

[Public version]

[Consolidated to incorporate the variations accepted by the Commission on 4 May, 11 September, 9 October, 13 December 2006 and 18 April 2007]

## Trade Practices Act 1974

Undertakings to the Australian Competition and Consumer Commission given for the purpose of section 87B

by

Toll Holdings Limited  
ACN 006 592 089

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## Recitals

- A. Toll is a provider of transport and logistics services. Patrick was a provider of port stevedoring, transport and logistics services. Toll and Patrick each held a 50% interest in Pacific National, which, amongst other things, provides rail line haul services for the interstate movement of containerised freight between each of Sydney and Melbourne and Perth.
- B. On 22 August 2005, Toll announced its intention to make offers under an off-market takeover bid for all the shares in Patrick that it did not already own ("**Proposed Acquisition**"). On 15 September 2005, Toll provided a bidder's statement under the Corporations Act to Patrick setting out the terms of the Offer.
- C. Toll's bidder's statement provided that the Offer was subject to a number of conditions including a condition that Toll receives notice that the Commission did not propose to intervene or seek to prevent the Proposed Acquisition.
- D. On 18 January 2006, following consideration of the Proposed Acquisition under the Commission's informal merger clearance process, the Commission announced that it would oppose the Proposed Acquisition on the grounds that it would contravene section 50 of the Act.
- E. On 9 February 2006, the Commission commenced proceedings in the Federal Court of Australia seeking orders to restrain the Proposed Acquisition from proceeding ("**Proceedings**").
- F. Toll denied that the Proposed Acquisition would substantially lessen competition in contravention of section 50 of the Act and filed a defence in the Proceedings.
- G. Toll offered to the Commission pursuant to section 87B of the Act the following undertakings to address and remedy the allegations contained in the Commission's Statement of Claim dated 9 February 2006.
- H. Among the competition concerns identified by the Commission in the Proceedings 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.
- I. Toll addressed the Commission's competition concerns in this respect by offering in these Undertakings 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.
- J. On the basis of the implementation of the terms of these Undertakings, the Commission discontinued the Proceedings on a final basis.
- K. These Undertakings were varied with the Commission's consent on 4 May 2006, 11 September 2006, 9 October 2006 and 13 December 2006.
- L. 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, referred to in these Undertakings as "**Asciano**". The restructure is proposed by Toll to involve transferring the assets, entities and/or businesses listed in Annexure F that comprise Toll's infrastructure assets to Asciano (the "**Proposed Restructure**").
- M. The Proposed Restructure will result in Toll ceasing to hold any interest in Pacific National.
- N. Toll is of the view that the Proposed Restructure will address more comprehensively a number of the Commission's competition concerns arising from Toll's acquisition of Patrick. Toll is of the view that divestiture of the PN Interest, the Vehicle Transport Business and the PrixCar Interest is no longer required to address competition concerns.
- O. The Commission is of the view, having regard to its market enquiries in relation to the Proposed Restructure, that 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 the original undertakings 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, the variation proposed by Toll has the effect of replacing a transparent divestiture process with a complex transaction that is intended to result in the creation of a wholly independent company from Toll; which company will own and control the assets that gave rise to the Commission's competition concerns.
- P. 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 the original undertakings, benefit competition. Consequently, the Commission has consented to a further variation of these Undertakings. In consenting to this variation, the Commission notes that Toll has agreed to

additional obligations that aim to enhance the structural separation of Toll and Asciano, including obligations in relation to:

- a) the independence of Toll and Asciano directors;
- b) the employment and secondment of personnel by and between Toll and Asciano; and
- c) arm's length commercial dealings between Toll and Asciano, including a prohibition on Toll and Asciano providing each other joint or shared services.

Q. In consenting to the variation, the Commission has also accepted assurances from Toll that Toll will not act in a manner which is inconsistent with the intent of the variation; 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 consents to the variation on the basis that Mr Mark Rowsthorn, Asciano, the Asciano directors and the Toll directors offer undertakings to ensure that Asciano and Toll are in effect wholly separate entities.

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## 1. Commencement and Duration of Undertakings

### 1.1 Commencement

- (a) Clauses 1 to 3, 8.2, 14 and 17 to 19 of these Undertakings come into effect when these Undertakings are accepted by the Commission.
- (b) Clauses 4 to 16 of these Undertakings come into effect on the Trigger Date, save for clauses 8.2 and 14.

### 1.2 Minimum Acceptance

Toll undertakes that it will not waive the condition contained in Section 16.12(a) of the Offer unless it has first received that number of acceptances pursuant to the Offer ("**Controlling Acceptances**") which, when aggregated with the shares in Patrick in which Toll already has a relevant interest, result in Toll having a relevant interest in more than 50% of the shares in Patrick.

### 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.

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## 2. Undertakings to restructure and divest businesses

### 2.1 Divestments

Subject to clauses 1.1, 1.3 and 2.6, Toll undertakes to the Commission, that upon the occurrence of the Trigger Date, Toll will:

- (a) in accordance with the sale process set out in clauses 2.1 and 4, divest, or procure Patrick to divest (as the case may be), to Pre-approved Purchasers or Approved Purchasers the:
  - (i) PN Interest;
  - (ii) Patrick Bass Strait Shipping Business;
  - (iii) Patrick Tasmanian Freight Forwarding Business; and
  - (iv) Vehicle Transport Business;
- (b) sell the PrixCar Interest in accordance with the sale process set out in clauses 2.1 and 5; and
- (c) procure Pacific National to lease or make available the East-West Rail Assets in accordance with the process set out in clauses 2.1 and 8.

## 2.2 Divestment of the PN Interest

- (a) Toll may discharge its obligation to divest the PN Interest by:
  - (i) selling the PN Shares to an Approved Purchaser so that, immediately after the sale, each of Toll and the Approved Purchaser has an Economic Interest in Pacific National equal to 50%, or
  - (ii) procuring that Pacific National issue and allot to an Approved Purchaser such number of ordinary shares (the "**New PN Shares**") so that, immediately following the issue and allotment, each of Toll and the Approved Purchaser has an Economic Interest in Pacific National equal to 50%.
- (b) Accordingly, any reference in these Undertakings to:
  - (i) the PN Interest being divested, sold, acquired or purchased, or the subject of a "sale process", "sale agreement" or "conditional sale agreement" includes, without limitation, the issue and allotment of, and subscription for, the New PN Shares or any agreement therefore; and
  - (ii) a "purchase" or "purchaser" of the PN Interest also includes, as relevant, a reference to the subscription or subscriber for the New PN Shares.

## 2.3 Toll Restructure

The **Restructure** means the completion, by no later than the Final Date, of each of the following steps:

- (a) the offer, pursuant to section 87B of the Act, and within 1 Business Day of the Variation being consented to by the Commission, of the undertaking in Annexure G by Asciano Limited (for the avoidance of doubt Toll will not transfer to Asciano any asset or interest until Asciano Limited offers the undertaking in Annexure G to the Commission);
- (b) the offer, pursuant to section 87B of the Act, and within 1 Business Day of the Variation being consented to by the Commission, of the undertaking in Annexure H by each existing director of Toll Limited, and each existing director of any other Toll entity in respect of whom Toll has the ability, either directly or

indirectly, to appoint or remove as a director (with the exception of Mr Mark Rowsthorn);

- (c) the offer, pursuant to section 87B of the Act, and prior to appointment to a board of Asciano, of the undertaking in Schedule G-1 to Annexure G by each person who has been, or is to be, appointed as a director of Asciano Limited, and each existing director of any other Asciano entity in respect of whom Asciano has the ability, either directly or indirectly, to appoint or remove as a director, with the exception of:
  - (i) the directorships held by Mr Paul Little and Mr Neil Chatfield between 29 January 2007 and 27 February 2007; and
  - (ii) Mr Mark Rowsthorn; and
  - (iii) the directors of the Independent Temporary Responsible Entity,
- (d) the offer, pursuant to section 87B of the Act, and within 1 Business Day of the Variation being consented to by the Commission of the undertaking in Schedule G-2 in Annexure G by Mr Mark Rowsthorn;
- (e) the issue of units in Asciano Trust on a pro rata basis to existing shareholders of Toll by way of an equal reduction of capital by Toll and a scheme of arrangement under section 411 of the Corporations Act;
- (f) the distribution of shares in Asciano Limited on a pro rata basis to existing shareholders of Toll by way of an equal reduction of capital by Toll and a scheme of arrangement under section 411 of the Corporations Act;
- (g) the stapling of the shares in Asciano Limited and the units in the Asciano Trust to create Asciano;
- (h) the making of all necessary orders by the Supreme Court of Victoria to give effect to the Restructure;
- (i) the separate listing of the securities of each of Asciano and Toll on the Australian Stock Exchange; and
- (j) the transfer to Asciano of the Asciano Assets.

#### **2.4 Toll not to transfer assets**

Toll will not transfer any asset to Asciano until such time as the undertakings required to be given as a part of the Restructure are offered to the Commission.

#### **2.5 Toll to Implement Restructure**

Toll will do everything in its power to have the Restructure implemented by the Final Date.

#### **2.6 Waiver of Obligations**

If Toll procures that the Restructure occurs in accordance with these Undertakings Toll is relieved of its obligations, as from the Restructure Date:

- (a) to procure Pacific National to lease or make available the East-West Rail Assets in accordance with clauses 2.1(c) and 8 on the basis that the obligations in those clauses, to the extent to which the obligations have not been discharged by Toll, have been assumed by Asciano, with the exception of clause 8.1A;

- (b) to divest the PN Interest under clause 2.1(a)(i);
- (c) to divest the Vehicle Transport Business under clause 2.1(a)(iv);
- (d) to divest the PrixCar Interest under clauses 2.1(b), 5.1(c) and 5.2;
- (e) in clauses 9.1(d) and (e) (rail non-discrimination regime), on the basis that these obligations have been assumed by Asciano;
- (f) in clause 11 (landside port dealings), on the basis that these obligations have been assumed by Asciano;
- (g) in clause 9.1(a) and (b);
- (h) in clause 9.2 (on the basis and to the extent that the obligations in that clause are superseded by obligations in clause 2.9);
- (i) in clause 9.3;
- (j) in clause 9.4, subject to clause 9.4 being complied with in relation to the provision of an audit report referred to in clause 9.4(b) and for the period between 31 March 2007 and the Restructure Date;
- (k) in clause 9.5; and
- (l) in 9.6 and 9.7(b), on the basis that these obligations have been assumed by Asciano.

## 2.7 Prior Contracts

Toll will grant Asciano, and will not itself assume or have, rights to renegotiate and unilaterally terminate any contract, arrangement or understanding entered into between Toll and Asciano prior to the Restructure Date (other than by reason of material breach) and will, independently of any contractual right, consent to the renegotiation and the termination of any such contract, arrangement or understanding, on condition that Asciano:

- (a) notifies Toll, within a period of three months after the Restructure Date, of its intention to exercise its right to renegotiate or terminate a contract, arrangement or understanding and which contract, arrangement or understanding is to be renegotiated or terminated; and
- (b) concludes its renegotiation or termination with Toll within 9 months of notice being given under sub-clause (a) above.

## 2.8 Constitution of Asciano

Toll will procure that, by the date the Asciano Undertakings are accepted by the Commission, the Constitution, as at the Restructure Date, of Asciano will provide that, between the Restructure Date and 31 March 2011, Asciano will:

- (a) procure that each director of Asciano Limited and any other Asciano entity in respect of whom Asciano has the ability, either directly or indirectly, to appoint or remove as a director (other than Mr Mark Rowsthorn and the directors of the Independent Temporary Responsible Entity) offers to the Commission, prior to appointment, and pursuant to section 87B of the Act, the undertaking in Schedule G-1 to Annexure G;

- (b) to the extent permitted by law, exclude Mr Mark Rowsthorn while he holds a Toll Share Interest or a Toll Asset Interest from any consideration, decision or resolution by the directors of Asciano after the Restructure Date in relation to proposed or actual contracts, arrangements or understandings between Toll and Asciano, until such time as the disposal of such Toll Share Interest or such Toll Asset Interest has occurred;
- (c) not acquire or retain any Toll Share Interest or Toll Asset Interest;
- (d) not enter into or maintain any joint venture with Toll;
- (e) not appoint any person as a director (other than Mr Mark Rowsthorn, whose involvement in Asciano is subject to the undertaking set out in Schedule G-2 to Annexure G), who is not an Independent Asciano Person;
- (f) unless otherwise agreed by the Commission, not employ, contract with, appoint or otherwise engage any person, company, partnership or organisation in a role with or directly related to Pacific National's Intermodal Business who is, or has been, a Senior Manager of, or held a senior operational position at Toll after the Restructure Date;
- (g) not pay to Toll or any employee of Toll any performance or incentive fees in relation to the performance, revenues or profits of Asciano, other than payment, credits or rebates provided by Asciano in the ordinary course of business which are available to other like customers on like terms;
- (h) not enter or give effect to a contract, make or give effect to an arrangement or reach or give effect to an understanding which would in effect allow Asciano to:
  - (i) share management or employees with Toll;
  - (ii) second management or employees to or from Toll; or
  - (iii) subject to sub-clause (g) above, share in any profits or revenues of Toll;
- (i) not enter or give effect to a contract, make or give effect to an arrangement or reach or give effect to an understanding which would in effect allow Toll to:
  - (i) share management or employees with Asciano;
  - (ii) second management or employees to or from Asciano; or
  - (iii) subject to sub-clause (g) above, share in any profits or revenues of Asciano;
- (j) not enter or give effect to a contract, make or give effect to an arrangement or reach or give effect to an understanding with Toll unless the terms of the contract, arrangement or understanding are:
  - (i) on an arm's length basis and non-exclusive terms consistent with these Undertakings;
  - (ii) approved of in advance by the board of Asciano and only approved of if the board is satisfied in good faith, after due inquiry, that the contract, arrangement or understanding with Toll is considered arms length and bona fide to be in the best interests of Asciano; and



- (k) not enter or give effect to a contract, make or give effect to an arrangement or reach or give effect to an understanding, between Asciano and Toll, in relation to Shared Services Arrangements.

## 2.9 Toll Obligations – Post Restructure Date

Between the Restructure Date and 31 March 2011 Toll will:

- (a) procure that each new director of Toll Limited and any other Toll entity in respect of whom Toll has the ability, either directly or indirectly, to appoint or remove as a director, offers to the Commission, prior to appointment, and pursuant to section 87B of the Act, the undertaking in Annexure H;
- (b) to the extent permitted by law, exclude any Toll director who holds an Asciano Share Interest or an Asciano Asset Interest from any consideration, decision or resolution by the directors of Toll after the Restructure Date in relation to proposed or actual contracts, arrangements or understandings between Toll and Asciano until such time as the disposal of such Asciano Share Interest or such Asciano Asset Interest has occurred;
- (c) not acquire or retain any Asciano Share Interest or Asciano Asset Interest;
- (d) not enter into or maintain any joint venture with Asciano;
- (e) not appoint as a director any person who is not an Independent Toll Person;
- (f) unless otherwise agreed by the Commission, not employ, contract with, otherwise engage or appoint any person, company, partnership or organisation:
  - (i) who is or has been a Senior Manager of, or held a senior operational position at, Pacific National's Intermodal Business;
  - (ii) who is or has been a director of Pacific National; or
  - (iii) who has had access to Rail Confidential Informationafter the Restructure Date;
- (g) not pay to Asciano or any employee of Asciano any performance or incentive fees in relation to the performance, revenues or profits of Toll, other than payments, credits or rebates provided by Toll in the ordinary course of business which are available to other like service providers on like terms;
- (h) not enter or give effect to a contract, make or give effect to an arrangement or reach or give effect to an understanding which would in effect allow Toll to:
  - (i) share management or employees with Asciano;
  - (ii) second management or employees to or from Asciano; or
  - (iii) subject to sub-clause (g) above, share in any profits or revenues of Asciano;
- (i) not enter or give effect to a contract, make or give effect to an arrangement or reach or give effect to an understanding which would in effect allow Asciano to:
  - (i) share management or employees with Toll;

- (ii) second management or employees to or from Toll; or
- (iii) subject to sub-clause (g) above, share in any profits or revenues of Toll;
- (j) not enter or give effect to a contract, make or give effect to an arrangement or reach or give effect to an understanding with Asciano unless the terms of the contract, arrangement or understanding are:
  - (i) on an arm's length basis and non-exclusive terms consistent with these Undertakings; and
  - (ii) approved of in advance by the board of Toll and only approved of if the board of Toll is satisfied in good faith after due inquiry that the contract, arrangement or understanding with Asciano is considered arms length and bona fide to be in the best interests of Toll; and
- (k) not enter or give effect to a contract, make or give effect to an arrangement or reach or give effect to an understanding, between Toll and Asciano, in relation to Shared Services Arrangements.

## 2.10 Consequence of frustration or non-compliance

- (a) Without limiting the Commission's ability to bring enforcement proceedings against Toll in relation to these Undertakings, Toll will divest the PrixCar Interest and the Vehicle Transport Business if any obligation in clause 2.9 is not fully performed or otherwise given effect to.
- (b) Toll will divest the PrixCar Interest and the Vehicle Transport Business, if divestiture is required by the operation of clause 2.10(a), at such times and on such conditions (including as to price) as approved or directed by the Commission.

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## 3. Prior to Trigger Date

### 3.1 Pre-approval of purchaser

Prior to the Trigger Date, (or, in the case of the Vehicle Transport Business, prior to the date when Toll elects which business to divest) Toll will use its best endeavours to identify prospective purchasers for each of the Divestment Businesses ("**Proposed Purchaser**") that:

- (a) are prepared to enter into a conditional agreement with Toll for the purchase of the relevant Divestment Businesses;
- (b) are independent of and have no direct or indirect controlling interest in Toll, Patrick or Pacific National;
- (c) Toll believes in good faith, having made reasonable inquiries, are of good financial standing and have an intention to operate the relevant Divestment Business as a going concern; and
- (d) in the case of the PN Interest, is not a participant in rail line haul or freight forwarding in Australia, and is not the Operator as defined in these Undertakings.

### 3.2 Commission may object

- (a) Within 5 Business Days of Toll selecting a Proposed Purchaser, Toll will provide the Commission with the following information and such other information that

the Commission reasonably requires to assess whether the Proposed Purchaser satisfies the criteria set out in sub-clauses 3.1(a) to 3.1(d) inclusive:

- (i) the name, address and all other available contact details of the Proposed Purchaser;
  - (ii) a copy of a signed or otherwise agreed conditional sale and purchase agreement with the Proposed Purchaser;
  - (iii) a description of any business carried on in Australia by the Proposed Purchaser; and
  - (iv) the names of the ultimate holding company and directors of the Proposed Purchaser.
- (b) Toll will use best endeavours to notify the Commission of an intended Proposed Purchaser as early as possible prior to seeking approval under clause 3.2(a), and request the Commission to advise whether it is likely to raise any objection to that purchaser.
- (c) If within 20 Business Days of receipt of the information from Toll referred to in clause 3.2(a) (or such further period as Toll and the Commission may agree) the Commission does not object to the Proposed Purchaser, Toll will use its best endeavours to complete the sale of the Divestment Business to the Proposed Purchaser in accordance with the conditional sale and purchase agreement referred to in clause 3.2(a) as soon as practicable after the Trigger Date.
- (d) The Commission may only object to the Proposed Purchaser on the basis that it has formed the opinion that sale to the Proposed Purchaser is likely to result in a substantial lessening of competition in a market in Australia when compared to the likely competition in that market in the absence of the Proposed Acquisition and in that event, the Commission will provide Toll with a written statement of its reasons including the material facts it relies on for its view, on a confidential basis.
- (e) Upon receipt of a notice of objection as provided under clause 3.2(d) (which Toll undertakes not to challenge), Toll must identify an alternative Proposed Purchaser for consideration by the Commission pursuant to this clause 3.2 as soon as practicable after receiving notice of the Commission's objection.

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## 4. Sale Process post Trigger Date

### 4.1 Pre-approved purchaser

If a conditional sale agreement is entered into with a Proposed Purchaser in accordance with clause 3.2 (hereafter referred to as "**Pre-approved Purchaser**"), Toll will divest the relevant Divestment Business or Businesses in accordance with these Undertakings and in accordance with the terms of the conditional sale and purchase agreement referred to in clause 3.2(a)(ii), to the Pre-approved Purchaser as soon as practicable after the Trigger Date.

### 4.2 Invitation to Tender

If, prior to the Trigger Date, or in the case of the Vehicle Transport Business, prior to the date when Toll elects which business to divest, no Pre-approved Purchaser has been identified for one or more of the Divestment Businesses, Toll will, within 45 days after the Trigger Date, or,

in the case of the Vehicle Transport Business, within 15 days after Toll elects which business to divest, invite offers to purchase the relevant Divestment Businesses by:

- (a) sending notices to prospective purchasers identified by Toll; and
- (b) publishing details of the invitation to tender in appropriate publications,

notifying prospective purchasers that the relevant Divestment Businesses will be offered by sale and requesting registration of expressions of interest in the relevant Divestment Businesses within 30 days of the date of despatch of the notices. Toll will provide to the Commission, within 5 Business Days of despatch, copies of the notices and invitation together with the list of addressees.

#### **4.3 Initial Sale Period**

- (a) Toll will use its best efforts to sell the Divestment Businesses pursuant to clause 4.2 to Approved Purchasers [Confidential], provided that if the Restructure has not been implemented and concluded by the Final Date, then the Initial Sale Period in relation to the PN Interest, the Vehicle Transport Business and the PrixCar Interest will be deemed to end on the date which is [Confidential] from the Final Date, or such further date consented to by the Commission in writing.
- (b) Within 5 Business Days of a binding agreement to purchase a Divestment Business being executed in response to Toll's invitation referred to in clause 4.2, Toll will provide the Commission with particulars of the purchaser, and a copy of the duly executed sale agreement on a confidential basis.
- (c) Toll will use best endeavours to notify the Commission of an intended purchaser as early as possible prior to seeking approval under clause 4.3(b), and request the Commission to advise whether it is likely to raise any objection to that purchaser.

#### **4.4 Sale consents**

- (a) Without affecting Toll's obligations under clause 4.3, the sale and/or assignment of any assets, licences, permits or approvals used by, or in, the Divestment Businesses at the date of these Undertakings that are leased or subject to third party consent upon a change of control or transfer of the business will be subject in each case to Toll obtaining the relevant written consent of the lessor or third party to the continuation of the use, after the sale of such business in accordance with this Undertaking, of such asset, licence, permit or approval (including the transfer, assignment or novation of such instrument if appropriate) by the Divestment Business, on no less favourable terms than enjoyed by the Divestment Business at the date of this Undertaking ("**Third Party Consents**").
- (b) Toll must:
  - (i) use its best endeavours to procure all Third Party Consents as soon as practicable after the execution of the binding agreement referred to in clause 4.3(b);
  - (ii) comply with all reasonable requirements necessary to obtain all Third Party Consents including providing necessary information promptly to the lessor or third party;
  - (iii) promptly pay the costs and expenses of any lessor or third party reasonably incurred in providing the Third Party Consent; and

- (iv) act in good faith in its negotiations to obtain all Third Party Consents.
- (c) If Toll is unable to procure any necessary Third Party Consent to a sale within 90 days after the execution of the binding agreement referred to in clause 4.3(b) (or such further time as the Commission may agree), Toll must nominate an alternative Proposed Approved Purchaser who may be acceptable to the lessor or third party concerned and comply again with clause 4.3.

#### 4.5 Obligations pending or if no novation or assignment

If the divestment of any of the Divestment Businesses requires the novation or assignment of any contracts, third party rights, licences, permits, or approvals, unless and until such a novation or assignment occurs, and to the extent permissible under any relevant contract, licences, permits, or approvals, Toll will require that the purchaser shall perform on behalf of Toll, Patrick or Pacific National as the case may be, all obligations of Toll, Patrick or Pacific National as the case may be, following completion. If the purchaser performs such obligations, Toll will account to the purchaser for any amounts paid by the purchaser to Toll, Patrick or Pacific National after completion in respect of that contract.

#### 4.6 Appointment of Proposed Agent

- (a) If at the expiration of the Initial Sale Period, any of the Divestment Businesses have not been sold in accordance with clause 4.3 ("**Unsold Divestment Businesses**") Toll must within 10 Business Days of the end of such period, identify a person as a prospective sales agent for each Unsold Divestment Business ("**Proposed Agent**").
- (b) The Proposed Agent must in each case be a person that is independent of Toll, Patrick and Pacific National and has the qualifications and experience necessary to effect the sale of the relevant Unsold Divestment Business.
- (c) Toll will advise the Commission in writing within 5 Business Days of Toll selecting each Proposed Agent, of the identity of the Proposed Agent together with such information that the Commission reasonably requires to assess whether the Proposed Agent satisfies the criteria set out in clause 4.6(b).
- (d) If, within 5 Business Days of receipt of the information from Toll referred to in clause 4.6(c) (or such further period as the Commission and Toll may agree):
  - (i) the Commission does not object to the Proposed Agent, Toll will appoint the Proposed Agent as soon as practicable thereafter and forward to the Commission a copy of the executed terms of appointment of the Proposed Agent; or
  - (ii) the Commission does object to the Proposed Agent, Toll must either (at the Commission's election):
    - A. identify an alternative prospective sales agent for the Unsold Divestment Businesses for consideration by the Commission pursuant to this clause 4.6; or
    - B. appoint the nominee of the President of the Institute of Chartered Accountants of Australia as the Proposed Agent and Toll must require him or her to carry out the functions contemplated pursuant to clause 4.7.

## 4.7 Sale by the Approved Agent

- (a) Within 5 Business Days of the appointment of the Proposed Agent or expiry of the specified objection period referred to in clause 4.6(d) (whichever comes first), ("Approved Agent"), Toll must:
- (i) procure and/or grant the Approved Agent all necessary power and authority to divest, sell and transfer the relevant Unsold Divestment Businesses in the manner and on the terms considered appropriate by the Approved Agent, in its sole discretion, to ensure compliance with these Undertakings;
  - (ii) if the Unsold Divestment Business is the PN Interest, procure that Pacific National grant the Approved Agent all necessary power and authority to require that, as an alternative to the sale of the PN Shares, Pacific National issue and allot the New PN Shares to ensure compliance with these Undertakings; and
  - (iii) require that the Approved Agent use his or her best endeavours to divest the relevant Unsold Divestment Businesses to an Approved Purchaser:
    - A. within 4 months from the date of the power of attorney granted by Toll pursuant to clause 4.7(b); and
    - B. at the most favourable price and terms reasonably available to Toll, Patrick or Pacific National (as the case may require) at the time, but subject to an absolute and unconditional obligation to divest the relevant Unsold Divestment Business at no minimum price.
- (b) Within 5 Business Days after the appointment of the Approved Agent, Toll will procure, execute and provide an unconditional and irrevocable power of attorney in favour of the Approved Agent that:
- (i) grants the Approved Agent all rights and powers necessary to permit the Approved Agent to effect the divestiture of the relevant Unsold Divestment Business; and
  - (ii) unconditionally (save for fraud, negligence or breach of duty) indemnifies the Approved Agent against loss and damage incurred by the Approved Agent, arising directly or indirectly from the Approved Agent exercising or attempting to exercise the powers and rights conferred upon it under the powers of attorney referred to in clauses 4.7(a) and 4.7(b).
- (c) Toll will provide the Approved Agent with:
- (i) all relevant information available to Toll; and
  - (ii) all reasonable assistance,
- to enable the Approved Agent to divest, sell and transfer the relevant Unsold Divestment Businesses as quickly as possible.
- (d) Toll will indemnify the Approved Agent against any loss and damage incurred by the Approved Agent in the course of carrying out his or her functions in accordance with the terms of his or her appointment. Toll will promptly pay the

costs of the Approved Agent in the performance of his or her functions under clause 4.7(a).

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## **5. PrixCar Interest sale process**

### **5.1 Sale under the PrixCar Shareholders Agreement**

- (a) Within 30 days of the Trigger Date, Toll will cause Toll (FHL) Pty Limited (ACN 004 272 860) ("FHL") to give a notice ("Transfer Notice") to the directors of PrixCar Services Limited (ACN 007 063 505) ("PrixCar") that FHL proposes to transfer all of its 725,283 shares ("PrixCar Sale Shares") in PrixCar in accordance with clause 5 of the agreement between Kawasaki (Australia) Pty Limited (ACN 000 748 621), A.R.C. Strang Pty Limited (ACN 062 605 850), Finemore Holdings Limited (ACN 004 272 860) and Conaust Limited (ACN 000 049 301) dated 31 March 1995 as varied by Deed dated 26 June 1996 ("PrixCar Shareholders' Agreement").
- (b) Toll will provide the Commission on a confidential basis with a copy of the Transfer Notice and other documents offering to sell or purchase the PrixCar Sale Shares pursuant to clause 5 of the PrixCar Shareholders' Agreement, within 5 Business Days of Toll despatching or receiving (as the case may be) such documents.
- (c) Toll will cause FHL to do everything necessary to dispose of its PrixCar Sale Shares pursuant to clause 5 of the PrixCar Shareholders' Agreement.

### **5.2 Inability to effect sale**

If the sale process provided for under clause 5 of the PrixCar Shareholders' Agreement does not result in a sale of all of the PrixCar Sale Shares, the PrixCar Interest will be sold in accordance with the process set out in clauses 4.6 to 4.7 of these Undertakings.

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## **6. Approved Purchasers post Trigger Date**

### **6.1 Approved Purchaser**

- (a) Subject to these Undertakings and unless otherwise agreed by the Commission, Toll must not sell and must not authorise the Approved Agent to sell, the Divestment Businesses to a purchaser other than an Approved Purchaser.
- (b) An Approved Purchaser is a prospective purchaser of the Divestment Businesses that:
  - (i) is independent of and has no direct or indirect controlling interest in Toll, Patrick or Pacific National;
  - (ii) Toll believes in good faith, having made reasonable inquiries, is of good financial standing and has an intention to operate the Divestment Business as a going concern;
  - (iii) in the case of the PN Interest, is not a participant in rail line haul or freight forwarding in Australia, and is not the Operator as defined in these Undertakings; and
  - (iv) has not been objected to by the Commission within the objection period specified in clause 6.2(c).

## 6.2 Commission may object

- (a) Within 5 Business Days of Toll or the Approved Agent reaching a "conditional sale" agreement with a prospective purchaser for a Divestment Business ("**Proposed Approved Purchaser**"), Toll will provide the Commission with the following information and such other information that the Commission reasonably requires to assess whether the purchase of the Divestment Business by the Proposed Approved Purchaser satisfies the criteria set out in clause 6.1(b)(i) to 6.1(b)(iii) inclusive:
  - (i) the name, address and all other available contact details of the Proposed Approved Purchaser;
  - (ii) a copy of a signed conditional sale and purchase agreement with the Proposed Approved Purchaser;
  - (iii) a description of the business carried on in Australia by the Proposed Approved Purchaser; and
  - (iv) the names of the ultimate holding company and directors of the Proposed Approved Purchaser.
- (b) Toll will use best endeavours to notify the Commission of an intended Proposed Approved Purchaser as early as possible prior to seeking approval under clause 6.2(a), and request the Commission to advise whether it is likely to raise any objection to that purchaser.
- (c) If, within 20 Business Days of receipt of the information from Toll referred to in clause 6.2(a) (or such further period as Toll and the Commission may agree) the Commission does not object to the Proposed Approved Purchaser, Toll will use its best endeavours to complete the sale of the Divestment Business to the Proposed Approved Purchaser in accordance with the conditional sale and purchase agreement referred to in clause 6.2(a)(ii), as soon as practicable after the Trigger Date.
- (d) The Commission may only object to the Proposed Approved Purchaser on the basis that it has formed the opinion that sale to the Proposed Approved Purchaser is likely to result in a substantial lessening of competition in a market in Australia when compared to the likely competition in that market in the absence of the Proposed Acquisition and in that event, the Commission will provide Toll with a written statement of its reasons including the material facts it relies on for its view, on a confidential basis.
- (e) In the event of an objection as provided under clause 6.2(d) (which Toll undertakes not to challenge), Toll must identify an alternative Proposed Approved Purchaser for consideration by the Commission pursuant to this clause 6.2 as soon as practicable.
- (f) The obligations set out in clause 6.1 and this clause 6.2 do not apply in respect of the sale of the PrixCar Interest unless the sale is effected pursuant to clause 5.1(g) of the PrixCar Shareholders' Agreement.



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## 7. No Other Sale

### 7.1 No other sale

Unless the Commission otherwise permits, Toll will not, and will procure that Patrick and Pacific National (as relevant) do not, sell or divest any legal or equitable interest in, or control over, the Divestment Businesses except in accordance with or as permitted by these Undertakings.

### 7.2 Preservation of Assets

- (a) Toll agrees that it will not, and will procure that Patrick and Pacific National (as relevant) do not, during the term of these Undertakings, except in accordance with these Undertakings, transfer the control of the Divestment Businesses and the East-West Rail Assets without the prior written consent of the Commission and it will not remove or make any material adverse change to the Divestment Businesses (including, but not limited to, service levels, plant, equipment, staffing levels, level of management, premises and inventory).
- (b) Pending the sale of the Divestment Businesses, Toll will itself and will procure that Patrick and Pacific National (as relevant) take all reasonable steps, including without limitation, making reasonable capital expenditure, to ensure that except as required to implement the Restructure by the Final Date the:
  - (i) Divestment Businesses and the East-West Rail Assets are:
    - A. operated as a going concern and in the ordinary and normal course, having regard to the nature of the Divestment Business and the operator's previous practice, in order to preserve the value of the Divestment Business and to maintain its trading and financial position; and
    - B. maintained and preserved in substantially the same condition as at the date of these Undertakings; and
  - (ii) sale of the Divestment Businesses takes place as expeditiously and effectively as practicable following the Trigger Date.

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## 8. Divestment of Rail Assets

### 8.1 East-West Rail Assets

Subject to clause 2.6, upon a request made to Toll by or on behalf of a prospective Operator prior to, or within 12 months after, the Trigger Date, Toll undertakes to cause Pacific National to make available or relinquish to an Operator or Operators, in accordance with this clause 8, any or all of the following rights and assets, which collectively form the "**East-West Rail Assets**":

- (a) the Rolling Stock;
- (b) the Ancillary Services;
- (c) the Terminal Access; and
- (d) the Selected Train Paths.

The East-West Rail Assets referred to in (a) to (c) are to be made available for the Start Up Period while the Selected Train Paths are to be relinquished as provided in clause 8.2.

### 8.1A Restructure

Within one month of the Restructure Date:

- (a) Toll may terminate any appointment of the Leasing Agent provided that Asciano has first appointed the Leasing Agent on the same terms and conditions as those in place between Toll and the Leasing Agent under these Undertakings; and
- (b) Toll may enter into an agreement with Asciano such that Asciano assumes Toll's obligations under clause 8.12(d) of these Undertakings to indemnify the Leasing Agent and otherwise pay the costs of the Leasing Agent.

### 8.2 Selected Train Paths

- (a) Toll undertakes to procure that, in accordance with these Undertakings, Pacific National relinquish all such rights that it may have to the "**Selected Train Paths**" which consist of:
  - (i) up to 5 return train paths per calendar week (on separate days) on the East-West Corridor:
    - A. as determined by clause 8.7(i); or
    - B. as determined by the Leasing Agent pursuant to clause 8.9(a), respectively in order that they may be allocated by ARTC to an Operator; and
  - (ii) corresponding rights to:
    - A. operate the relevant connecting train paths in Western Australia under the control of WestNet Rail Pty Ltd; and
    - B. (if a Perth/Sydney path is requested by an Operator), operate the relevant connecting train paths under the control of the Rail Infrastructure Corporation and Rail Corporation of New South Wales, as the case may be.
- (b) As the Selected Train Paths can only be allocated to an Operator by the relevant track operator Toll will, in accordance with the process set out in clauses 8.6 to 8.11, cause Pacific National to:
  - (i) relinquish the Selected Train Paths to the relevant track operator; and
  - (ii) use its best endeavours to procure the consent of the relevant track operator to the relinquishment of those rights and the granting of the Selected Train Paths to an Operator, as soon as practicable after nomination by an Operator, and will comply with all reasonable requirements necessary to do so, including providing all necessary information and assistance promptly to the relevant track operator and an Operator.

- (c) Toll's obligations under this clause 8.2 are subject to Pacific National having been allocated by ARTC on or after 1 July 2006 at least 5 weekly return train paths which can be relinquished under clause 8.2(a).
- (d) If, following any agreement between Pacific National and ARTC relating to the contracted train path entitlements granted to Pacific National on the East-West corridor, an Operator or Operators have been allocated train paths on that corridor by the ARTC, Toll may request and the Commission may consent, acting in good faith and in its discretion, that the number of Selected Train Paths which Pacific National is required to relinquish under these Undertakings is reduced. The decision of the Commission under this clause must be consistent with the object of promoting competition for intermodal rail line-haul services on the East-West corridor. In the event that the Commission does not grant Toll's request the Commission will provide Toll with a written explanation of its reasons. Toll undertakes not to object to or otherwise challenge the Commission's decision.

### 8.3 Rolling Stock

- (a) Toll undertakes to procure that, in accordance with these Undertakings, Pacific National make available, the "**Rolling Stock**" which consists of up to:
  - (i) 12 "NR Class" locomotives or a combination of up to 3 "NR Class" and up to 9 "G Class" locomotives ("**Selected Locomotives**"), and
  - (ii) sufficient Wagons to make up three train sets up to the maximum length permitted by the track operators on the East-West Corridor.
- (b) The Rolling Stock referred to in clause 8.3(a) may be either purchased or leased at the option of the Selected Bidder. The Rolling Stock must be in good order and condition and, where appropriate, suitable for double-stacking.
- (c) Prior to purchase or lease of the Rolling Stock, Toll will cause Pacific National to carry out, at Toll's expense and within a reasonable period identified by the Leasing Agent, any improvements to the Rolling Stock reasonably identified by the Leasing Agent in its sole discretion or, at Toll's election, substitute alternative Rolling Stock which does comply with clause 8.3(b).
- (d) An Operator may lease the Rolling Stock for the Start Up Period and has the option, at the end of the Start Up Period, by at least 12 months prior written notice to Pacific National, to extend the term of the lease for a further period of 12 months on the same terms and conditions, save that the lease payments will be adjusted during that further period to reflect the then current market value of the Rolling Stock lease, as determined by the Leasing Agent (acting as an expert).

### 8.4 Ancillary services

Toll undertakes to procure that, in accordance with these Undertakings, Pacific National provide the following "**Ancillary Services**" during the Start Up Period in relation to rail services on the East-West Corridor, for the operation of the Rolling Stock made available to an Operator as specified in the Final Agreement, at fair market rates and otherwise on reasonable commercial terms as agreed:

- (a) crewing;
- (b) fuelling;

- (c) provisioning; and
- (d) maintenance.

## 8.5 Terminal Access

- (a) Within 30 days of the Trigger Date, Toll will procure that Pacific National:
  - (i) gives notices of termination or surrender of all of its rights and interests under the lease ("**Dynon Lease**") of the Dynon Terminal with Victoria Rail Track Corporation ("**VicTrack**"), the licence for use of Lot 75 at the Dynon Terminal, and the leases or licences for the Selected Tracks and Land east of the Dynon Terminal in accordance with the terms of the lease and licence held by Pacific National;
  - (ii) thereafter, comply with the make good obligations on termination contained in the Dynon Lease;
  - (iii) appoint the Leasing Agent to continue negotiations with VicTrack on behalf of Pacific National, in the event the surrender is not completed within 90 days of Pacific National's notice, and Toll will procure that Pacific National executes and provides a power of attorney in favour of the Leasing Agent that grants the Leasing Agent all rights and powers necessary to permit the Leasing Agent to:
    - A. operate and/or control the Dynon Terminal; and
    - B. effect the surrender of the Dynon Terminal referred to in clause 8.5(a)(i) on terms satisfactory to VicTrack that the Leasing Agent determines to be fair and reasonable between the parties.
- (b) Toll undertakes to procure that, in accordance with these Undertakings, Pacific National provides "Terminal Access" to an Operator during the Start Up Period, to either or both the South Dynon Terminal and the Chullora Terminal (at the election of the Operator) sufficient to accommodate 5 East-West Corridor services per week, including, without limitation, the Selected Train Paths which consists of providing access for the purpose of loading and unloading trains, storage and all necessary ancillary activities.
- (c) For the purposes of this clause 8.5:
  - (i) **Selected Tracks** is defined as the following rail tracks shown on the map at Annexure E to the Undertakings:
    - A. the rail track from co-ordinate A (at easting co-ordinate 2493848.30 and northing co-ordinate 2410991.96) to co-ordinate B (at easting co-ordinate 2494297.77 and northing co-ordinate 2410917.85);
    - B. the rail track from co-ordinate C (at easting co-ordinate 2494295.40 and northing co-ordinate 2410914.23) to co-ordinate D (a "toe of points" where one track splits into two separate tracks) (at easting co-ordinate 2494318.56 and northing co-ordinate 2410892.85);

- C. the rail track from co-ordinate D (at easting co-ordinate 2494318.56 and northing co-ordinate 2410892.85) to co-ordinate E (at easting co-ordinate 2494935.30 and northing co-ordinate 2410252.62);
- D. the rail track from co-ordinate D (at easting co-ordinate 2494318.56 and northing co-ordinate 2410892.85) to co-ordinate F (at easting co-ordinate 2494932.36 and northing co-ordinate 2410249.00); and
- E. the rail track from co-ordinate G (at easting co-ordinate 2494803.89 and northing co-ordinate 2410362.10) to co-ordinate H (at easting co-ordinate 2494933.84 and northing co-ordinate 2410242.14).

The rail tracks from co-ordinates D to E and D to F are commonly known as the 'disconnected outside goods lines'. The co-ordinates referred to in this clause are co-ordinates used in the "VicGrid Datum GDA94" map projection system, which, for the removal of doubt, is the same map system used by VicTrack to plot co-ordinates on maps of the primary infrastructure leases in the Dynon Terminals Precinct.

(ii) **Land** is defined as:

- A. the Selected Tracks defined in this clause;
- B. the land surrounding the Selected Tracks, up to 3 metres on either side of the middle of the Selected Tracks;
- C. where the land surrounding the Selected Tracks suitable for the upkeep and maintenance of the Selected Tracks is less than 3 metres, all land necessary for the proper upkeep and maintenance of the tracks.

## 8.6 Process for seeking Proposals

- (a) On or before **11 October 2006**, Toll will write to all the parties from whom Toll has, by that date, received requests to take up East-West Rail Assets and ask those parties, by on or before **18 October 2006** to reconfirm their interest in the East-West Rail Assets.
- (b) On or before **25 October 2006**, Toll will distribute information to all Bidders, that will include (but not be limited to) a description of the process for the selection of an Operator and the making available of the East-West Rail Assets under these Undertakings.
- (c) Toll will ask Bidders to submit, on or before **25 November 2006**, proposals ("**Proposal**") to take up the East-West Rail Assets in response to the information referred to in clause 8.6(b), and such information as the Bidder considers relevant as to why the Commission should not object to the Bidder, pursuant to clause 8.10(c).
- (d) For the avoidance of doubt nothing in this clause 8.6 precludes another prospective Operator lodging a Proposal to take up the East-West Rail Assets within the time frame specified within this clause 8.6.

## 8.7 Selection of Bidder and Negotiation

- (a) By no later than the Nomination Date, Toll must select and notify a Bidder ("**Selected Bidder**") and provide the Commission with a copy of the Proposal and information received from that Bidder under clause 8.6(c).
- (b) By 45 days after the Nomination Date, or, if clause 8.8(a) applies, by 45 days after the Leasing Agent's selection of a Selected Bidder under that clause, ("**Contract Date**"), Toll will use its best endeavours to procure that Pacific National execute a Final Agreement with the Selected Bidder which is materially consistent with the Selected Bidder's Proposal, and this clause 8, and on terms that it will be null and void, if objected to by the Commission under clause 8.10.
- (c) If, after the Nomination Date, the Selected Bidder materially changes its Proposal, or requests a Final Agreement which is not materially consistent with its Proposal, Toll may, by notice given to the Selected Bidder and copied to the Commission within 45 days of the Nomination Date, (and subject to clause 8.7(d)), terminate negotiations with that Selected Bidder.
- (d) If a Selected Bidder disputes Toll's notice of termination of negotiations under clause 8.7(c), the Selected Bidder may, within 2 Business Days of Toll's notice, request the Leasing Agent to determine, within five Business Days of request, (acting as an expert and not as an arbitrator) whether Toll, under clause 8.7(c), validly gave notice terminating the negotiations with that Selected Bidder. Each of Toll and the Selected Bidder are bound by the determination of the Leasing Agent under this clause as being final and binding. If the Leasing Agent determines that Toll validly gave notice, that party ceases to be the "**Selected Bidder**" and Toll must select and notify another Bidder within 5 Business Days of the Leasing Agent's determination, and thereafter comply with these undertakings in relation to that second Bidder as if it was the "**Selected Bidder**". (In this event, the "**Nomination Date**", in relation to the new Selected Bidder, will be deemed to be the date on which that Selected Bidder is notified by Toll under this paragraph).
- (e) If the Selected Bidder fails to dispute Toll's notice in accordance with clause 8.7(d), Toll must select and notify another Bidder within 7 Business Days of Toll's notice of termination of negotiation referred to in clause 8.7(c) and thereafter comply with these undertakings in relation to that second Bidder as if it was the "**Selected Bidder**". (In this event, the "**Nomination Date**", in relation to the new Selected Bidder, will be deemed to be the date on which that Selected Bidder is notified by Toll under this paragraph.)
- (f) If the Leasing Agent determines, under clause 8.7(d), that Toll did not give valid notice of termination of negotiations with the Selected Bidder under clause 8.7(c), Toll must promptly resume negotiations with that Selected Bidder in respect of the Final Agreement, provided that the period referred to in clause 8.7(b), (and definition of "**Contract Date**") by which Toll must procure execution of the Final Agreement by Pacific National with that Selected Bidder, will be extended by the number of days between the date of Toll's notice under clause 8.7(c) and the date of the determination of the Leasing Agent under clause 8.7(d).
- (g) In the event that the Selected Bidder decides to withdraw its Proposal to take up the relevant East-West Rail Assets, Toll must:

- (i) notify the Commission within 2 Business Days and provide details of the relevant East-West Rail Assets relating to the withdrawn Proposal;
  - (ii) select and notify another Bidder within 5 Business Days of the Selected Bidder withdrawing its Proposal and thereafter comply with these undertakings in relation to that second Bidder as if it was the "**Selected Bidder**". (In this event, the "**Nomination Date**", in relation to the new Selected Bidder, will be deemed to be the date on which that Selected Bidder is notified by Toll under this paragraph).
- (h) The East-West Rail Assets are to be offered on commercial, arms length terms and at fair market value (save for the Selected Train Paths which are to be relinquished without consideration).
- (i) In respect of the composition of the Selected Train Paths, Toll will relinquish without objection and in accordance with clause 8.2, the first three train paths nominated by the Selected Bidder, and in the case of the fourth and fifth train paths, Toll has the right, within 5 Business Days of the Selected Bidder's nomination, to nominate substitute train paths having similar qualities and features as those requested by the Selected Bidder ("**Substitute Paths**").
- (j) The Final Agreement must also provide that the East-West Rail Assets must be made available to the Operator (or in the case of the Selected Train Paths, relinquished by Pacific National) within 30 days after the Commission approves the Final Agreement or such other period as agreed by the Commission to be no later than 6 months after the Commission approves the Final Agreement.

## 8.8 Leasing Agent determination

- (a) If, on or before the Nomination Date, Toll has not notified the Commission of a Selected Bidder, Toll must, within 2 Business Days of the Nomination Date, instruct the Leasing Agent (and notify the Commission that it has instructed the Leasing Agent), to select within 30 days, a Bidder to be the Selected Bidder. The Leasing Agent, following consultation with Toll, must select the Selected Bidder whose request under clause 8.1 or Proposal for the East-West Rail Assets is, in the opinion of the Leasing Agent, consistent with the requirements of this clause 8 and is closest to the fair market value (save for the Selected Train Paths which are to be relinquished without consideration) of the East-West Rail Assets (as assessed by the Leasing Agent in its reasonable opinion).
- (b) If, by the Contract Date, Toll has not caused Pacific National to execute with the Selected Bidder a Final Agreement, Toll must within 2 Business Days of the Contract Date instruct the Leasing Agent (acting as an expert and not an arbitrator), to determine, in accordance with clause 8.9, any outstanding terms and conditions necessary to finalise a Final Agreement acceptable to the Selected Bidder, which are materially consistent with the Selected Bidder's Proposal and these Undertakings, on a basis which is fair and commercial and at arms length. Subject to clause 8.8(d), the decisions of the Leasing Agent will be final and binding on Toll, Pacific National and the Selected Bidder.
- (c) Toll undertakes that it will cause Pacific National to execute and deliver to the Selected Bidder a Final Agreement reflecting the terms determined by the Leasing Agent under clause 8.8(b) within 5 Business Days of the Leasing Agent's determination.
- (d) Toll will require that a Selected Bidder execute the Process Deed under which the Selected Bidder unconditionally accepts and agrees that the Leasing Agent's

decisions made under this clause 8 will be final and binding on Toll, Pacific National and the Selected Bidder, **provided that**, to the extent that the Selected Bidder is dissatisfied with a relevant decision of the Leasing Agent made under clause 8 and notifies Toll in writing within seven days of the Leasing Agent's decision, Toll will permit the Selected Bidder to withdraw its Proposal to take up the relevant East-West Rail Assets.

- (e) In the event that the Selected Bidder decides to withdraw its Proposal to take up the relevant East-West Rail Assets under clause 8.8(d), Toll must:
  - (i) notify the Commission within 2 Business Days and provide details of the relevant East-West Rail Assets relating to the withdrawn Proposal; and
  - (ii) select and notify another Bidder within 5 Business Days of the Selected Bidder withdrawing its Proposal and thereafter comply with these undertakings in relation to that second Bidder as if it was the "**Selected Bidder**". (In this event, the "**Nomination Date**", in relation to the new Selected Bidder, will be deemed to be the date on which that Selected Bidder is notified by Toll under this paragraph).
- (f) In the event that the Selected Bidder elects, under clause 8.8(d), to withdraw the Proposal to take up certain East-West Rail Assets but wishes to take up other East-West Rail Assets (on terms agreed with Toll or determined by the Leasing Agent), Toll will cause Pacific National to execute and deliver to the Selected Bidder a Final Agreement reflecting the revised terms as soon as reasonably practicable.
- (g) If an Operator leases the Rolling Stock and exercises the option to extend the lease term by 12 months from the end of the Start Up Period, and Toll and the Operator have not agreed the lease payments for that further period at least 120 days prior to end of the Start Up Period, Toll must instruct the Leasing Agent (acting as an expert) to determine the lease payments in accordance with 8.3(d).

## **8.9 Process of determination of disputes as to terms and conditions**

If, by the Contract Date, clause 8.8(b) applies, Toll must instruct the Leasing Agent to proceed as follows:

- (a) where the Selected Bidder has not agreed to accept the Substitute Paths, Toll or the Selected Bidder must instruct the Leasing Agent to determine, within 30 days of the Contract Date, which of these alternative sets of train path options is to be relinquished by Pacific National in accordance with the following process. The Leasing Agent will determine, acting as an expert and not an arbitrator (whose decision will be final and binding on Toll, Pacific National and the Selected Bidder), that the Selected Bidder's original nominated paths must be relinquished by Pacific National unless the Leasing Agent determines that the Substitute Paths have similar qualities and features to the train paths nominated by the Selected Bidder, having regard to the:
  - (i) commercial attractiveness;
  - (ii) similarity of arrival and departure times; and
  - (iii) the day of the week,of those train paths;



- (b) where the purchase or lease terms and conditions, including lease payments, of the Rolling Stock have not been agreed between Toll and the Selected Bidder, these terms and conditions are to be determined by the Leasing Agent, in its sole discretion, within 30 days of the Contract Date, after consultation with Toll and the Selected Bidder. The Leasing Agent must obtain an independent valuation of the Rolling Stock by a suitably qualified valuer appointed by the Leasing Agent. The Leasing Agent will use the valuation report as the basis on which the Leasing Agent will determine the leasing payments or sale price for the Rolling Stock as the case may require. The Leasing Agent's determination of the purchase price or lease terms and conditions including the lease payments for the Rolling Stock will be final and binding;
- (c) where the terms and conditions on which the Ancillary Services requested by the Selected Bidder are to be made available have not been agreed between Toll and the Selected Bidder, the Leasing Agent (acting as an expert) must within 45 days of the Contract Date, determine those terms and conditions; and
- (d) where the terms and conditions of Terminal Access have not been agreed, the Leasing Agent will within a period of 60 days of the Contract Date and acting as an expert and not an arbitrator (whose decision will be final and binding on Toll), determine the terms and conditions of Terminal Access after consultation with Toll and the Selected Bidder, having regard to the terms and conditions of access to terminals provided for under the Victorian Rail Access Regime.

## **8.10 Commission approval of Selected Bidder and Final Agreement**

- (a) Toll will provide the Commission with a copy of the Final Agreement within 2 Business Days of execution, and must ensure that the Final Agreement is to be conditional on the Commission not objecting to the Final Agreement pursuant to clause 8.10(c).
- (b) Together with the Final Agreement Toll will provide the Commission with the following information and such other information that the Commission reasonably requires:
  - (i) the name, address and all other available contact details of the Selected Bidder;
  - (ii) a description of the business carried on in Australia by the Selected Bidder; and
  - (iii) the names of the ultimate holding company and directors of the Selected Bidder.
- (c) Within 15 Business Days of receipt of the Final Agreement pursuant to clause 8.10(a), the Commission may object to the Final Agreement on the basis that:
  - (i) it has formed the opinion that provision of the East-West Rail Assets to the Selected Bidder as specified in the Final Agreement is likely to result in a substantial lessening of competition in a market in Australia when compared to the likely competition in that market in the absence of the Proposed Acquisition; or
  - (ii) in the Commission's opinion the Selected Bidder's expertise or financial resources to purchase or lease and conduct the East-West Rail Assets are inadequate; or

- (iii) in the Commission's opinion the Selected Bidder is unlikely to be a vigorous and effective competitor in the provision of rail line haul services on the East-West Corridor,

and in that event, the Commission will provide Toll with a written explanation of its reasons and the material facts within 10 Business Days of making its decision, and Toll undertakes not to object to or otherwise challenge a decision by the Commission to object to the Final Agreement.

- (d) If the Commission does so object under clause 8.10(c), Toll must:-
  - (i) advise the remaining Bidders within 5 Business Days of the Commission's objection and request those Bidders or other prospective Operators who have provided Toll with a request under clause 8.1 to reconfirm or revise their requests under clause 8.1 or Proposals, as the case may be, within 10 Business Days of that advice;
  - (ii) select another Bidder, based on the revised or confirmed requests under clause 8.1 or Proposals received, and advise the Commission thereof in writing, within 30 days of receipt of those requests or Proposals, (such date being the new "**Nomination Date**") and
  - (iii) comply again with clauses 8.7 to 8.10, within corresponding time frames commencing at that Nomination Date.
- (e) If the Commission does not object to the Final Agreement within the time set out in clause 8.10(c), the Selected Bidder is an Operator.

## 8.11 Subsequent offer of Assets

- (a) If, following the process set out in clauses 8.7 to 8.10:
  - (i) one Operator has agreed to take up only some of the rights comprising the East-West Rail Assets, leaving available the rights to any of the Rolling Stock and Ancillary Services for the operation of the Rolling Stock, Selected Train Paths, or Terminal Access (any of which are referred to as "**Remaining Rights**"), Toll undertakes, in the first 12 months after the Trigger Date, to seek further Proposals as provided herein from prospective Operators to take up the Remaining Rights, provided that the offer of the Remaining Rights will not increase Toll's obligations under this clause 8 beyond those applicable if only one Operator had taken up all the East-West Rail Assets described herein; or
  - (ii) if no Bidder has become an Operator, Toll undertakes, in the first 12 months after the Trigger Date, to seek further Proposals from prospective Operators to take up the East-West Rail Assets as provided herein.
- (b) If clause 8.11 (a)(i) or (ii) applies, Toll will:
  - (i) in the case of clause 8.11(a)(i), within 10 Business Days of the date on which the Commission has not objected to the Final Agreement with the Selected Bidder; and
  - (ii) in the case of clause 8.11(a)(ii), within 10 Business Days of the date on which the Commission and Toll acting reasonably agree that the process in 8.7 to 8.10 has been exhausted,

publish details in appropriate publications offering the Remaining Rights or East-West Rail Assets (as the case may require) and inviting prospective Operators to submit requests under clause 8.1 within 15 days of the date of publication to take up the Remaining Rights or East-West Rail Assets referred to.

- (c) Toll will within 3 Business Days of receiving a request from a Bidder under clause 8.1 provide that Bidder with the information referred to clause 8.6(b) and will invite the Bidder to submit, within 30 days of receiving the information referred to in clause 8.6(b), Proposals to take up the Remaining Rights or East-West Rail Assets (as the case may require).
- (d) If one or more Proposals to take up the Remaining Rights or East-West Rail Assets, is received by Toll within the timeframe referred to under clause 8.11(c), Toll will select another "Selected Bidder" for the Remaining Rights or East-West Rail Assets, and advise the Commission thereof in writing, within 30 days of receipt of that Bidder's Proposal, (such date being a further "Nomination Date" for the purposes of clauses 8.7 to 8.10 hereof), and
- (e) Toll must thereafter, comply with clauses 8.7 to 8.10 hereof in relation to the Remaining Rights or East-West Rail Assets within corresponding timeframes.

## 8.12 Leasing Agent

- (a) Toll will use its best endeavours to identify and conditionally appoint a Leasing Agent in accordance with this clause 8 to act as an independent facilitator of the arrangements contemplated by this clause 8, being a person:
  - (i) suitably qualified and experienced in the sale or leasing of rail assets and independent of Toll, Patrick and Pacific National; and
  - (ii) independent of and having no direct or indirect controlling interest in Toll, Patrick or Pacific National.
- (b) Toll undertakes and agrees that the terms of appointment of the Leasing Agent will include that in fulfilling the arrangements contemplated by this clause 8 the Leasing Agent is acting as an expert and not an arbitrator and all determinations and decisions of the Leasing Agent are made in its sole discretion.
- (c) Toll will provide the Leasing Agent with:
  - (i) all relevant information available to Toll; and
  - (ii) all reasonable assistance,to enable the Leasing Agent to fulfil the arrangements contemplated by this clause 8 as quickly as possible.
- (d) Toll will execute a deed to indemnify the Leasing Agent against any loss and damage incurred by the Leasing Agent in the course of carrying out his or her functions in accordance with the terms of his or her appointment. Toll will promptly pay the costs of the Leasing Agent in the performance of his or her functions.

## 8.13 Commission may object to the Leasing Agent

- (a) Within 5 Business Days of Toll identifying a proposed Leasing Agent, Toll will provide the Commission with the following information and such other

information that the Commission reasonably requires to assess whether the proposed Leasing Agent satisfies the criteria set out in clause 8.12(a):

- (i) the name, address and all other available contact details of the proposed Leasing Agent;
  - (ii) a copy of a signed or agreed conditional agreement proposed with the proposed Leasing Agent;
  - (iii) a description of the business carried on in Australia by the proposed Leasing Agent; and
  - (iv) the names of the ultimate holding company and directors of the proposed Leasing Agent.
- (b) If, within 20 Business Days of receipt of the information from Toll referred to in clause 8.13(a) (or such further period as Toll and the Commission may agree):
- (i) the Commission does not object to the proposed Leasing Agent, Toll will use its best endeavours to execute an agreement with the proposed Leasing Agent substantially in the form of the conditional agreement referred to in clause 8.13(a)(ii), as soon as practicable after the Trigger Date; or
  - (ii) the Commission does object to the proposed Leasing Agent, Toll must within 30 days identify one or more alternative proposed Leasing Agent for consideration by the Commission pursuant to this clause 8.13.

#### **8.14 Operator**

- (a) Unless the Commission requires otherwise, Toll must not permit Pacific National to lease or make available the East-West Rail Assets to a person other than an Operator.
- (b) An Operator of the East West Rail Assets must:
  - (i) be independent of and having no direct or indirect controlling interest in Toll, Patrick or Pacific National;
  - (ii) be independent of any entity that acquires and must not itself acquire the PN Interest;
  - (iii) be an entity whom Toll believes in good faith, having made reasonable inquiries, is of good financial standing and has an intention to operate the East-West Rail Assets as a going concern; and
  - (iv) be a Selected Bidder with whom Toll has agreed a Final Agreement which has not been objected to by the Commission pursuant to this clause 8.

#### **8.15 Divestment of PN Interest is subject to this clause**

For the avoidance of doubt, the divestment of the PN Interest will take place on terms that the purchaser assumes the same obligation as Toll assumes under clauses 8 and 9 (other than clause 8.12(d)).

## 8.16 Sales consents and Toll to cooperate

- (a) Toll's obligation to procure necessary third party consents under clause 4.4 also applies in respect of the sale and leasing of the East-West Rail Assets.
- (b) Toll undertakes to cooperate fully with the Leasing Agent and to provide the Leasing Agent with such information and assistance as is necessary to enable the Leasing Agent to carry out his or her functions under these Undertakings."

## 8.17 Minto

- (a) Toll will offer to sell, (and if that offer is accepted, will sell), and will cause Patrick to offer to sell, (and if that offer is accepted, will cause Patrick to sell), each of Toll's and Patrick's interest (with clear title) in the rail siding known as Lot 1 of DP 1021772 (the "Land") to the owners of Lot 2 of DP 1021772 known as the Macarthur Intermodal Shipping Terminal (the "**MIST Owners**"):
  - (i) with settlement by 15 September 2006 or such later date (not later than 15 October 2006) as the Commission specifies in writing;
  - (ii) at a price equal to the current market value of the Land determined by an independent valuer appointed by the President of the New South Wales Division of the Australian Property Institute Inc. ("**API**") pursuant to the letter of request dated on or about the date Toll executes this Variation and signed by Toll and the MIST Owners; and
  - (iii) subject to clause 8.17(a)(i) and 8.17(a)(ii) above, otherwise on the terms of the draft contract of sale provided to the MIST Owners by Toll's solicitors on 7 July 2006.
- (b) Toll will agree to any terms and conditions of appointment consistent with these Undertakings proposed by the independent valuer within 5 days of the independent valuer proposing those terms and conditions.
- (c) Toll will execute a deed in favour of API and the independent valuer indemnifying the API and the independent valuer against loss and damage incurred by the API or the independent valuer arising directly or indirectly from any claims by Toll or Patrick against the API or the independent valuer carrying out their functions in accordance with this clause, but for the avoidance of doubt, Toll is not obliged to provide any indemnity concerning any claims made by or on behalf of the MIST Owners concerning the independent valuer or the API carrying out their functions.

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## 9. Other Rail undertakings

### 9.1 PN Shareholders Agreement

- (a) Subject to clause 2.6, Toll undertakes that on the divestment of the PN Interest in accordance with these Undertakings, it will enter into and give effect to a shareholders agreement with either the Pre-approved Purchaser or the Approved Purchaser (as the case may be) of the PN Interest that include the terms and conditions described in Annexure C ("**PN Shareholders Agreement**").
- (b) Subject to clause 2.6, Toll further undertakes that once it has completed the divestment of the PN Interest in accordance with these Undertakings, Toll will not increase its Economic Interest in Pacific National beyond 50%.

- (c) For the purposes of these Undertakings "**Economic Interest**" means:
- (i) interest in a company or partnership, including shares, voting rights, rights to receive dividends, rights to receive other distributions of income or capital, rights to receive a share of proceeds on winding up;
  - (ii) but excludes rights to purchase the interest of the other shareholder in Pacific National if seeking to divest its interest, where the exercise of those rights is subject to no objection being raised by the Commission or Toll obtaining approval (on a formal or informal basis) from the Commission or the Australian Competition Tribunal.
- (d) Subject to clause 2.6, Toll will use its best endeavours to cause Pacific National not to discriminate in the operation of the Intermodal Business in favour of Toll's freight forwarding or logistics operations on the price and service quality of Pacific National's service offerings on a like for like basis, provided that this does not apply to discrimination which:
- A. makes only reasonable allowance for differences in the cost or likely cost of providing services resulting from differences in the volume or nature of the services supplied; or
  - B. results from doing an act in good faith to meet a price or benefit offered by a competitor of Pacific National.
- (e) In order to ensure compliance with the commitment in clause 9.1(d) and subject to clause 2.6, Toll will use best endeavours to procure that Pacific National will:
- (i) enter into a contract, or include in an existing contract, if requested by any customer of the Intermodal Business, KPIs relating to:
    - A. proportion of requested slot allocations versus slot allocations actually received;
    - B. number of containers left behind;
    - C. turnaround times at relevant terminals;
    - D. freight availability at relevant terminals; and
    - E. damage to goods in transit;
  - (ii) collect, retain and provide to the Auditor appointed under clause 9.4 a report every 6 months (which report is to be provided no later than a month before the Auditor's report is required to be provided to the Commission) which sets out:
    - A. the average price per TEU actually charged to Toll and each of the other 10 largest customers of the Intermodal Business (as measured by TEU's carried) during the previous 12 month period;
    - B. the proportion of Toll's requested slots versus slot allocations received compared with the average proportion of requested slots versus slot allocations for all freight forwarding customers excluding Toll;

- C. actual numbers of Toll containers left behind on a terminal by terminal basis compared with the average number of containers left behind on a terminal by terminal basis for all freight forwarding customers excluding Toll;
  - D. turnaround times for Toll's freight forwarding operations at relevant terminals compared with turnaround times at relevant terminals for all freight forwarding customers excluding Toll;
  - E. freight availability for Toll's freight forwarding operations at relevant terminals compared with freight availability at relevant terminals for all freight forwarding customers excluding Toll; and
  - F. level of damage to goods in transit for goods transported on behalf of Toll's freight forwarding operations compared with the average level of damage to goods in transit for goods transported on behalf of all freight forwarding customers excluding Toll; and
- (iii) have the report referred to in (ii) above subject to audit in accordance with clause 9.4.

## 9.2 Toll's dealings with Pacific National

Without limiting the generality of clause 9.1(a) or any other obligations in these Undertakings, Toll undertakes to the Commission that, subject to clause 2.6, in respect of the Intermodal Business:

- (a) Toll will not participate in the appointment or supervision of the executive management of the Intermodal Business other than through its representation on the Board of Pacific National;
- (b) Any dealings between Toll and the Intermodal Business are to be conducted on an arms-length commercial basis;
- (c) Toll will not seek to involve itself or interfere with the commercial activities and operations of the Intermodal Business other than:
  - (i) by appointing Board members which are, at all times, obliged in that capacity to act in the best interests of Pacific National; and
  - (ii) in Toll's capacity as a counterparty to a transaction or proposed transaction in which all dealings are to be on an arms-length basis; and
- (d) Toll will not have access to confidential customer information about the Intermodal Business or arising from the operation of the Intermodal Business. For the avoidance of doubt:
  - (i) confidential customer information includes, but is not limited to, information regarding a freight forwarder's customers and information regarding a freight forwarder's request for capacity on rail services operated by the Intermodal Business;
  - (ii) this clause does not preclude Toll from having access to aggregate information reasonably necessary for reporting purposes or to exercise its rights under the PN Shareholders Agreement.

### 9.3 Pacific National Compliance

Toll undertakes to use best endeavours to procure that Pacific National comply on its part with the arrangements specified in clause 9.2.

### 9.4 Audit

Subject to clause 2.6:

- (a) Toll must, every six months from 1 March 2007, provide an Auditor's report to the Commission, at Toll's expense, reporting on:
  - (i) Toll's compliance with clauses 9.1(d), 9.1(e), 9.2, 9.4(b) and 11.1 hereof;
  - (ii) the Toll directors' compliance with the undertakings given by them in accordance with clauses 2.3(b) and 2.9(a);
  - (iii) any qualifications made by the Auditor in forming its view;
  - (iv) any recommendations by the Auditor to improve the integrity of audit process and the elimination of any qualifications, including without limitation, any recommendations to improve Pacific National's processes or reporting systems; and
  - (v) Pacific National's compliance with clauses 6, 7, 1, 9, 10, 11 and 12 set out in Annexure C as incorporated into the PN Shareholders Agreement.
- (b) In addition to its obligation under clause 9.4(a), Toll will, by no later than 31 May 2007, provide a report from the Auditor to the Commission reporting on Toll's compliance with the matters set out in clause 9.4(a) (but not clause 9.4(a)(ii)) for the period from 11 May 2006 to 31 March 2007.
- (c) Toll undertakes to use its best endeavours to procure Pacific National to implement any recommendations of the Auditor made pursuant to clause 9.4(a)(iv) as soon as reasonably practicable after the release of the relevant Auditor's report.
- (d) Toll undertakes to use its best endeavours to procure Pacific National and any Toll director who has given the Commission an undertaking 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 this clause 9.4.
- (e) Toll 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 this clause 9.4.
- (f) Toll shall authorise the Auditor to engage any technical expertise as the Auditor reasonably requires to conduct the audits.
- (g) Toll will use its best endeavours to procure that Pacific National informs at least the largest 20 customers (by revenue received) of the Intermodal Business by letter of the name and contact details of the Auditor as soon as practicable after the Commission has approved the Auditor. Toll will attach copies of the Recitals and clauses 9.1, 9.2, 9.3, 9.4 and Annexure C of these Undertakings to the letter to be sent to the customers.



- (h) Toll will not prevent the Commission from providing the Auditor's report to the shareholders of Pacific National (other than Toll).
- (i) The auditor ("**Auditor**") must be an independent person with appropriate expertise approved of by the Commission.
- (j) Toll will require the Auditor to provide to the Commission details of any possible failure to comply by Toll or the Toll directors with the obligations in their respective undertakings immediately upon such a possible failure to comply coming to the attention of the Auditor.
- (k) Without limiting clause 16, Toll will require that the Auditor comply with any request made by the Commission to the Auditor for information, or any direction given by the Commission in relation to the discharge by the Auditor of its functions as set out in this clause 9.4.
- (l) Toll will terminate the appointment of the Auditor if the Commission advises Toll in writing that it has formed the view that the Auditor is not properly performing its functions as set out in this clause 9.4.
- (m) In the event that the Auditor resigns, or Toll terminates the appointment of the Auditor in accordance with clause 9.4(l), Toll will, within 10 Business Days, appoint another Auditor who is nominated by the Commission as an independent person with appropriate expertise.

#### **9.4A Audit post Restructure Date**

In the event the Restructure is given effect to in accordance with these Undertakings, for the period between the Restructure Date and 31 March 2011:

- (a) Toll must, every 6 months, provide an Auditor's report to the Commission at Toll's expense, reporting on:
  - (i) Toll's compliance with these Undertakings;
  - (ii) the Toll directors' compliance with the undertakings given by them in accordance with clauses 2.3(b) and 2.9(a);
  - (iii) any qualifications made by the Auditor in forming its view; and
  - (iv) any recommendations by the Auditor to improve the integrity of audit process and the elimination of any qualifications.
- (b) Toll will implement any recommendations of the Auditor made pursuant to clause 9.4A(a)(iv) as soon as reasonably practicable after the release of the relevant Auditor's report;
- (c) Toll undertakes to use its best endeavours to procure any Toll director who has given the Commission an undertaking 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 this clause 9.4A;
- (d) Toll 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 this clause 9.4A;

- (e) Toll shall authorise the Auditor to engage any technical expertise as the Auditor reasonably requires to conduct the audits;
- (f) Toll will require the Auditor to provide to the Commission details of any possible failure to comply by Toll or the Toll directors with the obligations in their respective undertakings immediately upon such a possible failure to comply coming to the attention of the Auditor;
- (g) without limiting clause 16, Toll will require that the Auditor comply with any request made by the Commission to the Auditor for information, or any direction given by the Commission in relation to the discharge by the Auditor of its functions as set out in this clause 9.4A;
- (h) Toll will terminate the appointment of the Auditor if the Commission advises Toll in writing that it has formed the view that the Auditor is not properly performing its functions as set out in this clause 9.4A; and
- (i) in the event that the Auditor resigns, or Toll terminates the appointment of the Auditor in accordance with clause 9.4A(h), Toll will, within 10 Business Days, appoint another Auditor who is nominated by the Commission as an independent person with appropriate expertise.

## **9.5 PN Management**

Toll may only second or otherwise provide senior management to the Intermodal Business where the Board of Pacific National has given its prior approval in writing at a duly constituted Board Meeting at which full particulars have been provided to the Board for the proposed arrangements, the executives concerned, their arrangements or other benefits provided by Toll and such other information that the Board requires to be satisfied that such an arrangement is not likely to give rise to any breach of these Undertakings, including, without limitation, the disclosure to Toll of confidential customer information about the Intermodal Business consistent with clause 9.2(d).

## **9.6 Hook & Pull Contract extension**

Toll will cause Pacific National to extend the current Hook & Pull Contract with SCT from its expiry on 13 October 2007 until the date on which the SCT Locomotives are available and operational and otherwise on the terms of the letter of agreement set out in Annexure D.

## **9.7 ARTC Train Path Agreement**

Toll undertakes that it will cause Pacific National to:

- (a) waive and abandon its rights under clause 2.8 of the ARTC Track Access Agreement, insofar as they relate to the East-West Corridor; and
- (b) consent to ARTC exercising its discretion as ARTC sees fit to grant or renew train paths to Pacific National on the East-West Corridor on expiry of that Agreement on 30 June 2006.

## **9.8 Unwinding contracts**

- (a) If the Commission in its absolute discretion forms the view that a contract, arrangement or understanding entered into by Patrick between 22 August 2005 and the Trigger Date whether alone or in conjunction with the Proposed Acquisition is likely to have the effect of substantially lessening competition in a

market, Toll will, to the extent lawfully allowed, cause Patrick to unwind, terminate or otherwise set aside any such arrangement.

- (b) Toll undertakes that it will:
- (i) cause Patrick not to exercise Patrick's option to acquire FCL Interstate Transport Services Pty Ltd (ACN 007 429 567) ("FCL") announced by Patrick to the Australian Stock Exchange on 1 December 2005 or, if that option has been exercised, Toll will procure that Patrick sell the interest thereby acquired in FCL as if it was a "Divestment Business" in accordance with the provisions of clauses 4, 6 and 7 hereof;
  - (ii) cause Patrick to lawfully terminate the Alliance Agreement dated 14 October 2005 between Patrick and FCL as soon as reasonably practicable after the Trigger Date;
  - (iii) cause Patrick to act reasonably in the exercise of any of its rights, powers and remedies under the Term Loan Agreement between FCL and Patrick dated 31 October 2005 ("**Term Loan Agreement**") and the Transaction Documents (as defined in the Term Loan Agreement); and
  - (iv) give the Commission 7 days notice of any intention to demand repayment of the Amount Owing (as defined in the Term Loan Agreement) prior to the Final Repayment Date (as defined in the Term Loan Agreement), except if the right, power or remedy arises from an Event of Default described in clause 11.1(1) or 11.1(8) of the Term Loan Agreement.

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## 10. Uncompleted Transactions

### 10.1 Inability to complete

Without limiting the Commission's entitlement to enforce these Undertaking generally, if for any reason Toll is prevented from or is otherwise unable to:

- (a) complete the divestment and sale of any Unsold Divestment Business in accordance with these Undertakings;
- (b) procure Pacific National to perform the arrangements referred to under clauses 2, 8 and 9 of these Undertakings; or
- (c) procure Patrick to perform the Undertakings set out in clause 9.8,

(any of which events is referred to as an "**Uncompleted Transaction**"), the occurrence of an Uncompleted Transaction, from time to time, will constitute a breach of these Undertakings and the provisions of this clause will apply.

### 10.2 Notification

If an Uncompleted Transaction occurs, Toll will promptly advise the Commission and provide the Commission with any information reasonably requested by the Commission about the Uncompleted Transaction, and Toll's proposal to address and remedy the circumstances arising as a result of the Uncompleted Transaction.

### 10.3 Other divestment

If the Commission decides that the circumstances arising from an Uncompleted Transaction will not be remedied to its reasonable satisfaction within a time which is acceptable to the Commission, Toll undertakes to sell and dispose of such other assets and/or businesses within its power and control and will otherwise take such steps in the manner contemplated by these Undertakings as would be sufficient to address and remedy the circumstances arising as a result of the Uncompleted Transactions and the relevant allegations of breach of section 50 of the Act contained in the Commission's statement of claim filed in the Proceedings.

### 10.4 Application to Court

- (a) The Commission may at any time after it is notified of an Uncompleted Transaction under clause 10.2 bring an application to the Court under subsection 87B(4) of the Act in respect of the breach of these Undertakings by Toll ("**Remedy Application**") seeking orders which may include but are not limited to orders directing Toll to sell or procure the sale of such other assets and/or businesses within its power and control and otherwise take such steps in the manner contemplated by these Undertakings as would be sufficient to address and remedy the circumstances arising as a result of the Uncompleted Transaction and the relevant allegations of breach of section 50 of the Act contained in the Commission's statement of claim filed in the Proceedings;
- (b) Toll undertakes that it will not:
  - (i) oppose the bringing of any Remedy Application by the Commission under paragraph (a); and
  - (ii) contest any Remedy Application on any basis which is inconsistent with:
    - A. the spirit or the letter of these Undertakings; or
    - B. the relevant allegations of breach of section 50 of the Act contained in the Commission's statement of claim filed in the Proceedings,including on a basis that the original acquisition by Toll, or the failure to perform or complete any of its obligations in these Undertakings, would not or would not be likely to breach section 50 of the Act; and
- (c) Subject to the terms of this clause 10.4, the Commission and Toll may each lead evidence and make submissions to the Court as to what orders should be made under subsection 87B(4) of the Act in all the circumstances to give effect to the spirit and the letter of these Undertakings and to address and remedy the circumstances arising as a result of the Uncompleted Transaction and the relevant allegations of breach of section 50 of the Act contained in the Commission's statement of claim filed in the Proceedings.

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## 11. Port undertakings

### 11.1 No discrimination

Subject to clause 2.6:

- (a) Toll will ensure that neither Toll nor Patrick discriminate in favour of Toll's or Patrick's freight forwarding or logistics operations on the price and service quality of the service offerings (on a like for like basis) provided by Patrick in

relation to the landside delivery, storage or pickup of containerised freight (by rail and road) at Patrick's container terminals in Sydney, Melbourne, Brisbane and Fremantle, provided that this does not apply to discrimination which:

- (i) makes only reasonable allowance for differences in the cost or likely cost of providing services resulting from differences in the volume or nature of the services supplied; or
  - (ii) results from doing an act in good faith to meet a price or benefit offered by a competitor of Patrick.
- (b) In order to ensure compliance with the commitment in clause 11.1(a), Toll will:
- (i) include, if requested by any customer of a Patrick container terminal, in the contract for that customer, KPIs relating to access to and use of the terminals;
  - (ii) collect, retain and provide to the Auditor a report every 6 months (which report is to be provided no later than a month before the Auditor's report is required to be provided to the Commission) which sets out the average price and performance KPIs provided to Toll and Patrick during the previous 12 month period compared to other customers who have required use of those KPIs; and
  - (iii) have the report referred to in 11.1(b)(ii) above subject to audit in accordance with clause 9.4.
- (c) For the purposes of this clause 11.1, the KPIs relate to the Container Transaction Time Performance Benchmark, which means the average time taken for a truck to be moved between the entry gate, unload and/or load and depart through the terminal exit gate divided by the average number of containers delivered and received for each transaction during a three month period at the relevant terminal.

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## **12. Conditions precedent**

### **12.1 Condition Precedent**

Notwithstanding anything to the contrary in these Undertakings, neither clause 13, or 15 herein shall have any force or effect whatsoever unless and until Toll publicly announces its intention to declare its Offer to be free of the minimum acceptance condition set out in clause 16.12(a) of the Offer.

### **12.2 Condition Subsequent**

Notwithstanding anything to the contrary in these Undertakings, each of clauses 13 and 15 herein shall cease to have any force or effect if and when Toll has acquired 100% of the shares in Patrick, such that Patrick is a wholly-owned subsidiary of Toll.

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## **13. Indemnity**

### **13.1 Indemnified Entities**

Toll undertakes to indemnify on demand each of the Indemnified Entities respectively for:

- (a) the amount (if any) by which the gross sale price received by the Indemnified Entity for the Patrick Business is less than the fair market value of the relevant

Patrick Business as determined by an independent expert appointed in accordance with clause 13.2;

- (b) all transaction costs and expenses properly incurred in connection with the sale of the relevant Patrick Business;
- (c) all liabilities which the Indemnified Entity incurs by way of warranties and indemnities provided to a Purchaser of the relevant Patrick Business or otherwise in connection with the sale to that Purchaser; and
- (d) any loss suffered by Pacific National by reason of the operation of clauses 8 and 9,

so as to ensure that minority shareholders in Patrick and the Indemnified Entities are not adversely affected by the implementation of these Undertakings.

## 13.2 Appointment of independent expert

- (a) Toll will nominate for approval by the Commission, and provide such relevant information as is reasonably required by the Commission, an expert for the purposes of clause 13.1(a) that is ("**Nominated Expert**"):
  - (i) independent of Toll, Patrick, the purchaser of the Patrick Business or any other entity that responded to the invitation to tender for the divestment of the Patrick Business; and
  - (ii) suitably qualified and experienced to assess the fair market value of the Patrick Business.
- (b) If, within 20 Business Days of receipt of the nomination and information from Toll referred to in clause 13.2(a):
  - (i) the Commission does not object to the Nominated Expert, Toll will appoint the independent expert and require him or her to carry out the functions contemplated under clause 13.1(a); or
  - (ii) the Commission does object to the Nominated Expert, Toll must either:
    - A. identify an alternative nominee for consideration by the Commission pursuant to this clause 13.2; or
    - B. appoint the nominee of the President of the Institute of Chartered Accountants of Australia as the independent expert and require him or her to carry out the functions contemplated under clause 13.1(a).
- (c) Toll will bear the cost of the independent expert in connection with the discharge of his or her functions under clause 13.1(a).

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## 14. Hold separate

### 14.1 Pacific National undertaking

Except to the extent necessary to facilitate the divestment of the PN Interest in accordance with these Undertakings and subject to this paragraph Toll undertakes that, during the period commencing on the date of this Undertaking and ending on the date that Toll no longer has the

power to appoint a majority of the board of directors of Pacific National by reason of these Undertakings or otherwise, Toll will take all steps reasonably required to:

- (a) not divest the PN Interest (other than to a Related Body Corporate of Toll) or make any material change to the attributes or extent of the PN Business, except in accordance with these Undertakings;
- (b) operate the PN Business as a separate and independently viable going concern;
- (c) procure that the management, sales, service and operations of the PN Business are conducted by management of Pacific National separate from the management, sales, service, administration and operations of Toll;
- (d) not employ or otherwise engage or offer to employ or engage, directly or indirectly, any employee or servant engaged in the activities of the PN Business. For the avoidance of doubt, Toll will not seek to cause the Pacific National Intermodal Business to employ any Toll employee whose employment with Toll is terminated for whatever reason during the Hold Separate Period in any role at the Pacific National Intermodal Business;
- (e) ensure that the PN Business is operated independently of Toll's operations, including by empowering it independently to:
  - (i) acquire and requisition payment for sufficient and timely deliveries of all goods and services required in respect of the PN Business;
  - (ii) continue to market, price and sell all goods and services as were provided prior to the Trigger Date by the PN Business; and
  - (iii) maintain all current contracts and agreements relating to the PN Business;
- (f) subject to clauses 14.3(a) and 14.3(b):
  - (i) keep the books and records of the PN Business separate from those of the operations of Toll; and
  - (ii) direct management of the PN Business and Toll's management to act in accordance with this clause 14.1;
- (g) provide and maintain:
  - (i) access to sufficient working capital and sources of credit for the PN Business; and
  - (ii) current levels of promotional, advertising, sales and technical assistance, marketing and merchandising support for the PN Business,so as to ensure (so far as it is within Toll's reasonable ability to do so) that the PN Business is able to continue to provide the same level and quality of services that it was providing prior to the Proposed Acquisition.

Prior to the Trigger Date, Toll's obligations to comply with clauses 14.1(a) to (g) hereof are qualified by the extent of Toll's lawful power and ability to comply with those obligations.

## 14.2 Patrick Businesses undertaking

Except to the extent necessary to facilitate the divestment of the Patrick Businesses in accordance with these Undertakings, Toll undertakes that, during the Hold Separate Period, it will take all steps reasonably required to:

- (a) not sell or transfer the Patrick Businesses or make any material change to the attributes or extent of the Patrick Businesses, except in accordance with these Undertakings;
- (b) operate the Patrick Businesses as separate and independently viable going concerns;
- (c) procure that the management, sales, service and operations of the Patrick Businesses respectively are conducted by management separate from the management, sales, service, administration and operations of Toll;
- (d) not employ or otherwise engage or offer to employ or engage, directly or indirectly, any employee or servant engaged in the activities of the Patrick Businesses;
- (e) ensure that the Patrick Businesses are operated independently of Toll's operations, including by empowering them independently to:
  - (i) acquire and requisition payment for sufficient and timely deliveries of all goods and services required in respect of the Patrick Businesses;
  - (ii) continue to market, price and sell all goods and services as were provided prior to the Trigger Date by the Patrick Businesses; and
  - (iii) maintain all current contracts and agreements relating to the Patrick Businesses;
- (f) subject to clauses 14.3(a) and 14.3(b):
  - (i) keep the books and records of the Patrick Businesses separate from those of the operations of Toll;
  - (ii) ensure that no information in relation to the Patrick Businesses is requested or received by Toll directly or indirectly from Patrick; and
  - (iii) direct management of the Patrick Businesses and Toll's management to act in accordance with this clause 14.2;
- (g) provide and maintain:
  - (i) access to sufficient working capital and sources of credit for the Patrick Businesses; and
  - (ii) current levels of promotional, advertising, sales and technical assistance, marketing and merchandising support for Patrick Businesses,

so as to ensure (so far as it is within Toll's reasonable ability to do so) that the Patrick Businesses are able to continue to provide, the same level and quality of services that they were providing prior to the Proposed Acquisition.



### 14.3 Access to information

- (a) During the Hold Separate Period, Toll is entitled to receive and use:
  - (i) all publicly available information and information already in the possession of Toll as at the Trigger Date;
  - (ii) all information necessary to enable Toll to comply with legal and reporting obligations in Australia, including taxation, accounting and ASX continuous and periodical disclosure obligations;
  - (iii) such aggregate commercial and financial information compiled by the PN Business or the Patrick Businesses as is reasonably necessary to enable the directors of Toll to fulfil their duties as directors; and
  - (iv) such aggregate commercial and financial information compiled by the PN Business and the Patrick Businesses as is reasonably necessary to enable Toll to effect any divestiture of the PN Interest or the Patrick Businesses in accordance with these Undertakings.
- (b) Toll has the right to defend any legal claims, investigations or enforcement actions threatened or brought in respect of the PN Business or the Patrick Business and to access such books, records, information and staff assistance as is reasonably necessary for this purpose.
- (c) For the avoidance of doubt, but subject to clause 14.2 and this clause 14.3, Toll is not entitled to (either directly or indirectly) access, request, receive or use customer contract, pricing data or any other information of the Patrick Businesses which would be properly considered to be classified as commercial-in-confidence in the normal course of business.

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### 15. Shareholder Proceedings

- (a) If Shareholder Proceedings are commenced, Toll undertakes that it will take and cause to be taken all steps lawfully and reasonably available to defend such proceedings.
- (b) If, by any Final Judgment any of the Indemnified Entities or Pacific National is restrained permanently from giving effect to any of the transactions contemplated by these Undertakings, then the provisions of clause 10 apply.

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### 16. Further Information

- (a) Toll will provide the Commission with copies of any executed agreement in connection with the sale of any Divestment Business promptly when it is entered into.
- (b) At the Commission's direction, Toll will itself and Toll will procure that any Toll director, employee, agent or contractor identified by the Commission will:
  - (i) furnish information to the Commission;
  - (ii) produce documents to the Commission in relation to which Toll 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 Toll's compliance with these Undertakings.

- (c) 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.
- (d) Any direction made by the Commission under clause 16(b) will be notified to the company secretary of Toll.

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## **17. Obligations to procure and notify**

### **17.1 Related Bodies Corporate**

Where the performance of an obligation under these Undertakings requires a Related Body Corporate of Toll to take or refrain from taking some action, Toll will use its best endeavours to procure that Related Body Corporate to take or refrain from taking that action as the case may be.

### **17.2 Trigger Date**

Toll must inform the Commission in writing of the date of the Trigger Date, within 5 Business Days of the Trigger Date.

### **17.3 Service of Notices on the Commission**

Any notice or other communication to the Commission pursuant to these Undertakings must be sent to:

General Manager - Mergers & Assets Sales Branch  
Australian Competition & Consumer Commission  
470 Northbourne Avenue  
DICKSON ACT 2602

Facsimile: (02) 6243 1199

or in whatever manner the Commission subsequently notifies Toll.

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## **18. Confidentiality and no derogation**

### **18.1 Confidentiality**

The period and dates specified in clauses 4.3(a), 4.7(a)(iii), 19.1, Annexure D, Annexure H and Schedule G-2 to Annexure G to these Undertakings and marked 'Confidential' are provided to the Commission, on a confidential basis.

### **18.2 No derogation**

Toll acknowledges that nothing in these Undertakings:

- (a) restricts the right of the Commission to take action under the Act in the event that divestiture of the Divestment Businesses is not implemented in accordance with these Undertakings; nor

- (b) prevents the Commission from taking enforcement action at any time whether during or after the period of these Undertakings in respect of any breach by Toll of any of these Undertakings.

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## 19. Definitions and interpretation

### 19.1 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.

**Ancillary Services** mean the services referred to in clause 8.4.

**Approved Agent** means the sales agent of the Unsold Divestment Businesses appointed pursuant to clause 4.6(d)(i) and 4.6(d)(ii)B.

**Approved Purchaser** means a Proposed Approved Purchaser that has not been objected to by the Commission within the objection period specified in clause 6.2(c).

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

**ARTC** means Australian Rail Track Corporation Limited ACN 081 455 754.

**ARTC Track Access Agreement** means the track access arrangement between ARTC and Pacific National (ACT) Limited (formally known as National Rail Corporation Limited) dated 10 January 2002 and any subsequent Track Access Agreement between those parties.

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

- (a) the Asciano Asset;
- (b) a legal or equitable right or interest in or to the Asciano Asset, other than arising under a lease, licence 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 Asciano and Toll; and
  - (ii) approved of by the Commission.
- (c) a right under an Arrangement to acquire the Asciano Asset (including any option) whether or not subject to any condition;
- (d) a right to direct that the Asciano 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 Asciano Asset.

**Asciano Assets** means:

- (a) the businesses, assets and interests (including the benefit of contractual arrangements) described in Annexure F; 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 Share Interest** means any one or more of the following:

- (a) an issued share in Asciano or unit in Asciano Trust;
- (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 or unit;
- (c) an issued share in Asciano, or unit in Asciano Trust, 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 Asciano or unit in Asciano Trust; and
- (e) any right (including any option) whether or not subject to any condition to have issued any share in Asciano or unit in Asciano Trust.

**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).

**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 9.4(i).

**Autotrans Business** means Toll's private vehicle transportation, logistics and relocation business in Australia conducted by Autotrans Express (Aust) Pty Ltd ACN 080 635 365.

**Bidders** means the entities that have given a request in writing to Toll for the East-West Rail Assets under clause 8.6 or 8.11(b).

**Business Day** means a day on which all banks are open for business generally in the State of Victoria but does not include any Saturday, Sunday or public holiday.

**Commission** means the Australian Competition and Consumer Commission.

**Constitution** means, in the case of Asciano, the constitution of Asciano, the trust deed of Asciano Trust, and the constituent documents of each entity that forms a part of Asciano.

**Contract Date** means (subject to any extension under clause 8.7), the period of 45 days from the Nomination Date, or if clause 8.8(a) applies, 45 days after the Leasing Agent's selection of a Bidder.

**Controlling Acceptances** is defined in clause 1.2.

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

**Court** means any of the Supreme Courts of the States or of the Territories or the Federal Court of Australia.

**Customer Confidential Information** means confidential information relating to the terms and conditions on which Asciano and Toll provide or have offered to provide goods and services to customers.

**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).

**Devonport Berthing Rights** means all the leasehold interests of Patrick to the berth face and land adjacent to the berth face at the port of Devonport as specified in Annexure B, together with all leasehold improvements and any licences and other rights associated with the leasehold interests.

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

**Divestment Businesses** means the businesses or interests referred to in clauses 2.1(a) and 2.1(b) and "Divestment Business" means each of those businesses.

**Dynon Lease** is defined in clause 8.5.

**Dynon Terminal** means the rail terminal within the Dynon terminal precinct north of Dynon Road, Melbourne, currently leased by Pacific National from the Victorian Rail Track Corporation.

**East-West Corridor** means all of the standard gauge rail tracks between:

- (a) Melbourne, Adelaide and Perth; and
- (b) Sydney, Broken Hill and Perth; and
- (c) Perth, Adelaide and Brisbane.

**East-West Rail Assets** means all or any combination of the assets and rights referred to in clause 8.1.

**Economic Interest** is defined in clause 9.1(c).

**Final Agreement** means the final terms and conditions on which the requested East-West Rail Assets will be made available, and the composition of the Selected Train Paths pursuant to clause 8.7(i), as agreed between Toll and the Selected Bidder or as determined by the Leasing Agent pursuant to clauses 8.7(b) or 8.8(b).

**Final Date** means the date which is 4 months from the date the Commission consents to the Variation, or such further date or dates as the Commission consents in writing, such consent to be in the absolute discretion of the Commission.

**Final Judgment** means the final decision of a court or the Takeovers Panel in any Shareholder Proceedings in respect of which there is no right of appeal (including by reason of the effluxion of any period prescribed for the filing of such an appeal) to restrain on a permanent basis any of Toll, Patrick, Pacific National or any of their respective controlled entities from doing (or, as the case may be, refraining from doing) any material act which is required (or, as the case may be, prohibited) by or under these Undertakings.

**Final Judgment Date** means the date on which:

- (a) Final Judgment is given in any Shareholder Proceedings; or
- (b) a judgment given in any Shareholder Proceedings becomes a Final Judgment.

**FCL** is defined in clause 9.8.

**FHL** is defined in clause 5.1(a).

**Hold Separate Period** for each Divestment Business means the period commencing on the Trigger Date and ending on the last to occur of:

- (a) if Shareholder Proceedings are instituted and an injunction is granted restraining the sale of the Divestment Businesses, the date on which such injunction is discharged; or
- (b) completion of the sale of the relevant Divestment Business.

**Hook & Pull Contract** means the Rail Services Agreement between SCT and Pacific National (Victoria) Limited ACN 075 295 644 (formally known as Freight Victoria Limited) dated 1 August 2000 and due to expire on 13 October 2007.

**Indemnified Entities** means Patrick and each of the related bodies corporate of Patrick which own assets of the Divestment Businesses.

**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).

**Independent Temporary Responsible Entity** means a responsible entity of the Asciano Trust which is:

- (a) independent of Toll and Asciano (including having no management role in relation to either Toll or Asciano, no directors in common with Toll or Asciano, not being controlled by Toll or Asciano, and having no direct or indirect controlling interest in Toll or Asciano); and
- (b) eligible to be a trustee for the purposes of section 283AC(1) of the Corporations Act.

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

- (a) is an employee or officer or director of Asciano;
- (b) has an Asciano Share Interest or an Asciano Asset Interest between [Confidential] after the Restructure Date and 31 March 2011;
- (c) has, with the exception of the directorships held by Mr Paul Little and Mr Neil Chatfield between 29 January 2007 and 27 February 2007, been an employee or officer or director of Asciano in the past 5 years;
- (d) has an agreement, arrangement or understanding with Asciano relating to the performance of his or her functions as a director of Toll;
- (e) has, within the last 5 years, been a principal of a material professional adviser or a material consultant to Asciano or an employee materially associated with the provision of such services to Asciano;
- (f) has a material contractual relationship with Asciano;
- (g) has served on the board of Asciano for a period which could, or could reasonably be perceived to, materially interfere with his or her ability to act independently of Asciano;
- (h) has a relationship or interest which could, or could reasonably be perceived to, materially influence the person's decision-making with respect to Asciano; or
- (i) has a Relative or is a Related Entity of a person who is not an Independent Toll Person (except by reason of this subparagraph).

**Initial Sale Period** means the period referred to in clause 4.3.

**Intermodal Business** means the Pacific National business of providing rail linehaul services on the East-West Corridor to freight forwarders. For the avoidance of doubt, this excludes the

Bluescope Steel linehaul business, but includes the operation of terminals by Pacific National as part of its East-West Corridor services.

**Leasing Agent** means the agent responsible for facilitating the arrangements set out in clause 1 as appointed under clause 8.12.

**Minto Siding Sale** is defined in clause 8.17.

**New PN Shares** is defined in clause 2.2(a)(ii).

**Nominated Expert** is defined in clause 13.2(a).

**Nomination Date** means **7 December 2006**, or, if clauses 8.7(d), 8.7(e), 8.7(g), 8.8(e), 8.10(d) or 8.11 apply, the dates referred to in those clauses.

**Offer** means Toll's offers to acquire all the issued shares in Patrick dated 29 September 2005.

**Operator** means an Operator as defined in clause 8.10(e).

**Pacific National** means Pacific National Pty Ltd ACN 098 060 550 and its Related Bodies Corporate.

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

**Patrick Bass Strait Shipping Business** means the operations conducted by Patrick Shipping Pty Limited ACN 009 540 032 on the Trigger Date as a going concern between Melbourne and Tasmania (or if these operations and assets are exclusively conducted and owned by a corporate entity, 100% of the shares in that entity) including but not limited to:

- (a) the Vessels;
- (b) the Devonport Berthing Rights and the Webb Dock East Berthing Rights;
- (c) the employees;
- (d) goodwill;
- (e) business contracts; and

all the other assets used by Patrick predominantly in the Patrick Bass Strait Shipping Business.

**Patrick Businesses** means the Patrick Bass Strait Shipping Business, the Patrick Tasmanian Freight Forwarding Business and the Vehicle Transport Business (only if Toll elects on or before the Trigger Date that it be the Patrick business), and "**Patrick Business**" means each of those businesses.

**Patrick Tasmanian Freight Forwarding Business** means all the assets, operations, employees, goodwill, business contracts, leases and licences, permits and authorities used in Patrick's freight forwarding operation between Tasmania and mainland Australia at the Trigger Date (or if these operations and assets are exclusively conducted and owned by a corporate entity, 100% of the shares in that entity) including but not limited to its freight depots, vehicles, personnel and contracts.

**PN Business** means all the businesses conducted by Pacific National which includes, but is not limited to, the provision of rail line haul services for the interstate movement of containerised freight between each of Sydney and Melbourne, and Perth.



**PN Interest** means 50% of the Economic Interest in Pacific National.

**PN Sale Waiver** means Toll's proposed variation to the Undertakings to waive Toll's obligation to divest the PN Interest, if the Restructure occurs.

**PN Shareholders** mean Toll and either the Pre-approved Purchaser or the Approved Purchaser (as the case may be) of the PN Shares or the New PN Shares (as the case may be).

**PN Shareholders Agreement** means the agreement referred to in clause 9.1.

**PN Shares** means the 50% of the issued share capital of Pacific National at the time these Undertakings are given.

**Pre-approved Purchaser** means the Proposed Purchaser that has not been objected to by the Commission within the objection period specified in clause 3.2(c).

**PrixCar** is defined in clause 5.1(a).

**PrixCar Interest** means the entire rights and interests of Toll (FHL) Pty Limited ACN 004 272 860 in shares in the capital of PrixCar Services Limited ACN 007 063 505.

**PrixCar Sale Shares** is defined in clause 5.1(a).

**PrixCar Shareholders' Agreement** is defined in clause 5.1(a).

**Process Deed** means a deed as contemplated by clause 8.8(d) which binds a Bidder, if it requests any of the East-West Rail Assets, to accept as final and binding any decisions made by the Leasing Agent, subject to the Bidder's rights to withdraw its Proposal as referred to in clause 8.8(d).

**Proposal** means a written proposal as described in either clause 8.6 or clause 8.11 as the context requires.

**Proposed Acquisition** means the proposed acquisition by Toll of all of the shares in Patrick not already owned by Toll as discussed in Recital B.

**Proposed Agent** means the prospective sales agent of the Unsold Divestment Businesses selected by Toll in accordance with clause 4.6(a).

**Proposed Approved Purchaser** means the prospective purchaser of the Divestment Businesses identified by Toll in accordance with clause 6.2(a).

**Proposed Purchaser** means the prospective purchaser of the Divestment Businesses identified by Toll in accordance with clause 3.1.

**Rail Confidential Information** means confidential information relating to the terms and conditions on which Pacific National provides or has offered to provide rail line-haul services to customers.

**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.

**Remaining Rights** means rights to request any remaining East-West Rail Assets as referred to under clause 8.11.

**Remedy Application** is defined in clause 10.

**Restructure** has the meaning given to it in clause 2.3.

**Restructure Date** means the date on which all the steps to effect the Restructure listed in clause 2.3 have occurred.

**Rolling Stock** means the Selected Locomotives and Wagons referred to in clause 8.3.

**SCT** means Twentieth Super Pace Nominees Pty Ltd ACN 005 855 327 atf Byrnes Unit Trust ABN 37 757 194 158, trading as Specialized Container Transport.

**SCT Locomotives** means the locomotives to be acquired by SCT from Downer EDI Limited referred to in the press release of SCT on 16 November 2005.

**Selected Bidder** means the Bidder defined in clause 8.7 and not subsequently objected to by the Commission under clause 8.

**Selected Locomotives** means the locomotives referred to in clause 8.3(a)(i).

**Selected Train Paths** means the train paths referred to in clause 8.2.

**Senior Manager** means a senior manager within the meaning of the Corporations Act.

**Shared Services Arrangements** are arrangements between Toll and Asciano for the:

- (a) joint procurement, in any proportion, of goods and services; and
- (b) provision by Toll to Asciano, or by Asciano to Toll, of services not ordinarily provided to customers of Toll or Asciano in the ordinary course of Toll's or Asciano's business, including, but not limited to, any of the following services:
  - (i) treasury and tax services;
  - (ii) human resource management, including superannuation and payroll support;
  - (iii) property management;
  - (iv) accounting services;

- (v) procurement, purchasing and contract management;
- (vi) insurance and risk management (including workers compensation, insurance and claims management); and
- (vii) information technology (including facilities, infrastructure, applications and support).

**Shareholder Proceedings** means proceedings commenced by any one or more Patrick shareholders in a court or the Takeovers Panel in which orders (whether on an interim, interlocutory or permanent basis) are sought restraining any of Toll, Patrick, Pacific National or any of their respective controlled entities from doing (or, as the case may be, refraining from doing) any act which is required (or, as the case may be, prohibited) by or under these Undertakings.

**Start Up Period** means a period of 3 years, to commence:

- (a) on a day within 12 months after the Trigger Date at the election of the Operator; or
- (b) if no Final Agreement between Toll and the Selected Bidder has been executed within 12 months after the Trigger Date, the day the Final Agreement is executed.

**Substitute Paths** means the substitute train paths referred to in clause 8.7(i).

**Terminal Access** means the rights of terminal access referred to in clause 8.5.

**Third Party Consents** is defined in clause 4.4.

**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 Asciano and Toll; 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.

**Transfer Notice** is defined in clause 5.1(a).

**Trigger Date** means the date by which both of the following have occurred:

- (a) Toll achieves the receipt of Controlling Acceptances; and
- (b) Toll declares the Offer free from the conditions in section 16.12 of the Offer or gives a notice under section 630 of the Corporations Act that the conditions in section 16.12 of the Offer have been satisfied.

**Uncompleted Transaction** is defined in clause 10.

**Unsold Divestment Businesses** means the Divestment Businesses that remain unsold after the Initial Sale Period as defined in clause 4.6(a).

**Variation** means the fifth variation to these Undertakings, consented to on 18 April 2007.

**Vehicle Transport Business** means, at Toll's election (which must be notified to the Commission within 60 days after the Trigger Date), either Patrick's or Toll's vehicle transport and logistics business in Australia for domestically manufactured and imported vehicles. For the avoidance of doubt, Patrick's or Toll's vehicle transport and logistics business in Australia for domestically manufactured and imported vehicles includes all assets used by those businesses on the Trigger Date, including but not limited to car carrying vehicles, depots, contracts and personnel, but which, in the case of Toll's business, for the avoidance of doubt, does not include the Autotrans Business.

**Vessels** mean the interest held by Patrick in each of the MV "Mersey" and the MV "Tamar".

**Victorian Rail Access Regime** means the rail access regime contained in Part 2A of the *Rail Corporations Act 1996* (Vic).

**Wagons** means general container standard gauge high speed train wagons which have been accredited on the East-West Corridor under the relevant rail safety regime.

**Webb Dock East Berthing Rights** means the leasehold interests of Holyman Shipping Pty Limited ACN 009 540 032 (now known as Patrick Shipping Pty Limited ACN 009 540 032) to the berth face and land adjacent to the berth face at Webb Dock East as specified in Annexure A together with all leasehold improvements and any licences and other rights associated with the leasehold interests.

## 19.2 Interpretation

- (a) In these Undertakings:
  - (i) a reference to "**these Undertakings**" is a reference to all the provisions of this document, including Annexures A, B, C, D, E, F, G and H.
  - (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 19.2(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 its obligations under these Undertakings, Toll will do everything reasonably within its power to ensure that its performance of those obligations is done in a manner which is consistent with promoting the purpose and object of these Undertakings.

**Executed by Toll Holdings Limited ACN 006 592 089** in accordance with section 127 of the Corporations Act by or in the presence of:

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(Signature of Secretary/other Director)

---

(Signature of Director or Sole Director and Secretary)

---

(Name of Secretary/other Director in full)

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(Name of Director or Sole Director and Secretary in full)

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

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**Graeme Julian Samuel**  
Chairman

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Date

## **Annexure A — Webb Dock East Berthing Rights**

The leasehold interests of Holyman Shipping Pty Limited ACN 009 540 032 (now known as Patrick Shipping Pty Limited ACN 009 540 032) to the berth face and land adjacent to the berth face at Webb Dock East is indicated in the attached drawing as the area occupied by Patrick Shipping, and is marked by the red border on the attached photograph.

## **Annexure B - Devonport Berthing Rights**

The leasehold interests of Patrick to the berth face and land adjacent to the berth face at the port of Devonport is indicated as the area bordered in red and broadly aligns with areas noted by 46,633 and 1,862 on the attached diagram.

The numbers on the attached diagram refer to the appropriate square metreage for the bordered areas as identified at the port.



## **Annexure C — Terms and conditions of PN Shareholders Agreement**

The PN Shareholders Agreement will contain terms and conditions having the following effect:

### **Control of the Board**

1. Each shareholder in Pacific National will be able to appoint and dismiss as of right an equal number of directors to the Board. Additional appointments and dismissal of those additional appointments will require the consent of both shareholders.
2. The chairperson of the Board will alternate on a regular basis between a director appointed by Toll and a director appointed by the other shareholder.
3. Each director will be entitled to one vote at a Board meeting. The chairperson will not have a casting vote.
4. A unanimous vote of directors will be required in relation to matters including the appointment of the chief executive officer, business plan and budget, capital expenditure in excess of specified limits, and the disposal of any material asset.
5. Toll will not participate in the appointment or supervision of the executive management of Pacific National other than through its representation on the Board of Pacific National.

### **Dealings with Toll**

6. Any dealings between Toll and Pacific National Intermodal Business are to be conducted on an arms-length commercial basis.
7. The Board is to unanimously approve any material contract between the Intermodal Business and Toll or any contract between Toll and Pacific National that materially affects the Intermodal Business and will only approve the contracts if in the best interests of Pacific National.
8. Directors are to be provided with sufficient information to assess whether the terms and conditions of any such material contract with Toll are reasonable and fair taking into account similar contracts with third parties.

### **Operations of Pacific National**

9. Toll will not seek to involve itself or interfere with the commercial activities and operations of Pacific National other than:
  - (a) by appointing Board members which are, at all times, obliged in that capacity to act in the best interests of Pacific National; and
  - (b) in Toll's capacity as a counterparty to a transaction or proposed transaction in which all dealings are to be on an arms length basis.
10. The PN Shareholders Agreement will make provision for the adoption and compliance with a confidentiality regime which prohibits Toll and any Toll secondees from having access to confidential customer information about the Pacific National Intermodal Business. For the avoidance of doubt, the confidentiality regime will not preclude Toll from having access to aggregate information reasonably necessary for reporting purposes or to exercise its rights under the PN Shareholders Agreement.
11. The Shareholders will ensure that Pacific National does not discriminate in the operation of the Intermodal Business in favour of Toll's freight forwarding or logistics operations on the price

and service quality of Pacific National's service offerings on a like for like basis, provided that this does not apply to discrimination which:

- (a) makes only reasonable allowance for differences in the cost or likely cost of providing services resulting from difference in the volume or nature of the services supplied; or
- (b) results from doing an act in good faith to meet a price or benefit offered by a rail line haul competitor of Pacific National.

12. The Shareholders will procure that Pacific National will:

- (a) include, if requested by any customer of the Intermodal Business, in the contract for that customer, KPIs relating to:
  - (i) proportion of requested slot allocations versus slot allocations actually received;
  - (ii) number of containers left behind;
  - (iii) turnaround times at relevant terminals;
  - (iv) freight availability at relevant terminals; and
  - (v) damage to goods in transit;
- (b) collect, retain and provide to the Auditor appointed under clause 9.4 of the Undertakings a report every 6 months (which report is to be provided no later than a month before the Auditor's report is required to be provided to the Commission) which sets out:
  - (i) the average price per TEU actually charged to Toll during the previous 12 month period;
  - (ii) proportion of Toll's requested slots versus slot allocations received compared with the average proportion of requested slots versus slot allocations for all freight forwarding customers excluding Toll;
  - (iii) actual numbers of Toll containers left behind on a terminal by terminal basis compared with the average number of containers left behind on a terminal by terminal basis for all freight forwarding customers excluding Toll;
  - (iv) turnaround times for Toll's freight forwarding operations at relevant terminals compared with turnaround times at relevant terminals for all freight forwarding customers excluding Toll;
  - (v) freight availability for Toll's freight forwarding operations at relevant terminals compared with freight availability at relevant terminals for all freight forwarding customers excluding Toll; and
  - (vi) level of damage to goods in transit for goods transported on behalf of Toll's freight forwarding operations compared with the average level of damage to goods in transit for goods transported on behalf of all freight forwarding customers excluding Toll; and
- (c) have the report referred to in (b) above subject to audit in accordance with clause 9.4.

13. The Shareholders will procure that Pacific National fully and effectively implements all actions required of Pacific National, as referred to or contemplated by clauses 8 and 9 (other than clause 9.8) of the Undertakings.

**Annexure D — Letter of Agreement between Toll and SCT**

## Annexure E — Map of Selected Tracks

**Annexure F**  
**Asciano Assets**

The following Toll Group businesses:

	<b>Business description</b>	<b>Principal corporate entities comprising the business</b>	<b>Organisation chart reference</b>
1.	The Patrick Corporation Limited (" <b>Patrick</b> ") 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 (" <b>Pacific National</b> "), 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 Westernport 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

	<b>Business description</b>	<b>Principal corporate entities comprising the business</b>	<b>Organisation chart reference</b>
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

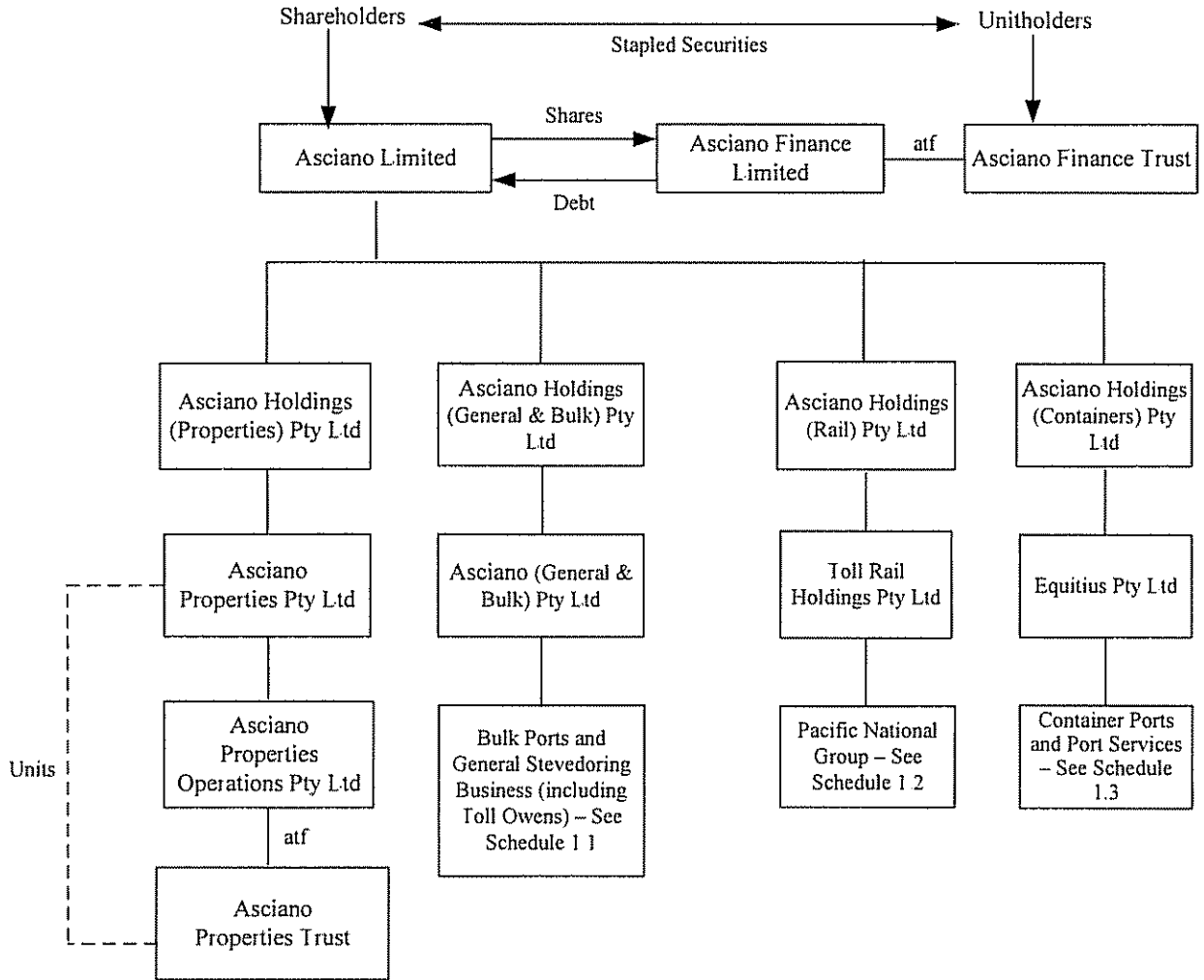
Toll Group interests in the following joint ventures:

	<b>Entity</b>	<b>Business description</b>	<b>Organisation chart reference</b>
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

	<b>Entity</b>	<b>Business description</b>	<b>Organisation chart reference</b>
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

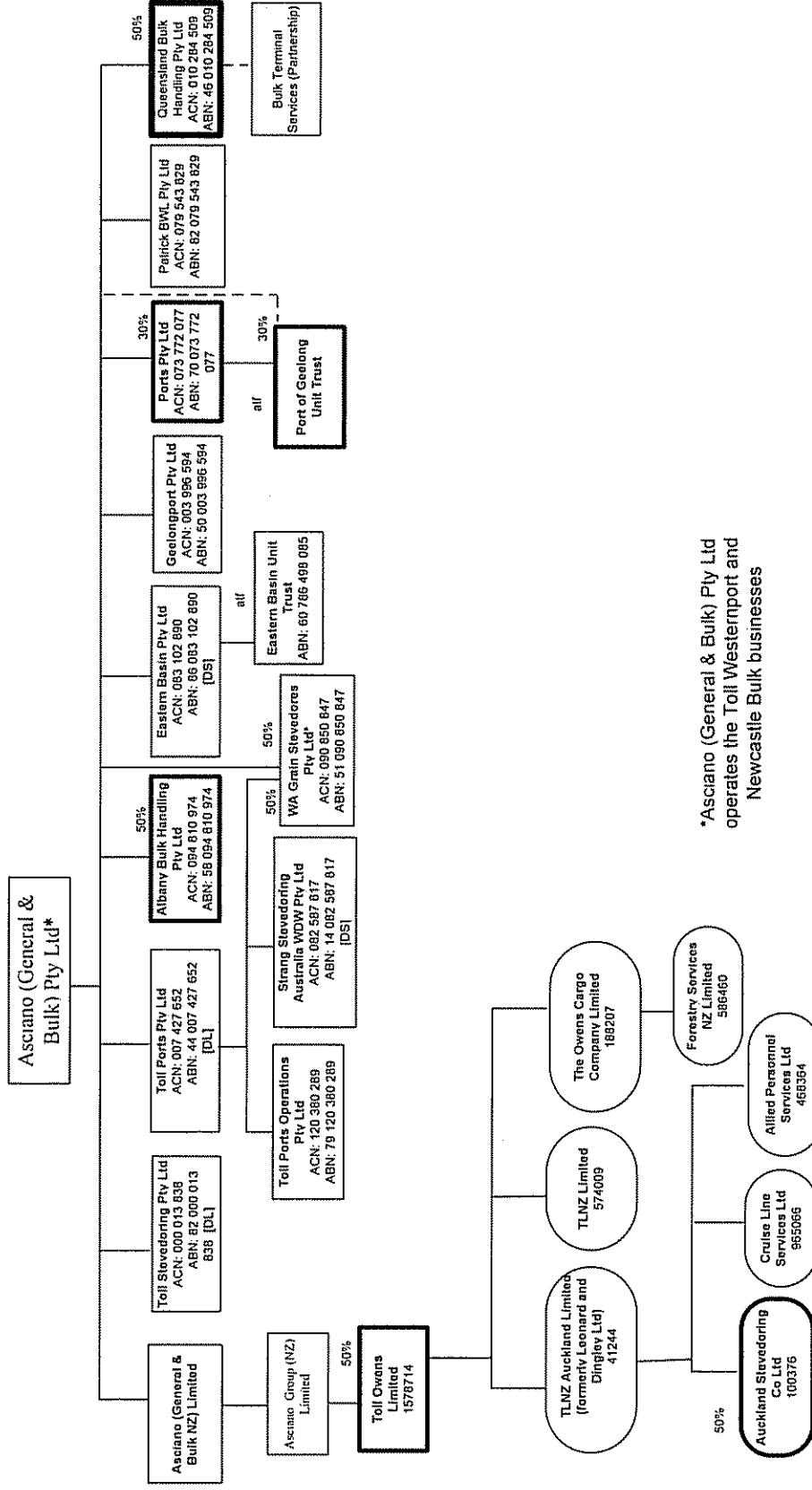


Schedule 1  
Infrastructure Co Post Settlement



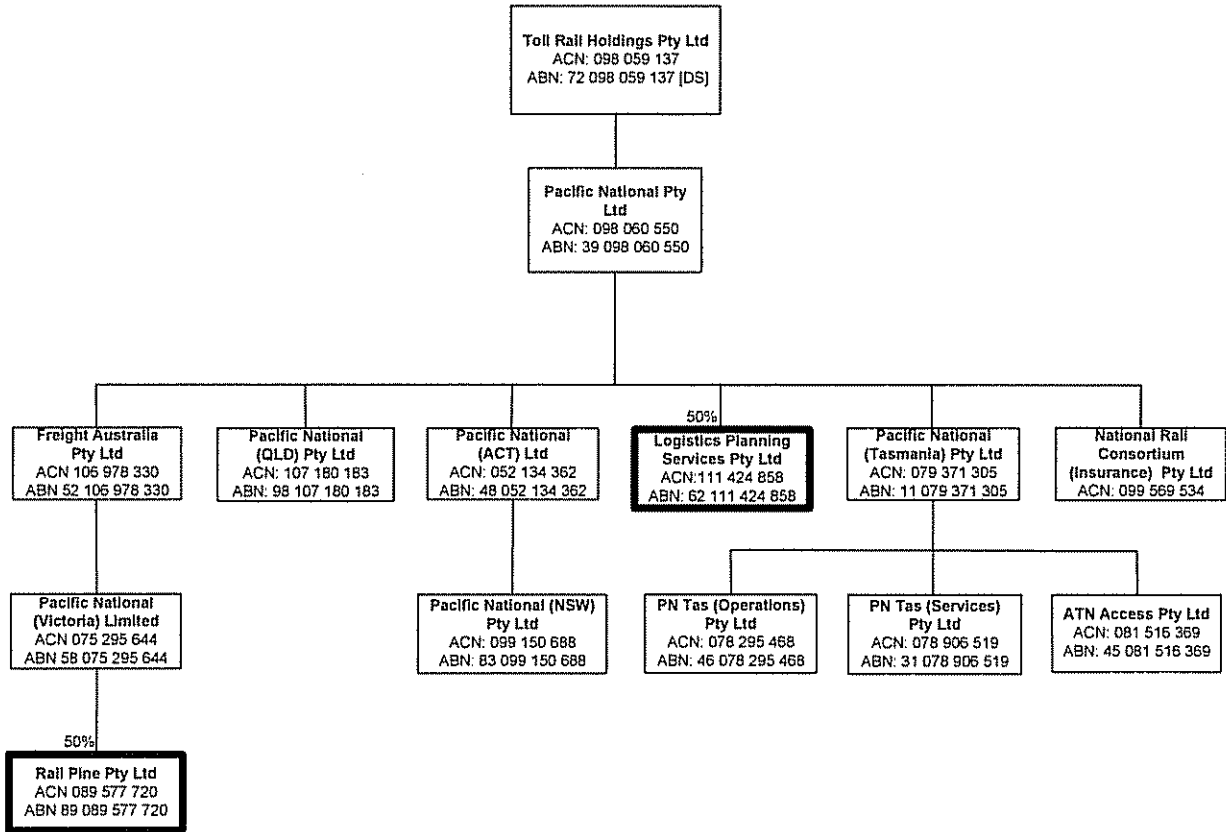
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Schedule 1.1  
General and Bulk



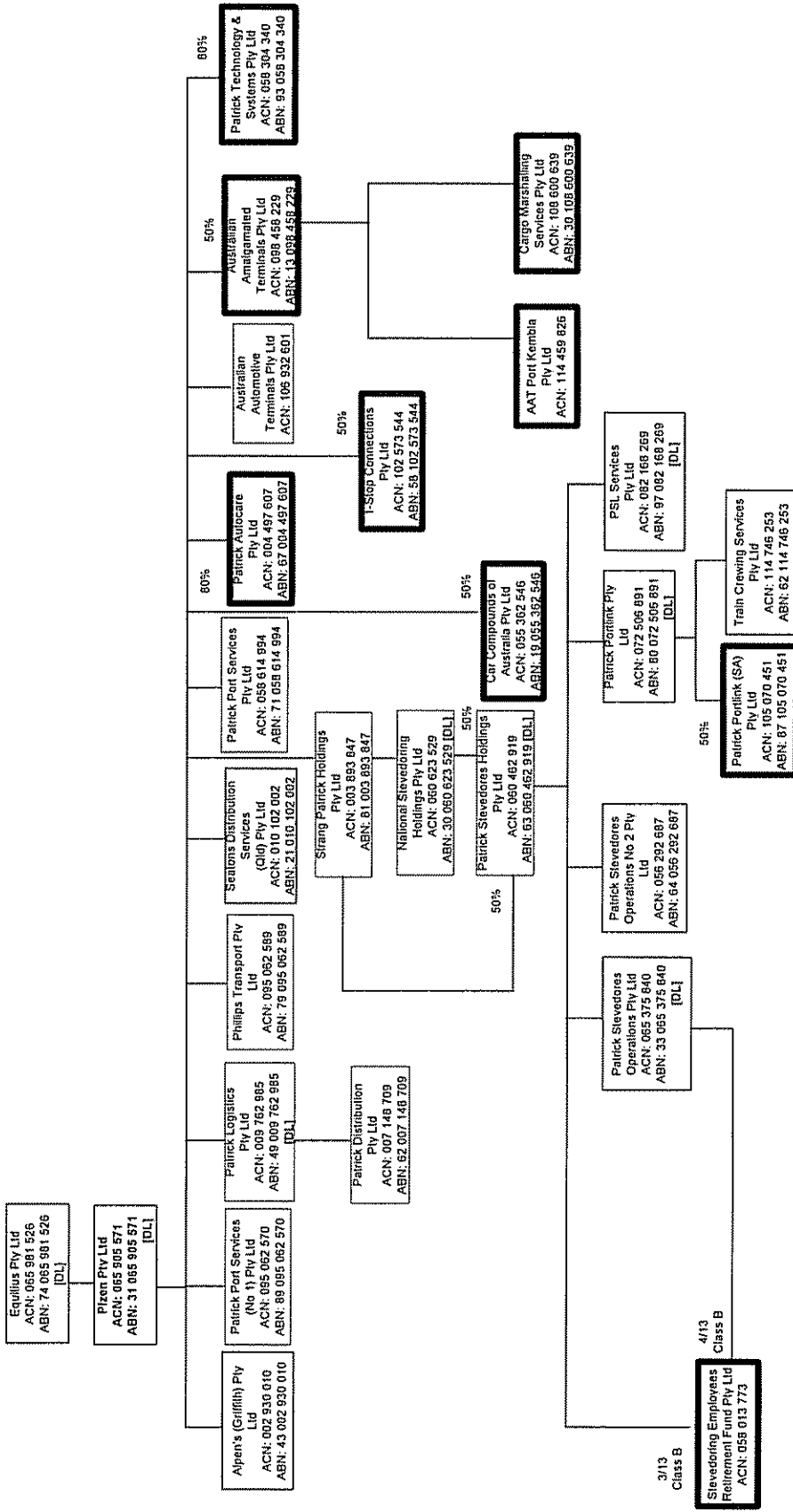
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## Schedule 1.2 Pacific National Group



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Schedule 1.3  
Container Ports and Port Services – Equitius Group



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## Annexure G

### Trade Practices Act 1974

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

by

Asciano Limited ABN 26 123 652 862

#### 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 Schedule G-4 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, that Toll will have no ability to cause Pacific National to give preference to Toll's freight forwarding operations and that 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. Asciano 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 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.
- J. In accepting these Undertakings, the Commission notes that Asciano has agreed to obligations that aim to enhance the structural separation of Toll and Asciano, including obligations in relation to:
- a. the independence of Asciano and Toll directors;
  - b. the employment and secondment of personnel by and between Asciano and Toll; and
  - c. arm's length commercial dealings between Asciano and Toll, including a prohibition on Toll and Asciano providing each other joint or shared services.
- K. In accepting these Undertakings the Commission has also accepted assurances from Asciano that Asciano 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 Mr Mark Rowsthorn, the Asciano directors

and the Toll directors 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.

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## **1. Commencement and Duration of Undertakings**

### **1.1 Commencement**

These Undertakings come into effect when:

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

### **1.2 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.

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## **2. Asciano not to hold Interest in Toll**

Asciano will not, between the Restructure Date and 31 March 2011, acquire or retain any Toll Share Interest or Toll Asset Interest.

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## **3. Asciano directors**

- (a) Asciano will procure that each new director of Asciano Limited and any other Asciano entity in respect of whom Asciano has the ability, either directly or indirectly, to appoint or remove as a director (other than Mr Mark Rowsthorn, whose involvement in Asciano is subject to the undertaking set out in Schedule G-2, and for the directors of the Independent Temporary Responsible Entity), offers to the Commission, prior to appointment, and pursuant to section 87B of the Act, the undertaking set out in Schedule G-1.
- (b) Asciano will, to the extent permitted by law, exclude Mr Mark Rowsthorn, while he holds a Toll Share Interest or a Toll Asset Interest, from any consideration, decision or resolution by the directors of Asciano after the Restructure Date in relation to proposed or actual contracts, arrangements or understandings between Toll and Asciano until such time as the disposal of such Toll Share Interest or such Toll Asset Interest has occurred.
- (c) Asciano will not appoint any person as a director (other than Mr Mark Rowsthorn, whose involvement in Asciano is subject to the undertaking set out in Schedule G-2, and the directors of the Independent Temporary Responsible Entity) who is not an Independent Asciano Person.

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## **4. Separation arrangements**

### **4.1 Pacific National independence**

Asciano will not, unless otherwise agreed by the Commission, employ, contract with, appoint or otherwise engage any person, company, partnership or organisation in a role with or directly

in relation to Pacific National's Intermodal Business who is, or who has been, a Senior Manager of, or held a senior operational position at Toll after the Restructure Date.

#### **4.2 No performance or incentive fees**

Asciano will not pay to Toll or any employee of Toll any performance or incentive fees in relation to the performance, revenues or profits of Asciano, other than payments, credits or rebates provided by Asciano in the ordinary course of business which are available to other like customers on like terms.

#### **4.3 No secondments**

- (a) Asciano will not enter or give effect to a contract, make or give effect to an arrangement or reach or give effect to an understanding which would in effect allow Asciano to:
  - (i) share management or employees with Toll;
  - (ii) second management or employees to or from Toll; or
  - (iii) subject to clause 4.2 above, share in any profits or revenues of Toll.
- (b) Asciano will not enter or give effect to a contract, make or give effect to an arrangement or reach or give effect to an understanding which would in effect allow Toll to:
  - (i) share management or employees with Asciano;
  - (ii) second management or employees to or from Asciano; or
  - (iii) subject to clause 4.2 above, share in any profits or revenues of Asciano.

#### **4.4 Arm's length dealing**

Asciano will not enter or give effect to a contract, make or give effect to an arrangement or reach or give effect to an understanding with Toll unless the terms of the contract, arrangement or understanding are:

- (a) on an arm's length basis and on non-exclusive terms consistent with these Undertakings; and
- (b) approved of in advance by the board of Asciano and only approved of if the board is satisfied, in good faith, after due inquiry, that the contract, arrangement or understanding with Toll is considered arms length and bona fide to be in the best interests of Asciano.

#### **4.5 No Shared Services Arrangements**

Asciano will not enter or give effect to a contract, make or give effect to an arrangement or reach or give effect to an understanding, between Asciano and Toll, in relation to Shared Services Arrangements.

#### **4.6 No joint ventures**

Asciano will not enter into or maintain any joint venture with Toll.



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## 5. Rail Assets

### 5.1 Assumption of Toll's obligations

Asciano will, as from the Restructure Date, assume Toll's obligations under clauses 2.1(c), 8 (other than clause 8.1A), 9.6 and 9.7(b) of Toll's Undertakings, a copy of which is attached to this Undertaking as Schedule G-3, to the extent those obligations have not been discharged by Toll, and each reference to "Toll" in those clauses will be read to be a reference to "Asciano".

### 5.2 Leasing Agent

- (a) Asciano will appoint WorleyParsons Services Pty Limited ("**Worley Parsons**") as the Leasing Agent for the purposes of clause 8 of Toll's Undertakings, on the same terms and conditions (or as otherwise approved by the Commission) as those agreed to by Toll and Worley Parsons. Asciano will provide a copy of the terms of appointment as between Asciano and Worley Parsons to the Commission within 5 Business Days of execution.
- (b) If Asciano is unable to appoint Worley Parsons as the Leasing Agent pursuant to clause 5.2(a) within 10 Business Days from the Restructure Date, Asciano will appoint another Leasing Agent not objected to by the Commission pursuant to clause 8.13 of Toll's Undertakings.
- (c) Asciano will assume Toll's obligations under clause 8.12(d) of Toll's Undertakings to indemnify the Leasing Agent and otherwise pay the costs of the Leasing Agent arising from performance of the Leasing Agent role after the Restructure Date.

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## 6. Non-discrimination regimes

### 6.1 Rail non-discrimination

- (a) As from the Restructure Date, Asciano will ensure that Pacific National does not discriminate in the operation of the Intermodal Business in favour of either Toll's freight forwarding or logistics operations, or Patrick Autocare, on the price and service quality of Pacific National's service offerings on a like for like basis, provided that this does not apply to discrimination which:
  - (i) makes only reasonable allowance for differences in the cost or likely cost of providing services resulting from differences in the volume or nature of the services supplied; or
  - (ii) results from doing an act in good faith to meet a price or benefit offered by a competitor of Pacific National.
- (b) In order to ensure compliance with the commitment in clause 6.1(a), Asciano will use best endeavours to procure that Pacific National will:
  - (i) enter into a contract, or include in an existing contract, if requested by any customer of the Intermodal Business, KPIs relating to:
    - A. proportion of requested slot allocations versus slot allocations actually received;
    - B. number of containers left behind;

- C. turnaround times at relevant terminals;
  - D. freight availability at relevant terminals; and
  - E. damage to goods in transit;
- (ii) collect, retain and provide to the Auditor appointed under clause 6.3 a report every 6 months (which report is to be provided no later than a month before the Auditor's report is required to be provided to the Commission) which sets out:
- A. the average price per TEU actually charged to Toll and Patrick Autocare and each of the other 10 largest customers of the Intermodal Business (as measured by TEU's carried) during the previous 12 month period;
  - B. the proportion of Toll's and Patrick Autocare's requested slots versus slot allocations received compared with the average proportion of requested slots versus slot allocations for all freight forwarding customers excluding Toll and Patrick Autocare;
  - C. actual numbers of Toll and Patrick Autocare containers left behind on a terminal by terminal basis compared with the average number of containers left behind on a terminal by terminal basis for all freight forwarding customers excluding Toll and Patrick Autocare;
  - D. turnaround times for Toll's and Patrick Autocare's freight forwarding operations at relevant terminals compared with turnaround times at relevant terminals for all freight forwarding customers excluding Toll and Patrick Autocare;
  - E. freight availability for Toll's and Patrick Autocare's freight forwarding operations at relevant terminals compared with freight availability at relevant terminals for all freight forwarding customers excluding Toll and Patrick Autocare; and
  - F. level of damage to goods in transit for goods transported on behalf of Toll's and Patrick Autocare's freight forwarding operations compared with the average level of damage to goods in transit for goods transported on behalf of all freight forwarding customers excluding Toll and Patrick Autocare; and
- (iii) have the report referred to in (ii) above subject to audit in accordance with clause 6.3.

## 6.2 Ports non-discrimination regime

- (a) As from the Restructure Date, Asciano will ensure that Asciano Containers, or the company that operates the container terminals in Sydney, Melbourne, Brisbane and Fremantle, does not discriminate in favour of Toll's freight forwarding or logistics operations on the price and service quality of the service offerings (on a like for like basis) provided by Asciano Containers, or the company that operates the container terminals in Sydney, Melbourne, Brisbane

and Fremantle, in relation to the landside delivery, storage or pickup of containerised freight (by rail and/or road) at the container terminals in Sydney, Melbourne, Brisbane and Fremantle, provided that this does not apply to discrimination which:

- (i) makes only reasonable allowance for differences in the cost or likely cost of providing services resulting from differences in the volume or nature of the services supplied; or
  - (ii) results from doing an act in good faith to meet a price or benefit offered by a competitor of Asciano Containers, or the company that operates the container terminals in Sydney, Melbourne, Brisbane and Fremantle.
- (b) In order to ensure compliance with the commitment in clause 6.2(a), Asciano will:
- (i) include, if requested by any customer of Asciano Containers, or the company that operates the container terminals in Sydney, Melbourne, Brisbane and Fremantle, in the contract for that customer, KPIs relating to access to and use of the terminals;
  - (ii) collect, retain and provide to the Auditor a report every 6 months (which report is to be provided no later than a month before the Auditor's report is required to be provided to the Commission) which sets out the average price and performance KPIs provided to Toll and Asciano Containers, or the company that operates the container terminals in Sydney, Melbourne, Brisbane and Fremantle, during the previous 12 month period compared to other customers who have required use of those KPIs; and
  - (iii) have the report referred to in 6.2(b)(ii) above subject to audit in accordance with clause 6.3.
- (c) For the purposes of this clause 6.2, the KPIs relate to the Container Transaction Time Performance Benchmark, which means the average time taken for a truck to be moved between the entry gate, unload and/or load and depart through the terminal exit gate divided by the average number of containers delivered and received for each transaction during a three month period at the relevant terminal.

### **6.3 Audit**

- (a) From the Restructure Date, Asciano must, every 6 months, provide an Auditor's report to the Commission, at Asciano's expense, reporting on:
  - (i) Asciano's compliance with these Undertakings;
  - (ii) the Asciano directors' compliance with the undertakings given by them in accordance with clause 3;
  - (iii) any qualifications made by the Auditor in forming its view; and
  - (iv) any recommendations by the Auditor to improve the integrity of audit process and the elimination of any qualifications.
- (b) Asciano will implement any recommendations of the Auditor made pursuant to clause 6.3(a)(iv) as soon as reasonably practicable after the release of the relevant Auditor's report.

- (c) Asciano undertakes to use its best endeavours to procure any Asciano director who has given the Commission an undertaking 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 his or her functions as set out in this clause 6.3.
- (d) Asciano 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 this clause 6.3.
- (e) Asciano shall authorise the Auditor to engage any technical or other expertise as the Auditor reasonably requires to conduct the audits.
- (f) Asciano will inform at least the largest 20 customers (by revenue received) of the Intermodal Business of Pacific National by letter of the name and contact details of the Auditor as soon as practicable after the Commission has approved the Auditor. Asciano will attach copies of the Recitals and clauses 6.1 and 6.3 to the letter to be sent to the customers.
- (g) The auditor ("**Auditor**") must be an independent person with appropriate expertise approved of by the Commission.
- (h) If the Auditor has been appointed by Toll prior to the Restructure Date, Asciano will appoint the Auditor on the same terms and conditions as the appointment by Toll prior to the Restructure Date or as otherwise approved of by the Commission. Asciano will provide a copy of the terms of appointment as between Asciano and the Auditor to the Commission within 5 Business Days of execution.
- (i) Toll will require the Auditor to provide to the Commission details of any possible failure to comply by Asciano or the Asciano directors with the obligations in their respective undertakings immediately upon such a possible failure to comply coming to the attention of the Auditor.
- (j) Without limiting clause 9, Asciano will require that the Auditor comply with any request made by the Commission to the Auditor for information or any direction given by the Commission in relation to the discharge by the Auditor of its functions as set out in this clause 6.3.
- (k) Asciano will terminate the appointment of the Auditor if the Commission advises Asciano in writing that it has formed the view that the Auditor is not properly performing his or her functions as set out in this clause 6.3.
- (l) In the event that the Auditor resigns, or Asciano terminates the appointment of the Auditor in accordance with clause 6.3(k), Asciano will, within 10 Business Days, appoint another Auditor who is nominated by the Commission as an independent person with appropriate expertise.

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## 7. Uncompleted Transactions

### 7.1 Inability to complete

Without limiting the Commission's entitlement to enforce these Undertaking generally, if for any reason Asciano is prevented from or is otherwise unable to procure Pacific National to perform the arrangements referred to under clause 5.1 of these Undertakings (any of which events is referred to as an "**Uncompleted Transaction**"), the occurrence of an Uncompleted

Transaction, from time to time, will constitute a breach of these Undertakings and the provisions of this clause will apply.

## 7.2 Notification

If an Uncompleted Transaction occurs, Asciano will promptly advise the Commission and provide the Commission with any information reasonably requested by the Commission about the Uncompleted Transaction, and Asciano's proposal to address and remedy the circumstances arising as a result of the Uncompleted Transaction.

## 7.3 Other divestment

If the Commission decides that the circumstances arising from an Uncompleted Transaction will not be remedied to its reasonable satisfaction within a time which is acceptable to the Commission, Asciano undertakes to sell and dispose of such other assets and/or businesses within its power and control and will otherwise take such steps in the manner contemplated by these Undertakings as would be sufficient to address and remedy the circumstances arising as a result of the Uncompleted Transactions.

## 7.4 Application to Court

- (a) The Commission may at any time after it is notified of an Uncompleted Transaction under clause 7.2 bring an application to the Court under subsection 87B(4) of the Act in respect of the breach of these Undertakings by Asciano ("**Remedy Application**") seeking orders which may include but are not limited to orders directing Asciano to sell or procure the sale of such other assets and/or businesses within its power and control and otherwise take such steps in the manner contemplated by these Undertakings as would be sufficient to address and remedy the circumstances arising as a result of the Uncompleted Transaction.
- (b) Asciano undertakes that it will not:
  - (i) oppose the bringing of any Remedy Application by the Commission under paragraph (a); and
  - (ii) contest any Remedy Application on any basis which is inconsistent with the spirit or the letter of these Undertaking including on a basis that the original acquisition by Asciano, or the failure to perform or complete any of its obligations in these Undertakings, would not or would not be likely to breach section 50 of the Act.
- (c) Subject to the terms of this clause 7.4, the Commission and Asciano may each lead evidence and make submissions to the Court as to what orders should be made under subsection 87B(4) of the Act in all the circumstances to give effect to the spirit and the letter of these Undertakings and to address and remedy the circumstances arising as a result of the Uncompleted Transaction.

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## 8. Consequence of frustration or non-compliance

- (a) Without limiting the Commission's ability to bring enforcement proceedings against Asciano in relation to these Undertakings, Asciano will divest 50% of its interest in Pacific National if any obligation in clauses 2, 3 and 4 of these Undertakings is not fully performed or otherwise given effect to.

- (b) Asciano will divest 50% of its interest in Pacific National, if divestiture is required by the operation of clause 8(a), at such times and on such conditions (including as to price) as approved or directed by the Commission.

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## 9. Further Information

- (a) At the Commission's direction, Asciano will itself and Asciano will procure that any Asciano director, employee, agent or contractor identified by the Commission will:
- (i) furnish information to the Commission;
  - (ii) produce documents to the Commission in relation to which Asciano 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 Asciano'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.
- (c) Any direction made by the Commission under clause 9(a) will be notified to the company secretary of Asciano.

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## 10. Related Bodies Corporate

Where the performance of an obligation under these Undertakings requires a Related Body Corporate of Asciano (including without limitation any responsible entity of the Asciano Trust) to take or refrain from taking some action, Asciano will use its best endeavours to procure that Related Body Corporate to take or refrain from taking that action as the case may be.

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## 11. Acknowledgement

Asciano acknowledges that the Commission may:

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

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## 12. Definitions and interpretation

### 12.1 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 the 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 Asset Interest** means in relation to any Asciano Asset (whether alone or with any other Asciano Asset or any other property or thing) means:

- (a) the Asciano Asset;
- (b) a legal or equitable right or interest in or to the Asciano Asset, other than arising under a lease, licence 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 Asciano Asset (including any option) whether or not subject to any condition;
- (d) a right to direct that the Asciano 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 Asciano Asset.

**Asciano Assets** means:

- (a) the businesses, assets and interests (including the benefit of contractual arrangements) described in Schedule G-4; 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 Containers** means Asciano Holdings (Containers) Limited ACN 123 684 060.

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

**Asciano Share Interest** means any one or more of the following:

- (a) an issued share in Asciano or unit in Asciano Trust;
- (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 or unit;
- (c) an issued share in Asciano, or unit in Asciano Trust, 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 Asciano or unit in Asciano Trust; and

- (e) any right (including any option) whether or not subject to any condition to have issued any share in Asciano or unit in Asciano Trust.

**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.

**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).

**Business Day** means a day on which all banks are open for business generally in the State of Victoria but does not include any Saturday, Sunday or Public Holiday.

**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.

**Customer Confidential Information** means confidential information relating to the terms and conditions on which Asciano and Toll provide or have offered to provide goods and services to customers.

**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).

**Independent Temporary Responsible Entity** means a responsible entity of the Asciano Trust which is:

- (a) independent of Toll and Asciano (including having no management role in relation to either Toll or Asciano, no directors in common with Toll or Asciano, not being controlled by Toll or Asciano, and having no direct or indirect controlling interest in Toll or Asciano); and
- (b) eligible to be a trustee for the purposes of section 283AC(1) of the Corporations Act.

**Intermodal Business** means the Pacific National business of providing rail linehaul services on the East-West Corridor to freight forwarders. For the avoidance of doubt, this excludes the Bluescope Steel linehaul business, but includes the operation of terminals by Pacific National as part of its East-West Corridor services.

**KPI** means key performance indicator.

**Leasing Agent** means the agent responsible for facilitating the arrangements set out in clause 8 of Toll's Undertakings and as appointed under clause 8.12 of Toll's Undertakings.

**Pacific National** means Pacific National Pty Ltd ACN 098 060 550 and its Related Bodies Corporate.

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

**Patrick Autocare** means Patrick Autocare Pty Ltd ABN 67 004 497 607.

**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.

**Senior Manager** means a senior manager within the meaning of the Corporations Act.

**Shared Services Arrangements** are arrangements between Toll and Asciano for the:

- (a) joint procurement, in any proportion, of goods and services; and
- (b) provision by Toll to Asciano, or by Asciano to Toll, of services not ordinarily provided to customers of Toll or Asciano in the ordinary course of Toll's or Asciano's business, including, but not limited to, any of the following services:
  - (i) treasury and tax services;
  - (ii) human resource management, including superannuation and payroll support;
  - (iii) property management;
  - (iv) accounting services;
  - (v) procurement, purchasing and contract management;
  - (vi) insurance and risk management (including workers compensation, insurance and claims management); and
  - (vii) information technology (including facilities, infrastructure, applications and support).

**TEU** means twenty foot equivalent unit.

**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 Asciano and Toll; 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.

## 12.2 Interpretation

- (a) In these Undertakings:
  - (i) a reference to "**these Undertakings**" is a reference to all the provisions of this document, including Schedules G-1, G-2, G-3 and G-4.
  - (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 12.2(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 its obligations under these Undertaking, Asciano will do everything reasonably within its power to ensure that its performance of those obligations is done in a manner which is consistent with promoting the purpose and object of these Undertakings.

**Executed by Asciano Limited ABN 26  
123 652 862** in accordance with section 127  
of the *Corporations Act 2001* by or in the  
presence of:

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(Signature of Secretary/other Director)

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(Name of Secretary/other Director in full)

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Date of Execution by Asciano Limited

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

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**Graeme Julian Samuel**  
Chairman

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Date

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(Signature of Director or Sole Director and Secretary)

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(Name of Director or Sole Director and Secretary in full)

## Schedule G-1

### Trade Practices Act 1974

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

by

[the Asciano Director]

#### 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-1-1 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. The Asciano Director 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 the Asciano Director. In accepting these Undertakings, the Commission has accepted assurances from the Asciano Director that he or she 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 Mr Mark Rowsthorn, the Toll 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.

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## **1. Commencement and Duration of Undertakings**

### **1.1 Commencement**

These Undertakings come into effect when:

- (a) these Undertakings are executed by the Asciano Director; and
- (b) the Commission accepts these Undertakings so executed.

## 1.2 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.

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## 2. Undertakings and Acknowledgement

### 2.1 Undertakings

- (a) Subject to clause 2.1(c), the Asciano Director undertakes to resign immediately as a director of Asciano and from any other position with Asciano if the Asciano Director is not an Independent Asciano Person.
- (b) After resignation by reason of clause 2.1(a), the Asciano Director will take no further part, in any capacity whatsoever, in the operation of Asciano until the termination of these Undertakings.
- (c) If the Asciano Director is a Relative of a person who is not an Independent Asciano Person by reason of that person acquiring a Toll Share Interest, the Asciano Director will resign within 21 days of that person acquiring that interest, unless the person disposes of the Toll Share Interest within those 21 days.

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## 3. Auditor

The Asciano Director 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.

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## 4. Further Information

- (a) At the Commission's direction, the Asciano Director will:
  - (i) furnish information to the Commission;
  - (ii) produce documents to the Commission in relation to which the Asciano Director 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 the Asciano Director'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.

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## 5. Acknowledgement

The Asciano Director acknowledges that the Commission may:

- (a) make these Undertakings available for public inspection; and



- (b) from time to time publicly refer to these Undertakings.

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## 6. Definitions and interpretation

### 6.1 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 the 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-1-1; 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 Director** means [NAME]

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

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

**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.

## 6.2 Interpretation

- (a) In these Undertakings:
  - (i) a reference to "**these Undertakings**" is a reference to all the provisions of this document, including Attachment G-1-1;
  - (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 6.2(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 its obligations under these Undertakings, the Asciano Director will do everything reasonably within the Asciano Director's power to ensure that the Asciano Director's performance of those obligations is done in a manner which is consistent with promoting the purpose and object of these Undertakings.

Signed by [NAME] in the presence of:

|

\_\_\_\_\_  
 (Signature of Witness)

\_\_\_\_\_  
 (Signature of [Name])

\_\_\_\_\_  
 (Name of Witness)

\_\_\_\_\_  
 Date of Execution by [Name]

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

\_\_\_\_\_  
**Graeme Julian Samuel**  
 Chairman

\_\_\_\_\_  
 Date

**Attachment G-1-1**

**Asciano Assets**

The following Toll Group businesses:

	<b>Business description</b>	<b>Principal corporate entities comprising the business</b>	<b>Organisation chart reference</b>
1.	The Patrick Corporation Limited (" <b>Patrick</b> ") 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 (" <b>Pacific National</b> "), 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 Westernport 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

	<b>Business description</b>	<b>Principal corporate entities comprising the business</b>	<b>Organisation chart reference</b>
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

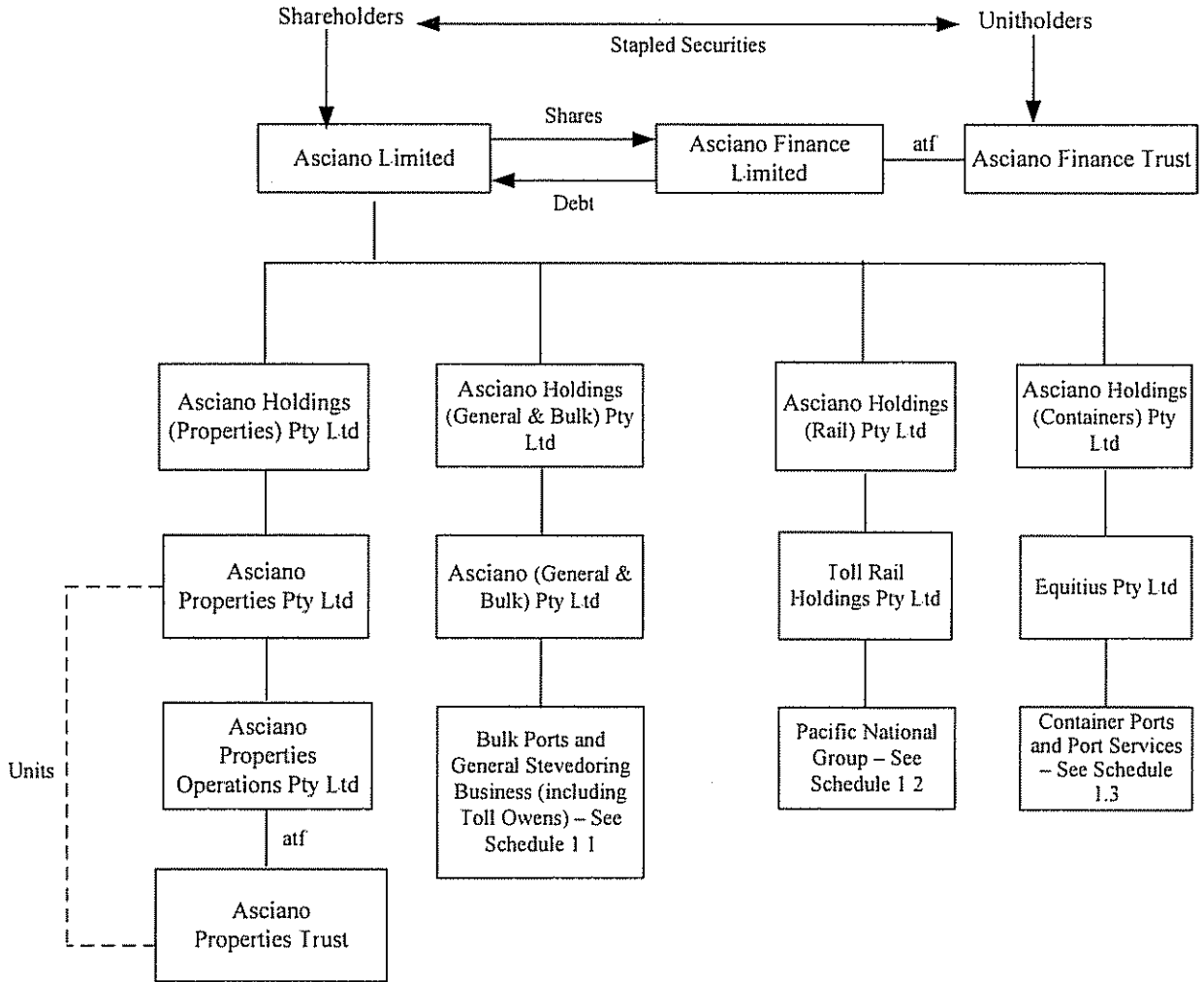
Toll Group interests in the following joint ventures:

	<b>Entity</b>	<b>Business description</b>	<b>Organisation chart reference</b>
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

	<b>Entity</b>	<b>Business description</b>	<b>Organisation chart reference</b>
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

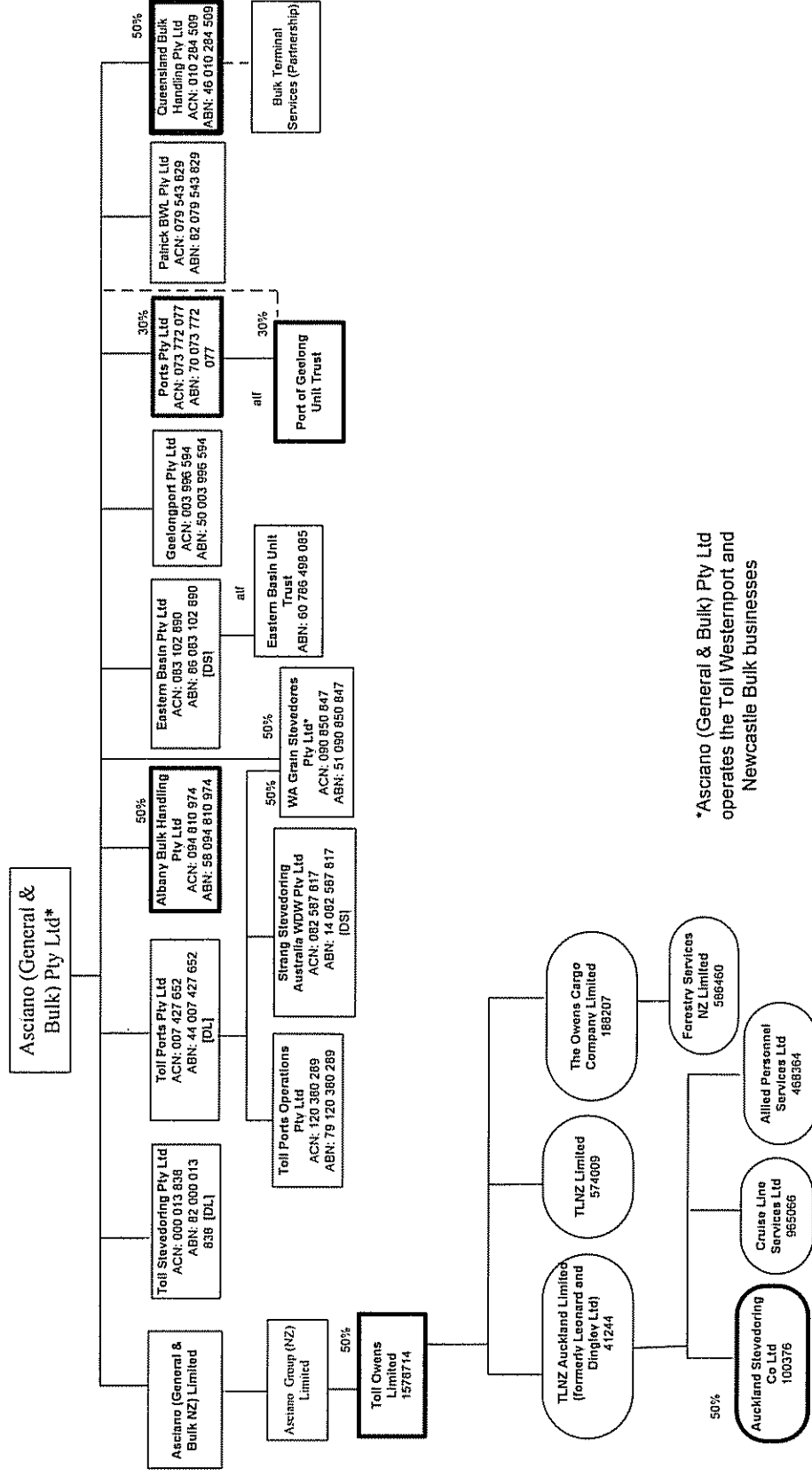


Schedule 1  
Infrastructure Co Post Settlement



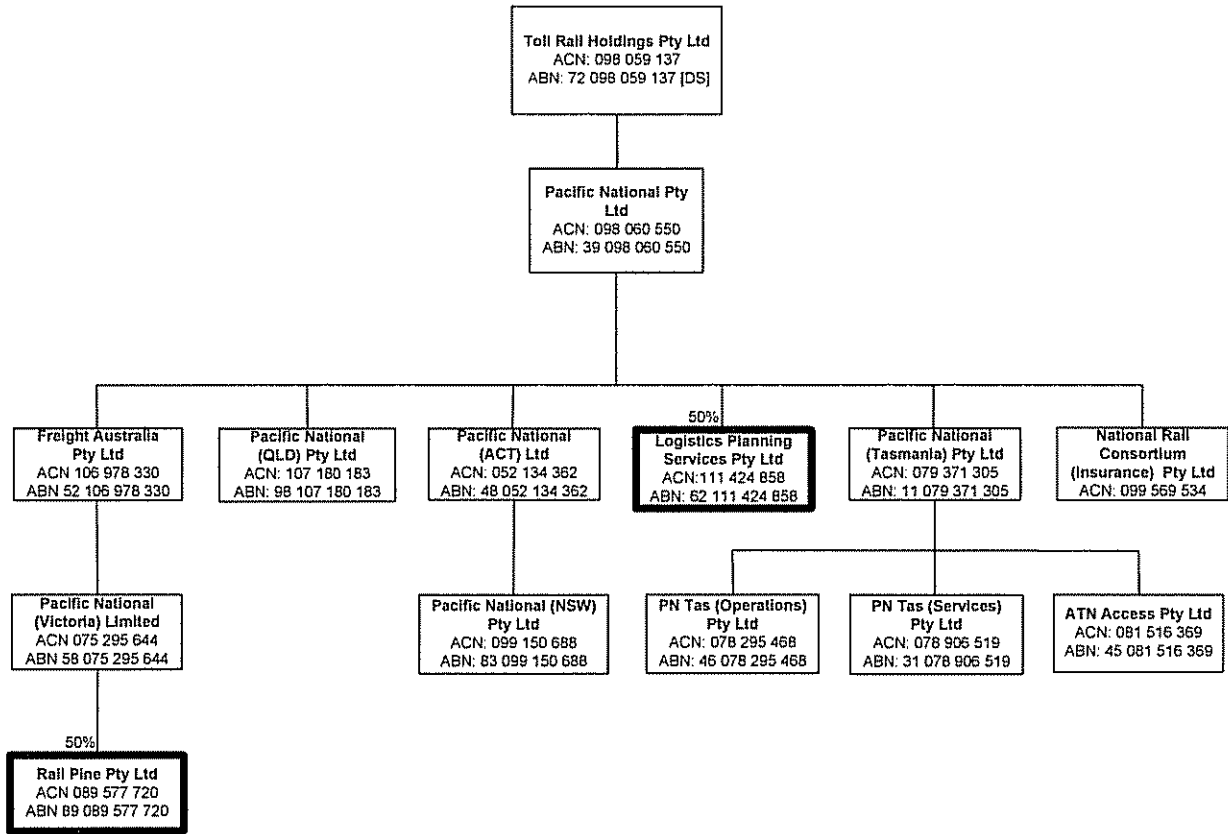
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Schedule 1.1  
General and Bulk



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

## Schedule 1.2 Pacific National Group



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## Schedule G-2

### 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.

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## **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.

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## 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 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 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 of that person acquiring that interest, unless the person disposes of the Toll Share Interest within those 21 days.

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## 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.



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## 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.

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## 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.

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## 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.

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## 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:

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(Signature of Witness)

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(Name of Witness)

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Date of Execution by Mr Mark Rowsthorn

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(Signature of Mark Rowsthorn)

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

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**Graeme Julian Samuel**  
Chairman

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Date

## Attachment G-2-1

### Asciano Assets

The following Toll Group businesses:

	<b>Business description</b>	<b>Principal corporate entities comprising the business</b>	<b>Organisation chart reference</b>
1.	The Patrick Corporation Limited (" <b>Patrick</b> ") 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 (" <b>Pacific National</b> "), 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 Westernport 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

	<b>Business description</b>	<b>Principal corporate entities comprising the business</b>	<b>Organisation chart reference</b>
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

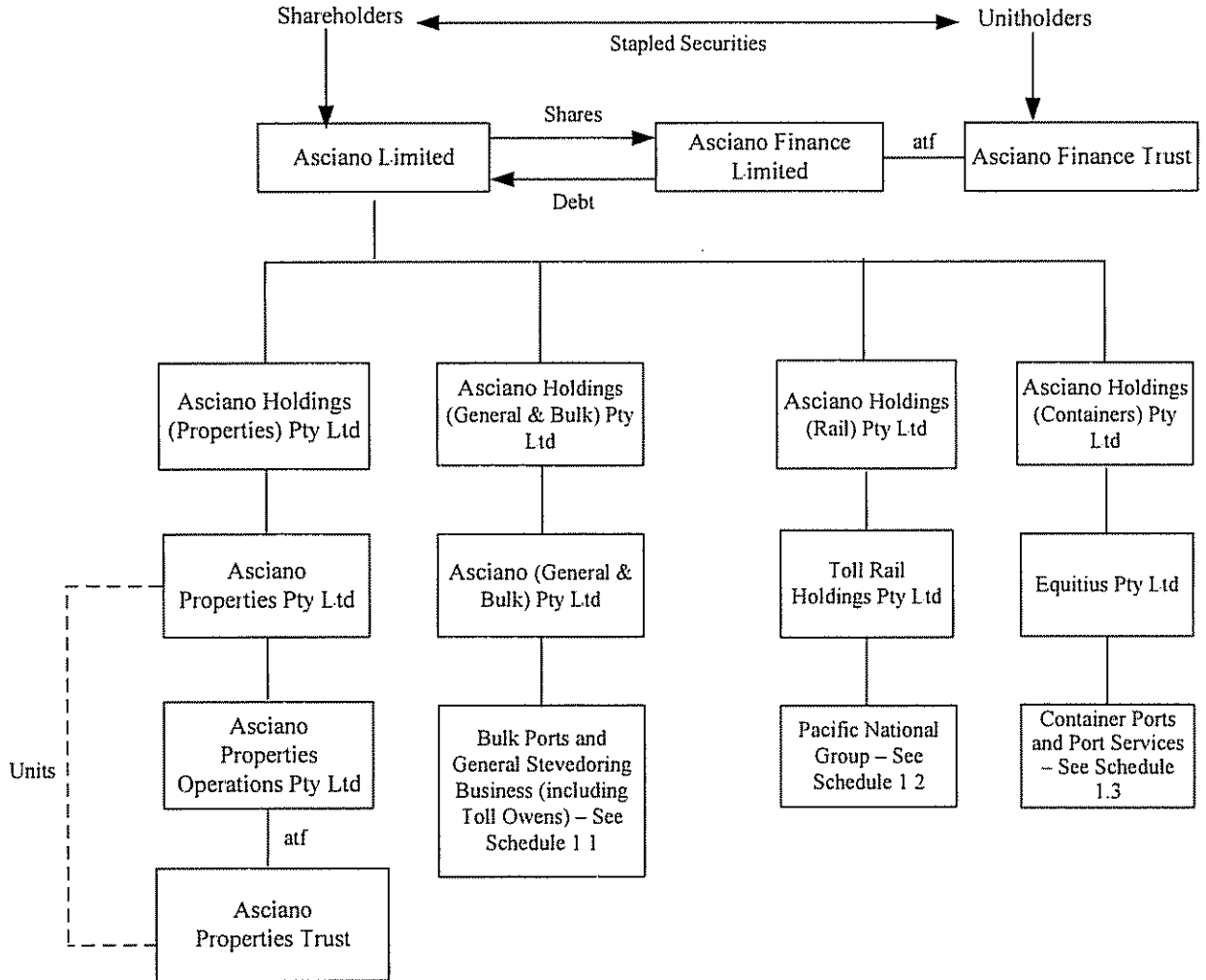
Toll Group interests in the following joint ventures:

	<b>Entity</b>	<b>Business description</b>	<b>Organisation chart reference</b>
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



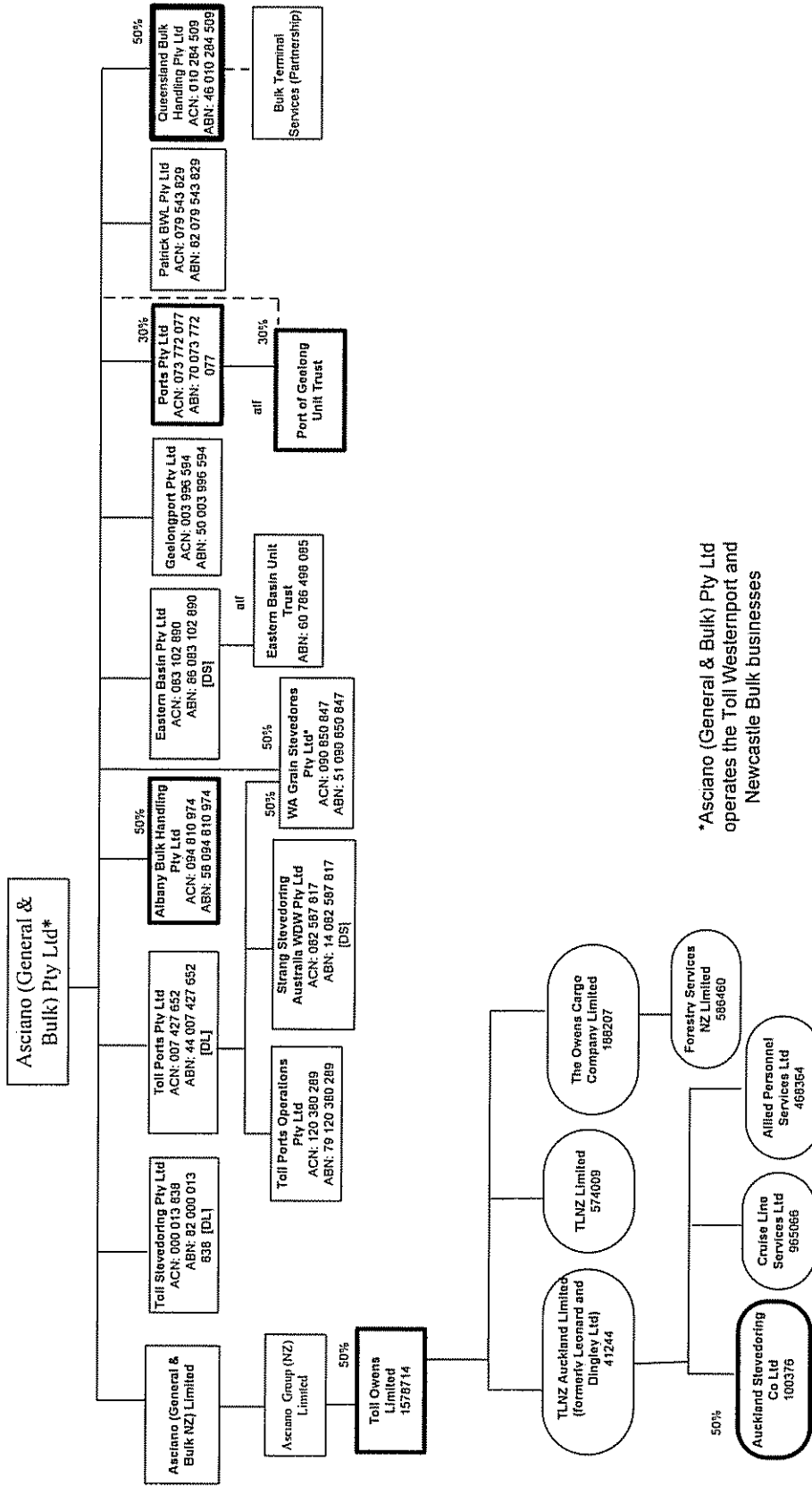
	<b>Entity</b>	<b>Business description</b>	<b>Organisation chart reference</b>
9.	Toll Owens Limited 1578714	Provides services including log and general cargo marshalling, inventory management, storage, consolidation and container handling at the Port of Tauranga and other ports in New Zealand.	Schedule 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



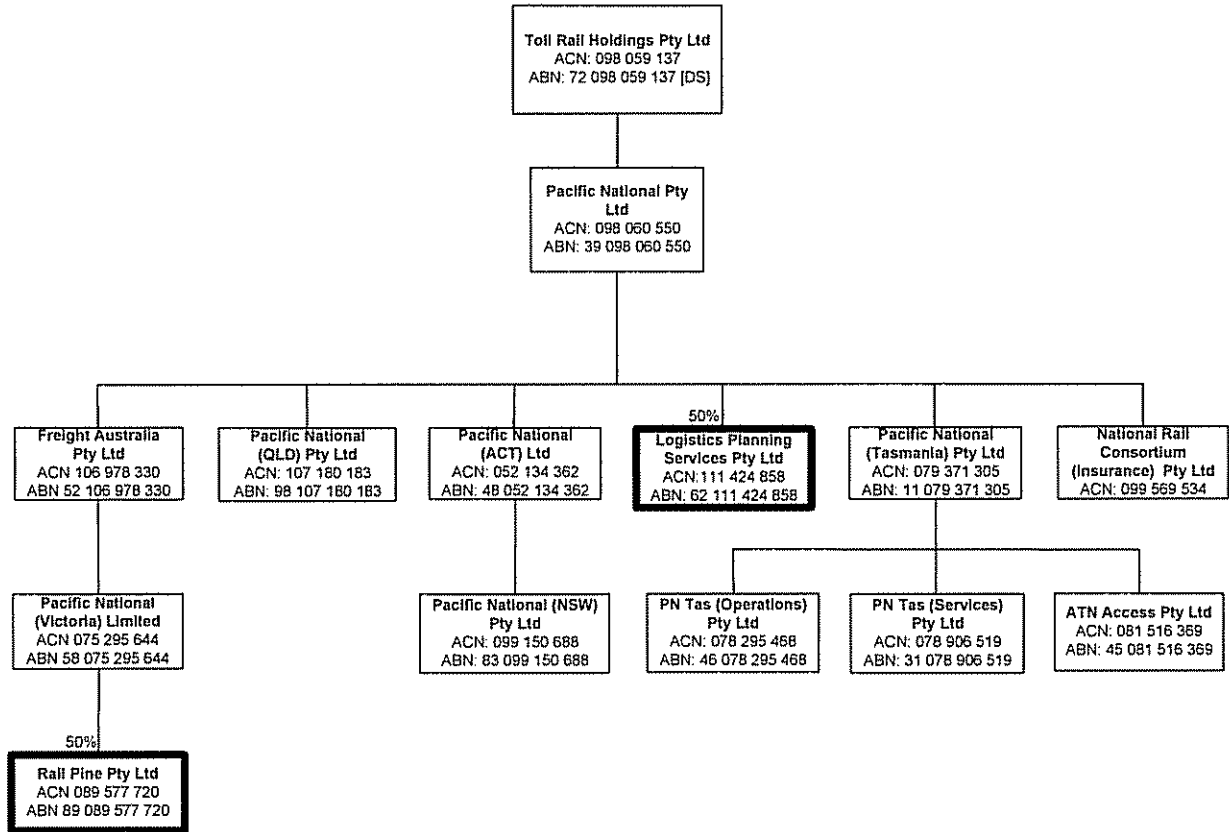
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Schedule 1.1  
General and Bulk



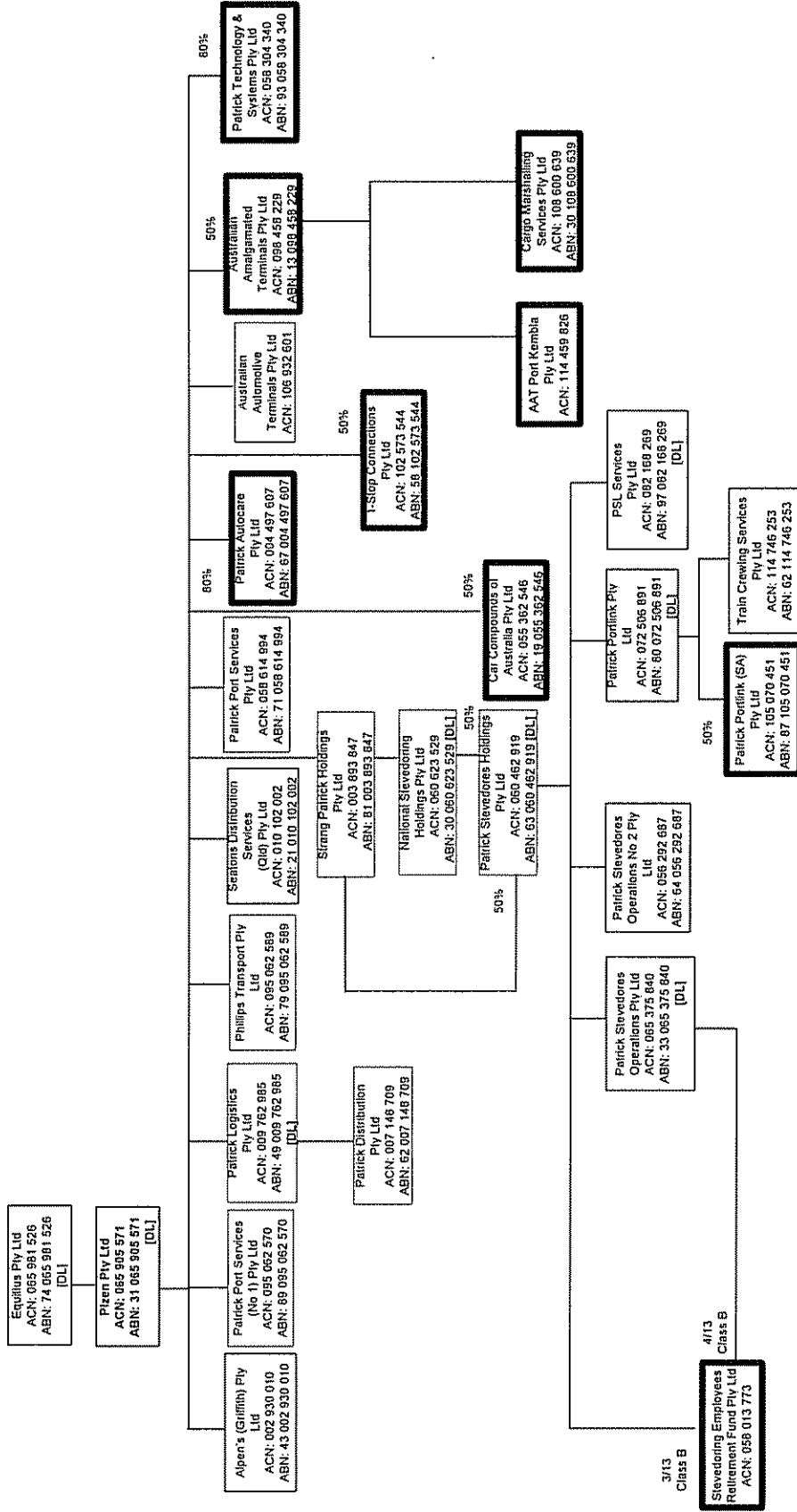
\*Asciano (General & Bulk) Pty Ltd operates the Toll Westernport and Newcastle Bulk businesses

## Schedule 1.2 Pacific National Group



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Schedule 1.3  
Container Ports and Port Services – Equitius Group



## Schedule G-3

### (Extract from Toll's Undertakings)

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#### 2.1(c) Divestments

Subject to clauses 1.1, 1.3 and 2.6, Toll undertakes to the Commission, that upon the occurrence of the Trigger Date, Toll will:

- (c) procure Pacific National to lease or make available the East-West Rail Assets in accordance with the process set out in clauses 2.1 and 8.

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#### 8. Divestment of Rail Assets

##### 8.1 East West Rail Assets

Subject to clause 2.6, upon a request made to Toll by or on behalf of a prospective Operator prior to, or within 12 months after, the Trigger Date, Toll undertakes to cause Pacific National to make available or relinquish to an Operator or Operators, in accordance with this clause 8, any or all of the following rights and assets, which collectively form the "**East-West Rail Assets**":

- (a) the Rolling Stock;
- (b) the Ancillary Services;
- (c) the Terminal Access; and
- (d) the Selected Train Paths.

The East-West Rail Assets referred to in (a) to (c) are to be made available for the Start Up Period while the Selected Train Paths are to be relinquished as provided in clause 8.2.

##### 8.2 Selected Train Paths

- (a) Toll undertakes to procure that, in accordance with these Undertakings, Pacific National relinquish all such rights that it may have to the "**Selected Train Paths**" which consist of:
  - (i) up to 5 return train paths per calendar week (on separate days) on the East-West Corridor:
    - A. as determined by clause 8.7(i); or
    - B. as determined by the Leasing Agent pursuant to clause 8.9(a), respectively in order that they may be allocated by ARTC to an Operator; and
  - (ii) corresponding rights to:
    - A. operate the relevant connecting train paths in Western Australia under the control of WestNet Rail Pty Ltd; and

- B. (if a Perth/Sydney path is requested by an Operator), operate the relevant connecting train paths under the control of the Rail Infrastructure Corporation and Rail Corporation of New South Wales, as the case may be.
- (b) As the Selected Train Paths can only be allocated to an Operator by the relevant track operator Toll will, in accordance with the process set out in clauses 8.6 to 8.11, cause Pacific National to:
  - (i) relinquish the Selected Train Paths to the relevant track operator; and
  - (ii) use its best endeavours to procure the consent of the relevant track operator to the relinquishment of those rights and the granting of the Selected Train Paths to an Operator, as soon as practicable after nomination by an Operator, and will comply with all reasonable requirements necessary to do so, including providing all necessary information and assistance promptly to the relevant track operator and an Operator.
- (c) Toll's obligations under this clause 8.2 are subject to Pacific National having been allocated by ARTC on or after 1 July 2006 at least 5 weekly return train paths which can be relinquished under clause 8.2(a).
- (d) If, following any agreement between Pacific National and ARTC relating to the contracted train path entitlements granted to Pacific National on the East-West corridor, an Operator or Operators have been allocated train paths on that corridor by the ARTC, Toll may request and the Commission may consent, acting in good faith and in its discretion, that the number of Selected Train Paths which Pacific National is required to relinquish under these Undertakings is reduced. The decision of the Commission under this clause must be consistent with the object of promoting competition for intermodal rail line-haul services on the East-West corridor. In the event that the Commission does not grant Toll's request the Commission will provide Toll with a written explanation of its reasons. Toll undertakes not to object to or otherwise challenge the Commission's decision.

### 8.3 Rolling Stock

- (a) Toll undertakes to procure that, in accordance with these Undertakings, Pacific National make available, the "**Rolling Stock**" which consists of up to:
  - (i) 12 "NR Class" locomotives or a combination of up to 3 "NR Class" and up to 9 "G Class" locomotives ("**Selected Locomotives**"), and
  - (ii) sufficient Wagons to make up three train sets up to the maximum length permitted by the track operators on the East-West Corridor.
- (b) The Rolling Stock referred to in clause 8.3(a) may be either purchased or leased at the option of the Selected Bidder. The Rolling Stock must be in good order and condition and, where appropriate, suitable for double-stacking.
- (c) Prior to purchase or lease of the Rolling Stock, Toll will cause Pacific National to carry out, at Toll's expense and within a reasonable period identified by the Leasing Agent, any improvements to the Rolling Stock reasonably identified by the Leasing Agent in its sole discretion or, at Toll's election, substitute alternative Rolling Stock which does comply with clause 8.3(b).

- (d) An Operator may lease the Rolling Stock for the Start Up Period and has the option, at the end of the Start Up Period, by at least 12 months prior written notice to Pacific National, to extend the term of the lease for a further period of 12 months on the same terms and conditions, save that the lease payments will be adjusted during that further period to reflect the then current market value of the Rolling Stock lease, as determined by the Leasing Agent (acting as an expert).

#### 8.4 Ancillary services

Toll undertakes to procure that, in accordance with these Undertakings, Pacific National provide the following "**Ancillary Services**" during the Start Up Period in relation to rail services on the East-West Corridor, for the operation of the Rolling Stock made available to an Operator as specified in the Final Agreement, at fair market rates and otherwise on reasonable commercial terms as agreed:

- (a) crewing;
- (b) fuelling;
- (c) provisioning; and
- (d) maintenance.

#### 8.5 Terminal Access

- (a) Within 30 days of the Trigger Date, Toll will procure that Pacific National:
  - (i) gives notices of termination or surrender of all of its rights and interests under the lease ("**Dynon Lease**") of the Dynon Terminal with Victoria Rail Track Corporation ("**VicTrack**"), the licence for use of Lot 75 at the Dynon Terminal, and the leases or licences for the Selected Tracks and Land east of the Dynon Terminal in accordance with the terms of the lease and licence held by Pacific National;
  - (ii) thereafter, comply with the make good obligations on termination contained in the Dynon Lease;
  - (iii) appoint the Leasing Agent to continue negotiations with VicTrack on behalf of Pacific National, in the event the surrender is not completed within 90 days of Pacific National's notice, and Toll will procure that Pacific National executes and provides a power of attorney in favour of the Leasing Agent that grants the Leasing Agent all rights and powers necessary to permit the Leasing Agent to:
    - A. operate and/or control the Dynon Terminal; and
    - B. effect the surrender of the Dynon Terminal referred to in clause 8.5(a)(i) on terms satisfactory to VicTrack that the Leasing Agent determines to be fair and reasonable between the parties.
- (b) Toll undertakes to procure that, in accordance with these Undertakings, Pacific National provides "**Terminal Access**" to an Operator during the Start Up Period, to either or both the South Dynon Terminal and the Chullora Terminal (at the election of the Operator) sufficient to accommodate 5 East-West Corridor services per week, including, without limitation, the Selected Train Paths which



consists of providing access for the purpose of loading and unloading trains, storage and all necessary ancillary activities.

(c) For the purposes of this clause 8.5:

(i) **Selected Tracks** is defined as the following rail tracks shown on the map at Annexure E to the Undertakings:

- A. the rail track from co-ordinate A (at easting co-ordinate 2493848.30 and northing co-ordinate 2410991.96) to co-ordinate B (at easting co-ordinate 2494297.77 and northing co-ordinate 2410917.85);
- B. the rail track from co-ordinate C (at easting co-ordinate 2494295.40 and northing co-ordinate 2410914.23) to co-ordinate D (a "toe of points" where one track splits into two separate tracks) (at easting co-ordinate 2494318.56 and northing co-ordinate 2410892.85);
- C. the rail track from co-ordinate D (at easting co-ordinate 2494318.56 and northing co-ordinate 2410892.85) to co-ordinate E (at easting co-ordinate 2494935.30 and northing co-ordinate 2410252.62);
- D. the rail track from co-ordinate D (at easting co-ordinate 2494318.56 and northing co-ordinate 2410892.85) to co-ordinate F (at easting co-ordinate 2494932.36 and northing co-ordinate 2410249.00); and
- E. the rail track from co-ordinate G (at easting co-ordinate 2494803.89 and northing co-ordinate 2410362.10) to co-ordinate H (at easting co-ordinate 2494933.84 and northing co-ordinate 2410242.14).

The rail tracks from co-ordinates D to E and D to F are commonly known as the 'disconnected outside goods lines'. The co-ordinates referred to in this clause are co-ordinates used in the "VicGrid Datum GDA94" map projection system, which, for the removal of doubt, is the same map system used by VicTrack to plot co-ordinates on maps of the primary infrastructure leases in the Dynon Terminals Precinct.

(ii) **Land** is defined as:

- A. the Selected Tracks defined in this clause;
- B. the land surrounding the Selected Tracks, up to 3 metres on either side of the middle of the Selected Tracks;
- C. where the land surrounding the Selected Tracks suitable for the upkeep and maintenance of the Selected Tracks is less than 3 metres, all land necessary for the proper upkeep and maintenance of the tracks.

## 8.6 Process for seeking Proposals

(a) On or before **11 October 2006**, Toll will write to all the parties from whom Toll has, by that date, received requests to take up East-West Rail Assets and ask

those parties, by on or before **18 October 2006** to reconfirm their interest in the East-West Rail Assets.

- (b) On or before **25 October 2006**, Toll will distribute information to all Bidders, that will include (but not be limited to) a description of the process for the selection of an Operator and the making available of the East-West Rail Assets under these Undertakings.
- (c) Toll will ask Bidders to submit, on or before **25 November 2006**, proposals ("**Proposal**") to take up the East-West Rail Assets in response to the information referred to in clause 8.6(b), and such information as the Bidder considers relevant as to why the Commission should not object to the Bidder, pursuant to clause 8.10(c).
- (d) For the avoidance of doubt nothing in this clause 8.6 precludes another prospective Operator lodging a Proposal to take up the East-West Rail Assets within the time frame specified within this clause 8.6.

## **8.7 Selection of Bidder and Negotiation**

- (a) By no later than the Nomination Date, Toll must select and notify a Bidder ("**Selected Bidder**") and provide the Commission with a copy of the Proposal and information received from that Bidder under clause 8.6(c).
- (b) By 45 days after the Nomination Date, or, if clause 8.8(a) applies, by 45 days after the Leasing Agent's selection of a Selected Bidder under that clause, ("**Contract Date**"), Toll will use its best endeavours to procure that Pacific National execute a Final Agreement with the Selected Bidder which is materially consistent with the Selected Bidder's Proposal, and this clause 8, and on terms that it will be null and void, if objected to by the Commission under clause 8.10.
- (c) If, after the Nomination Date, the Selected Bidder materially changes its Proposal, or requests a Final Agreement which is not materially consistent with its Proposal, Toll may, by notice given to the Selected Bidder and copied to the Commission within 45 days of the Nomination Date, (and subject to clause 8.7(d)), terminate negotiations with that Selected Bidder.
- (d) If a Selected Bidder disputes Toll's notice of termination of negotiations under clause 8.7(c), the Selected Bidder may, within 2 Business Days of Toll's notice, request the Leasing Agent to determine, within five Business Days of request, (acting as an expert and not as an arbitrator) whether Toll, under clause 8.7(c), validly gave notice terminating the negotiations with that Selected Bidder. Each of Toll and the Selected Bidder are bound by the determination of the Leasing Agent under this clause as being final and binding. If the Leasing Agent determines that Toll validly gave notice, that party ceases to be the "**Selected Bidder**" and Toll must select and notify another Bidder within 5 Business Days of the Leasing Agent's determination, and thereafter comply with these undertakings in relation to that second Bidder as if it was the "**Selected Bidder**". (In this event, the "**Nomination Date**", in relation to the new Selected Bidder, will be deemed to be the date on which that Selected Bidder is notified by Toll under this paragraph).
- (e) If the Selected Bidder fails to dispute Toll's notice in accordance with clause 8.7(d), Toll must select and notify another Bidder within 7 Business Days of Toll's notice of termination of negotiation referred to in clause 8.7(c) and thereafter comply with these undertakings in relation to that second Bidder as if it was the "**Selected Bidder**". (In this event, the "**Nomination Date**", in relation to

the new Selected Bidder, will be deemed to be the date on which that Selected Bidder is notified by Toll under this paragraph.)

- (f) If the Leasing Agent determines, under clause 8.7(d), that Toll did not give valid notice of termination of negotiations with the Selected Bidder under clause 8.7(c), Toll must promptly resume negotiations with that Selected Bidder in respect of the Final Agreement, provided that the period referred to in clause 8.7(b), (and definition of "**Contract Date**") by which Toll must procure execution of the Final Agreement by Pacific National with that Selected Bidder, will be extended by the number of days between the date of Toll's notice under clause 8.7(c) and the date of the determination of the Leasing Agent under clause 8.7(d).
- (g) In the event that the Selected Bidder decides to withdraw its Proposal to take up the relevant East-West Rail Assets, Toll must:
  - (i) notify the Commission within 2 Business Days and provide details of the relevant East-West Rail Assets relating to the withdrawn Proposal;
  - (ii) select and notify another Bidder within 5 Business Days of the Selected Bidder withdrawing its Proposal and thereafter comply with these undertakings in relation to that second Bidder as if it was the "**Selected Bidder**". (In this event, the "**Nomination Date**", in relation to the new Selected Bidder, will be deemed to be the date on which that Selected Bidder is notified by Toll under this paragraph).
- (h) The East-West Rail Assets are to be offered on commercial, arms length terms and at fair market value (save for the Selected Train Paths which are to be relinquished without consideration).
- (i) In respect of the composition of the Selected Train Paths, Toll will relinquish without objection and in accordance with clause 8.2, the first three train paths nominated by the Selected Bidder, and in the case of the fourth and fifth train paths, Toll has the right, within 5 Business Days of the Selected Bidder's nomination, to nominate substitute train paths having similar qualities and features as those requested by the Selected Bidder ("**Substitute Paths**").
- (j) The Final Agreement must also provide that the East-West Rail Assets must be made available to the Operator (or in the case of the Selected Train Paths, relinquished by Pacific National) within 30 days after the Commission approves the Final Agreement or such other period as agreed by the Commission to be no later than 6 months after the Commission approves the Final Agreement.

## 8.8 Leasing Agent determination

- (a) If, on or before the Nomination Date, Toll has not notified the Commission of a Selected Bidder, Toll must, within 2 Business Days of the Nomination Date, instruct the Leasing Agent (and notify the Commission that it has instructed the Leasing Agent), to select within 30 days, a Bidder to be the Selected Bidder. The Leasing Agent, following consultation with Toll, must select the Selected Bidder whose request under clause 8.1 or Proposal for the East-West Rail Assets is, in the opinion of the Leasing Agent, consistent with the requirements of this clause 8 and is closest to the fair market value (save for the Selected Train Paths which are to be relinquished without consideration) of the East-West Rail Assets (as assessed by the Leasing Agent in its reasonable opinion).

- (b) If, by the Contract Date, Toll has not caused Pacific National to execute with the Selected Bidder a Final Agreement, Toll must within 2 Business Days of the Contract Date instruct the Leasing Agent (acting as an expert and not an arbitrator), to determine, in accordance with clause 8.9, any outstanding terms and conditions necessary to finalise a Final Agreement acceptable to the Selected Bidder, which are materially consistent with the Selected Bidder's Proposal and these Undertakings, on a basis which is fair and commercial and at arms length. Subject to clause 8.8(d), the decisions of the Leasing Agent will be final and binding on Toll, Pacific National and the Selected Bidder.
- (c) Toll undertakes that it will cause Pacific National to execute and deliver to the Selected Bidder a Final Agreement reflecting the terms determined by the Leasing Agent under clause 8.8(b) within 5 Business Days of the Leasing Agent's determination.
- (d) Toll will require that a Selected Bidder execute the Process Deed under which the Selected Bidder unconditionally accepts and agrees that the Leasing Agent's decisions made under this clause 8 will be final and binding on Toll, Pacific National and the Selected Bidder, **provided that**, to the extent that the Selected Bidder is dissatisfied with a relevant decision of the Leasing Agent made under clause 8 and notifies Toll in writing within seven days of the Leasing Agent's decision, Toll will permit the Selected Bidder to withdraw its Proposal to take up the relevant East-West Rail Assets.
- (e) In the event that the Selected Bidder decides to withdraw its Proposal to take up the relevant East-West Rail Assets under clause 8.8(d), Toll must:
  - (i) notify the Commission within 2 Business Days and provide details of the relevant East-West Rail Assets relating to the withdrawn Proposal; and
  - (ii) select and notify another Bidder within 5 Business Days of the Selected Bidder withdrawing its Proposal and thereafter comply with these undertakings in relation to that second Bidder as if it was the "**Selected Bidder**". (In this event, the "**Nomination Date**", in relation to the new Selected Bidder, will be deemed to be the date on which that Selected Bidder is notified by Toll under this paragraph).
- (f) In the event that the Selected Bidder elects, under clause 8.8(d), to withdraw the Proposal to take up certain East-West Rail Assets but wishes to take up other East-West Rail Assets (on terms agreed with Toll or determined by the Leasing Agent), Toll will cause Pacific National to execute and deliver to the Selected Bidder a Final Agreement reflecting the revised terms as soon as reasonably practicable.
- (g) If an Operator leases the Rolling Stock and exercises the option to extend the lease term by 12 months from the end of the Start Up Period, and Toll and the Operator have not agreed the lease payments for that further period at least 120 days prior to end of the Start Up Period, Toll must instruct the Leasing Agent (acting as an expert) to determine the lease payments in accordance with 8.3(d).

## 8.9 Process of determination of disputes as to terms and conditions

If, by the Contract Date, clause 8.8(b) applies, Toll must instruct the Leasing Agent to proceed as follows:

- (a) where the Selected Bidder has not agreed to accept the Substitute Paths, Toll or the Selected Bidder must instruct the Leasing Agent to determine, within 30 days

of the Contract Date, which of these alternative sets of train path options is to be relinquished by Pacific National in accordance with the following process. The Leasing Agent will determine, acting as an expert and not an arbitrator (whose decision will be final and binding on Toll, Pacific National and the Selected Bidder), that the Selected Bidder's original nominated paths must be relinquished by Pacific National unless the Leasing Agent determines that the Substitute Paths have similar qualities and features to the train paths nominated by the Selected Bidder, having regard to the:

- (i) commercial attractiveness;
- (ii) similarity of arrival and departure times; and
- (iii) the day of the week,

of those train paths;

- (b) where the purchase or lease terms and conditions, including lease payments, of the Rolling Stock have not been agreed between Toll and the Selected Bidder, these terms and conditions are to be determined by the Leasing Agent, in its sole discretion, within 30 days of the Contract Date, after consultation with Toll and the Selected Bidder. The Leasing Agent must obtain an independent valuation of the Rolling Stock by a suitably qualified valuer appointed by the Leasing Agent. The Leasing Agent will use the valuation report as the basis on which the Leasing Agent will determine the leasing payments or sale price for the Rolling Stock as the case may require. The Leasing Agent's determination of the purchase price or lease terms and conditions including the lease payments for the Rolling Stock will be final and binding;
- (c) where the terms and conditions on which the Ancillary Services requested by the Selected Bidder are to be made available have not been agreed between Toll and the Selected Bidder, the Leasing Agent (acting as an expert) must within 45 days of the Contract Date, determine those terms and conditions; and
- (d) where the terms and conditions of Terminal Access have not been agreed, the Leasing Agent will within a period of 60 days of the Contract Date and acting as an expert and not an arbitrator (whose decision will be final and binding on Toll), determine the terms and conditions of Terminal Access after consultation with Toll and the Selected Bidder, having regard to the terms and conditions of access to terminals provided for under the Victorian Rail Access Regime.

## **8.10 Commission approval of Selected Bidder and Final Agreement**

- (a) Toll will provide the Commission with a copy of the Final Agreement within 2 Business Days of execution, and must ensure that the Final Agreement is to be conditional on the Commission not objecting to the Final Agreement pursuant to clause 8.10(c).
- (b) Together with the Final Agreement Toll will provide the Commission with the following information and such other information that the Commission reasonably requires:
  - (i) the name, address and all other available contact details of the Selected Bidder;
  - (ii) a description of the business carried on in Australia by the Selected Bidder; and

- (iii) the names of the ultimate holding company and directors of the Selected Bidder.
- (c) Within 15 Business Days of receipt of the Final Agreement pursuant to clause 8.10(a), the Commission may object to the Final Agreement on the basis that:
- (i) it has formed the opinion that provision of the East-West Rail Assets to the Selected Bidder as specified in the Final Agreement is likely to result in a substantial lessening of competition in a market in Australia when compared to the likely competition in that market in the absence of the Proposed Acquisition; or
  - (ii) in the Commission's opinion the Selected Bidder's expertise or financial resources to purchase or lease and conduct the East-West Rail Assets are inadequate; or
  - (iii) in the Commission's opinion the Selected Bidder is unlikely to be a vigorous and effective competitor in the provision of rail line haul services on the East-West Corridor,

and in that event, the Commission will provide Toll with a written explanation of its reasons and the material facts within 10 Business Days of making its decision, and Toll undertakes not to object to or otherwise challenge a decision by the Commission to object to the Final Agreement.

- (d) If the Commission does so object under clause 8.10(c), Toll must:-
- (i) advise the remaining Bidders within 5 Business Days of the Commission's objection and request those Bidders or other prospective Operators who have provided Toll with a request under clause 8.1 to reconfirm or revise their requests under clause 8.1 or Proposals, as the case may be, within 10 Business Days of that advice;
  - (ii) select another Bidder, based on the revised or confirmed requests under clause 8.1 or Proposals received, and advise the Commission thereof in writing, within 30 days of receipt of those requests or Proposals, (such date being the new "**Nomination Date**") and
  - (iii) comply again with clauses 8.7 to 8.10, within corresponding time frames commencing at that Nomination Date.
- (e) If the Commission does not object to the Final Agreement within the time set out in clause 8.10(c), the Selected Bidder is an Operator.

## 8.11 Subsequent offer of Assets

- (a) If, following the process set out in clauses 8.7 to 8.10:
- (i) one Operator has agreed to take up only some of the rights comprising the East-West Rail Assets, leaving available the rights to any of the Rolling Stock and Ancillary Services for the operation of the Rolling Stock, Selected Train Paths, or Terminal Access (any of which are referred to as "**Remaining Rights**"), Toll undertakes, in the first 12 months after the Trigger Date, to seek further Proposals as provided herein from prospective Operators to take up the Remaining Rights, provided that the offer of the Remaining Rights will not increase Toll's

obligations under this clause 8 beyond those applicable if only one Operator had taken up all the East-West Rail Assets described herein; or

- (ii) if no Bidder has become an Operator, Toll undertakes, in the first 12 months after the Trigger Date, to seek further Proposals from prospective Operators to take up the East-West Rail Assets as provided herein.
- (b) If clause 8.11 (a)(i) or (ii) applies, Toll will:
- (i) in the case of clause 8.11(a)(i), within 10 Business Days of the date on which the Commission has not objected to the Final Agreement with the Selected Bidder; and
  - (ii) in the case of clause 8.11(a)(ii), within 10 Business Days of the date on which the Commission and Toll acting reasonably agree that the process in 8.7 to 8.10 has been exhausted,

publish details in appropriate publications offering the Remaining Rights or East-West Rail Assets (as the case may require) and inviting prospective Operators to submit requests under clause 8.1 within 15 days of the date of publication to take up the Remaining Rights or East-West Rail Assets referred to.

- (c) Toll will within 3 Business Days of receiving a request from a Bidder under clause 8.1 provide that Bidder with the information referred to clause 8.6(b) and will invite the Bidder to submit, within 30 days of receiving the information referred to in clause 8.6(b), Proposals to take up the Remaining Rights or East-West Rail Assets (as the case may require).
- (d) If one or more Proposals to take up the Remaining Rights or East-West Rail Assets, is received by Toll within the timeframe referred to under clause 8.11(c), Toll will select another "Selected Bidder" for the Remaining Rights or East-West Rail Assets, and advise the Commission thereof in writing, within 30 days of receipt of that Bidder's Proposal, (such date being a further "Nomination Date" for the purposes of clauses 8.7 to 8.10 hereof), and
- (e) Toll must thereafter, comply with clauses 8.7 to 8.10 hereof in relation to the Remaining Rights or East-West Rail Assets within corresponding timeframes.

## 8.12 Leasing Agent

- (a) Toll will use its best endeavours to identify and conditionally appoint a Leasing Agent in accordance with this clause 8 to act as an independent facilitator of the arrangements contemplated by this clause 8, being a person:
  - (i) suitably qualified and experienced in the sale or leasing of rail assets and independent of Toll, Patrick and Pacific National; and
  - (ii) independent of and having no direct or indirect controlling interest in Toll, Patrick or Pacific National.
- (b) Toll undertakes and agrees that the terms of appointment of the Leasing Agent will include that in fulfilling the arrangements contemplated by this clause 8 the Leasing Agent is acting as an expert and not an arbitrator and all determinations and decisions of the Leasing Agent are made in its sole discretion.
- (c) Toll will provide the Leasing Agent with:

- (i) all relevant information available to Toll; and
- (ii) all reasonable assistance,

to enable the Leasing Agent to fulfil the arrangements contemplated by this clause 8 as quickly as possible.

- (d) Toll will execute a deed to indemnify the Leasing Agent against any loss and damage incurred by the Leasing Agent in the course of carrying out his or her functions in accordance with the terms of his or her appointment. Toll will promptly pay the costs of the Leasing Agent in the performance of his or her functions.

### **8.13 Commission may object to the Leasing Agent**

- (a) Within 5 Business Days of Toll identifying a proposed Leasing Agent, Toll will provide the Commission with the following information and such other information that the Commission reasonably requires to assess whether the proposed Leasing Agent satisfies the criteria set out in clause 8.12(a):
  - (i) the name, address and all other available contact details of the proposed Leasing Agent;
  - (ii) a copy of a signed or agreed conditional agreement proposed with the proposed Leasing Agent;
  - (iii) a description of the business carried on in Australia by the proposed Leasing Agent; and
  - (iv) the names of the ultimate holding company and directors of the proposed Leasing Agent.
- (b) If, within 20 Business Days of receipt of the information from Toll referred to in clause 8.13(a) (or such further period as Toll and the Commission may agree):
  - (i) the Commission does not object to the proposed Leasing Agent, Toll will use its best endeavours to execute an agreement with the proposed Leasing Agent substantially in the form of the conditional agreement referred to in clause 8.13(a)(ii), as soon as practicable after the Trigger Date; or
  - (ii) the Commission does object to the proposed Leasing Agent, Toll must within 30 days identify one or more alternative proposed Leasing Agent for consideration by the Commission pursuant to this clause 8.13.

### **8.14 Operator**

- (a) Unless the Commission requires otherwise, Toll must not permit Pacific National to lease or make available the East-West Rail Assets to a person other than an Operator.
- (b) An Operator of the East West Rail Assets must:
  - (i) be independent of and having no direct or indirect controlling interest in Toll, Patrick or Pacific National;



- (ii) be independent of any entity that acquires and must not itself acquire the PN Interest;
- (iii) be an entity whom Toll believes in good faith, having made reasonable inquiries, is of good financial standing and has an intention to operate the East-West Rail Assets as a going concern; and
- (iv) be a Selected Bidder with whom Toll has agreed a Final Agreement which has not been objected to by the Commission pursuant to this clause 8.

### **8.15 Divestment of PN Interest is subject to this clause**

For the avoidance of doubt, the divestment of the PN Interest will take place on terms that the purchaser assumes the same obligation as Toll assumes under clauses 8 and 9 (other than clause 8.12(d)).

### **8.16 Sales consents and Toll to cooperate**

- (a) Toll's obligation to procure necessary third party consents under clause 4.4 also applies in respect of the sale and leasing of the East-West Rail Assets.
- (b) Toll undertakes to cooperate fully with the Leasing Agent and to provide the Leasing Agent with such information and assistance as is necessary to enable the Leasing Agent to carry out his or her functions under these Undertakings."

### **8.17 Minto**

- (a) Toll will offer to sell, (and if that offer is accepted, will sell), and will cause Patrick to offer to sell, (and if that offer is accepted, will cause Patrick to sell), each of Toll's and Patrick's interest (with clear title) in the rail siding known as Lot 1 of DP 1021772 (the "Land") to the owners of Lot 2 of DP 1021772 known as the Macarthur Intermodal Shipping Terminal (the "MIST Owners"):
  - (i) with settlement by 15 September 2006 or such later date (not later than 15 October 2006) as the Commission specifies in writing;
  - (ii) at a price equal to the current market value of the Land determined by an independent valuer appointed by the President of the New South Wales Division of the Australian Property Institute Inc. ("API") pursuant to the letter of request dated on or about the date Toll executes this Variation and signed by Toll and the MIST Owners; and
  - (iii) subject to clause 8.17(a)(i) and 8.17(a)(ii) above, otherwise on the terms of the draft contract of sale provided to the MIST Owners by Toll's solicitors on 7 July 2006.
- (b) Toll will agree to any terms and conditions of appointment consistent with these Undertakings proposed by the independent valuer within 5 days of the independent valuer proposing those terms and conditions.
- (c) Toll will execute a deed in favour of API and the independent valuer indemnifying the API and the independent valuer against loss and damage incurred by the API or the independent valuer arising directly or indirectly from any claims by Toll or Patrick against the API or the independent valuer carrying out their functions in accordance with this clause, but for the avoidance of doubt, Toll is not obliged to provide any indemnity concerning any claims made by or

on behalf of the MIST Owners concerning the independent valuer or the API carrying out their functions.

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## **9.6 Hook & Pull Contract extension**

Toll will cause Pacific National to extend the current Hook & Pull Contract with SCT from its expiry on 13 October 2007 until the date on which the SCT Locomotives are available and operational and otherwise on the terms of the letter of agreement set out in Annexure D.

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## **9.7 ARTC Train Path Agreement**

Toll undertakes that it will cause Pacific National to:

- (a) waive and abandon its rights under clause 2.8 of the ARTC Track Access Agreement, insofar as they relate to the East-West Corridor; and
- (b) consent to ARTC exercising its discretion as ARTC sees fit to grant or renew train paths to Pacific National on the East-West Corridor on expiry of that Agreement on 30 June 2006.

**Schedule G-4**

**Asciano Assets**

The following Toll Group businesses:

	<b>Business description</b>	<b>Principal corporate entities comprising the business</b>	<b>Organisation chart reference</b>
1.	The Patrick Corporation Limited (" <b>Patrick</b> ") 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 (" <b>Pacific National</b> "), 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 Westernport 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

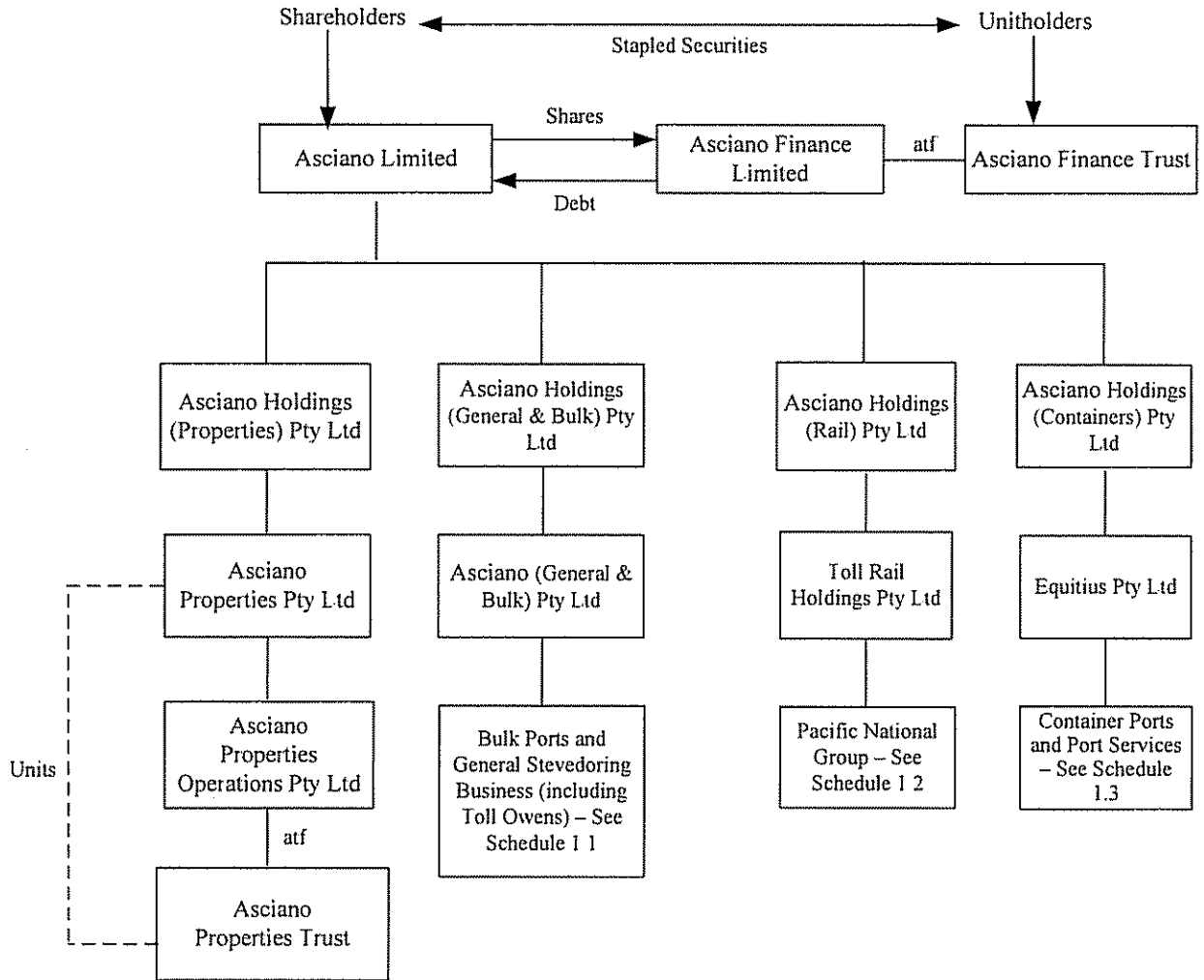
	<b>Business description</b>	<b>Principal corporate entities comprising the business</b>	<b>Organisation chart reference</b>
5.	Patrick's general stevedoring business conducted at Port Botany, Brisbane, Melbourne and Fremantle.	Patrick Stevedores Operations Pty Ltd ACN 065 375 840 Patrick Stevedores Operations 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:

	<b>Entity</b>	<b>Business description</b>	<b>Organisation chart reference</b>
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

	<b>Entity</b>	<b>Business description</b>	<b>Organisation chart reference</b>
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

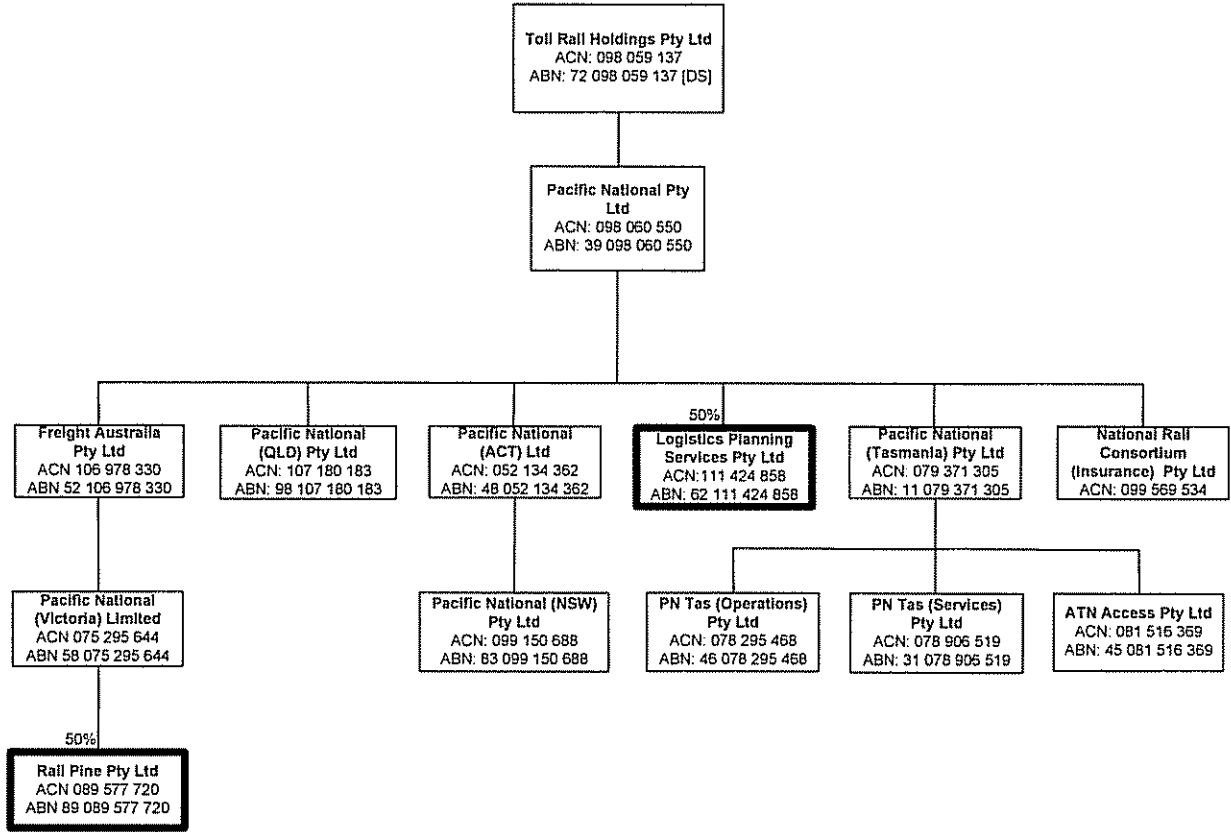
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Infrastructure Co Post Settlement



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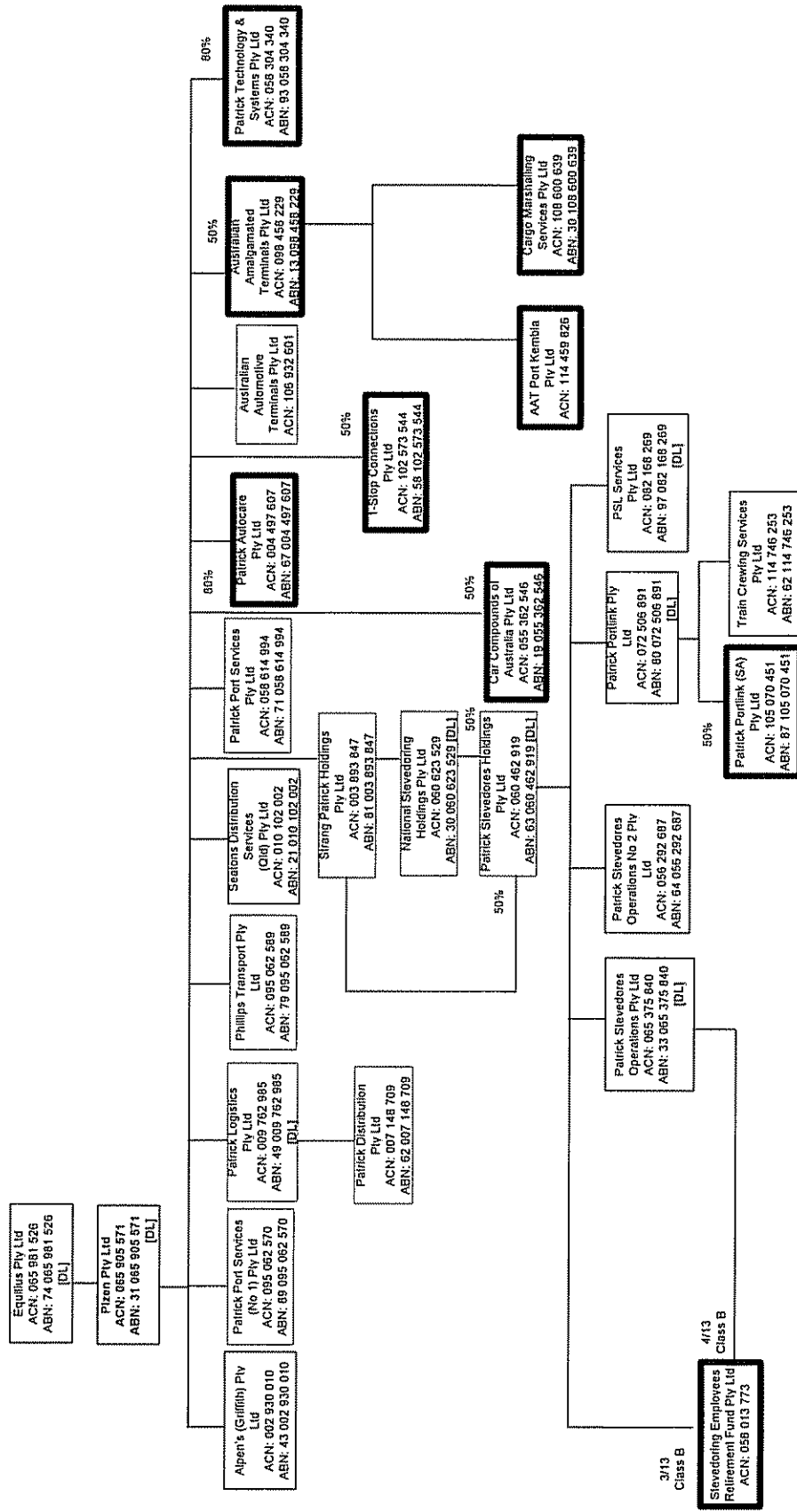
## Schedule 1.2 Pacific National Group



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## Schedule 1.3 Container Ports and Port Services – Equitius Group



## Annexure H

### Trade Practices Act 1974

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

by

[the Toll Director]

#### 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 Schedule H-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, 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. The Toll Director 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 the Toll Director. In accepting these Undertakings, the Commission has accepted assurances from the Toll Director that he or she 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 Mr Mark Rowsthorn, 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.

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## **1. Commencement and Duration of Undertakings**

### **1.1 Commencement**

These Undertakings come into effect when:

- (a) these Undertakings are executed by the Toll Director; and
- (b) the Commission accepts these Undertakings so executed.

## 1.2 Operation

- (a) Apart from clause 2.4, these Undertakings operate whilst the Toll Director is a director of Toll.
- (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.

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## 2. Undertakings and Acknowledgement

### 2.1 Interest Sell-Down

If, as at or from the Restructure Date, the Toll Director has any Asciano Share Interest or Asciano Asset Interest, the Toll Director will:

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

### 2.2 Relatives' Interest Sell-Down

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

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

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

## 2.3 No Acquisition of Asciano Interests

The Toll Director will:

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

## 2.4 Independent Toll Person

- (a) Subject to clause 2.4(c), the Toll Director will resign immediately as a director of Toll and from any other position with Toll if:
  - (i) the Toll Director is not an Independent Toll Person; or
  - (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), the Toll Director will take no further part, in any capacity whatsoever, in the operation of Toll until the termination of these Undertakings.
- (c) If the Toll Director is a Relative of a person who is not an Independent Toll Person by reason of that person acquiring an Asciano Share Interest, the Toll Director will resign within 21 days of that person acquiring that interest, unless the person disposes of the Asciano Share Interest within those 21 days.

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## 3. Auditor

The Toll Director 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 Toll's Undertakings.

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## 4. Further Information

- (a) At the Commission's direction, the Toll Director will:
  - (i) furnish information to the Commission;
  - (ii) produce documents to the Commission in relation to which the Toll Director 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 the Toll Director'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.

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## 5. Confidentiality

The time periods and figures referred in clauses 2.1, 2.2 and 7.1 and marked 'Confidential' are provided to the Commission on a confidential basis.

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## 6. Acknowledgement

Subject to clause 5, the Toll Director acknowledges that the Commission may:

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

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## 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 the 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 Asset Interest** in relation to any Asciano Asset (whether alone or with any other Asciano Asset or any other property or thing) means:

- (a) the Asciano Asset;
- (b) a legal or equitable right or interest in or to the Asciano 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 Asciano Asset (including any option) whether or not subject to any condition;
- (d) a right to direct that the Asciano 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 Asciano Asset.

**Asciano Assets** means:

- (a) the businesses, assets and interests (including the benefit of contractual arrangements) described in Schedule H-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 Share Interest** means any one or more of the following:

- (a) an issued share in Asciano or unit in Asciano Trust;
- (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 or unit;
- (c) an issued share in Asciano, or unit in Asciano Trust, 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 Asciano or unit in Asciano Trust; and
- (e) any right (including any option) whether or not subject to any condition to have issued any share in Asciano or unit in Asciano Trust.

**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.

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

- (a) is an employee or officer or director of Asciano;
- (b) has an Asciano Share Interest or an Asciano Asset Interest between [Confidential] after the Restructure Date and 31 March 2011;
- (c) has, with the exception of the directorships held by Mr Paul Little and Mr Neil Chatfield between 29 January 2007 and 27 February 2007, been an employee or officer or director of Asciano in the past 5 years;
- (d) has an agreement, arrangement or understanding with Asciano relating to the performance of his or her functions as a director of Toll;
- (e) has, within the last 5 years, been a principal of a material professional adviser or a material consultant to Asciano or an employee materially associated with the provision of such services to Asciano;
- (f) has a material contractual relationship with Asciano;
- (g) has served on the board of Asciano for a period which could, or could reasonably be perceived to, materially interfere with his or her ability to act independently of Asciano;
- (h) has a relationship or interest which could, or could reasonably be perceived to, materially influence the person's decision-making with respect to Asciano; or
- (i) has a Relative or is a Related Entity of a person who is not an Independent Toll 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 Director** means [NAME]

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

**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 Schedule H-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 its obligations under these Undertakings, the Toll Director will do everything reasonably within the Toll Director's power to ensure that the Toll Director's performance of those obligations is done in a manner which is consistent with promoting the purpose and object of these Undertakings.

**Signed by [NAME] in the presence of:**

|

\_\_\_\_\_  
(Signature of Witness)

\_\_\_\_\_  
(Signature of [Name])

\_\_\_\_\_  
(Name of Witness)

\_\_\_\_\_  
Date of Execution by [Name]

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

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**Graeme Julian Samuel**  
Chairman

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Date

## Schedule H-1

### Asciano Assets

The following Toll Group businesses:

	<b>Business description</b>	<b>Principal corporate entities comprising the business</b>	<b>Organisation chart reference</b>
1.	The Patrick Corporation Limited (" <b>Patrick</b> ") 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 (" <b>Pacific National</b> "), 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 Westernport 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

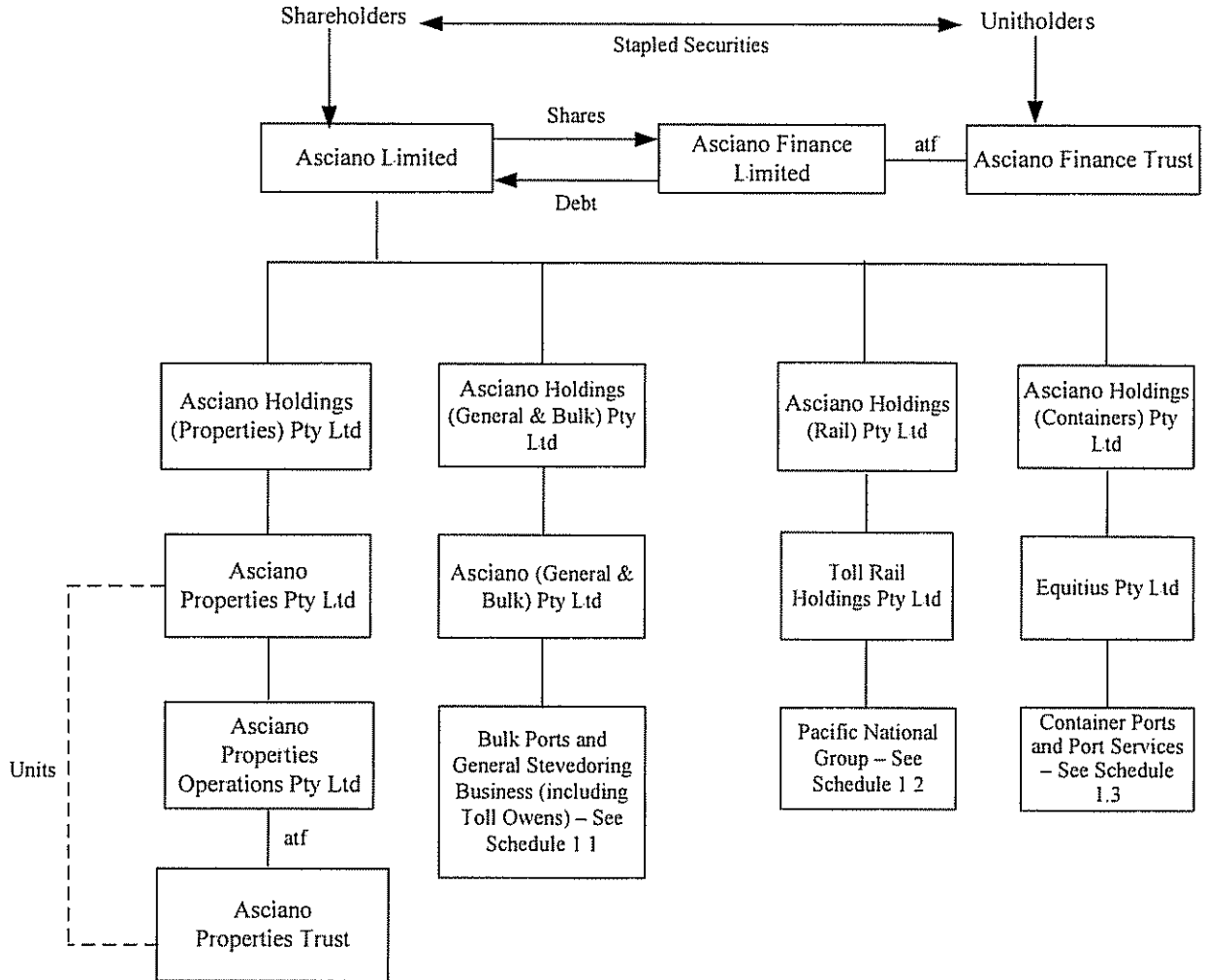
	<b>Business description</b>	<b>Principal corporate entities comprising the business</b>	<b>Organisation chart reference</b>
5.	Patrick's general stevedoring business conducted at Port Botany, Brisbane, Melbourne and Fremantle.	Patrick Stevedores Operations Pty Ltd ACN 065 375 840 Patrick Stevedores Operations 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:

	<b>Entity</b>	<b>Business description</b>	<b>Organisation chart reference</b>
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

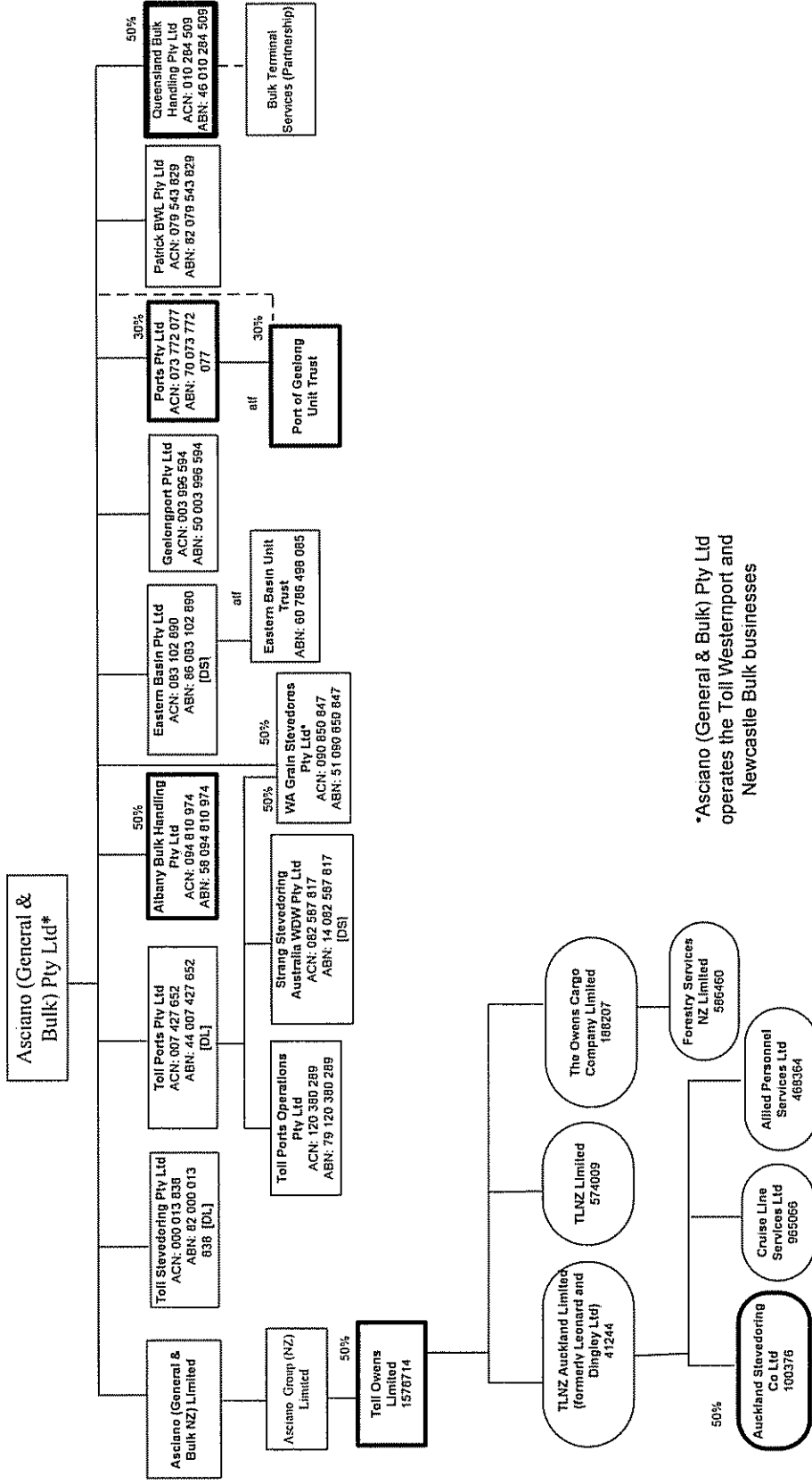
	<b>Entity</b>	<b>Business description</b>	<b>Organisation chart reference</b>
9.	Toll Owens Limited 1578714	Provides services including log and general cargo marshalling, inventory management, storage, consolidation and container handling at the Port of Tauranga and other ports in New Zealand.	Schedule 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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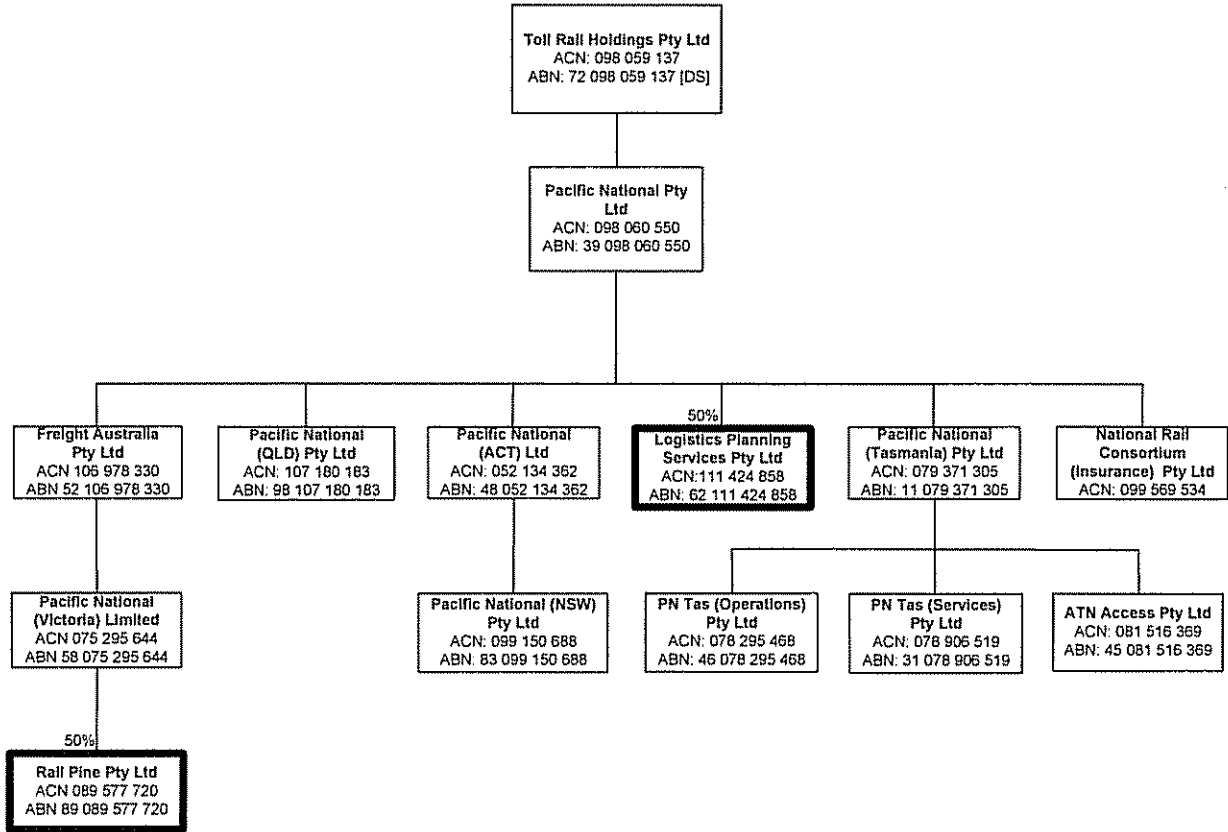
Schedule 1.1  
General and Bulk



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Schedule 1.2  
Pacific National Group



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Schedule 1.3  
Container Ports and Port Services – Equitius Group

