

Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the
Competition and Consumer Act 2010 by
Toll Holdings Limited ACN 006 592 089

Undertaking

1. Person giving this undertaking

- (a) This Undertaking is given to the Australian Competition and Consumer Commission (ACCC) by Toll Holdings Limited ACN 006 592 089 (**Toll**) of Level 7, 380 St Kilda Road, Melbourne VIC 3004 for the purposes of section 87B of the *Competition and Consumer Act 2010* (the **Act**).

2. Background

2.1 The parties to the Proposed Transaction

- (a) Sea Swift Pty Ltd ACN 010 889 040 (**Sea Swift**), a subsidiary of Sea Swift (Holdings) Pty Limited ACN 159 387 390, provides coastal and community shipping services (being sea-borne delivery of freight to remote islands and communities) in certain regions in Far North Queensland (**FNQ**) and in certain regions of the Northern Territory (**NT**).
- (b) Toll Marine Logistics Australia, part of Toll, operates a marine freight business in FNQ and NT supplying coastal and community shipping services (the **TML Business**).

2.2 The Original Proposed Transaction

- (a) On 24 November 2014, Sea Swift and Toll (together the **Parties**) entered into an agreement under which it was proposed that Sea Swift would acquire certain assets of the TML Business, and Toll would receive (in addition to the purchase price) a 20% holding in Sea Swift, conditional upon informal clearance from the ACCC (the **Original Proposed Transaction**).

2.3 The ACCC's review

- (a) On 5 December 2014, the Parties submitted an application for informal clearance in relation to the Original Proposed Transaction to the ACCC.
- (b) On 9 December 2014, the ACCC commenced its public review of the Original Proposed Transaction.
- (c) The ACCC undertook market inquiries and considered information provided by the Parties, industry participants and others.
- (d) On 19 February 2015, the ACCC issued a Statement of Issues in relation to the Original Proposed Transaction which outlined its preliminary competition concerns.
- (e) The ACCC was due to announce its decision in respect of the Original Proposed Transaction on 11 June 2015.

2.4 The Revised Proposed Transaction

- (a) On 9 June 2015, the Parties informed the ACCC that the Parties had reached an in-principle agreement to vary the terms of the Original Proposed Transaction (**Revised Proposed Transaction**).
- (b) The Parties requested that the ACCC delay its original decision date of 11 June 2015 to allow sufficient time for the Parties to:
 - (i) formalise the terms of the Revised Proposed Transaction, including the specific elements of s87B undertakings that the Parties propose to offer to the ACCC (**Proposed Undertakings**); and

- (ii) provide information relating to the Revised Proposed Transaction and the Proposed Undertaking to the ACCC for its consideration.
- (c) The ACCC has agreed to extend the original decision date until 9 July 2015 to permit it to consider the Revised Proposed Transaction and Proposed Undertakings conditional on Toll providing the undertakings relating to the continuation of the TML Business in NT and FNQ and not outsourcing marine freight services to Sea Swift that are contained in this Undertaking.

2.5 Purpose of undertaking

- (a) The objective of this Undertaking is:
 - (i) to maintain the TML Business, including maintaining the supply of services by the TML Business in a manner consistent with the supply of those services as at 11 June 2015, until 30 November 2015 unless the matter is resolved earlier or in other agreed circumstances; and
 - (ii) to prohibit Toll from entering into an Agreement pursuant to which any of the marine freight services provided by the TML Business as at 11 June 2015 will be provided by Sea Swift, except in limited circumstances where Toll is unable to meet ad hoc or short term customer service requirements itself,

while the Revised Proposed Transaction and Proposed Undertakings are being considered by the ACCC or the Tribunal.

- (b) The ACCC acknowledges that there may be legitimate circumstances where it is appropriate for Toll to outsource or subcontract services to Sea Swift. This Undertaking includes mechanisms for Toll to seek the consent of the ACCC for this to occur.

3. Commencement

3.1 Commencement

This Undertaking comes into effect when:

- (a) the Undertaking is executed by Toll; and
 - (b) the Undertaking so executed is accepted by the ACCC.
- (Commencement Date).

4. Cessation of Ongoing Obligations

4.1 Termination

- (a) This Undertaking terminates on the date on which any of the following events occurs:
 - (i) the ACCC communicates in writing to Sea Swift and Toll that it does not intend to oppose the Revised Proposed Transaction;
 - (ii) the ACCC communicates in writing to Sea Swift and Toll that it intends to oppose the Revised Proposed Transaction and Sea Swift communicates in writing to the ACCC that it will not make any application to the Tribunal nor any application to the Federal Court of Australia in respect of the Revised Proposed Transaction or any similar transaction;
 - (iii) Sea Swift withdraws any application it has made to the Tribunal in accordance with the Varied ASSA, and the ACCC has been advised by Sea Swift in writing that Sea Swift does not intend to make any further application for merger

authorisation nor make any application to the Federal Court of Australia in respect of the Revised Proposed Transaction or any similar transaction;

- (iv) the Tribunal authorises the Revised Proposed Transaction, with or without conditions;
- (v) the ACCC has been advised by Sea Swift or Toll in writing that the Varied ASSA is otherwise rescinded or terminated;
- (vi) the date the ACCC confirms in writing that this Undertaking has terminated on the basis that the Parties have provided written advice, and the ACCC is satisfied, that the Parties will not proceed with the Revised Proposed Transaction or any similar acquisition.

4.2 Withdrawal or variation

Toll may request withdrawal or variation of this Undertaking pursuant to section 87B of the Act at any time. This Undertaking is to be taken to be withdrawn or varied on the date the ACCC consents in writing to any such withdrawal or variation.

4.3 Waiver

The ACCC may, at any time, expressly waive in writing any of the obligations contained in this Undertaking or extend the date by which any such obligation is to be satisfied.

5. Commitment to maintain TML business

From the Commencement Date, Toll must maintain, manage and operate the TML Business in the ordinary course of business, including maintaining the existing services supplied by the TML Business in a manner consistent with the supply of those services as at 11 June 2015.

6. Commitment not to further outsource or subcontract to Sea Swift

- (a) Subject to clause 6(c), from the Commencement Date, Toll must not enter into any Agreement pursuant to which any of the marine freight services provided by the TML Business as at 11 June 2015 will be provided by Sea Swift unless:
 - (i) the Agreement is for a specified period to temporarily enable the TML Business to meet ad hoc or short term customer service requirements that the TML Business would ordinarily provide but is not able to provide or meet itself, including as a result of:
 - (A) vessel dry docking or inspection requirements;
 - (B) equipment or vessel breakdown, failure or maintenance; or
 - (C) acts of god or weather conditions affecting vessel operations; and
 - (ii) Toll seeks and obtains prior written consent from the ACCC in respect of the proposed outsourcing or subcontracting to Sea Swift.
- (b) In deciding whether to grant consent under clause 6(a)(ii), the ACCC will have regard to:
 - (i) whether the proposed outsourcing or subcontracting arrangement was a genuine 'business as usual' arrangement;
 - (ii) the length of the proposed outsourcing or subcontracting arrangement;
 - (iii) whether the proposed outsourcing or subcontracting arrangement is of an ad hoc or permanent nature; and

- (iv) whether Toll would otherwise be unable to meet its obligations to its customers, including as a result of the matters set out in clause 6(a)(i)(A) to 6(a)(i)(C).
- (c) If, due to the urgency of the need to enter into an outsourcing or subcontracting arrangement to ensure the continuity of marine freight services (an **Urgent Arrangement**), it is impracticable for Toll to obtain the ACCC's prior written consent under clause 6(a), Toll must:
 - (i) immediately notify the ACCC in writing that it has entered into an Urgent Arrangement and within 2 Business Days of such notification seek the ACCC's consent pursuant to clause 6.1(a); and
 - (ii) if the ACCC advises that it does not consent to the Urgent Arrangement, cease the Urgent Arrangement as soon as the voyage the subject of the Urgent Arrangement is complete and the vessel has returned to its base or home port.
- (d) The ACCC agrees to notify Toll of its decision whether to grant consent under this clause 6 in a timely manner.
- (e) Nothing in this clause 6 restricts Sea Swift from outsourcing or subcontracting any services to Toll.

7. Compliance reporting

- (a) Toll must provide a written report (**Compliance Report**) to the ACCC regarding its compliance with this Undertaking within 5 Business Days of the end of each calendar month, until this Undertaking is terminated or withdrawn.
- (b) Each compliance report must contain a statement of Toll's compliance with each of clauses 5 and 6 of this Undertaking during the preceding calendar month.
- (c) If Toll is aware of any instances of actual or potential non-compliance with this Undertaking, whether in the relevant Compliance Report period or in previous periods if not previously notified to the ACCC, Toll must immediately notify the ACCC and identify and describe all known instances of non-compliance and the steps Toll has taken to address those non-compliance issues.
- (d) Toll must comply with any direction given by the ACCC in relation to non-compliance issues arising from a Compliance Report, within 10 Business Days of the ACCC's direction (or any other period as agreed in writing with the ACCC).

8. ACCC access to information

- (a) The ACCC may direct Toll in respect of its compliance with this Undertaking to, and Toll must:
 - (i) furnish information to the ACCC in the time and in the form requested by the ACCC;
 - (ii) produce documents and materials to the ACCC within Toll's custody, power or control in the time and in the form requested by the ACCC; and / or
 - (iii) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.
- (b) Any direction made by the ACCC under this clause 8 will be notified Toll in accordance with clause 13.

- (c) Information furnished, documents and material produced or information given in response to any request or direction from the ACCC under this clause 8 may be used by the ACCC for any purpose consistent with the exercise of its statutory duties.
- (d) Nothing in this clause 8 requires the provision of information or documents in respect of which Toll has a claim of legal professional or other privilege.

9. Disclosure of undertaking

- (a) Toll acknowledges that the ACCC will:
 - (i) make this Undertaking publicly available;
 - (ii) publish this Undertaking on its Public Section 87B Undertakings Register and Public Mergers Register;
 - (iii) from time to time, make public reference to the Undertaking.
- (b) Nothing in this Undertaking prevents the ACCC from disclosing information as is:
 - (i) required by law;
 - (ii) permitted by s155AAA of the Act; or
 - (iii) necessary for the purpose of enforcement action under section 87B of the Act.
- (c) Nothing in this Undertaking prevents the ACCC from using the information contained in this Undertaking for any purpose consistent with its statutory functions and powers.

10. Related bodies corporate

Where the performance of an obligation under this Undertaking requires a Related Body Corporate of Toll to take or refrain from taking some action, Toll will procure that Related Body Corporate to take or refrain from taking that action.

11. No derogation

- (a) The Undertaking does not prevent the ACCC from taking enforcement action at any time, whether during or after the period of the Undertaking, in respect of any breach by Toll of any term of the Undertaking.
- (b) Nothing in the Undertaking is intended to restrict the right of the ACCC to take action under the Act for penalties or other remedies in the event that Toll does not fully implement and/or perform its obligations under the Undertaking, or in any other event where the ACCC decides to take action under the Act for penalties or other remedies.

12. Costs

Toll must pay all of its own costs incurred in relation to this Undertaking.

13. Notices

13.1 Giving notices

- (a) Any notice or communication to the ACCC pursuant to this Undertaking must be sent to:

Email address:	mergers@acc.gov.au
Attention:	Executive General Manager – Merger and Authorisation Review
Division	

With a copy sent to: mergersucu@accc.gov.au

Director, Undertaking Compliance Unit, Coordination and Strategy
Branch, Merger and Authorisation Review Division

- (b) Any notice or communication to Toll pursuant to this Undertaking must be sent to:

Name: Toll Holdings Ltd
Address: Level 7, 380 St Kilda Road, Melbourne VIC 3004 Australia
Email address: bernard.mcinerney@tollgroup.com
Attention: Bernard McInerney – Company Secretary

With a copy sent to:

Name: Minter Ellison Lawyers
Address: 525 Collins St, Melbourne
Email address: geoff.carter@minterellison.com
Attention: Geoff Carter - Partner

- (c) If sent by post, notices are taken to be received three Business Days after posting (or seven Business Days after posting if sent to or from a place outside Australia).
- (d) If sent by email, notices are taken to be received at the time shown in the email as the time the email was sent.

13.2 Change of contact details

Toll must notify the ACCC of any change to its contact details within three Business Days. If Toll gives the ACCC three business days' notice of a change to its contact details, any notice or communication is only given to Toll if it is sent to the most recently advised contact details.

14. Defined terms & interpretation

14.1 Defined terms

In this agreement:

ACCC means the Australian Competition and Consumer Commission as defined in clause 1.

Agreement means any contract, arrangement or understanding, including any contract, arrangement or understanding to renew, amend, vary or extend any contract, arrangement or understanding.

Business Day means:

- (a) for receiving a notice under clause 13, a day that is not a Saturday, Sunday, public holiday or bank holiday in the place where the notice is received; and
- (b) for all other purposes, a day that is not a Saturday, Sunday, public holiday or bank holiday in Victoria, Australia.

Commencement Date has the meaning given to it in clause 3.1.

Compliance Reporting has the meaning given to it in clause 7(a).

Corporations Act means the *Corporations Act 2001* (Cth).

Far North Queensland includes the outer Torres Strait Islands.

Original Proposed Transaction has the meaning given to it in clause 2.2.

Parties means Sea Swift and Toll.

Proposed Undertakings has the meaning given to it in clause 2.4(b).

Public Mergers Register means the ACCC's public register of merger clearance applications, available at www.accc.gov.au.

Public Section 87B Undertakings Register means the ACCC's public register of section 87B undertakings, available at www.accc.gov.au.

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

Revised Proposed Transaction has the meaning given to it in clause 2.4.

Sea Swift means the entity referred to in clause 2.1(a) and its Related Bodies Corporate.

Toll means Toll Holdings Limited as defined in clause 1(a).

TML Business has the meaning given to it in clause 2.1(b).

Tribunal means the Australian Competition Tribunal.

Undertaking means all of the provisions of this document, including its schedules and as varied from time to time under section 87B of the Act.

Urgent Arrangement has the meaning given to it in clause 6(c).

Varied ASSA means the varied asset and share sale agreement to be entered into by Sea Swift and Toll, and other parties in relation to the Revised Proposed Transaction.

14.2 Interpretation

In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires:

- (a) a reference to this Undertaking includes all of the provisions of this document including its schedules;
- (b) headings are inserted for convenience only and do not affect the interpretation of this Undertaking;
- (c) if the day on which any act, matter or thing is to be done under this Undertaking is not a Business Day, the act, matter or thing must be done on the next Business Day;
- (d) a reference in this Undertaking to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
- (e) a reference in this Undertaking to any company includes its Related Bodies Corporate;
- (f) a reference in this Undertaking to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced;
- (g) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Undertaking;
- (h) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
- (i) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- (j) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders;

- (k) a reference to the words 'such as', 'including', 'particularly' and similar expressions is to be construed without limitation;
- (l) a construction that would promote the purpose- or object- underlying the Undertaking (whether expressly stated or not) will be preferred to a construction that would not promote that purpose or object;
- (m) material not forming part of this Undertaking may be considered to:
 - (i) confirm the meaning of a clause is the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the competition concerns intended to be addressed by the Undertaking and the clause in question; or
 - (ii) determine the meaning of the clause when the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the purpose or object underlying the Undertaking, leads to a result that does not promote the purpose or object underlying the Undertaking;
- (n) in determining whether consideration should be given to any material in accordance with paragraph (m) or in considering any weight to be given to any such material, regard must be had, in addition to any other relevant matters, to the effect that reliance on the ordinary meaning conveyed by the text of the clause would, have (taking into account its context in the Undertaking and whether that meaning promotes the purpose or object of the Undertaking);
- (o) the ACCC may authorise the ACCC Mergers Review Committee, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the ACCC may impose;
- (p) in performing its obligations under this Undertaking, 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 this Undertaking;
- (q) a reference to:
 - (i) a thing (including, but not limited to, a chose in action or other right) includes a part of that thing;
 - (ii) a party includes its successors and permitted assignees; and
 - (iii) a monetary amount is in Australian dollars.

Executed as an undertaking

Executed for and on behalf of
TOLL HOLDINGS LIMITED

ACN 006 592 089

in Melbourne, Australia

under Power of Attorney dated 31 December 2014 by:


Signature of attorney

Adam Martin

Name of attorney (please print)


Signature of attorney

*Each Attorney declares that he has no notice
of revocation of the power of attorney.*

Roger Chong
Assistant Company Secretary

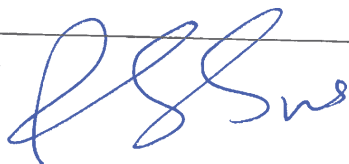
Name of attorney (please print)

Accepted by the Australian Competition and Consumer Commission
pursuant to section 87B of the *Competition and Consumer Act 2010* on:

Date **29/6/15**

And signed on behalf of the ACCC:

Chairman



Date **29/6/15**