AUSTRALIAN COMPETITION TRIBUNAL

Application by Sea Swift Pty Ltd [2015] ACompT 5

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| Citation: | Application by Sea Swift Pty Ltd [2015] ACompT 5 |
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| Re: | **APPLICATION FOR MERGER AUTHORISATION OF THE PROPOSED ACQUISITION OF CERTAIN ASSETS OF TOLL MARINE LOGISTICS AUSTRALIA’S MARINE FREIGHT OPERATIONS** |
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| By: | **SEA SWIFT PTY LTD** |
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| Proposed Intervenor: | **THE MARITIME UNION OF AUSTRALIA** |
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| File number: | ACT 9 of 2015 |
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| Tribunal: | **MANSFIELD J (PRESIDENT)****MR GF LATTA (MEMBER)****MR RF SHOGREN (MEMBER)** |
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| Date of decision: | 21 October 2015 |
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| Date of hearing: | Heard on the Papers |
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| Place: |  |
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| Category: | No catchwords |
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| Number of paragraphs: | 13 |
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| Counsel for the Applicant: | G Cass-Gottlieb |
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| Solicitor for the Applicant: | Gilbert+Tobin Lawyers |
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| Counsel for the Australian Competition and Consumer Commission: | S Uthmeyer |
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| Solicitor for the Australian Competition and Consumer Commission: | DLA Piper Australia |
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| Counsel for the Intervenor, Toll Holdings Ltd: | G Carter |
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| Solicitor for the Intervenor, Toll Holdings Ltd | Minter Ellison |

**Table of Corrections**

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| 26 October 2015 | In paragraph 13, correction made to typographic error amending 27 October 2015 to 30 October 2015. |

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| applicant: | SEA SWIFT PTY LTD |
| PROPOSED INTERVENOR: | THE MARITIME UNION OF AUSTRALIA |

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| TRIBUNAL: | MANSFIELD J (PRESIDENT)MR GF LATTA (MEMBER)MR RF SHOGREn (MEMBER) |
| DATE OF DIRECTION: | 21 October 2015 |
| WHERE MADE: | ADELAIDE |

THE TRIBUNAL DIRECTS THAT:

1. The Maritime Union of Australia have leave to intervene in this application, limited to making such submissions and (subject to the further leave of the Tribunal) adducing such evidence and cross-examining other witnesses as it may be advised on the topic of any detriment to the public by reason of any risk to the employment or prospective employment of its members by the applicant or by Toll Holdings Ltd in the Northern Territory or in far north Queensland.
2. The Maritime Union of Australia, if it intends to seek leave to adduce any evidence at the hearing on that issue, do lodge and serve on the applicant, the Australian Competition and Consumer Commission and on Toll Holdings Ltd by their respective solicitors the proposed evidence by 30 October 2015.
3. The applicant, the Australian Competition and Consumer Commission, and Toll Holdings Ltd have leave to lodge and serve within eight working days such proposed evidence in response as it may be advised.

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| DATE: | 21 oCTOBER 2015 |
| PLACE: | ADELAIDE |

**REASONS FOR DECISION**

1. Following directions given on 30 September 2015, The Maritime Union of Australia (MUA), a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) on 2 October 2015 applied to intervene in this proceeding. It says it has constitutional coverage of employees in the maritime industry, including members employed by Sea Swift Pty Ltd (Sea Swift) and by Toll Holdings Ltd (Toll).
2. The decision whether to allow it to intervene was deferred pending receipt of additional information from the MUA, and any submissions from the applicant Sea Swift and the Australian Competition and Consumer Commission (ACCC).
3. The MUA says that its members employed by both Sea Swift and Toll may be affected by the proposed merger because their employment may be at risk. It secondly says that the proposed merger will “further extend the remarkably low terms and conditions of Sea Swift employees throughout the Maritime sector” so as to presumably, affect the interests of its other members. Thirdly, it says that the proposed merger will adversely affect the community interests (including those of its members and their families) who live in remote areas of the Northern Territory and Far North Queensland because it will lead to increased transport pricing and reduced transport access.
4. The application to intervene is opposed by Sea Swift. The ACCC has adopted a neutral position.
5. The Tribunal has decided that the MUA should be permitted to intervene, limited to the first of those issues, namely the employment risks to its members presently employed by Sea Swift and/or Toll. It may make written and oral submissions on the material before the Tribunal on that issue, and it may apply to the Tribunal to adduce such evidence as it may be advised and to cross-examine such other oral evidence as may be adduced at the hearing relating to that issue.
6. The reason for the presently limited extent of the intervention is because the Tribunal does not presently know the nature and extent of the MUA’s possible evidence on that issue, or the time by which it may be provided to the parties. Consequently, the Tribunal is not in a position to form a view about its relevance, or to be able to ensure that it is presented at a time and in a manner which will enable a fair hearing of the issues to be addressed. Nor does the Tribunal know whether that material is said to be relevant to the matters previously considered by the ACCC and whether it was provided to the ACCC, or whether it is confined to the question of the public interest. Both Sea Swift and Toll have now provided to the Tribunal their proposed evidence. The leave to intervene order therefore fixes a date by which any proposed evidence is to be lodged with the Tribunal and served on the other parties. The primary reason for presently restricting the right to cross-examine is simply to ensure that there is not unnecessary duplication in the course of the hearing.
7. The Tribunal’s reasons for that ruling are as follows.
8. Section 109(2) of the *Competition and Consumer Act 2010* (the CC Act) empowers the Tribunal to permit a person to intervene on such conditions as it thinks fit. Earlier decisions of the Tribunal indicate that the proposed intervener should have a “real and substantial interest” in the outcome of the proposed merger, sufficient to warrant the time and cost incurred in the participation of the proposed intervenor: see *Qantas Airways Ltd* (2003) ATPR 41-972; [2003] ACompT 4 at [4]; *Re Fortescue Metals Group Ltd* [2006] ACompT 6 at [35]; *Application by Independent Contractors Australia* [2015] ACompT 1 at [28].
9. The Tribunal is mindful of the important role of the ACCC in any such application as the present, including its report to be provided under s 95AZEA of the CC Act, its right to call evidence at the hearing under s 95AZF and to test other evidence, and its right to pursue avenues of enquiry under s 95AZFA.
10. It is not presently for the Tribunal to determine finally the significance or potential significance of the three matters raised by the MUA. However, its intention on behalf of its members to present arguments or material about the risks to the employment of its members employed by either Sea Swift or Toll would appear both appropriate and relevant to the question the Tribunal will have to address. Accepting that it has such members (a matter which would need to be proved), it may be arguable that such risks may be relevant to the benefits or detriment to the public by the proposed merger. It is not necessary to go beyond that step. It is not presently clear what, if any, position the ACCC will adopt in relation to that issue.
11. The Tribunal does not propose to grant leave to the MUA to intervene in relation to its second issue. There is no apparent basis made out for the assertion. Given the specific and obviously relatively small sections of the “Maritime sector” that the services presently provided by Sea Swift and Toll serve, the suggestion that the proposed merger – if authorised – might somehow lead to circumstances which might materially affect the terms and conditions of other MUA employees working elsewhere in the “Maritime sector” is factually too speculative to warrant leave to intervene on that basis. The MUA has not provided any material to support that proposition. The Tribunal is not, of course, to be taken as having accepted the description about the level of the presently applicable wages and conditions. The Tribunal also is not to be taken as accepting that, even if the proposed merger – if authorised – might potentially have the effect asserted, an application for authorisation of a merger under s 95AV of the CC Act is an appropriate vehicle to ventilate such an assertion as an element of the relevant interests of the public, having regard to the legislative structure and processes by which terms and conditions in the “Maritime sector” (and indeed generally) are determined.
12. The Tribunal also does not propose to give the MUA leave to intervene on the third matter it seeks to raise. That is simply because that matter is fairly and squarely a matter which the ACCC will no doubt address to the extent appropriate. It is a matter which may affect the relevant sections of the public (the users or potential users of the services presently provided by Sea Swift and Toll in the Northern Territory and Far North Queensland). The MUA has not shown, or suggested, that it has any particular community representative function in that regard. If it has particular relevant information, it may provide that to the ACCC to make use of as the ACCC considers appropriate.
13. Accordingly, the Tribunal directs that the MUA be permitted to intervene on this application limited to the issue referred to in [5] above. It directs that any evidence the MUA proposes to rely upon be lodged and served on Sea Swift, the ACCC and Toll by 30 October 2015. Each of those three entities is given leave to lodge and serve any responsive evidence within a further seven days.

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| I certify that the preceding thirteen (13) numbered paragraphs are a true copy of the Reasons for Decision herein of the Honourable Justice Mansfield, President, Mr GF Latta and Mr RF Shogren, Members. |

Associate:

Dated: 21 October 2015