



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Decision

Australian Rail Track Corporation's
application to extend the 2008
Interstate Access Undertaking –
extension of term to 30 June 2021

19 June 2020

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1. Summary

On 19 June 2020, the Australian Competition and Consumer Commission (**ACCC**) issued this notice to extend the period of the 2008 Interstate Access Undertaking (**2008 IAU**) to 30 June 2021. This notice is in response to the Australian Rail Track Corporation's (**ARTC's**) 5 May 2020 application to extend its 2008 IAU (**the Application**).

The Application sought to extend the term of the 2008 IAU from 30 June 2020, to 30 June 2021, and did not propose to make any other amendments.

The ACCC has issued this notice of its decision, and published its reasons for the decision, in accordance with sections 44ZZBB(3) and 44ZZBE(1) of the *Competition and Consumer Act 2010* (Cth) (**the Act**), having regard to the matters listed under section 44ZZA(3). The extension will provide regulatory certainty and further time for ARTC, in conjunction with the ACCC and stakeholders, to further develop and finalise a replacement IAU for ARTC's Interstate network.¹

Stakeholder submissions in response to the ACCC's consultation letter published on 11 May 2020, do 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).² The 2008 IAU sets out the terms and conditions of access for parties seeking to run trains on ARTC's Interstate network.³ The 2008 IAU was originally due to expire on 21 August 2018.

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

2.1. 2018 IAU

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

On 20 December 2018, the ACCC published a draft decision to not accept the 2018 IAU.⁴ 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 Depreciated Optimised Replacement Cost (**DORC**) DORC methodology, to address the

¹ For more information on ARTC's defined Interstate Rail Network, see: <https://www.artc.com.au/customers/standards/route/access/defined-interstate/>

² 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.

³ Documents relating to the accepted 2008 IAU are available at: <https://www.accc.gov.au/regulated-infrastructure/rail/artc-interstate-rail-access-undertaking>.

⁴ See ACCC, *Draft Decision – Australian Rail Track Corporation's 2018 Interstate Access Undertaking*, 20 December 2018.

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 Approach,⁵ confirming the view that a full DORC valuation was the most appropriate approach to valuing the RAB of the Interstate network, with the ACCC to engage a consultant.

On 23 April 2020, the ACCC engaged GHD Advisory to conduct the DORC valuation. The valuation is expected to take approximately six months to complete. Stakeholders will have the opportunity to provide submissions to the ACCC on the draft report, prior to the ACCC publishing the final DORC valuation report.

ARTC's replacement IAU is expected following the completion of the DORC valuation, following which the ACCC will make a formal decision on the replacement IAU.

2.3. Variations to the 2008 IAU

The Application is ARTC's fifth variation application seeking to extend the term of the 2008 IAU since June 2018. Table 1 summarises the timeline of key events leading up to the Application.

Table 1: Key events leading to the Application

Date	Event
30 July 2008	The ACCC accepts the 2008 IAU under Part IIIA of the Act. 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 four months to 21 December 2018 (first variation application).
25 July 2018	The ACCC issues a Decision to consent to ARTC's first variation application.
16 November 2018	ARTC submits an application to vary the term of the 2008 IAU by around two months to 28 February 2019 (second variation application).
12 December 2018	The ACCC issues a Decision to consent to ARTC's second variation 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 ACCC assessment.
29 January 2019	ARTC submits an application to vary a number of terms in the 2008 IAU, including extending the term of the undertaking by 12 months to 29 February 2020 (third variation application).
22 February 2019	ARTC withdraws its third variation application from the ACCC's assessment, and submits a revised variation application.
28 February 2019	The ACCC issues a Decision to consent to ARTC's revised third variation application.
29 July 2019	ARTC submits an application to extend the term of the 2008 IAU for four months to 30 June 2020 (fourth extension application).

⁵ Available here: <https://www.accc.gov.au/regulated-infrastructure/rail/artc-interstate-access-undertaking/proposed-valuation-for-the-interstate-network/statement-of-approach>.

Date	Event
26 September 2019	The ACCC issues a Decision to consent to ARTC's fourth extension application.
8 November 2019	The ACCC publishes its Statement of Approach, ⁶ confirming the view that a full DORC valuation is the preferred approach to valuing the RAB of the Interstate network.
23 April 2020	The ACCC engages GHD Advisory to conduct the DORC valuation.
5 May 2020	ARTC submits the Application to extend the term of the 2008 IAU for 12 months to 30 June 2021.

3. ARTC's application and stakeholder consultation

3.1.1. ARTC's extension application

On 5 May 2020, the ACCC received the Application from ARTC to extend the term of the 2008 IAU by 12 months. ARTC seeks to do so by amending clause 2.3(a) of the 2008 IAU by replacing the words '30 June 2020' with '30 June 2021'. The Application does not propose to make any other amendments to the 2008 IAU.⁷

ARTC submits the purpose of the extension is to ensure that there is sufficient time:⁸

...to allow both the DORC process and the review of the renewed IAU to complete.

Further, ARTC also notes that:⁹

... due to the impacts of Covid-19 we are operating in uncertain and unique times, so any decision on timing contains a degree of uncertainty on the future and is subject to ongoing review.

3.1.2. The ACCC's consultation on the Application

On 11 May 2020, the ACCC invited public submissions on the Application pursuant to section 44ZZBD(1) of the Act. Submissions were due on 26 May 2020. In response, the ACCC received submissions from four stakeholders, which are summarised below:

- V/Line,¹⁰ dated 22 May 2020 - V/Line does not oppose the Application on the condition that the ACCC provide ongoing updates to relevant rail operators/stakeholders.
- Pacific National (PN),¹¹ dated 25 May 2020 - PN welcomes and supports ARTC's application to extend the termination date of the 2008 IAU to 30 June 2021.

⁶ Available here: <https://www.accc.gov.au/regulated-infrastructure/rail/artc-interstate-access-undertaking/proposed-valuation-for-the-interstate-network/statement-of-approach>.

⁷ 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-2021/application>.

⁸ ARTC, *Re: 2008 Interstate Access Undertaking Extension Application to the ACCC*, 5 May 2020.

⁹ ARTC, *Re: 2008 Interstate Access Undertaking Extension Application to the ACCC*, 5 May 2020.

¹⁰ V/Line submission, *Consultation on proposed extension and variation to Australian Rail Track Corporation's 2008 Interstate Access Undertaking*, dated 22 May 2020.

¹¹ Pacific National submission, *Extension of the 2008 Access Undertaking (to 30 June 2021)*, dated 25 May 2020.

- Metro Trains Melbourne (**MTM**),¹² dated 25 May 2020 - MTM has no opposition to extending the operation of the 2008 IAU to 30 June 2021.
- NSW Trains,¹³ dated 26 May 2020 - NSW Trains does not oppose ARTC's application on the condition that there are no increases to access fees or other charges.

Submissions from V/Line and NSW Trains are considered further below.¹⁴

V/Line

In its submission, V/line request that the ACCC provide ongoing updates to stakeholders e.g. on the DORC valuation process, milestone achievements, and risks associated with the completion of assessment of the replacement IAU. The ACCC will provide periodic updates to stakeholders over the next 12 months, noting that stakeholders will also be invited to make submissions on the draft DORC valuation report, as well as through the process of assessing the replacement IAU.

NSW Trains

The submission from NSW Trains states that it does not oppose the Application, on the condition that there are no increases in access fees or other charges.

Under section 4.6(d) of the 2008 IAU, ARTC may increase Indicative Access Charges by CPI on 1 July each year. We understand that NSW Trains' condition does not refer to the annual increase provided for in the 2008 IAU, and we note that ARTC's application does not seek to make any changes to the current pricing framework including this annual increase.

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

The Application has been assessed in accordance with the decision-making framework under Part IIIA of the Act, as detailed in part 6 of this decision. In doing so the ACCC has had regard to the matters set out in section 44ZZA(3) of the Act, as required by section 44ZZBB(3) of the Act. The matters that are particularly relevant to this decision are:

- the objects of Part IIIA of the Act (section 44ZZA(3)(aa))
- the legitimate business interests of ARTC (section 44ZZA(3)(a))
- the interests of persons who might want access to the Interstate network under the 2008 IAU (section 44ZZA(3)(c))

ARTC's application to extend the expiry of the 2008 IAU to 30 June 2021, permits the continuation of the existing regulatory framework which was approved by the ACCC under the Act.

The ACCC considers that extending the expiry of the 2008 IAU encourages a consistent approach to access regulation and is in accordance with the objects of Part IIIA of the Act (section 44ZZA(3)(aa)). The extension allows the existing regulatory framework to continue, whilst the DORC valuation process is finalised, ARTC develops a replacement undertaking

¹² Metro Trains submission, *Consultation on proposed extension and variation to the Australian Rail Track Corporation's 2008 Interstate Access Undertaking*, dated 25 May 2020.

¹³ NSW Trains submission, *Application to the ACCC to extend the 2008 Interstate Access Undertaking*, dated 26 May 2020.

¹⁴ Submissions are available at:

<https://www.accc.gov.au/regulated-infrastructure/rail/artc-interstate-access-undertaking/extension-of-the-2008-interstate-access-undertaking-to-30-june-2021/consultation-letter-submissions>.

and the ACCC assesses that undertaking. 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 sections 44ZZA(3)(a) and 44ZZA(3)(c) of the Act.

The Application provides clarity and certainty to ARTC and access seekers for a further 12 months and is therefore likely to promote the economically efficient operation of, use of, and investment in ARTC's Interstate network (section 44ZZA(3)(aa) of the Act).

For the reasons set out above, this decision is a notice to extend the period of the 2008 IAU until 30 June 2021, in accordance with sub-section 44ZZBB(3) of the Act.

5. Next steps

The next steps are the completion of the DORC valuation process, the finalisation and lodgement of the replacement IAU by ARTC and its subsequent assessment by the ACCC. The ACCC also recognises ARTC's aim to have a replacement IAU in place by 1 July 2021.

The ACCC encourages ARTC and stakeholders to constructively engage with each other to resolve the key issues outlined in the ACCC's draft decision, prior to ARTC formally submitting its replacement IAU application. The ACCC considers that the replacement IAU will need to be lodged with the ACCC with sufficient time for assessment, prior to 30 June 2021.

6. 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
- ensuring the relevant statutory criteria is satisfied.

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

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

Section 44ZZBB(3) of the Act 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 section 44ZZA(3) of the Act.

The matters in section 44ZZA(3) include:

- the objects of Part IIIA of the Act, 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 Act (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 Act 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.

6.2. Timeframe for and publication of ACCC decision

Section 44ZZBC(1) of the Act 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'). A request made to the ACCC for the extension of an access undertaking is an access undertaking application.

Further, section 44ZZBC(2) of the Act 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.

As the ACCC received the Application from ARTC on 5 May 2020, and a notice inviting public submissions was published under section 44ZZBD(1) of the Act on 11 May 2020, seeking submission by 26 May 2020, the ACCC is statutorily required to make its decision by 17 November 2020.

Section 44ZZBE(1) of the Act 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 Act provides that the Commission must give a copy of the publication to the provider of the service.

Section 44ZZBE(3) of the Act 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.