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Toll told to be realistic

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* Toll Holdings was told to take a "reality check" yesterday about its chances of winning a court fight against the Australian Competition and Consumer Commission and urged to use mediation to resolve its dispute over its undertakings following its acquisition of Patrick Corp.

* "Take your fighting boots off and put your resolution hat on and go into mediation," Federal Court judge Peter Gray told Toll's lawyer, Stephen Parmenter. "Mediation is your real chance to get something that your client might want."

Toll and the ACCC are in disagreement over whether a labour hire company, Toll Personnel, is allowed to provide employees to Asciano, which was spun out of Toll in 2007, partially to satisfy competition concerns of the regulator about its 2006 takeover of Patrick.

Undertakings provided by Toll require it not to share management or employees with Asciano so as to ensure the two companies are run separately. The ACCC believes the labour hire arrangements between the pair breach those undertakings.

In May the ACCC threatened to take Toll to court unless the labour hire arrangements stopped. Asciano has since agreed to stop sourcing workers from Toll Personnel. Toll is now seeking a court declaration that it can provide casual manual workers to Asciano without being in breach of the undertakings.

But yesterday Justice Gray said the court might be unwilling to provide such a declaration, given Asciano had stopped using the workers and there no longer appeared to be any live controversy with the ACCC for the court to resolve.

"You are not prepared to back your judgement by continuing to do what you were doing and have the ACCC go against you for breaching the undertaking," the judge said. "Instead you want to take the riskier course, if you're right, by saying you want a declaration in the vaguest imaginable terms. Take a reality check."

* The judge ordered both parties to mediate and told Toll that a mediated outcome was the best course. Mediation will take place by August 18.

ends.