



Decision

Australian Rail Track Corporation's
application to vary the 2008 Interstate
Access Undertaking – extension of
term to 30 June 2020

26 September 2019

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1. Summary

On 26 September 2019, the Australian Competition and Consumer Commission (**ACCC**) issued this notice to extend the period of the 2008 Interstate Access Undertaking (**2008 IAU**) until 30 June 2020. This notice is in response to the Australian Rail Track Corporation's (**ARTC's**) 29 July 2019 application (**the Application**) to vary its 2008 IAU to extend the period for which the 2008 IAU is in operation.

The Application seeks to extend the term of the 2008 IAU from 29 February 2020 to 30 June 2020 to provide additional time for a replacement IAU to be assessed and finalised, and does not propose to make any other amendments to the 2008 IAU.

The ACCC has issued this notice in accordance with section 44ZZBB(3) 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, the ACCC and stakeholders to work towards developing and finalising a replacement IAU for ARTC's Interstate network.¹

Stakeholder submissions in response to the ACCC's consultation letter published on 5 August 2019 are generally supportive of the Application. Pacific National (**PN**) opposes the Application, as it considers it will not have a material effect on the development of a replacement IAU. PN's concerns broadly relate to stakeholder consultations about the replacement IAU that have occurred to date and the pricing framework under the 2008 IAU.²

While the ACCC acknowledges the concerns raised by PN in its submission, the ACCC considers that not accepting the Application would result in an outcome that is not consistent with the matters under section 44ZZA(3) of the Act.

Next steps

The ACCC recognises that the intention of the Application to extend the term of the 2008 IAU is to allow enough time for ARTC to resolve outstanding issues raised by the ACCC in its draft decision on the 2018 IAU. The ACCC also recognises ARTC's aim to have a replacement IAU, which includes its commercial and pricing strategy, in place by 1 July 2020.

However, even with a four month extension to the term of the 2008 IAU, the ACCC considers the development and assessment of the replacement IAU will need to occur in an extremely tight timeframe in order to be in place prior to 1 July 2020. In light of this timeframe and the complexity of the outstanding issues from the 2018 IAU, the ACCC considers the following will need to occur prior to 30 June 2020:

- Stakeholders to engage productively in the ACCC's consultation on the asset valuation methodology for the replacement IAU
- ARTC to work constructively with the ACCC to provide information in order for the Interstate network to be valued for the replacement IAU
- ARTC to continue to work with the ACCC to provide the information sought on the remaining issues set out in the ACCC's draft decision on the 2018 IAU application, including providing justification for any information ARTC considers to be confidential

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

² Pacific National, *Consultation on proposed extension and variation to the Australian Rail Track Corporation's (ARTC) 2008 Interstate Access Undertaking*, 14 August 2019.

- ARTC and stakeholders engage productively to determine the terms and conditions of a replacement IAU, taking into account the ACCC's views in the draft decision on the 2018 IAU application
- ARTC to submit the replacement IAU to the ACCC for assessment with sufficient time prior to the expiry date of the 2008 IAU, taking into account the ACCC's assessment timelines set out in the Act.

2. Background

On 30 July 2008, the ACCC accepted ARTC's 2008 IAU under Part IIIA of the then *Trade Practices Act 1974* (Cth) (**TPA**).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 2018.⁵

The Act allows the provider of an access undertaking (in this case, ARTC) to vary the undertaking at any time after it has been accepted by the ACCC, but only with the ACCC's consent.⁶ The provider may also apply for an extension of the period for which the access undertaking is in operation.

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

Table 1: Events leading to ARTC's fourth variation application to the 2008 IAU

| Date | Event |
|-------------------------|---|
| 30 July 2008 | The ACCC accepted the 2008 IAU under Part IIIA of the then TPA. The original expiry date of the 2008 IAU was 21 August 2018. |
| 6 March 2018 | ARTC submitted the 2018 IAU for ACCC assessment as a replacement to the 2008 IAU. |
| 28 June 2018 | ARTC submitted an application to vary the term of the 2008 IAU by four months to 21 December 2018 (June 2018 extension). |
| 25 July 2018 | The ACCC issued a Decision to consent to ARTC's June 2018 extension. |
| 16 November 2018 | ARTC submitted an application to vary the term of the 2008 IAU by around two months to 28 February 2019 (November 2018 extension). |
| 12 December 2018 | The ACCC issued a Decision to consent to ARTC's November 2018 extension. |
| 20 December 2018 | The ACCC published a Draft Decision to not accept the 2018 IAU. |
| 25 January 2019 | ARTC withdrew the 2018 IAU from the ACCC's assessment. |
| 29 January 2019 | ARTC submitted an application to vary a number of terms in the 2008 IAU, including extending the term of the undertaking to 29 February 2020 (January 2019 variation). |
| 30 January 2019 | The ACCC sent a letter to stakeholders seeking comments on ARTC's January 2019 application. |

³ Division 6 of Part IIIA of the Act provides 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 For more information on the ARTC's defined Interstate Rail Network, see: <https://www.artc.com.au/customers/standards/route/access/defined-interstate/>

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

⁶ See section 44ZZA(7) of the Act.

| Date | Event |
|------------------|---|
| 22 February 2019 | ARTC withdrew its January 2019 variation application from the ACCC's assessment, and submitted a revised variation application. |
| 28 February 2019 | The ACCC issued a Decision to consent to ARTC's revised variation application. |
| 29 July 2019 | ARTC submitted the Application to extend the term of the 2008 IAU for a further period of four months to 30 June 2020. |

2.1. 2018 IAU

On 6 March 2018, ARTC submitted the proposed 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.⁷ The ACCC identified a number of issues in the 2018 IAU, including ARTC's:

- proposed approach to the roll-forward of the Regulatory Asset Base, used to determine the initial Ceiling Limit to be applied from 2018–19
- proposed real pre-tax weighted average cost of capital (**WACC**) of 7.76 per cent, and nominal pre-tax WACC of 10.40 per cent. The ACCC considered a real pre-tax WACC of 5.57 per cent and nominal pre-tax WACC of 8.16 per cent was appropriate
- proposed mechanism for adjusting the Indicative Access Charges Range. The ACCC also sought views from stakeholders regarding whether the Consumer Price Index (**CPI**) is the appropriate mechanism for escalation of the Indicative Access Charges Range
- obligations regarding potential regulatory gaps. The ACCC considered the period of notice by which ARTC will notify the ACCC of its intention to submit a replacement undertaking should be longer to reduce regulatory uncertainty for users of the Interstate network and ARTC.

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

2.2. June 2018 extension

On 28 June 2018, ARTC submitted an application to vary the term of the 2008 IAU by four months to 21 December 2018. ARTC considered that this extension would provide regulatory certainty as the ACCC's assessment of the 2018 IAU continued.

Stakeholder submissions supported ARTC's proposal to extend the term of the 2008 IAU to 21 December 2018.

On 25 July 2018, the ACCC issued a decision to consent to ARTC's application.⁸

⁷ See ACCC, *Draft Decision – Australian Rail Track Corporation's 2018 Interstate Access Undertaking*, 20 December 2018.

⁸ Available here: <https://www.accc.gov.au/regulated-infrastructure/rail/artc-interstate-rail-access-undertaking/extension-of-the-2008-interstate-access-undertaking-to-december-2018>

2.3. November 2018 extension

On 16 November 2018, ARTC submitted an application to vary the term of the 2008 IAU by around two months to 28 February 2019. ARTC considered that this extension provided sufficient time for the ACCC to complete its assessment of the 2018 IAU.

Stakeholder submissions supported ARTC's proposal to extend the term of the 2008 IAU to 28 February 2019. However, one submission raised concerns regarding the ability for the ACCC to complete its assessment of the 2018 IAU, and the uncertainty it would provide rail operators with respect to access agreements.

On 12 December 2018, the ACCC issued a decision to consent to ARTC's application, acknowledging the concerns raised regarding the length of the extension.⁹

2.4. January 2019 variation

On 29 January 2019, following the withdrawal of its 2018 IAU, ARTC submitted an application to vary its 2008 IAU. The variation initially sought to change the following:

- extend the term of the undertaking to 29 February 2020
- set new Indicative Access Charges based on current charges escalated by the CPI, except for Adelaide to Kalgoorlie Segments which ARTC sought to escalate by CPI plus 2 per cent
- include an obligation on ARTC to draft a reconciliation mechanism into any future replacement or extended undertaking, that reconciles the charges set out in the variation against the charges in any replacement or extended undertaking accepted by the ACCC.

On 30 January 2019, the ACCC sent a letter to stakeholders seeking comments on ARTC's proposal. Stakeholders were generally supportive of ARTC's proposal to extend the term of the 2008 IAU. However, the majority of stakeholder submissions raised concerns with the clarity and certainty of operation of the proposed reconciliation mechanism.

On 22 February 2019, in light of stakeholder concerns with the reconciliation mechanism, ARTC withdrew the proposed variation from the ACCC's consideration, and submitted a revised variation application. The revised variation sought to change the following:

- extend the term of the undertaking to 29 February 2020.
- extend the notice ARTC will give to the ACCC of its intention to submit a replacement undertaking from 3 months to 6 months prior to the expiry of the undertaking.

The ACCC did not seek comments from stakeholders in relation to the revised variation application, as it largely retained the substance of the 2008 IAU, and the ACCC took into account stakeholders' views on ARTC's original proposal.

On 28 February 2019, the ACCC issued a decision to consent to ARTC's revised variation application.¹⁰

⁹ Available here: <https://www.accc.gov.au/regulated-infrastructure/rail/artc-interstate-rail-access-undertaking/extension-of-the-2008-interstate-access-undertaking-to-february-2019>

¹⁰ Available here: <https://www.accc.gov.au/regulated-infrastructure/rail/artc-interstate-rail-access-undertaking/january-2019-variation-of-the-2008-interstate-access-undertaking>

2.5. ARTC's application to extend the 2008 IAU to 30 June 2020

2.5.1. ARTC's variation application

On 29 July 2019, the ACCC received the Application from ARTC to extend the term of the 2008 IAU by four months. ARTC seeks to do so by amending clause 2.3(a) of the 2008 IAU by replacing the words '29 February 2020' with '30 June 2020'.¹¹ The Application does not propose to make any other amendments to the 2008 IAU.

The Application is available at:

<https://www.accc.gov.au/regulated-infrastructure/rail/artc-interstate-rail-access-undertaking/extension-of-the-2008-interstate-access-undertaking-to-30-june-2020>

2.5.2. The ACCC's consultation on the Application

On 5 August 2019, the ACCC invited public submissions on the Application pursuant to section 44ZZBD(1) of the Act. Submissions were due on 19 August 2019.

In response, the ACCC received submissions from:

- PN, 14 August 2019
- V-Line, 16 August 2019
- NSW Trains, 16 August 2019
- Metro Trains Melbourne (**MTM**), 21 August 2019.

Submissions are available at:

<https://www.accc.gov.au/regulated-infrastructure/rail/artc-interstate-rail-access-undertaking/extension-of-the-2008-interstate-access-undertaking-to-30-june-2020/consultation-letter>

¹¹ The ACCC notes the Application proposes to change '28 February 2020' in the current 2008 IAU. However, clause 2.3(a) currently states '29 February 2020'. The ACCC presumes ARTC intended the Application to state '29 February 2020'.

3. ACCC views on the Application

This decision is a notice to extend the period of the 2008 IAU until 30 June 2020 in accordance with sub-section 44ZZBB(3) of the Act. Having regard to the matters in section 44ZZA(3) of the Act, the ACCC's reasons for its decision are below.

Further information about the ACCC's decision-making framework under Part IIIA is set out in Chapter 5 of this Decision.

3.1. Extending the term of the 2008 IAU

ARTC proposes to vary section 2.3(a) of the 2008 IAU to extend the term of the undertaking by four months, with a new expiry date of 30 June 2020.

ARTC submits the purpose of the extension is to ensure there is:¹²

...enough time for ARTC to resolve the outstanding asset valuation methodology issues with the ACCC and then submitting [sic] a renewed IAU consistent with the issues raised by the ACCC in their Draft Decision on the withdrawn 2018 IAU published on 20 December 2018 and ensuring the renewed IAU is approved and commences from 1 July 2020.

Further, ARTC states that:¹³

[t]he timing is critical to ensure that [ARTC] can implement its proposed commercial and pricing strategy necessary to ensure the commercial sustainability of the Interstate Network; noting that ARTC's published pricing is not related to the outcome of the [Regulatory Asset Base] methodology decision being assessed with the ACCC.

The majority of submissions to the Application support ARTC's proposed extension:

- V/Line supports ARTC's proposed extension, following consultation with internal business stakeholders and review of ARTC's arguments for the extension.¹⁴
- NSW Trains submits that does not oppose ARTC's application.¹⁵
- MTM submits that it has no opposition to extending the operation of the 2008 IAU.¹⁶

However, PN opposes the extension to the 2008 IAU as it considers it will not materially change the development of a replacement IAU.¹⁷ The ACCC understands PN's concerns largely relate to stakeholder engagement since the January 2019 variation of the 2008 IAU, and ARTC's pricing framework.

¹² ARTC, *Re: 2008 Interstate Access Undertaking Extension Application to the ACCC*, 29 July 2019.

¹³ ARTC, *Re: 2008 Interstate Access Undertaking Extension Application to the ACCC*, 29 July 2019.

¹⁴ V/Line, *RE: Consultation on proposed extension and variation to the Australian Rail Track Corporation's 2008 Interstate Access Undertaking*, 16 August 2019.

¹⁵ NSW Trains, *Re: Application to the ACCC to extend the 2008 Interstate Access Undertaking*, 16 August 2019.

¹⁶ MTM, *RE: Consultation on proposed extension and variation to the Australian Rail Track Corporation's 2008 Interstate Access Undertaking*, 19 August 2019.

¹⁷ Pacific National, *Consultation on proposed extension and variation to the Australian Rail Track Corporation's (ARTC) 2008 Interstate Access Undertaking*, 14 August 2019, p. 1.

3.1.1. Stakeholder engagement since the third variation of the 2008 IAU

PN raises the following concerns about engagement on the replacement IAU:¹⁸

- The draft decision on the 2018 IAU rebutted ARTC's proposed approach to revenue and pricing
- ARTC has not moved quickly since the ACCC's draft decision on the 2018 IAU
- PN has not been a party to discussions between the ACCC and ARTC on the replacement IAU, with ARTC disclosing these discussions at a 12 June 2019 meeting. PN states that it also subsequently received a letter from ARTC on 21 June 2019, but no detail has been provided
- PN does not have any visibility of ARTC's proposed commercial and pricing strategy, and considers there has been no effective engagement; and
- If ARTC were to accept the ACCC's recommendations in its draft decision on the 2018 IAU in full, PN considers that this would be a starting point for discussions rather than an end point.

The ACCC notes that when it consented to ARTC's revised January 2019 variation of the 2008 IAU on 28 February 2019, it set out its expectations for ARTC to commence discussions with the ACCC and industry regarding a replacement IAU shortly after the release of that Decision.¹⁹ This expectation was due to the number of complex issues, requests for information and stakeholder views set out in the ACCC's draft decision on the 2018 IAU.

The ACCC understands ARTC has commenced consultation with stakeholders to resolve outstanding issues from the ACCC's draft decision on the 2018 IAU. Further, on 12 September 2019 the ACCC commenced industry consultation on the approach to valuing the Interstate network for the next IAU.²⁰

In the ACCC's Decision on ARTC's revised January 2019 variation of the 2008 IAU, the ACCC considered that an application to extend the 2008 IAU under sections 2.2(c) and 2.2(d) of the 2008 IAU should provide:²¹

...a suitable time buffer...to ensure there is more than sufficient time for the development and assessment of a replacement undertaking.

The ACCC considers that, given the number and complexity of the issues raised in its draft decision on the 2018 IAU, the timeline for developing and assessing the replacement IAU is extremely tight, even with ARTC's proposed four month extension. That is, the ACCC has concerns ARTC may not have provided sufficient time in the Application for the development and assessment of the replacement IAU. In order for a replacement IAU to be in place by 1 July 2020, the ACCC considers it is essential that there is timely and effective engagement from ARTC and stakeholders to resolve the issues set out in the draft decision on the 2018 IAU.

¹⁸ Pacific National, *Consultation on proposed extension and variation to the Australian Rail Track Corporation's (ARTC) 2008 Interstate Access Undertaking*, 14 August 2019, p. 1.

¹⁹ ACCC, *Decision – Australian Rail Track Corporation's application to vary the 2008 Interstate Access Undertaking*, 28 February 2019, p. 18.

²⁰ Available here: <https://www.accc.gov.au/regulated-infrastructure/rail/artc-interstate-rail-access-undertaking/proposed-valuation-for-the-interstate-network/issues-paper>

²¹ ACCC, *Decision – Australian Rail Track Corporation's application to vary the 2008 Interstate Access Undertaking*, 28 February 2019, p. 18.

As an alternative to extending the 2008 IAU by four months to enable the ARTC to develop and implement a replacement IAU, PN submits ARTC should take the following approach:²²

...rather than ARTC continually seeking extension [sic] to its 2008 AU [sic] or otherwise submitting a new undertaking incapable of being accepted by the ACCC (because it is fundamentally inconsistent with the objectives and criteria of the Act) ARTC should accept ACCC's 2018 draft decision (in full) and incorporate it as the starting point for collaborating with stakeholders/rail operators on a new IAU.

The ACCC notes that there were a number of issues in the 2018 IAU, including ARTC's pricing framework, where the ACCC could not form a view because it required further information from ARTC and/or stakeholder submissions. Given the number of unresolved issues from the 2018 IAU it is unclear to the ACCC how PN's proposed alternative approach would be preferable, having regard to matters set out in section 44ZZA(3) of the Act, than the Application.

Overall, the ACCC considers the short term certainty provided by an extension of the 2008 IAU to 30 June 2020 is in the legitimate business interests of ARTC and the interests of access holders, having regard to sections 44ZZA(3)(a) and 44ZZA(3)(c) of the Act.

The ACCC also considers that providing clarity and certainty to ARTC and access seekers for a further four months is more likely to promote the economically efficient operation of, use of, and investment in ARTC's Interstate Network (sections 44ZZA(3)(aa) of the Act). This is in comparison to a scenario where the 2008 IAU expires on 29 February 2020, which the ACCC understands would lead to most of the Interstate network becoming unregulated.

3.1.2. ARTC's pricing framework

Although the Application does not propose to make any changes to the pricing framework in the 2008 IAU, PN raises the following concerns in its submission:²³

ARTC's current pricing framework is not fit for purpose. Pacific National undertook analysis revealing access costs of hauling a 20-foot container between Melbourne and Sydney by a freight train on the ARTC network is double that of a B-double truck on a road; we estimate less than 1 per cent of the 20-tonnes of palletised or containerised freight transported between Melbourne and Sydney is hauled by trains.

and

Pacific National is a business operating in a fast moving commercial market - we need an undertaking and agreement with appropriate terms and conditions with significant access charge reductions as soon as possible.

PN also raises concerns with the Application by reference to the matters under section 44ZZA(3) of the Act:²⁴

The extension of the current 2008 IAU is inconsistent with the public interest (section 44ZZAA(3)(b)) [sic] as it does nothing to grow competition in intermodal rail freight markets and does not promote the economically efficient operation of, use of and

²² Pacific National, *Consultation on proposed extension and variation to the Australian Rail Track Corporation's (ARTC) 2008 Interstate Access Undertaking*, 14 August 2019, p. 2.

²³ Pacific National, *Consultation on proposed extension and variation to the Australian Rail Track Corporation's (ARTC) 2008 Interstate Access Undertaking*, 14 August 2019, p. 1.

²⁴ Pacific National, *Consultation on proposed extension and variation to the Australian Rail Track Corporation's (ARTC) 2008 Interstate Access Undertaking*, 14 August 2019, p. 2.

investment in the infrastructure by which services are provided (section 44AA(a)). Pacific National cannot support such an outcome.

Additionally, the proposed extension only cements inefficient pricing (with CPI escalation of access charges) for a further four months. It would therefore be inconsistent with section 44ZZCA pricing principle (c) which requires pricing to incentivise cost reduction or otherwise improve productivity.

Under section 4.6(d) of the 2008 IAU, ARTC may vary Indicative Access Charges in July of each year. The ACCC therefore expects that there will be no changes to Indicative Access Charges between 29 February and 30 June 2020, during the extension period proposed in the Application.

The ACCC notes PN's view that escalating access charges by CPI is not consistent with providing incentives for ARTC to reduce costs or otherwise improve productivity (sections 44ZZA(3)(ab) and 44ZZCA(c) of the Act). The ACCC raised similar concerns in its draft decision on the 2018 IAU.²⁵ In particular, the ACCC noted that escalating access charges by CPI is unlikely to:

- reflect the actual year on year variation in costs
- provide any incentives for ARTC to reduce costs or improve productivity
- reflect changes in the costs of maintenance, overheads and capex for below-rail infrastructure as CPI is a measure of changes in the price of household goods and services.

While the ACCC noted its concerns that escalating access charges by CPI is not cost reflective, it also acknowledged that this approach provided clarity and certainty to access seekers and would ensure that any changes would be smoothed from year to year. The ACCC sought views from stakeholders on whether CPI escalation remained appropriate for the 2018 IAU.²⁶

The ACCC will consult with stakeholders on the pricing framework proposed by ARTC in its replacement IAU.

Overall, the ACCC considers that maintaining CPI as an escalator during the four month extension proposed in the Application is likely to provide short term clarity and certainty on the operation of the pricing framework during the term of the 2008 IAU (section 44ZZA(3)(e) of the Act). The ACCC considers this promotes the interests of persons who might want to access the service (section 44ZZA(3)(c) of the Act) and the legitimate business interests of ARTC (section 44ZZA(3)(a) of the Act). This is likely to promote the efficient operation and use of the Interstate network during the development and assessment of a replacement IAU, having regard to section 44ZZA(3)(aa) of the Act.

²⁵ ACCC, *Draft Decision – Australian Rail Track Corporation's 2018 Interstate Access Undertaking*, 20 December 2018, p. 169.

²⁶ ACCC, *Draft Decision – Australian Rail Track Corporation's 2018 Interstate Access Undertaking*, 20 December 2018, p. 191-2.

4. ACCC's decision to extend the 2008 IAU

For the reasons set out in Chapter 3, this decision is a notice to extend the period of the 2008 IAU until 30 June 2020 in accordance with sub-section 44ZZBB(3) of the Act.

The ACCC has had regard to the matters set out in section 44ZZA(3) of the Act. The matters that are particularly relevant to this decision are:

- the objects of Part IIIA of the Act (sections 44AA and 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))
- short-term clarity and certainty in relation to the regulation of the Interstate Network for the duration of the 2008 IAU (section 44ZZA(3)(e)).

4.1. Next steps

The ACCC recognises that the intention of the Application to extend the term of the 2008 IAU is to allow enough time for ARTC to resolve outstanding issues raised by the ACCC in its draft decision on the 2018 IAU. The ACCC also recognises ARTC's aim to have a replacement IAU, which includes its commercial and pricing strategy, in place by 1 July 2020.

As noted in Chapter 3, even with a four month extension to the term of the 2008 IAU to 30 June 2020, the ACCC considers the development and assessment of the replacement IAU will need to occur in an extremely tight timeframe in order to be in place prior to 1 July 2020. Specifically, the ACCC considers the following will need to occur prior to 30 June 2020:

- Stakeholders to engage productively in the ACCC's consultation on the asset valuation methodology for the replacement IAU
- ARTC to work constructively with the ACCC to provide information in order for the Interstate network to be valued for the replacement IAU
- ARTC to continue to work with the ACCC to provide the information sought on the remaining issues set out in the ACCC's draft decision on the 2018 IAU application, including providing justification for any information ARTC considers to be confidential
- ARTC and stakeholders engage productively to determine the terms and conditions of a replacement IAU, taking into account the ACCC's views in the draft decision on the 2018 IAU application
- ARTC to submit the replacement IAU to the ACCC for assessment with sufficient time prior to the expiry date of the 2008 IAU, taking into account the ACCC's assessment timelines set out in the Act.

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 airport, 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 vary or replace existing undertakings under Part IIIA of the Act are set out below.

5.1. Legal framework for accepting an application to vary 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.

5.2. Timeframe for 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 start of the day the application is received (referred to as 'the expected period'). A request made to the ACCC for the variation 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 29 July 2019, and a notice inviting public submissions was published under section 44ZZBD(1) of the Act on 5 August 2019 seeking submission by 19 August 2019, the ACCC is statutorily required to make its decision by 10 February 2020.