87B of the *Trade Practices Act 1974* (the "**Act**") ("**Toll's Undertakings**"). Toll's Undertakings were varied with the Commission's consent on 4 May 2006, 11 September 2006, 9 October 2006 and 13 December 2006.
- B. Toll's Undertakings were accepted by the Commission to address concerns held by the Commission in relation to the acquisition by Toll of Patrick Corporation ("**Patrick**").
- C. Among the competition concerns identified by the Commission was that, by acquiring Patrick, Toll would acquire a 100% interest in Pacific National and that Toll would have the ability and incentive to cause Pacific National to favour Toll's freight forwarding operations on the East-West Corridor to the detriment of other freight forwarding customers of Pacific National on that corridor. The Commission also raised concerns that common ownership by Toll of both the Patrick and Toll automotive distribution businesses and vehicle pre-delivery and inspection services businesses would increase ownership concentration in the respective markets.
- D. Toll addressed the Commission's competition concerns in this respect by undertaking to:
 - a. divest a fifty per cent interest in Pacific National (referred to as the "PN Interest");
 - b. divest the rights and interests of Toll in PrixCar Services Limited (referred to as the "PrixCar Interest");
 - c. divest either Patrick's or Toll's vehicle transport and logistics business in Australia for domestically manufactured and imported vehicles (referred to as the "Vehicle Transport Business");
 - d. divest the operations conducted by Patrick Shipping Pty Limited (referred to as the "Patrick Bass Strait Shipping Business");
 - e. divest the assets used in Patrick's freight forwarding operation between Tasmania and mainland Australia (referred to as the "Patrick Tasmanian Freight Forwarding Business");
 - f. make available certain assets and rights to facilitate new entry and expansion on the East-West Corridor (referred to as the "East-West Rail Assets"); and
 - g. implement a non-discrimination regime and separation protocol which was subject to audit, as between Toll and Pacific National, and between Toll and Patrick's container terminals.
- E. On 13 December 2006, Toll announced its intention to implement a restructure of its group businesses by way of scheme of arrangement to create a new listed entity and trust to be known as "**Asciano**". The restructure is proposed by Toll to involve transferring the

assets, entities and/or businesses listed in Attachment G-2-1 that comprise Toll's infrastructure assets to Asciano (the "**Proposed Restructure**").

- F. The Commission has been told by Toll that the Proposed Restructure will result in Toll ceasing to hold any interest in Pacific National and that Toll will have no ability to cause Pacific National to give preference to Toll's freight forwarding operations and Asciano will have no incentive to give or offer to Toll any such preference concerning the Toll operations. The Commission has also been told by Toll that the transfer of the Patrick Autocare business to Asciano will address concerns with respect to concentration in the markets for automotive distribution businesses and vehicle pre-delivery and inspection services.
- G. Mr Mark Rowsthorn is of the view that the Proposed Restructure addresses the competition concerns held by the Commission as a result of Toll's acquisition of Patrick.
- H. The Commission is of the view that, having regard to its market enquiries in relation to the Proposed Restructure, the Proposed Restructure may have the effect of addressing the competition concerns it identified with respect to the acquisition of Patrick by Toll if the separation of Toll and Asciano results in two wholly independent entities. However, the Commission remains very concerned that the competition issues that arose by reason of Toll's acquisition of Patrick and which were addressed by Toll's original undertakings to the Commission continue to be addressed notwithstanding the Proposed Restructure. Additionally, the Commission is mindful that its competition concerns in the context of mergers are typically addressed by means of a transparent divestiture process. In the circumstances of the Proposed Restructure, these Undertakings, together with the Asciano Undertakings and the variation proposed by Toll to its undertakings, have the effect of replacing a transparent divestiture process with a complex transaction that is intended to result in the creation of Asciano, which will own and control the assets that gave rise to the Commission's competition concerns.
- I. Notwithstanding the Commission's concerns relating to the Proposed Restructure, the Commission's market enquiries have revealed that the structural separation of the assets proposed to be owned by Asciano from Toll will, as compared to the enforcement of Toll's original undertakings, benefit competition. Consequently, the Commission has consented to the further variation of Toll's Undertakings and has accepted these Undertakings from Mr Mark Rowsthorn. In accepting these Undertakings, the Commission has accepted assurances from Mr Mark Rowsthorn that he will not act in a manner which is inconsistent with the intent of these Undertakings; namely, that Toll and Asciano will only ever have dealings with each other that are at arms length and on normal commercial terms. Additionally, the Commission accepts these Undertakings on the basis that the Toll directors, the Asciano directors and Asciano offer undertakings, and in the case of Toll a variation to its undertakings, to ensure that Asciano and Toll are in effect wholly separate entities.

1. Commencement and Duration of Undertakings

1.1 Commencement

These Undertakings come into effect when:

- (a) these Undertakings are executed by Mr Mark Rowsthorn; and
- (b) the Commission accepts these Undertakings so executed.

1.2 Operation

- (a) Apart from clause 2.4, these Undertakings operate whilst Mr Mark Rowsthorn is a director of Asciano.
- (b) Clause 2.4 of these Undertakings continues to operate throughout the term of these Undertakings.

1.3 Termination

These Undertakings will terminate on the first to occur of:

- (a) the date on which the Commission consents to the withdrawal of these Undertakings in accordance with section 87B of the Act; or
- (b) 31 March 2011.

2. Undertakings and Acknowledgement

2.1 Interest Sell-Down

If, as at or from the Restructure Date, Mr Mark Rowsthorn has any Toll Share Interest or Toll Asset Interest, he will:

- (a) dispose of such Toll Share Interest within [Confidential –] of the Restructure Date;
- (b) not exercise any voting power attached to shares comprised in any Toll Share Interest that he may have;
- (c) dispose of such Toll Asset Interest within [Confidential –] of the Restructure Date; and
- (d) absent himself from any consideration, decision or resolution by the directors of Asciano in relation to proposed or actual contracts, arrangements or understandings between Asciano and Toll until such Toll Share Interest or Toll Asset Interest is disposed of.

2.2 Relatives' Interest Sell-Down

If, as at or from the Restructure Date, any of Mr Mark Rowsthorn's Relatives have any Toll Share Interest or Toll Asset Interest, Mr Mark Rowsthorn will use his best endeavours to procure that such Relative:

- (a) disposes of such Toll Share Interest within [Confidential –] of the Restructure Date;
- (b) does not exercise any voting power attached to shares comprised in any Toll Share Interest that he may have before such interest is disposed of; and
- (c) disposes of such Toll Asset Interest within [Confidential –] of the Restructure Date,

and Mr Mark Rowsthorn will absent himself from any consideration, decision or resolution by the directors of Asciano in relation to proposed or actual contracts, arrangements or understandings between Asciano and Toll until such Toll Share Interests or Toll Asset Interests are disposed of.

2.3 No Acquisition of Toll Interests

Mr Mark Rowsthorn will:

- (a) not, after to the Restructure Date, acquire any Toll Share Interest or any Toll Asset Interest in any of the Toll Assets; and
- (b) use his best endeavours to procure that each of his Relatives, after to the Restructure Date, does not acquire any Toll Share Interest or any Toll Asset Interest in any of the Toll Assets.

2.4 Independent Asciano Person

- (a) Subject to clause 2.4(c), Mr Mark Rowsthorn will resign immediately as a director of Asciano and from any other position with Asciano if:
 - (i) he is not an Independent Asciano Person, unless one of the following exceptions applies:
 - A. the relevant Toll Asset Interest or Toll Share Interest was acquired before the Restructure Date and has not been held for more than [Confidential -];
 - B. he fails to meet the definition of Independent Asciano Person by reason of the fact that, prior to the Restructure Date, he has been:
 - 1) an employee, officer or director of Toll;
 - 2) a principal of a material professional adviser or a material consultant to Toll or an employee materially associated with the provision of such services to Toll;

or

 - C. he fails to meet the definition of Independent Asciano Person by reason of the fact that, prior to the Restructure Date, he has served on the board of Toll;
 - (ii) the obligations in clauses 2.1 to 2.3 of these Undertakings are not observed.
- (b) After resignation by reason of clause 2.4(a), Mr Mark Rowsthorn will take no further part, in any capacity whatsoever, in the operation of Asciano until the termination of these Undertakings.
- (c) If Mr Mark Rowsthorn is a Relative of a person who is not an Independent Asciano Person by reason of that person acquiring a Toll Share Interest, Mr Mark Rowsthorn will resign within 21 days that person acquiring that interest, unless the person disposes of the Toll Share Interest within those 21 days.

3. Auditor

Mr Mark Rowsthorn undertakes to cooperate fully with the Auditor and to provide the Auditor with such information and assistance as is necessary to enable the Auditor to carry out its functions as set out in the Asciano Undertakings.

4. Further Information

- (a) At the Commission's direction, Mr Mark Rowsthorn will:
- (i) furnish information to the Commission;
 - (ii) produce documents to the Commission in relation to which Mr Mark Rowsthorn has custody, control or power; and/or
 - (iii) attend the Commission at a time and place appointed by the Commission to answer any questions the Commission (its Commissioners, its staff or its agents) may have,
- in relation to Mr Mark Rowsthorn's compliance with these Undertakings.
- (b) Information furnished, documents produced or information given in answer to questions may be used by the Commission for any purpose consistent with its statutory functions.

5. Confidentiality

The time periods and figures referred to in clauses 2.1, 2.2 and 2.4 and marked 'Confidential' are provided to the Commission on a confidential basis.

6. Acknowledgement

Subject to clause 5, Mr Mark Rowsthorn acknowledges that the Commission may:

- (a) make these Undertakings available for public inspection; and
- (b) from time to time publicly refer to these Undertakings.

7. Definitions and interpretation

7.1 Definitions

In these Undertakings, unless the context indicates otherwise:

Act means the *Trade Practices Act 1974* (Cth) as in force as at the date of these Undertakings.

Arrangement has the meaning given to that term in section 761A of Corporations Act.

Asciano means Asciano Limited ABN 26 123 652 862 and:

- (a) its Related Bodies Corporate from time to time;
- (b) the Asciano Trust; and
- (c) any other entity it is required to consolidate for the purpose of preparing annual financial reports.

Asciano Assets means:

- (a) the businesses, assets and interests (including the benefit of contractual arrangements) described in Attachment G-2-1; and

- (b) such other assets and interests, approved of by the Commission, (including the benefit of contractual arrangements) reasonably necessary to ensure that the businesses and interests referred to in paragraph (a) are capable of operating independently of Toll.

Asciano Limited means Asciano Limited ABN 26 123 652 862 and any Related Bodies Corporate.

Asciano Trust means the unit trust which will provide finance to Asciano Limited to enable it to acquire the Asciano Assets and any responsible entity of the Trust and any Related Body Corporate.

Asciano Undertakings means the undertakings to be given by Asciano to the Commission pursuant to section 87B of the Act, as required under clause 2.3(a) of Toll's Undertakings.

Associate has the meaning set out in subsections 12(2) and (3), and section 15 of the Corporations Act, as if a reference to the designated body's affairs also included a reference to the economic benefits arising from holding any interest in the designated body.

Auditor is defined in clause 6.3(g) of Asciano's Undertakings.

Commission means the Australian Competition and Consumer Commission.

Corporations Act means the *Corporations Act 2001* (Cth) as in force as at the date of these Undertakings.

Derivative means an Arrangement in relation to which:

- (a) under the Arrangement, a party to the Arrangement must, or may be required to, provide at some future time (being not less than three days) consideration of a particular kind or kinds to someone; and
- (b) the amount of the consideration, or the value of the Arrangement (if that can be obtained by dealing in the Arrangement), is ultimately determined, derived from or varies by reference to (wholly or in part) the value or amount of something else (of any nature whatsoever and whether or not deliverable),

except where the consideration provided is the something else referred to in paragraph (b).

director means a director within the meaning of the Corporations Act.

Independent Asciano Person means a person who is independent of Toll. Without limitation, a person is not an Independent Asciano Person (unless otherwise agreed by the Commission) if the person:

- (a) is an employee or officer or director of Toll;
- (b) has a Toll Asset Interest or a Toll Share Interest;
- (c) has been an employee or officer or director of Toll in the past 5 years;
- (d) has an agreement, arrangement or understanding with Toll relating to the performance of his or her functions as a director of Asciano;
- (e) has, within the last 5 years, been a principal of a material professional adviser or a material consultant to Toll or an employee materially associated with the provision of such services to Toll;

- (f) has a material contractual relationship with Toll;
- (g) has served on the board of Toll for a period which could, or could reasonably be perceived to, materially interfere with his or her ability to act independently of Toll;
- (h) has a relationship or interest which could, or could reasonably be perceived to, materially influence the person's decision-making with respect to Toll; or
- (i) has a Relative or is a Related Entity of a person who is not an Independent Asciano Person (except by reason of this subparagraph).

Patrick means Patrick Corporation Limited ACN 008 660 124 and its Related Bodies Corporate from time to time.

Related Body Corporate has the meaning given in section 50 of the Corporations Act.

Related Entity, in relation to a body corporate, means any of the following:

- (a) a promoter of the body;
- (b) a Relative of such a promoter;
- (c) a director or member of the body or of a related body corporate;
- (d) a Relative of such a director or member;
- (e) a beneficiary under a trust of which the first-mentioned body is or has at any time been a trustee;
- (f) a Relative of such a beneficiary;
- (g) a trustee of a trust under which a person is a beneficiary, where the person is a related entity of the first-mentioned body because of any other application or applications of this definition.

Relative means the spouse, de facto spouse, parent or remoter lineal ancestor, son, daughter or remoter issue (including step-children) of a person and includes any body corporate or other entity controlled (directly or indirectly) by such a Relative.

Restructure has the meaning given to it in clause 2.3 of Toll's Undertakings.

Restructure Date means the date on which all the steps to effect the Restructure listed in clause 2.3 of Toll's Undertakings have occurred.

Toll means Toll Holdings Limited ACN 006 592 089 and:

- (a) its Related Bodies Corporate from time to time; and
- (b) any other entity it is required to consolidate for the purposes of preparing annual financial reports.

Toll Asset Interest in relation to any Toll Asset (whether alone or with any other Toll Asset or any other property or thing) means:

- (a) the Toll Asset;
- (b) a legal or equitable right or interest in or to the Toll Asset, other than arising under a lease, license or other commercial arrangement in the ordinary course of business

on terms that are arm's length and consistent with terms available to other like customers and which lease, licence or other commercial arrangement is:

- (i) not material to the separation and independence of Toll and Asciano; and
 - (ii) approved of by the Commission.
- (c) a right under an Arrangement to acquire the Toll Asset (including any option) whether or not subject to any condition;
 - (d) a right to direct that the Toll Asset be transferred, whether or not to a specified person and whether or not on fulfilment of any condition; or
 - (e) a Derivative which refers to the price or value of the Toll Asset.

Toll Assets means the businesses, assets and interests (including the benefit of contractual arrangements) of Toll and the consolidated entity (as defined in the Corporations Act) of which it is part, other than the Asciano Assets.

Toll Group means Toll, including Patrick, prior to implementation of the Restructure.

Toll Interest means a Toll Asset Interest and a Toll Share Interest.

Toll Share Interest means any one or more of the following:

- (a) an issued share in Toll;
- (b) any thing that constitutes a relevant interest (as defined for the purposes of Part 6C.1 of the Corporations Act) in such an issued share;
- (c) an issued share in Toll in which an Associate has a relevant interest (as defined for the purposes of Part 6C.1 of the Corporations Act);
- (d) a Derivative which refers to the price or value of a share (whether issued or unissued) in Toll; or
- (e) any right (including any option) whether or not subject to any condition to have issued any share in Toll.

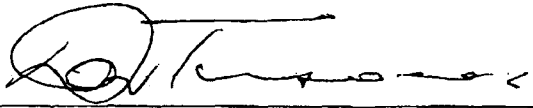
Toll's Undertakings means the undertakings given by Toll as varied under section 87B of the Act and accepted by the Commission on 11 March 2006.

7.2 Interpretation

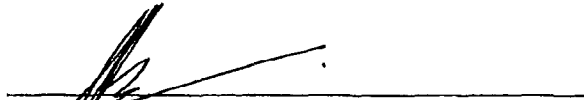
- (a) In these Undertakings:
 - (i) a reference to "**these Undertakings**" is a reference to all the provisions of this document, including Attachment G-2-1;
 - (ii) headings and explanation notes to clauses are for convenience only and do not affect interpretation;
 - (iii) a reference to a document (including these Undertakings) is to that document as varied, novated, ratified or replaced from time to time;
 - (iv) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;

- (v) a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender; and
 - (vi) if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning.
- (b) In the interpretation of a clause of these Undertakings, a construction that would promote the purpose or object underlying these Undertakings (whether that purpose or object is expressly stated in these Undertakings or not) shall be preferred to a construction that would not promote that purpose or object.
- (c) In the interpretation of these Undertakings, material not forming part of this Undertaking, including the Commission's Public Competition Assessment of May 2006, may be considered:
- (i) to confirm the meaning of a clause is the ordinary meaning conveyed by the text of the clause taking into account its context in these Undertakings and the competition concerns intended to be addressed by these Undertakings and the clause in question; or
 - (ii) to determine the meaning of the clause when the ordinary meaning conveyed by the text of the clause taking into account its context in these Undertakings and the purpose or object underlying these Undertakings leads to a result that does not promote the purpose or object underlying these Undertakings.
- (d) In determining whether consideration should be given to any material in accordance with clause 7.2(c), or in considering any weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to:
- (i) the effect that reliance on the ordinary meaning conveyed by the text of the clause would have (taking into account its context in these Undertakings and whether that meaning promotes the purpose or object of these Undertakings); and
 - (ii) the need to ensure that the result of these Undertakings is to restore or maintain competition, thereby preventing any competitive harm that may arise as a result of Toll's acquisition of Patrick or the Restructure.
- (e) In performing his obligations under these Undertakings, Mr Mark Rowsthorn will do everything reasonably within his power to ensure that his performance of those obligations is done in a manner which is consistent with promoting the purpose and object of these Undertakings.

Signed by Mr Mark Rowsthorn in the presence of:



(Signature of Witness)



(Signature of Mark Rowsthorn)

DAVID TELFORD

(Name of Witness)

3 April 2007

Date of Execution by Mr Mark Rowsthorn

Accepted by the **Australian Competition and Consumer Commission** pursuant to Section 87B of the *Trade Practices Act 1974*.



Graeme Julian Samuel
Chairman

18/04/07

Date

Attachment G-2-1

Asciano Assets

The following Toll Group businesses:

	Business description	Principal corporate entities comprising the business	Organisation chart reference
1.	The Patrick Corporation Limited (" Patrick ") container terminals at Port Botany (Sydney), Fisherman Islands (Brisbane), East Swanson Dock (Melbourne) and Fremantle.	Patrick Stevedores Operations Pty Ltd ACN 065 375 840 Patrick Stevedores Operations No. 2 Pty Ltd ACN 056 292 687 Patrick Stevedores Holdings Pty Ltd ACN 060 462 919 PSL Services Pty Ltd ACN 082 168 269	Schedule 1.3
2.	100% of the issued capital in Pacific National Pty Limited (" Pacific National "), which holds and conducts the Pacific National Business.	Pacific National Pty Ltd ACN 098 060 550 and all entities within the Pacific National Group	Schedule 1.2
3.	Toll Ports business, which provides port operations and management and stevedoring services at the Ports of Geelong, Hastings and Newcastle.	Asciano (General & Bulk) Pty Ltd (which will operate the Toll Westport and Newcastle Bulk businesses) Eastern Basin Pty Ltd ACN 083 102 890 Eastern Basin Unit Trust ABN 60 786 498 085 Geelongport Pty Ltd ACN 003 996 594 Ports Pty Ltd ACN 073 772 077 as trustee for the Port of Geelong Unit Trust (30%)	Schedule 1.1
4.	Toll's general stevedoring business conducted at ports in Australia.	Toll Stevedoring Pty Ltd ACN 000 013 838 Toll Ports Pty Ltd ACN 007 427 652 Toll Ports Operations Pty Ltd ACN 120 380 289 Strang Stevedoring Australia WDW Pty Ltd ACN 082 587 817 WA Grain Stevedores Pty Ltd ACN 090 850 847 (50%)	Schedule 1.1

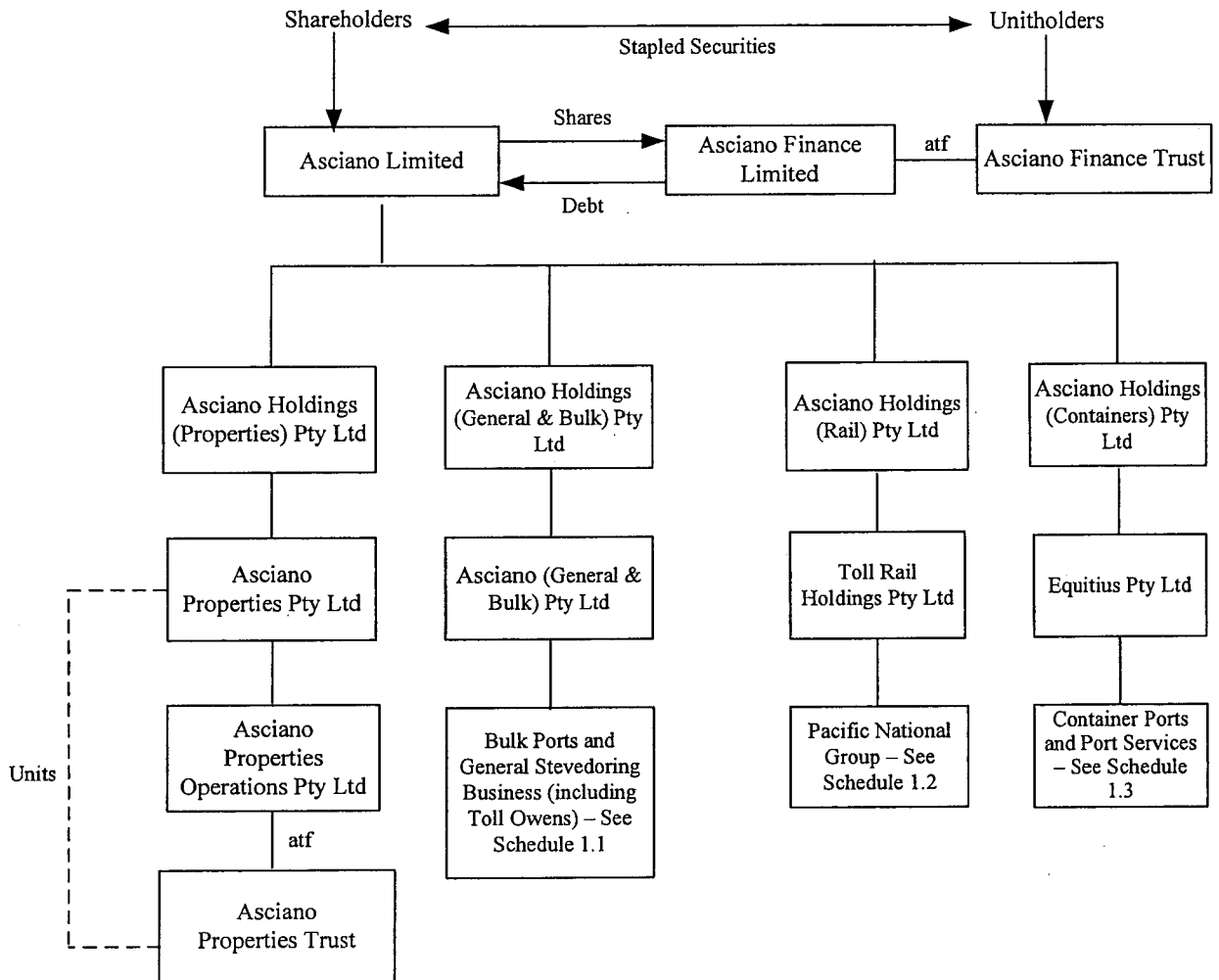
	Business description	Principal corporate entities comprising the business	Organisation chart reference
5.	Patrick's general stevedoring business conducted at Port Botany, Brisbane, Melbourne and Fremantle.	Patrick Stevedores Operations Pty Ltd ACN 065 375 840 Patrick Stevedores Operations No. 2 Pty Ltd ACN 056 292 687 Patrick BWL Pty Ltd ACN 079 543 629 WA Grain Stevedores Pty Ltd ACN 090 850 847 (50%) PSL Services Pty Ltd ACN 082 168 269 Patrick Stevedores Holdings Pty Ltd ACN 060 462 919	Schedules 1.3 and 1.1
6.	The Portlink business, which provides inland rail services and freight forwarding to and from regional centres in Victoria, New South Wales, South Australia and the Northern Territory.	Patrick Portlink Pty Ltd ACN 072 506 891 Patrick Portlink (SA) Pty Ltd ACN 105 070 451 Train Crewing Services Pty Ltd ACN 114 746 253 Alpen's (Griffin) Pty Ltd ACN 002 930 010	Schedule 1.3
7.	The Port Services business, which provides land-based services to shipping lines, freight forwarding agents, customs brokers, importers and exporters at major Australian ports.	Patrick Port Services (No. 1) Pty Ltd ACN 095 062 570 Patrick Logistics Pty Ltd ACN 009 762 985 Phillips Transport Pty Ltd ACN 095 062 589 Seatons Distribution Services (Qld) Pty Ltd ACN 010 102 002 Patrick Port Services Pty Ltd ACN 058 614 994 Patrick Distribution Pty Ltd ACN 007 148 709 PSL Services Pty Ltd ACN 082 168 269	Schedule 1.3

Toll Group interests in the following joint ventures:

	Entity	Business description	Organisation chart reference
8.	Patrick Autocare Pty Ltd ACN 004 497 607	Provides an integrated service for the transportation, processing and storage of motor vehicles.	Schedule 1.3

	Entity	Business description	Organisation chart reference
9.	Toll Owens Limited 1578714	Provides services including log and general cargo marshalling, inventory management, storage, consolidation and container handling at the Port of Tauranga and other ports in New Zealand.	Schedule 1.1
10.	Albany Bulk Handling Pty Ltd ACN 094 810 974	Conducts bulk handling operations at the Port of Albany.	Schedule 1.1
11.	Patrick Technology & Systems Pty Ltd ACN 058 304 340	Conducts research and development of information technology and communication support systems for freight logistics operations engineering and hazardous cargo.	Schedule 1.3
12.	Car Compounds of Australia Pty Ltd ACN 055 362 546	Provides imported vehicle processing and compounding services.	Schedule 1.3
13.	Queensland Bulk Handling Pty Ltd ACN 010 284 509	Provides bulk commodity handling services and conducts rail terminal operations at the Port of Brisbane (Fisherman Islands).	Schedule 1.1
14.	Australian Amalgamated Terminals Pty Ltd ACN 098 458 229	Conducts facility management operations at the Glebe Island Automotive Terminal in Port Jackson, New South Wales and at other locations.	Schedule 1.3
15.	1-Stop Connections Pty Limited ACN 102 573 544	Provides EDI technology and e-commerce systems services to the international freight and logistics industry.	Schedule 1.3

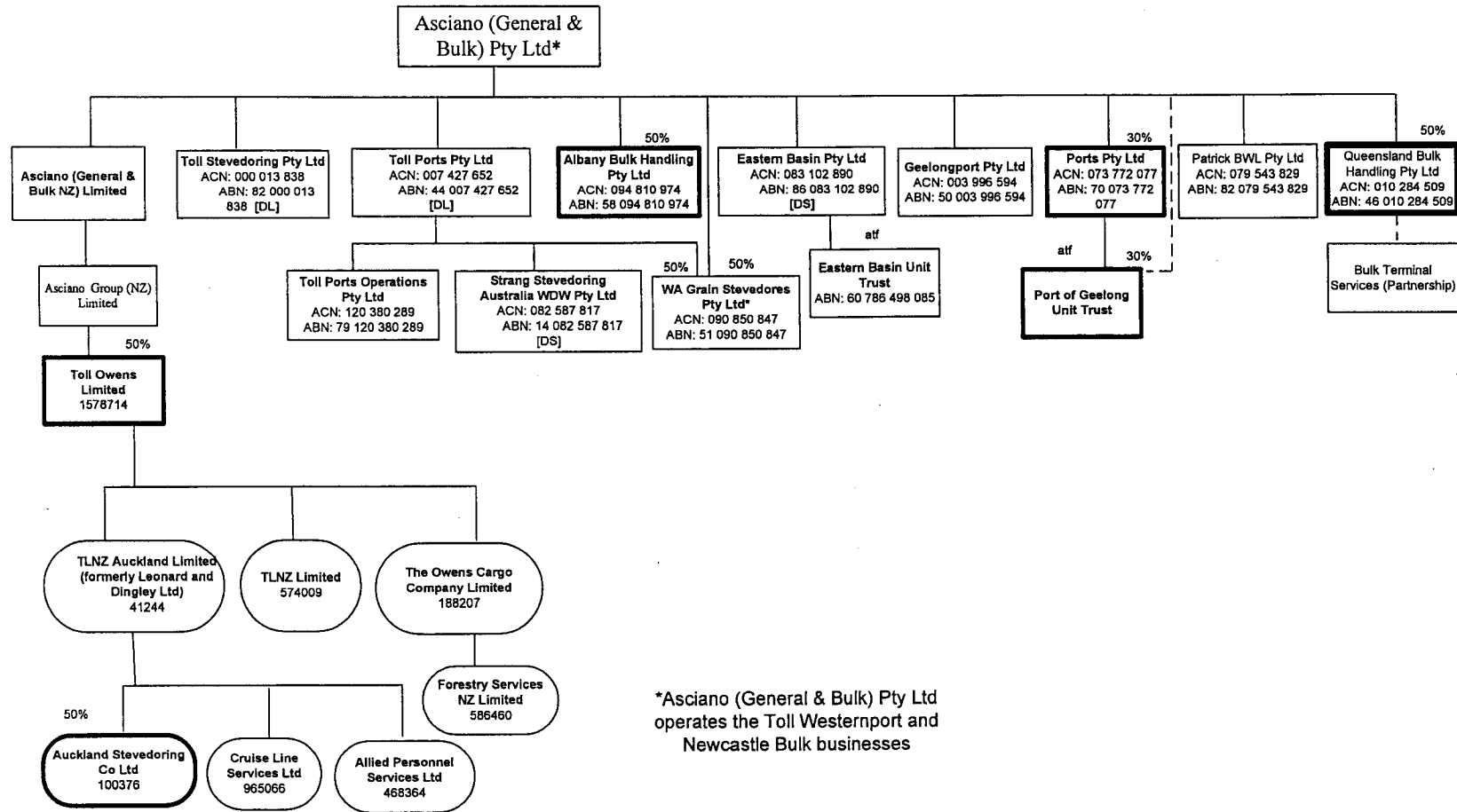
Schedule 1
Infrastructure Co Post Settlement



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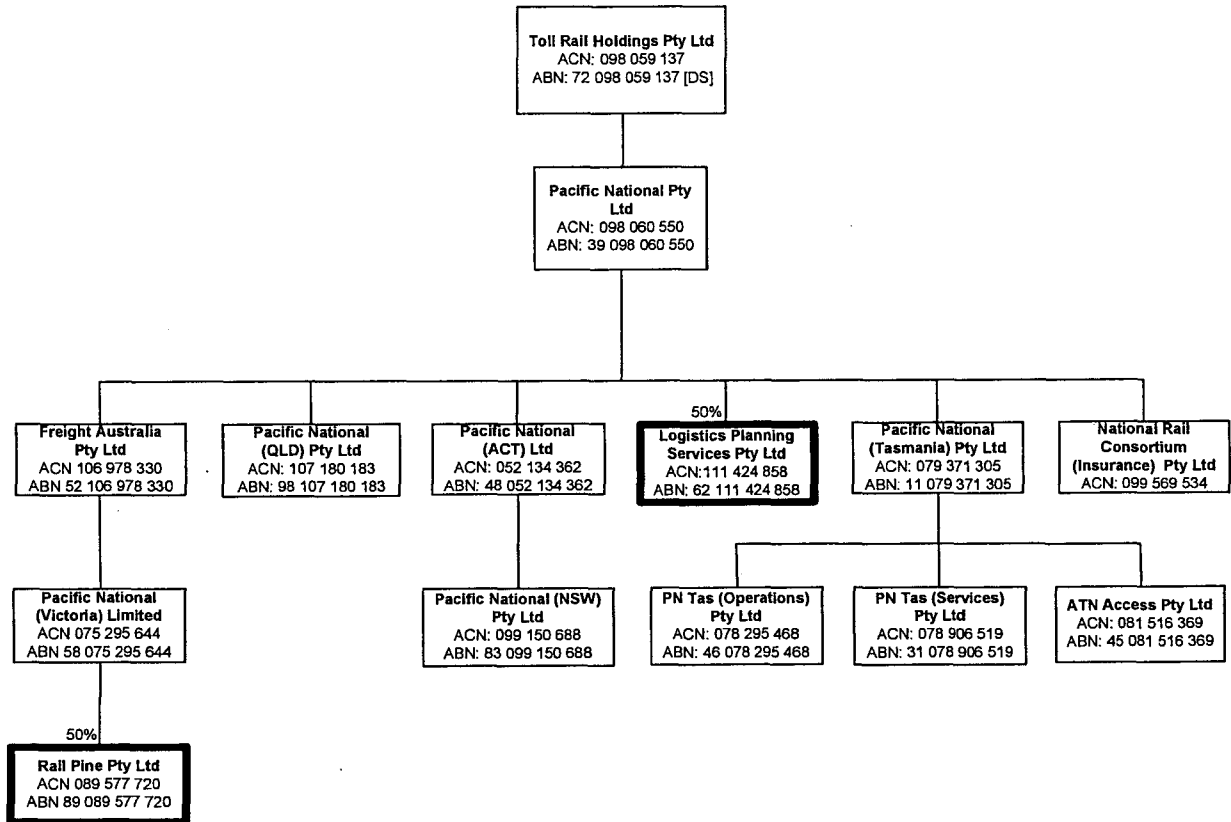
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Schedule 1.1
General and Bulk



*Asciano (General & Bulk) Pty Ltd
operates the Toll Westernport and
Newcastle Bulk businesses

Schedule 1.2 Pacific National Group



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Schedule 1.3
Container Ports and Port Services – Equitius Group

