AUSTRALIAN COMPETITION TRIBUNAL

Application by Sea Swift Pty Ltd (No 2) [2015] ACompT 6

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| Citation: | Application by Sea Swift Pty Ltd (No 2) [2015] ACompT 6 |
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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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| 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: | 14 |
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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 |

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| TRIBUNAL: | MANSFIELD J (PRESIDENT)  MR GF LATTA (MEMBER)  MR R SHOGREN (MEMBER) |
| DATE OF DIRECTION: | 21 OCTOBER 2015 |
| WHERE MADE: | ADELAIDE |

THE TRIBUNAL DIRECTS THAT:

1. Annexure SW-22 to the Statement of Scott Woodward is not confidential.
2. The rates of the applicant for 2015 set out in:
   1. Annexure PB-73 to the Statement of Pasquale “Lino” Bruno; and
   2. Schedule 4 of Annexure A to the application

are not confidential to the extent that the Australian Competition and Consumer Commission may in its discretion disclose those rates to such customers of the applicant or Toll Holdings Ltd as it considers appropriate for the purpose of its investigations and consideration of the benefit to the public and in submissions to the Tribunal.

1. There be liberty to apply to vary or discharge these directions.

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**REASONS FOR DECISION**

1. On 30 September 205, the Tribunal gave general Directions and “Directions on Confidentiality” (the latter dealing with how confidential material may be accessed).
2. Direction 8 of the general Directions addresses the claims which the applicant Sea Swift Pty Ltd (Sea Swift) and the intervenor Toll Holdings Ltd (Toll) made to have material they lodged be treated as confidential under the Directions on Confidentiality regime. The Australian Competition and Consumer Commission (ACCC) duly considered and made submissions with respect to those claims.
3. With one qualification, the ACCC agreed that the claims for confidentiality made by Sea Swift and Toll are appropriate. The Tribunal has considered those claims under s 95AZA of the *Competition and Consumer Act 2010* (Cth) (CC Act) and accepts them. They do not need to be further addressed at present.
4. It is necessary to address in detail only the one issue. It is the status of the information in Schedule 4 of Annexure A to Form S, that is the application made by Sea Swift. Sea Swift has requested that the Tribunal grant authorisation of the proposed acquisition subject to the conditions set out at Annexure A to the Form S. One of those conditions is the “Remote Community Pricing Condition” (as that term is defined in Annexure A to the Form S), which sets the maximum rates that Sea Swift can charge for particular services post-acquisition. The maximum rate will be capped at the current scheduled rates of Toll for customers in the Northern Territory (NT), and of Sea Swift for customers in Far North Queensland (FNQ) (subject to publicly indexed cost price increases). Presently, Schedule 4 currently contains no information, but it is identified as to be confidential when completed, unless and until the merger authorisation is granted.
5. Sea Swift has confirmed that the information which is to be inserted into Schedule 4 is to be derived from the following material lodged with the Form S application:

* Confidential Annexure PB-73 to the Statement of Pasquale “Lino” Bruno, which sets out Sea Swift’s current scheduled rates for FNQ (Annexure PB-73); and
* Confidential Annexure SW-22 to the Statement of Scott Woodward, which sets out Toll’s current scheduled rates for the NT (Annexure SW-22).

1. Toll no longer claims that Annexure SW-22 to the Statement of Scott Woodward should be confidential. This ruling of the Tribunal will give effect to that position.
2. Sea Swift however maintains its claim that Annexure PB-73 should be confidential. It is desirable to note that Annexure PB-73 comprises Sea Swift’s current rates for both the NT and FNQ as at present, and for the previous years 2010-2014 (in the case of FNQ) and for the year 2013/2014 (in the case of NT). As noted, it accepts that, if its application is successful, Schedule 4 will need to become publicly available as it is a relevant part of one of the Conditions to the authorisation it seeks.
3. Sea Swift however says that, at present:
4. the rates to be set out in Schedule 4 to the Conditions are not rates that Sea Swift generally publishes or makes available to customers or to the general public, but they are rates that are used internally by Sea Swift in providing quotes for marine freight to customers;
5. if other persons in the market (particularly competitors or potential competitors) obtained that information, this could be of real detriment to Sea Swift because it would allow those persons to see its current pricing on a range of base services that it provides and the range of destinations that it visits. This would be useful information for a competitor or potential competitor in considering its own pricing strategy. The competitor or potential competitor could use that information against Sea Swift, to Sea Swift’s commercial detriment; and
6. Sea Swift should not be subject to that competitive disadvantage now, by reason of its application to acquire certain assets of Toll in circumstances where the transaction may not be authorised.
7. The rates information of Sea Swift in Annexure PB-73 is not within s 95AZA(3). It is therefore necessary for the Tribunal to exercise its discretion under s 95AZA(4) whether to exclude that information from its register and the ACCC website.
8. It is of course appropriate for the ACCC to conduct such inquiries as it considers appropriate to consider Sea Swift’s claim as to the benefit to the public if the authorisation is granted. It says, and the Tribunal accepts, that interested parties may need to know the base from which the maximum capped rates are to be calculated (and, if the authorisation is granted, to be included in Schedule 4) where (as Sea Swift says) its pricing rates are not presently transparent so that particular customers may not know whether they are currently receiving “list” prices or discounts off those “list” prices.
9. Schedule 4, when completed, is intended to contain the current scheduled rates for those types of freight commonly utilised by uncontracted customers. Sea Swift is still preparing its proposed Schedule 4 in its final form. It will then seek to have the maximum rates in Schedule 4 remain confidential unless and until the authorisation it seeks has been granted.
10. The Tribunal has reached the view, on the material available to it, that whilst it may be desirable that Sea Swift’s internal rates be regarded as confidential commercial information, the particular circumstances require that the ACCC be entitled, without the necessity of particular applications to the Tribunal to vary its directions, to address the current rates of Sea Swift as contained in Annexure PB-73 (or, when Sea Swift has produced its proposed Schedule 4 with detailed maximum rates, as set out in Schedule 4) without impediment. The investigative step of the ACCC being able to obtain relevant customer’s views about the effects of the proposed price caps in Schedule 4 (as proposed) is an appropriate one for the ACCC to explore if potentially relevant material concerning the benefit to the public of the proposed authorisation is properly to be presented to the Tribunal for its consideration. It would not, in the view of the Tribunal, be practicable or cost-efficient for the ACCC (or a particular customer) to be required to seek a variation of the confidentiality direction on each occasion that the ACCC seeks to engage with a particular customer or potential customer of Sea Swift or Toll.
11. The application makes it clear that the continued offering of “current scheduled prices [with some qualification] will give customers certainty that prices will not rise above competitive levels”. The benefits of the proposed price cap are also referred to in [21.7] and [21.3] of the application. The ACCC understandably wants to investigate those assertions in the context of the two geographic markets where, with the existing competition at least between Sea Swift and Toll, there may be levels of discounting which might be removed if the proposed acquisition were authorised.
12. Accordingly, the Tribunal considers that:
13. the maximum prices expressed (or to be expressed) in Schedule 4, and until they are provided the 2015 year rates of Sea Swift as disclosed in Annexure PB-73 (but not the rates for earlier years), should be available to be used by the ACCC in its investigations, and submissions to the Tribunal;
14. the rates of Toll as disclosed in Annexure SW-22 are not confidential; and
15. the direction in (a) should operate on the basis that general access to Annexure PB-73 continues to be restricted in accordance with the confidentiality regime, save that the ACCC may disclose the 2015 year rates of Sea Swift (as set out in Annexure PB-73) to such customers of Sea Swift or Toll as it considers appropriate for the purpose of its investigations and consideration of the benefit to the public and in submissions to the Tribunal; and
16. upon the lodgment and service of the content of Schedule 4, Sea Swift shall be at liberty to seek a direction that its contents be confidential, and in any event the ACCC may disclose the rates therein set out to such customers of Sea Swift or Toll as it considers appropriate for the purpose of its investigations and consideration of the benefit to the public and in submissions to the Tribunal.

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| I certify that the preceding fourteen (14) 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