



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Notice of Decision

Australian Rail Track Corporation's
application to extend the 2008
Interstate Access Undertaking to
30 June 2024

May 2023

Contents

1. Notice of Decision	2
2. Background.....	2
3. ARTC's application and stakeholder consultation.....	3
4. ACCC's decision-making framework	4
5. The ACCC's decision to extend the 2008 IAU	5

1. Notice of Decision

Pursuant to subsection 44ZZBB(3) of the *Competition and Consumer Act 2010 (Cth)* (CCA), 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 2024.

The ACCC considers it appropriate to grant this extension, having regard to the matters mentioned in subsection 44ZZA(3) of the CCA.¹

This access undertaking decision is made in response to ARTC's application of 21 February 2023 requesting an extension to the operating period of the 2008 IAU 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 2023 to 30 June 2024 and did not propose to make any other amendments to the undertaking.

This notice incorporates the ACCC's access undertaking decision under subsection 44ZZBB(3) of the CCA and its reasons for the decision for the purposes of subsection 44ZZBE(1) of the CCA.

2. Background

On 30 July 2008 the ACCC accepted ARTC's 2008 IAU under Part IIIA of the then *Trade Practices Act 1974 (Cth)*.³ The 2008 IAU sets out the terms and conditions of access for parties seeking to run trains on ARTC's Interstate network.⁴ 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 seventh application to extend the term of the 2008 IAU. Information about previous applications is available on the [ACCC's website](#).

2.1. Proposed 2018 Interstate Access Undertaking and withdrawal

On 6 March 2018 ARTC submitted the proposed 2018 Interstate Access Undertaking (2018 IAU). ARTC submitted the 2018 IAU to replace the 2008 IAU, which was scheduled to expire on 21 August 2018 after the initial 10-year term of the 2008 IAU concluded.

On 20 December 2018 the ACCC released its draft decision to not accept the 2018 IAU.⁵ The ACCC identified several issues in the 2018 IAU, particularly that the proposed roll-forward of the regulated asset base (RAB) of \$10 billion was not appropriate. On 25 January 2019 ARTC withdrew the 2018 IAU from the ACCC's consideration. The 2008 IAU was subsequently extended several times between 2019 and 2021, as shown at the link to our website above, to reach its current expiry of 30 June 2023.

¹ See definition of 'access undertaking decision' in s44B of the CCA.

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 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.

⁴ Documents relating to the accepted 2008 IAU are available at: <https://www.accc.gov.au/regulated-infrastructure/rail/artc-interstate-rail-access-undertaking>

⁵ See ACCC, *Draft Decision – Australian Rail Track Corporation's 2018 Interstate Access Undertaking*, 20 December 2018.

2.2. Subsequent consultations on the IAU

Between 2019 and 2022 the ACCC attempted to provide clarity on the Interstate network's potential RAB and to consult industry stakeholders on regulating the Interstate network. Responses to the ACCC's August 2021 Issues Paper provided different views on the degree of ARTC's market power and concerns about that power being used from the perspective of users that consider themselves captive customers.

In July 2022 the ACCC published a Guidance Paper that identified substantial challenges in determining a RAB for the Interstate network. These included difficulty assessing the efficiency of past capital expenditure, the ongoing rollout of the Inland Rail project and a lack of clarity about the intended benefits of government funding, and the extent to which users should pay for the network. The ACCC indicated that it may be acceptable for ARTC to propose an undertaking to replace the one expiring on 30 June 2023 that continues to include a price control but without the need for a RAB for the term of the next undertaking (likely 5 years).

On 10 October 2022 the ACCC sent a letter to ARTC about the potential timing of a new IAU and stated that ARTC should consider an extension to the 2008 IAU to allow the ACCC sufficient time to consult on and assess the expected replacement 2023 IAU. On 19 December 2022 ARTC provided a response letter notifying the ACCC of its intention to lodge an extension.

3. ARTC's application and stakeholder consultation

3.1. ARTC's extension application

On 21 February 2023 the ACCC received ARTC's Application for an extension of the term of the 2008 IAU by a further period of 12 months. ARTC seeks to do so by amending clause 2.3(a) of the 2008 IAU by replacing the words '30 June 2023' with '30 June 2024'. The Application does not propose to make any other amendments to the 2008 IAU.⁶

ARTC submitted the extension Application in anticipation of lodging a replacement IAU in 2023. ARTC stated in its Application that it intends to continue stakeholder engagement for the 2023 IAU and aims to submit the replacement IAU to the ACCC for assessment in 2023.

3.2. The ACCC's consultation on the Application

On 9 March 2023 the ACCC invited public submissions on the Application, pursuant to subsection 44ZZBD(1) of the CCA. Submissions were due on 31 March 2023. In response, the ACCC received one stakeholder submission, from GrainCorp.

GrainCorp supports ARTC's extension Application on the basis that ARTC seeks feedback from GrainCorp regarding the terms of any proposed replacement undertaking. In its submission, GrainCorp stated that aside from an industry-wide Q&A session in mid-2022, ARTC has not engaged with GrainCorp on the proposed replacement IAU. GrainCorp noted in the submission that as an access seeker and key stakeholder, it expects to be included in the consultation process by ARTC.

⁶ 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>

4. ACCC's decision-making framework

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

4.1. 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 appropriate to do so having regard to the matters set out in subsection 44ZZA(3) of the CCA.

The matters in subsection 44ZZA(3) are:

- 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. The ACCC's decision to extend the 2008 IAU

The ACCC has assessed the Application in accordance with the decision-making framework in Part IIIA of the CCA, as detailed in part 4 of this decision. In making this decision the ACCC has had regard to all of the matters set out in subsection 44ZZA(3), as required by subsection 44ZZBB(3) of the CCA.⁷

ARTC's application to extend the period of the 2008 IAU to 30 June 2024 permits the continuation of the existing regulatory framework that 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 consults on and assesses that undertaking. Further, the interests of access seekers are promoted through thorough consultation. The short continuation of an existing, well-understood framework in order to consult on a new framework is likely to continue to promote the economically efficient operation of, use of, and investment in ARTC's Interstate network, thereby promoting effective competition in upstream and downstream markets (paragraph 44ZZA(3)(aa)).

Under clause 4.6(d) of the 2008 IAU, ARTC may vary Indicative Access Charges in July of each year by an amount up to the cumulative Consumer Price Index (CPI).⁸ The Application does not propose to make any changes to the pricing framework in the 2008 IAU. The ACCC considers that having prices increase in line only with the existing cumulative CPI formula during the 12-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. There is no evidence before the ACCC that suggests, for the purposes of a 12-month extension, there is a change in circumstances that would require the existing approved undertaking framework to be reconsidered against the pricing principles under section 44ZZCA.

The ACCC considers that the Application to maintain the framework for a further year is an appropriate outcome. In forming this view, the ACCC has had regard to the legitimate business interests of ARTC and the interests of access seekers to maintain consistent and certain terms of access and pricing for the Interstate network while a new IAU is developed, with regard to paragraphs 44ZZA(3)(a) and 44ZZA(3)(c) of the CCA. Further, in the one submission received responding to the ACCC's consultation letter of 9 March 2023, GrainCorp supported the Application subject to it being consulted by ARTC before lodgement. The ACCC does not consider the extension is inconsistent with the public interest under paragraph 44ZZA(3)(b).

Regarding any other matters the Commission considers relevant (paragraph 44ZZA(e)), the ACCC considers that the extension will provide a more appropriate timeframe for ARTC to lodge and the ACCC to assess the 2023 replacement IAU for ARTC's Interstate network and ensure sufficient time for appropriate consultation.⁹

For the reasons set out above, the ACCC extends the period of the 2008 IAU to 30 June 2024, in accordance with section 44ZZBB of the CCA.

⁷ Paragraph 44ZZA(3)(da), which is 'whether the undertaking is in accordance with an access code that applies to the service', is not relevant because there is no applicable access code for the Interstate rail network.

⁸ ARTC's 2008 Interstate Access Undertaking (last varied on 15 June 2021) defines "CPI" to mean the CPI All Groups, Weighted Average of Eight Capital Cities index number published by the Australian Bureau of Statistics.

⁹ For more information on ARTC's defined Interstate rail network, see: <https://www.artc.com.au/customers/standards/route/access/defined-interstate/>