

Toll was slow to put its cards on the ACCC's table

Joshua Gans

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The Toll-Patrick merger could have been approved much earlier if Toll had dealt with the commission's concerns, writes Joshua Gans

On Saturday, the ACCC ended its upcoming legal battle with Toll by accepting its merger proposal and undertakings. Actually, that is probably the wrong way to put it. Let me try again. A week or so ago, Toll ended its upcoming legal battle with the ACCC but putting forward undertakings that assured consumers would be protected if it acquired Patrick.

The way we view the problem here is important. On the one hand, some businesses may argue that the months of negotiations, legal proceedings and delay are a system of a merger system that takes too long and isn't working. If they were going to agree to the merger, the ACCC surely could have done so sooner.

But that isn't what happened. What happened was that Toll put forward a merger proposal that was clearly going to harm consumers. For instance, it would give it (almost) full control over East-West rail freight and likely stifle potential for competition emerging there by giving it a healthy chunk of the freight forwarding business too. For months, it proposed undertakings. Each one was a promise not to discriminate and favour its own businesses but each one did not get at the core of the problem: its control over key physical assets going forward.

Finally, with legal action impending, Toll put forward a structural change. It would not acquire Patrick's share at all but divest it to a third party – outside of the industry. No more horizontal issue (there would be no increase in concentration) and no vertical one (the new owner would not be a freight forwarder). At last, the ACCC had a merger proposal that offered real insurance: consumers would have a chance of competition going forward rather than it being foreclosed.

The end point illustrates how the system is supposed to work. Firms come to the ACCC with merger suggestions but will only approve those ones that do not harm consumers. The remainder benefits the businesses involved and should be permitted.

But sometimes, there are benefits to the business and harm to consumers. In these cases, the ACCC raises concerns and ultimately business, using imagination that only industry insiders possess, come up with changes to the proposal – divestitures or restrictions on behaviour – that might cost them some profits but still leave enough left over to make the whole deal worthwhile. This is where we ended up with Toll.

But business is right. It shouldn't have taken this long. Three months ago, the concerns of the ACCC were clear. And three months ago, the path to allay those concerns was obvious. But it took most of that time for Toll to put an acceptable proposal forward. That is where the fault, the delay and the market uncertainty all lie.

Toll will be paying the ACCC's legal costs. Just as well. The costs caused by their own delay shouldn't be borne by tax payers.

Joshua Gans is Professor of Management (Information Economics) at the Melbourne Business School, University of Melbourne. He assisted the ACCC in its competition evaluation of the Toll-Patrick proposal. The views here, however, are his own and not necessarily those of the ACCC.