



Notice of Decision

Australian Rail Track Corporation's application
to extend the 2008 Interstate Access Undertaking
to 30 June 2023

15 June 2021

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1. Notice of Decision

Pursuant to subsection 44ZZBB(3) of the *Competition and Consumer Act 2010 (Cth)* (CCA), in publishing this notice the Australian Competition and Consumer Commission (ACCC) extends the period for which the Australian Rail Track Corporation's (ARTC) 2008 Interstate Access Undertaking (2008 IAU) is in operation, to 30 June 2023.

In making this access undertaking decision,¹ the ACCC considers it appropriate to extend the period for which the 2008 IAU is in operation, having regard to the matters mentioned in subsection 44ZZA(3) of the CCA.

This access undertaking decision is made in respect of ARTC's application of 23 April 2021, which requested an extension of the period for which the 2008 IAU is in operation pursuant to subsection 44ZZBB(1) of the CCA (the Application).² The Application sought to extend the period of the 2008 IAU from 30 June 2021 to 30 June 2023, and did not propose to make any other amendments.

In publishing this notice, the ACCC publishes its access undertaking decision and its reasons for the decision for the purposes of subsection 44ZZBE(1) of the CCA.

The ACCC considers that the extension will provide sufficient time for the completion of the Depreciated Optimised Replacement Cost (DORC) valuation and for ARTC, in conjunction with the ACCC and stakeholders, to further develop and finalise a replacement IAU for ARTC's Interstate network.³ It will also provide the ACCC with the opportunity to review the regulatory framework relevant to the Interstate network in consultation with stakeholders.

In submissions responding to the ACCC's consultation letter of 29 April 2021, all stakeholders except Pacific National supported or did not oppose the Application.

2. Background

On 30 July 2008, the ACCC accepted ARTC's 2008 IAU under Part IIIA of the then *Trade Practices Act 1974 (Cth)*.⁴ The 2008 IAU sets out the terms and conditions of access for parties seeking to run trains on ARTC's Interstate network.⁵ The 2008 IAU was originally due to expire on 21 August 2018.

Under subsection 44ZZBB(1) of the CCA, the provider of the service (in this instance, ARTC) can apply for an extension of the period for which the access undertaking is in operation.

The Application is ARTC's sixth application to extend the term of the 2008 IAU. Appendix 1 summarises the timeline of key events leading up to the Application.

2.1. 2018 Interstate Access Undertaking

On 6 March 2018, ARTC submitted the proposed 2018 Interstate Access Undertaking (2018 IAU), intended to replace the 2008 IAU, for assessment by the ACCC.

¹ See definition in s 44B, *Competition and Consumer Act 2010*.

² Available here: <https://www.accc.gov.au/regulated-infrastructure/rail/artc-interstate-access-undertaking/extension-of-the-2008-interstate-access-undertaking-to-30-june-2023/application>

³ For more information on ARTC's defined Interstate rail network, see: <https://www.artc.com.au/customers/standards/route/access/defined-interstate/>

⁴ Division 6 of Part IIIA of the *Trade Practices Act 1974* provided that the ACCC may accept an undertaking from a person who is, or expects to be, the provider of a service, in connection with provision of access to the service.

⁵ Documents relating to the accepted 2008 IAU are available at: <https://www.accc.gov.au/regulated-infrastructure/rail/artc-interstate-rail-access-undertaking>

On 20 December 2018, the ACCC published a draft decision to not accept the 2018 IAU.⁶ The ACCC identified a number of issues in the 2018 IAU, including ARTC's proposed roll forward of the regulatory asset base (RAB).

On 25 January 2019, ARTC withdrew the 2018 IAU from the ACCC's consideration.

2.2. Valuation of the Interstate network

On 23 August 2019, ARTC proposed to revalue the RAB on the Interstate network using the DORC methodology, to address the concerns raised in the ACCC's draft decision in respect of ARTC's proposed RAB roll forward.

On 8 November 2019, the ACCC published its Statement of Approach⁷ stating that it would appoint a consultant to undertake a DORC valuation of the Interstate network in order to determine the RAB value. On 23 April 2020, the ACCC engaged GHD Advisory to conduct the DORC valuation.

On 15 June 2021, the ACCC published GHD Advisory's draft DORC valuation report and accompanying consultation inviting stakeholder views.⁸ The consultation paper highlights some of the ACCC's concerns regarding the use of a DORC and notes the ACCC's intention to consult stakeholders on possible options for the future regulation of ARTC's Interstate network.

Stakeholders will have the opportunity to provide submissions to the ACCC on the draft DORC valuation report by 28 July 2021 (6 weeks), prior to the ACCC publishing the final DORC valuation report.

Given the concerns we have in relation to the DORC methodology and the current regulatory framework for the Interstate network, we will consult on a future regulatory framework for the network in 2021. We will soon publish an Issues Paper that will seek to understand stakeholders' views on a number of matters, including:

- the current regulatory framework that applies to the Interstate network
- the competitive environment the Interstate network faces, including the extent of constraint from heavy vehicles and coastal shipping and whether certain customers may be 'captive' to rail (that is, difficult to switch to alternative forms of transport)
- alternative approaches to the regulation of the Interstate network, such as negotiate-arbitrate, price controls, applying different regulation depending on the level of competition in different geographic areas, or other frameworks stakeholders wish to put forward.

⁶ See ACCC, *Draft Decision – Australian Rail Track Corporation's 2018 Interstate Access Undertaking*, 20 December 2018.

⁷ Available here: <https://www.accc.gov.au/regulated-infrastructure/rail/artc-interstate-access-undertaking/proposed-valuation-for-the-interstate-network/statement-of-approach>

⁸ Available here: <https://www.accc.gov.au/regulated-infrastructure/rail/dorc-valuation-of-the-interstate-network>

3. ARTC's application and stakeholder consultation

3.1. ARTC's extension application

On 23 April 2021, the ACCC received the Application from ARTC requesting to extend the term of the 2008 IAU by a further period of 24 months. ARTC seeks to do so by amending clause 2.3(a) of the 2008 IAU by replacing the words '30 June 2021' with '30 June 2023'. The Application does not propose to make any other amendments to the 2008 IAU.⁹

ARTC submits that:

*Given that a draft DORC report is yet to be published and finalisation of this process is a condition precedent to the lodgement of the renewed IAU, ARTC considers that a two year extension is the most appropriate timeframe in order to provide the necessary certainty to stakeholders that a further extension is not required.*¹⁰

Further, recognising that there will be a gap between the DORC valuation date of 1 July 2019 and the likely start date of the replacement IAU of 1 July 2023, ARTC is committed to maintaining the accuracy of the DORC value during this period:

*... ARTC acknowledges that this requires a prudency assessment of capital expended on the Interstate Network during that temporal gap period... To this end, ARTC is committed to a process of working with the ACCC to provide necessary documentation and analysis required for this prudency assessment as early a date as possible.*¹¹

3.2. The ACCC's consultation on the Application

On 29 April 2021, the ACCC invited public submissions on the Application pursuant to subsection 44ZZBD(1) of the CCA. Submissions were due on 13 May 2021. In response, the ACCC received submissions from 10 stakeholders. All submissions from stakeholders, with the exception of Pacific National, are brief and were supportive or did not object to ARTC's proposed 24 month extension.

Stakeholder submissions are summarised below:

- Bowmans Rail¹² – Bowmans Rail supports ARTC's application to extend the 2008 IAU to 30 June 2023. Bowmans Rail agree in principle that given a DORC valuation needs to be complete prior to ARTC's lodgement of a replacement IAU, it considers a 2-year extension a reasonable timeframe without requiring any further extensions.
- Metro Trains Melbourne¹³ – Metro Trains Melbourne has no opposition to extending the operation of the 2008 IAU until 30 June 2023.
- NSW Trains¹⁴ – NSW Trains does not object to the Application, provided that the terms and conditions remain the same.

⁹ The Application is available at: <https://www.accc.gov.au/regulated-infrastructure/rail/artc-interstate-access-undertaking/extension-of-the-2008-interstate-access-undertaking-to-30-june-2023/application>

¹⁰ ARTC, Re: 2008 Interstate Access Undertaking (IAU) Extension Application to the ACCC, 23 April 2021.

¹¹ ARTC, Re: 2008 Interstate Access Undertaking (IAU) Extension Application to the ACCC, 23 April 2021.

¹² Bowmans Rail submission, RE: 2008 Interstate Access Undertaking (IAU) Extension Application to the ACCC, 23 April 2021, received 13 May 2021.

¹³ Metro Trains Melbourne submission, RE: Consultation on proposed extension and variation to the Australian Rail Track Corporation's 2008 Interstate Access Undertaking, dated 13 May 2021.

¹⁴ NSW Trains submission, RE: ARTC's Application to extend the 2008 IAU - invitation to make submissions, dated 11 May 2021.

- One Rail Australia¹⁵ – One Rail does not oppose the request to amend the 2008 IAU as the requested timeline seems reasonable and will provide One Rail the certainty and stability needed for its continued operations.
- Pacific National¹⁶ – Pacific National does not support the proposed length of the extension and contends that the process should be concluded in less than 2 years.
- Qube Logistics¹⁷ – Qube Logistics has no objections to the proposed extension.
- SCT Logistics¹⁸ – SCT Logistics agrees with ARTC’s request to extend the term of the current agreement.
- Southern Shorthaul Railroad¹⁹ – Southern Shorthaul Railroad supports ARTC’s application to extend the expiry of the 2008 IAU by 24 months to 30 June 2023.
- Sydney Rail Services²⁰ – Sydney Rail Services agrees with ARTC’s application to extend the existing 2008 IAU for a period of 2 years.
- Yancoal Australia (Gloucester Coal Ltd)²¹ – Gloucester does not object to ARTC’s proposal to extend the term of the 2008 IAU by a further period of 24 months.

Pacific National’s submission is considered further below.

Pacific National

As noted, Pacific National does not support the proposed length of the extension. Pacific National contends, subject to the finalisation of the DORC process, the replacement undertaking should be concluded in less than 2 years. In its submission, Pacific National notes the competitive environment in 2021 is different to when the ACCC approved ARTC’s 2008 IAU. Pacific National seek more efficient regulatory processes and policy settings as soon as possible that support the competitiveness of the rail industry and are responsive to changing market conditions.

As set out in section 2.2, we will soon publish an Issues Paper on a future regulatory framework for the Interstate network. This will provide stakeholders, including Pacific National, the opportunity to put forward their views on the appropriate regulatory framework for the Interstate network. We note it is unlikely that consulting on and implementing potential changes to the regulatory approach would take significantly less than 2 years.

4. The ACCC’s decision to extend the 2008 IAU

The Application has been assessed in accordance with the decision-making framework in Part IIIA of the CCA, as detailed in part 5 of this decision. In making this decision the ACCC has had regard to the matters set out in subsection 44ZZA(3), as required by subsection 44ZZBB(3) of the CCA. The matters that are particularly relevant to this decision are:

¹⁵ One Rail Australia submission, *Re: Extension to the ARTC’s 2008 Interstate Undertaking*, dated 12 May 2021.

¹⁶ Pacific National submission, *RE: Extension of the 2008 Interstate Access Undertaking (to 30 June 2023)*, dated 13 May 2021.

¹⁷ Qube Logistics submission, *Re: Australian Rail Track Corporation’s 2008 Interstate Access Undertaking – Extension*, dated 13 May 2021.

¹⁸ SCT Logistics submission, *Consultation on proposed extension to the Australian Rail Track Corporation’s 2008 Interstate Access Undertaking*, dated 12 May 2021.

¹⁹ Southern Shorthaul Railroad submission, *RE: ARTC’s Application to extend the 2008 IAU - invitation to make submissions*, dated 14 May 2021.

²⁰ Sydney Rail Services submission, *SRS response to the ARTC application to extend the existing 2008 IAU network access agreement*, dated 11 May 2021.

²¹ Yancoal Australia (Gloucester Coal Ltd) submission, *Proposed extension to the Australian Rail Track Corporation’s 2008 Interstate Access Undertaking*, dated 12 May 2021.

- the objects of Part IIIA of the CCA (subsection 44ZZA(3)(aa))
- the pricing principles (subsection 44ZZA(3)(ab) and section 44ZZCA)
- the legitimate business interests of ARTC (subsection 44ZZA(3)(a))
- the interests of persons who might want access to the Interstate network under the 2008 IAU (subsection 44ZZA(3)(c))

ARTC's application to extend the period of the 2008 IAU to 30 June 2023 permits the continuation of the existing regulatory framework which the ACCC approved under the CCA.

The ACCC considers that extending the period of the 2008 IAU encourages a consistent approach to access regulation and is in accordance with the objects of Part IIIA (subsection 44ZZA(3)(aa)). The extension allows the existing regulatory framework to continue whilst ARTC develops a replacement undertaking and the ACCC assesses that undertaking.

Under clause 4.6(d) of the 2008 IAU, ARTC may vary Indicative Access Charges in July of each year up to an amount equal to the Consumer Price Index (CPI).²² The Application does not propose to make any changes to the pricing framework in the 2008 IAU. As such, there will be no changes to the Indicative Access Charges between 30 June 2021 and 30 June 2023, during the extension period proposed in the Application. The ACCC considers that having prices increase by no more than CPI each year during the 24 month extension period sought in the Application is likely to provide clarity and certainty on the operation of the pricing framework during the term of the 2008 IAU.

The ACCC therefore considers that the Application is in the legitimate business interests of ARTC and in the interests of access seekers having regard to subsections 44ZZA(3)(a) and 44ZZA(3)(c) of the CCA. This is likely to promote the economically efficient operation of, use of, and investment in ARTC's Interstate network (subsection 44ZZA(3)(aa)).

For the reasons set out above, the ACCC has consented to the Application and issued this notice to extend the period of the 2008 IAU until 30 June 2023, in accordance with section 44ZZBB of the CCA.

5. ACCC's decision-making framework

The ACCC has a key role in promoting efficient investment in, operation of and use of infrastructure, as well as identifying market failures. Types of infrastructure regulated and monitored by the ACCC include airports, aviation, energy, fuel, postal services, rail, telecommunications, stevedoring, shipping, bulk water and wheat export terminals.

Across this infrastructure, the ACCC applies a consistent framework to assess whether there is economically efficient investment in, operation of and use of the infrastructure. This encompasses:

- transparency
- robustly assessing and testing evidence provided by infrastructure operators and users
- applying the relevant statutory criteria and having regard to the relevant matters set out in the legislation.

²² ARTC's 2008 Interstate Access Undertaking (last varied on 19 June 2020) defines "CPI" to mean the CPI All Groups, Weighted Average of Eight Capital Cities index number published by the Australian Bureau of Statistics.

The statutory criteria relevant to the consideration of applications to extend existing undertakings under Part IIIA of the CCA are set out below.

5.1. Legal framework for accepting an application to extend an access undertaking

Subsection 44ZZBB(3) of the CCA provides that the ACCC may, by notice in writing, extend the period for which an undertaking is in operation if it thinks it is appropriate to do so, having regard to the matters set out in subsection 44ZZA(3) of the CCA.

The matters in subsection 44ZZA(3) include:

- the objects of Part IIIA of the CCA, which are to:
 - promote the economically efficient operation of, use of and investment in the infrastructure by which the services are provided, thereby promoting effective competition in upstream and downstream markets, and
 - provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry
- the pricing principles specified in section 44ZZCA of the CCA (see further below)
- the legitimate business interests of the provider of the service
- the public interest, including the public interest in having competition in markets (whether or not in Australia)
- the interests of persons who might want access to the service
- whether the undertaking is in accordance with an access code that applies to the service, and
- any other matters that the ACCC thinks are relevant.

In relation to the pricing principles, section 44ZZCA of the CCA provides that:

- regulated access prices should:
 - be set so as to generate expected revenue for a regulated service that is at least sufficient to meet the efficient costs of providing access to the regulated service or services, and
 - include a return on investment commensurate with the regulatory and commercial risks involved
- access price structures should:
 - allow multi-part pricing and price discrimination when it aids efficiency, and
 - not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operations is higher, and
- access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

5.2. Timeframe for and publication of ACCC decision

Section 44ZZBC(1) of the CCA provides that the ACCC must make a decision on an access undertaking application within the period of 180 days, starting at the beginning of the day the application is received (referred to as 'the expected period').

Further, section 44ZZBC(2) of the CCA provides that in working out the expected period, the period between the day a notice is published under section 44ZZBD(1) inviting public submissions in relation to an application and the day specified in the notice as the day by which submissions may be made, is to be disregarded.

Section 44ZZBE(1) of the CCA provides that the Commission must publish, by electronic or other means, a decision to extend the period for which an access undertaking is in operation, and its reasons for the decision.

Section 44ZZBE(2) of the CCA provides that the Commission must give a copy of the publication to the provider of the service.

Section 44ZZBE(3) of the CCA provides that before publishing its decision to extend the period for which an access undertaking is in operation, the Commission may give the provider of the service a notice in writing specifying what the Commission is proposing to publish and inviting written submissions on whether any information should not be published because of its confidential commercial nature. The Commission must have regard to any submission so made in deciding what to publish, and may have regard to any other matter it considers relevant.

Appendix

Table 1: Key events leading to the Application

Date	Event
30 July 2008	The ACCC accepts the 2008 IAU under Part IIIA of the then <i>Trade Practices Act 1974</i> (Cth). The original expiry date of the 2008 IAU was 21 August 2018.
6 March 2018	ARTC submits the 2018 IAU for ACCC assessment as a replacement to the 2008 IAU.
28 June 2018	ARTC submits an application to extend the term of the 2008 IAU by 4 months to 21 December 2018 (first application).
25 July 2018	The ACCC issues a Decision to consent to ARTC's first application.
16 November 2018	ARTC submits an application to extend the term of the 2008 IAU by around 2 months to 28 February 2019 (second application).
12 December 2018	The ACCC issues a Decision to consent to ARTC's second application.
20 December 2018	The ACCC publishes a draft decision to not accept the 2018 IAU.
25 January 2019	ARTC withdraws the 2018 IAU from the ACCC's consideration.
29 January 2019	ARTC submits an application to vary a number of terms in the 2008 IAU, including extending the term of the undertaking to 29 February 2020 (third application).
22 February 2019	ARTC withdraws its third application from the ACCC's assessment, and submits a revised application.
28 February 2019	The ACCC issues a Decision to consent to ARTC's revised third application.
29 July 2019	ARTC submits an application to extend the term of the 2008 IAU for a further period of 4 months to 30 June 2020 (fourth application).
26 September 2019	The ACCC issues a Decision to consent to ARTC's fourth application.
8 November 2019	The ACCC publishes its Statement of Approach, stating that it will appoint a consultant to undertake a DORC valuation of the Interstate network in order to determine the RAB value.
23 April 2020	The ACCC engages GHD Advisory to conduct the DORC valuation.
5 May 2020	ARTC submits an application to extend the term of the 2008 IAU for a further period of 12 months to 30 June 2021 (fifth application).
19 June 2020	The ACCC issues a Decision to consent to ARTC's fifth application.
23 April 2021	ARTC submits the Application to extend the term of the 2008 IAU for a further period of 24 months to 30 June 2023.