

## **SeaSwift– chronology of mergers and acquisitions**

### **Sea Swift Pty Ltd – acquisition of assets Endeavour Shipping Pty Ltd**

**Status**

Completed

**Outcome**

Not opposed

on

4 December 2008

**Reference number**

34554

**Industry**

Shipping

**Commenced**

24 October 2008

**Total review days**

14 days

**Acquirer(s)**

- Sea Swift Pty Ltd

**Target(s)**

- Endeavour Shipping Pty Ltd

**Summary**

Sea Swift Pty Ltd's acquisition of Endeavour Shipping Pty Ltd.

**Market definition**

The separate markets for the supply of shipping (freight and/or passenger) services from Cairns to each of:

- Thursday Island;
- Bamaga/Seisia;
- Weipa;
- Horn Island; and
- the outer Torres Strait islands.

The ACCC considered a substantial lessening of competition would be unlikely to arise in any relevant market as a result of the acquisition. Factors informing the ACCC's view included:

- Perkins Shipping Pty Ltd (Perkins) is likely to continue to provide strong competition to *Sea Swift* on the Cairns-to-Weipa route;

- *Sea Swift* is likely to be constrained on the remaining shipping routes given the potential ability and incentive for new entry and expansion by other shipping service suppliers; and
- barriers to entry to any of the relevant markets do not appear to be substantial, as reflected in the recent history of entry including Perkins entry to the Cairns-to-Weipa route.

## Timeline

Date	Event
2 Oct 2008	Sea Swift Pty Ltd acquired certain assets of Endeavour Shipping Pty Ltd.
24 Oct 2008	ACCC received a submission from Sea Swift Pty Ltd. ACCC commenced review under the Merger Review Process Guidelines.
10 Nov 2008	Former closing date for submissions from interested parties.
27 Nov 2008	Closing date for submissions from interested parties.
4 Dec 2008	ACCC announced it would not oppose the proposed acquisition.

On 1 July 2016, the Australian Competition Tribunal granted authorisation to Sea Swift's proposed acquisition of certain shares and assets relating to Toll Marine Logistics' (TML) business in the Northern Territory and Far North Queensland.

## SeaSwift acquisition of Toll Marine's NT and FNQ marine freight assets authorised by the Australian Competition Tribunal

### Date

1 July 2016

### Topics

[Mergers](#)

The Australian Competition Tribunal has granted authorisation for Sea Swift Pty Ltd's (Sea Swift) proposed acquisition of the Northern Territory and Far North Queensland marine freight assets of Toll Marine Logistics Australia (Toll)

The Tribunal has granted the authorisation subject to conditions imposing a cap on future prices and requiring Sea Swift to continue to operate scheduled services to remote communities for up to 5 years, and providing for access by other marine freight firms to the roll-on roll-off ramp at Gove (Nhulunbuy).

While the Tribunal has yet to release its reasons, in order to grant authorisation it must be satisfied that the proposed acquisition would result in such a benefit to the public that it should be allowed to occur.

The ACCC had previously opposed the proposed acquisition by Sea Swift because the ACCC considered that it was likely to have the effect of substantially lessening competition. The ACCC's merger clearance decisions consider only whether a proposed acquisition would be likely to substantially lessen competition, whereas the Tribunal applies a different test in which it also assesses the likely public benefits and is required to balance these against likely competitive detriment.

ACCC Commissioner Roger Featherston said “We are disappointed that the Tribunal has authorised the acquisition, as the ACCC remains of the view that the acquisition is likely to have significant implications for future competition in scheduled marine freight services in the Northern Territory and far north Queensland, ultimately to the detriment of the communities reliant on these services.”

“The acquisition follows a price war between Sea Swift and Toll, and will result in a near monopoly position for Sea Swift in the supply of scheduled marine freight services in both the NT and FNQ,” Mr Featherston said.

“Customers in remote communities rely on scheduled services for essential deliveries including fuel and fresh food. The ACCC understands that the Tribunal was concerned that these communities would face uncertainty as to whether deliveries would continue if the transaction was not authorised. The ACCC’s view remains that competition between providers is the best way to ensure acceptable prices and service levels for these communities in the longer term,” Mr Featherston said.

“The ACCC will continue to oppose acquisitions which it considers are likely to substantially lessen competition. The Tribunal’s decision in this matter is unlikely to apply to many other transactions, as the matter involved the unique circumstance that the scheduled marine freight services in question are essential services for the remote communities that they service,” Mr Featherston said.

## **Background**

On 9 July 2015, the ACCC decided it would oppose the proposed acquisition by Sea Swift of Toll’s Northern Territory and Far North Queensland marine freight assets under section 50 of the *Competition and Consumer Act 2010* (Cth) (the Act), which prohibits acquisitions which would be likely to have the effect of substantially lessening competition.

The ACCC considered the proposed acquisition was likely to result in a substantial lessening of competition for the supply of scheduled marine freight services in the Northern Territory and far north Queensland.

On 4 April 2016, Sea Swift made an application to the Tribunal under section 95AT of the Act, seeking authorisation for the proposed acquisition, subject to behavioural conditions relating to pricing and service levels to remote communities in the NT and FNQ.

Pursuant to section 95AT, the Tribunal must be satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to occur. This requires the Tribunal to conduct a balancing exercise to weigh the public benefits that are likely to result from the proposed acquisition against the detriment arising from any lessening of competition.

The role of the ACCC is to assist the Tribunal. This includes making inquiries, calling and examining witnesses, making submissions to the Tribunal, and preparing a report for the Tribunal.

Sea Swift's application was heard by the Tribunal in Melbourne for nine days between 6 and 17 June 2016.

There is no merits appeal available from the Tribunal's decision to authorise a merger, although there are limited grounds of appeal based on error of law.

Sea Swift is a subsidiary of Sea Swift Holdings Pty Limited. It is majority owned by private equity firms CHAMP Ventures and HarbourVest Partners.

Toll Marine Logistics Australia is a division of Toll Holdings Limited, whose ultimate owner is Japan Post.

**Release number**

MR 117/16

**General enquiries**

[Contact us](#) to report an issue or make an enquiry.

On 1 July 2016, the Australian Competition Tribunal granted authorisation to *Sea Swift's* proposed acquisition of certain shares and assets relating to Toll Marine Logistics' (TML) business in the Northern Territory and Far North Queensland. *Sea Swift* and *Toll* (through TML) provide scheduled marine freight services and marine freight charter services in these regions.

Applying for merger authorisation from the Tribunal is a rarely used process for obtaining clearance for a merger under the Australian Competition and Consumer Act 2010 (Cth) (CCA). This is only the third such application since the process became available nearly a decade ago. It is also only one of two applications that have proceeded to a determination (with the other being an application by AGL to acquire Macquarie Generation). Both resulted in authorisation being granted.

MinterEllison acted on behalf of Toll Holdings Ltd.

On 28 July 2016, the Tribunal released reasons for its determination. Our analysis is available in our alert, Fact trumps theory - Australian Competition Tribunal releases reasons for authorising *Sea Swift's* proposed acquisition of Toll marine freight business.

### **The proposed transaction and application**

*Sea Swift* and *Toll* entered into an asset and share sale agreement in respect of the proposed transaction in November 2014, and sought ACCC clearance. The parties renegotiated the agreement when it was apparent that the ACCC may not reach a

decision by the sunset date at the end of May 2015. In July 2015, the ACCC announced it opposed the proposed transaction.

In September 2015, *Sea Swift* (with support from *Toll*, as intervenor) filed an application for authorisation with the Tribunal under section 95AT(1) of the CCA. This application was withdrawn in November 2015, and a new application filed on 4 April 2016.

In the application, *Sea Swift* sought authorisation to acquire shares in, and assets from, entities who were subsidiaries of Perkins Industries Pty Ltd, which is wholly owned by Perkins Group Holdings Pty Ltd, which in turn is wholly owned by *Toll*, the ultimate Australian parent company for the Toll Group. The Toll entities trade as Toll Marine Logistics Australia.

*Toll* was granted leave to intervene in the process. The Maritime Union of Australia (MUA) was also granted limited leave to intervene.

### **Authorisation process**

Section 50 of the CCA prohibits mergers or acquisitions which have the effect or likely effect of substantially lessening competition.

Merger authorisation is an alternative process to the ACCC's informal clearance process and, if granted, provides in effect statutory immunity to the relevant transaction.

To grant authorisation, the Australian Competition Tribunal must be satisfied that the proposed transaction involves such a benefit to the public that it should be allowed to proceed. In practice, this involves assessing whether there are public benefits which outweigh any competitive or public detriment arising from the proposed transaction, based on a consideration of what would transpire 'with or without' the transaction.

### **Overview of submissions**

The Tribunal register contains public versions of the application, evidence filed and the closing submissions of *Sea Swift*, *Toll*, the ACCC and the MUA.

As noted above, in applying the net public benefits test, the Tribunal applies a 'future with and without test'. A critical feature of this Application was that, in the future without the proposed transaction, *Toll* intended to wind up the TML business in the NT and FNQ and exit the relevant markets.

Both *Sea Swift* and *Toll* contended that, having regard to this, the proposed transaction would not result in any competitive detriment and would result in significant public benefits. *Sea Swift* and *Toll* submitted that barriers to entry were low and would not be heightened by the proposed transaction. Against this, *Sea Swift* and *Toll* submitted authorisation would (among other things) provide clear and substantial public benefits by:

- providing certainty of regular supply to remote communities in the NT and FNQ, who rely on regular shipping services for essentials such as groceries, fuel and pharmaceuticals;
- preserving contracted customers, large and small, the benefits of their current contract terms and conditions; and
- improving conditions for entry, relative to the situation that would prevail absent the proposed transaction, by reason of the condition applying to the customer contracts to be transferred.

The ACCC contended that, absent authorisation, Toll would wind up the TML business in a way which provided a 'unique opportunity' for an alternative service provider to establish itself by gaining access to TML's customer contracts (and/or vessels), and that the proposed acquisition would heighten barriers to entry (including reputational barriers).

As noted by the Tribunal, the process involved hearing evidence from more than 40 lay witnesses, as well as interested parties, representing customers, communities and competitors. It also involved evidence from 7 experts.

### **Grant of authorisation**

The Tribunal granted authorisation on 1 July 2016, releasing a determination (including certain conditions of authorisation) and a document containing background to that determination. Reasons have not yet been published.

The Tribunal handed down its determination within the statutory 3 month time limit. While the CCA allows the Tribunal to extend the period in which it may make the determination, the Tribunal explained that:

'commercial exigencies call for it to make and publish its determination relatively quickly. A speedy resolution of the application also gives remote communities certainty in respect of the provision of essential supplies by way of regular scheduled services as Toll exits the market.'

## **INFRASTRUCTURE FUND ACQUIRES SEA SWIFT**

5th September, 2019

CAIRNS shipping and logistics provider *Sea Swift* is to be acquired by QIC Global Infrastructure Fund, under a deal announced this week.

QGIF is made up of domestic and global superannuation, pension, insurance and sovereign wealth investors.

**SEA SWIFT has sold to State Government-owned investment corporation QIC.....** Private equity firm Champ Ventures has sold its controlling share in the Cairns-based shipping freight company to the Queensland Investment Corporation.

*Sea Swift*, a privately-owned company, provides general cargo and charter freight services to remote communities in Far North Queensland and the Northern Territory, delivering the essentials of life as well as things like building products.

QIC is described as a “long-term specialist manager in alternatives offering infrastructure, real estate, private capital, liquid strategies and multi-asset investments”.

Sea Swift chief executive Fred White said they pleased to have found “a strong long-term focused and socially responsible partner in QIC, which shares our commitment to safety and customer service”.

“QIC is one of the largest owners of transportation infrastructure in Australia, and in particular brings extensive experience managing marine transportation assets, including being the equal largest shareholder of the Port of Melbourne and Port of Brisbane,” Mr White said.

“The Sea Swift team is looking forward to leveraging QIC’s experience to continue the growth of the business and the service offering to our customers.”

QIC did a due diligence process and, according to Sea Swift, has advised it has “no current plans for any significant changes to the day-to-day operations of the business”.

Mr White said QIC had also confirmed its support for Sea Swift’s commitment to the training and development of Sea Swift’s workforce, and to supporting regional

development and growth in the remote communities Sea Swift serves via the continued provision of high-quality, reliable services.

Financial close on the transaction is expected to be reached over the next few months.

Sea Swift has offices in Darwin, Gove, Groote Eylandt, Cairns, Horn Island, Thursday Island, Seisia and Weipa. It operates four container vessels, plus a collection of barges, tugs and landing craft.