Submission to Productivity Commission

Review of the National Access Regime

Anglo American Metallurgical Coal Pty Ltd

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1. Executive Summary

Anglo American Metallurgical Coal Pty Ltd (***Anglo American***) welcomes the opportunity to make a submission to the Productivity Commission (***Commission***). This submission relates to the Commission's report into the National Access Regime (***Regime***) and the operation and terms of the Competition and Infrastructure Reform Agreement (***CIRA***).

In over a decade since the Commission last reviewed the Regime, the Australian mining industry has grown exponentially. In 2001 access regimes were still a relatively new and developing concept and it has become increasingly clear that the workability of multi-user access regimes is clearly essential to the competitiveness of Australian mining. There are a number of significant barriers which prevent every new mining project from constructing infrastructure exclusively for that project, including the prohibitive cost of large transport or export facilities, the extensive approvals regime at all levels of Australian government and the impediment of dealing with multiple land owners across significant distances. As such, the Regime is vital to the international competitiveness of Australian mining.

Initially a large number of multi-user facilities were government-owned, however, the recent trend has been towards privatisation. Prior to this trend many investments were made on the understanding that access to export facilities was guaranteed, or at least, that the government entity would allow for access on a relatively non-discriminatory basis. Privatisations can, and have, resulted in ownership of significant natural monopoly infrastructure being transferred to vertically integrated companies such as Aurizon Limited who may have an incentive to refuse access, to provide access on unfavourable terms or to place unreasonable conditions on expansion. Without government regulation, access to critical export infrastructure could be restricted or prevented and drastically affect the ability of Australian miners to remain competitive in the dynamic global industry. This could harm existing miners and also deter potential investment and investors from entering the Australian market. The recent significant decrease in commodity prices has engendered a sharp focus on costs and efficiencies. This, and the expectation of increased medium to long term production necessitating expanded capacity in several regulated supply chains, has highlighted the importance of effective access regimes. In short, the existence of workable Part IIIA of the *Competition and Consumer Act 2010* (Cth) (***CCA***) is almost more important now than at any time in the history of the Regime.

Anglo American supports the Regime. However, Anglo American sees opportunities for this review to develop and extend the operation of the Regime in ways which facilitate the competitiveness of Australian mining and ensure continued investment in mining and infrastructure, which has been a significant driver of economic growth in Australia. In summary, Anglo American agrees with the submissions of other parties such as Xstrata Coal (***Xstrata***), the Mineral Council of Australia (***MCA***) and the Law Council of Australia (***LCA***). In particular, Anglo American supports the need for separate consideration to be given to the appropriateness of regulation, and the form of regulation, for different forms of ownership structures. For example, the vertically integrated railways of the Pilbara need to have separate consideration from the multi-user networks which have developed in the Queensland and New South Wales coal networks.

In particular, Anglo American makes the following submissions:

(a) the current interpretation of the declaration criteria promotes, and sometimes compels, inefficient investment and reform is necessary to ensure there is no inefficient investment in infrastructure;

(b) as it stands, the Regime and other relevant third party access regimes do not adequately promote, regulate or compel expansions to facilities to cater for future investment capacity. There are specific examples of regulated assets not being expanded until users agreed to rates of return above that contemplated under the relevant access regime; and

(c) there are a number of regulatory governance issues which arise in respect of Part IIIA of the CCA where reform is desirable, including the timeframes within which the decision-making processes relating to third party access should be made as the current process is unworkable and is stifling competition and investment in the industry.

2. Declaration Criteria

As the Commission is aware the declaration criteria have been the subject of a number of significant decisions since the last time that the Commission reviewed the Regime. Those decisions include:

(a) **Application by Virgin Blue for declaration of airport services (2002):** A decision of the Australian Competition Tribunal,[1] a decision of the Full Court of the Federal Court[2] and a decision of the High Court;[3]

(b) **Application by Fortescue Metals Group (*FMG*) for declaration of Mount Newman Railway (2004):** A decision of the Australian Competition Tribunal,[4] a decision of the Federal Court,[5] a decision of the Full Court of the Federal Court[6] and a decision of the High Court;[7] and

(c) **Applications by FMG for Pilbara Railways (2008):** A decision of the Australian Competition Tribunal (at first instance),[8] a decision of the Full Court of the Federal Court,[9] a decision of the High Court (referring the matter back to the Australian Competition Tribunal)[10] and a subsequent decision of the Australian Competition Tribunal.[11]

A number of these decisions have made differing conclusions in respect of the interpretation of the declaration criteria. Whilst it is sometimes desirable to allow the courts to arrive at a settled legal position based upon iterative decisions, it is also desirable that the outcomes of those decisions be carefully reviewed to ensure that the interpretation of the legislation as passed by the Parliament is achieving the objectives that the legislation

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[1] *Re Virgin Blue Airlines Pty Ltd* (2005) 195 FLR 242.

[2] *Sydney Airport Corporation Ltd v Australian Competition Tribunal* (2006) 155 FCR 124.

[3] *Sydney Airport Corporation Ltd v Australiana Competition Tribunal* [2007] HCATrans 098.

[4] *Re Application by Fortescue Metals Group Ltd* (2006) 203 FLR 28.

[5] *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2007) ATPR 42-141.

[6] *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2007) 162 FCR 234.

[7] *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145.

[8] *Re Fortescue Metals Group Ltd* (2010) 242 FLR 136.

[9] *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57.

[10] *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal; National Competition Council v Hamersley Iron Pty Ltd; National Competition Council v Robe River Mining Co Pty Ltd* (2012) 86 ALJR 1126.

[11] *Re Applications by Robe River Mining Co Pty Ltd and Hamersley Iron Pty Ltd* [2013] ACompT 2.

was originally intended to address but also responds to contemporary developments.[12] This section of the submission seeks to comment upon the following issues:

(d) the objectives of Part IIIA of the CCA;

(e) criterion (b), the criterion which requires that it is uneconomical for anyone to develop another facility; and

(f) conclusions in respect of the declaration criteria.

2.1 The Objectives of Part IIIA of the CCA

On 4 October 1992 the Prime Minister announced the establishment of an independent inquiry into competition policy which would be chaired by Professor Fred Hilmer, Dean of the Australian Graduate School of Management in the University of New South Wales (***Hilmer Committee***). The other members were Mr Geoff Taperell, a partner in the law firm of Baker & McKenzie and Mr Mark Rayner, Group Executive, CRA Ltd.[13]

The Hilmer Committee's report was delivered to the Heads of Government on 25 August 1993 (***Hilmer Report***) and it made six main policy recommendations:

(a) extending the reach of the *Trade Practices Act 1974* (Cth) (***TPA***) to unincorporated businesses and State and Territory government businesses so that the competitive conduct rules (contained in Part IV of the TPA) apply to all business activity in Australia;

(b) provision for third party access to nationally significant infrastructure;

(c) introduction of competitive neutrality so that government businesses do not enjoy unfair advantages when competing with private businesses;

(d) restructuring of public sector monopoly businesses to increase competition;

(e) review of all laws which restrict competition to ensure that any regulatory restriction does not exceed what is justified in the public interest; and

(f) extending prices surveillance arrangements to State and Territory government businesses to deal with those circumstances where all other competition policy reforms prove inadequate.

In respect of the recommendations as to the provision of third party access to nationally significant infrastructure, the Hilmer Report identified the 'essential facilities problem' as arising where there is a natural monopoly at one level of the market and the owner of the facility which is the natural monopoly is competing in either upstream or downstream market.[14] The owner therefore, has an incentive to inhibit competitors' access to the facility.

The Hilmer Report concluded that whilst it was necessary to carefully limit the right to third party access, because the failure to provide appropriate protection to the owners of facilities has the potential to undermine incentives for investments, there was a strong public interest in ensuring effective competition could take place.[15] Examples of natural

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[12] The general role of regulatory oversight bodies on behalf of governments should be 'coordinating *ex post* evaluation for policy revision and for refinement of *ex ante* methods': Organisation for Econdomic Corporation and Development, *Recommendation of the Council on Regulatory Policy and Governance* (2012).

[13] The Honourable Prime Minister, Mr Paul Keating, 'National Competition Policy' (Ministerial Statement, 4 October 1992).

[14] Independent Committee of Inquiry, *National Competition Policy* (August 1993) 240-241.

[15] Independent Committee of Inquiry, *National Competition Policy* (August 1993) 248.

monopolies where the Hilmer Report considered there was a strong public interest in ensuring competition in upstream and downstream markets were telecommunications, electricity, rail and other key infrastructure industries.[16]

It can be seen from the above that the Hilmer Report was drawing on the US 'essential facilities problem' and the desirability of regulating 'natural monopolies'.

At the time of the Hilmer Report there was a well developed economic theory in respect of the definition and regulation of natural monopolies.

A natural monopoly was generally defined in the economic literature as a market that can be served at a lower cost by having only one producer rather than two or more producers.[17] In other words, the conditions giving rise to a natural monopoly occur when a market can be served at a lower cost by having only one producer. This usually arises when the industry average cost of production is lowest; ie, when there is a single producer.[18]

There are a variety of rationales which have been used to justify government intervening in the operation of the market by regulating either the price of the product supplied by a natural monopolist or regulating entry into a market in which a natural monolopist supplies products. The most common rationale stated for the regulation of natural monopolies is that industries with natural monopoly characteristics will exhibit poor economic performance and regulation will improve this performance.[19] The poor economic performance might arise from the ability of the natural monopolist to charge monopolistic prices[20] or from a lack of any incentive to increase productive efficiency or engage in innovation. This rationale is also often referred to as the ‘market failure rationale’.[21]

A variation on the rationale of enhancing economic efficiency and consumer welfare is the rationale of achieving domestic economic efficiency for the purposes of promoting international competitiveness which, in turn, increases gross domestic product and therefore the living standards of Australians.[22]

It is clear from the above that the economic rationale for regulating natural monopolies is clearly to avoid 'market failure' of vertical closure and inefficient economic performance; for example, the owner being able to impose economically inefficient prices.

2.2 Criterion (b) – Uneconomic to duplicate

One of the significant issues in determining the effectiveness of Part IIIA of the CCA is the interpretation of criterion (b).

Criterion (b) is contained in sections 44G(2)(b) and 44H(4)(b) of the CCA. The requirement states that the Minister cannot declare an infrastructure service for the purposes of the Regime unless satisfied that 'it would be uneconomical for anyone to develop another

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[16] Independent Committee of Inquiry, *National Competition Policy* (August 1993) 248.

[17] William W Sharkey, *The Theory of Natural Monopoly* (1982) 2.

[18] Jeffrey Church and Roger Ware, *Industrial Organization - A Strategic Approach* (2000) 752; Stephen King and Rodney Maddock, *Unlocking the Infrastructure - The Reform of Public Utilities in Australia* (1996) 72.

[19] Paul Joskow, 'Regulation of Natural Monopolies' (Working Paper, Center for Energy and Environmental Policy Research, 2005) 33.

[20] Richard Schmalensee, *The Control of Natural Monopolies* (1979) 6.

[21] Paul Joskow, 'Regulation of Natural Monopolies' (Working Paper, Center for Energy and Environmental Policy Research, 2005) 33-34.

[22] Stephen King and Rodney Maddock, *Unlocking the Infrastructure - The Reform of Public Utilities in Australia* (1996) 3.

facility to provide the service'. This criterion has been the subject of a significant number of court decisions as outlined above.

In decisions relating to criterion (b) the relevant decision-makers have previously employed two different tests: the 'net social benefit' test and the 'natural monopoly' test. The differences and similarities between these tests have led to a great deal of confusion.

Recently the High Court adopted a third test.[23] The High Court upheld the previous reasoning of the Federal Court, which had overturned a review decision of the Australian Competition Tribunal. In the Fortescue Decision, which has been ongoing for over a decade, FMG sought access to rail lines in the Pilbara owned by BHP Billiton and Rio Tinto Iron Ore. The High Court referred the matter back for consideration by the Australian Competition Tribunal which reached the same conclusion.

The High Court found that the appropriate test was not a 'natural monopoly' or 'net social benefit' test, but rather one of 'private economic feasibility'. This means that in order to declare infrastructure under the Regime, the Minister must be satisfied that it is not economically feasible and privately profitable for any other entity (including the proponent) to construct further infrastructure. In FMG's case that meant privately constructing a rail line running almost exactly the same path as an already existing one.[24] This interpretation focuses on what is uneconomical from an individual perspective as opposed to what will be most damaging to the interests of the Australian market and society.

Although it was privately profitable for another investor to develop infrastructure, this does not address whether the current infrastructure could have more efficiently provided for the expected volume. It appears that the only time this test would not be satisfied is if no other player in the marketplace could create the same infrastructure and secure a profit from it.

If this interpretation is allowed to stand situations will arise where multiple duplications of exactly the same infrastructure exist because, on the whole, it was privately profitable for every individual investor to develop and maintain its own facility.

This interpretation does not take into account the social or economic harm that duplication might cause to the environment, society or most importantly the Australian market. Further, smaller potential investors may suffer because, while it is not privately profitable for them to duplicate existing infrastructure, there are larger competitors who could. This may have the effect of deterring or restricting smaller competitors from entering the market. It is not clear what position smaller potential investors are left in if it is privately profitable for a large company to duplicate, but that company decides not to duplicate. In reality, the privately profitable interpretation will damage the competitiveness of the Australian market and the overall effectiveness of the Regime, particularly when applied to multi-owner, multi-user supply chains.

There are also boarder social considerations which support a policy position against insufficient duplication of infrastructure facilities. This includes damage to the visual environment surrounding constructed infrastructure and also disturbance to ordinary life in an area during the process of construction. In submissions already before the Commission Xstrata outlines situations outside a quantifiable monetary value. This includes increased focus on the protection of the environment created by multiple infrastructure projects

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[23] See the recent decision in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 290 ALR 750 (***Fortescue Decision***).

[24] Attachment 1 is a map of the region.

impacting on the same area or near a World Heritage Site. This environmental focus is particularly important in environmental areas of national significance, such as:

(a) port developments near the Great Barrier Reef or other delicate marine environments;

(b) offshore development that impacts on Australian's unique marine environment; and

(c) rail lines across valuable farming land or Aboriginal heritage sites.

Anglo American owns and operates many mines within these regions and maintains strong focus on sustainable and environmentally-conscious mining. As such, it submits that the intention of the legislation was originally much boarder than the most recent interpretation given to criterion (b) by the High Court in the Fortescue Decision. Importantly, these are all considerations raised by the object of the CCA in section 44AA(a); ie, the efficient operation of, use of and investment in the infrastructure. These important considerations regarding wasteful investment in infrastructure are not encompassed in the narrow interpretation of the High Court. Even if the High Court was correct in interpreting the proper scope of the objects of Part IIIA, Anglo American believes that reform is necessary to ensure that there is no inefficient duplication of facilities. This may require amendment to section 44AA of the CCA.

In its original decision, which was upheld by the High Court, the Federal Court acknowledged that both the 'natural monopoly' test and the 'private economic feasibility' test have shortcomings. In particular, the Court's favoured approach of 'private economic feasibility' 'might occasion some wastage of society's resources'.[25] In an industry with dramatically decreasing profits all parties' attention should be focused on inefficiencies created through under-utilized infrastructure. Such inefficiencies may cause increased costs of products and reduce international competitiveness. The Commission has the opportunity to ensure that avoiding duplication and wasted infrastructure becomes a legislative focus as well.

2.3 Conclusions

In light of the confusion caused by numerous inconsistent judicial decisions, Anglo American suggests that reform is necessary to clarify the appropriate test to be applied in considering criterion (b). Whilst there are clear limitations to the test, Anglo American submits that the appropriate test is the 'natural monopoly' test. Any costs which are difficult to quantify should be addressed in criterion (f), the public benefit criterion.

As outlined above, it may also be necessary to amend the objects of Part IIIA in section 44AA to make it clear that one object of the Regime is to avoid inefficient duplication of infrastructure facilities.

One of the central risks arising from the Fortescue Decision is that it could be used by owners of currently regulated assets as a basis for applying to the relevant Minister for revocation of the relevant regulatory instrument. In particular, Anglo American would be concerned with the revocation of regulation over either the Dalrymple Bay Coal Terminal and/or the Central Queensland Coal Network as these form essential parts of Anglo American's coal production process. Both of these assets clearly satisfied the previous 'net social benefit' and 'natural monopoly' tests. If, however, the private profitability test is to be read as 'an asset is economic to duplicate if there is one producer with sufficient reserves and access to capital to build a facility (irrespective of whether they do so)' then Anglo

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[25] *Re Fortescue Metals Group Ltd* (2010) 271 ALR 256, [100].

American would be deeply concerned. This review and any subsequent legislative amendments must protect third party users against the possibility of deregulation of key export infrastructure facilities.

3. Expansions of Infrastructure

One of the current issues in respect of the effectiveness of all third party access regimes, including Part IIIA, is that the regimes seem to be insufficient to deal with the question of the appropriate expansion of the relevant infrastructure.

Disagreement can arise where expansion to existing facilities is required by a user or users but not supported by the owner. This can arise for a number of different reasons, including the owner not wanting to invest unless they get higher than the regulated weighted average cost of capital (***WACC***). In these instances, it is essential for the user to have a mechanism to require and/or force the owner to complete expansions. These expansions may require the financial assistance of the user,[26] however, the access regime should not allow an owner to restrict a third party user's ability to increase the output of the user's facility.

Anglo American agrees with the statement by the Commission that there is an economic rationale for having a power to require capacity expansions.[27] The expansion power should be explicit and allow the regulator to force the owner to invest as long as the legitimate business interests of the owner are protected. There are a number of ways that the legitimate business interests of the owner can be protected. In this regard, Anglo American notes the 'access conditions' regime in the Queensland Aurizon Network Access Undertaking 2010 (known as UT3) which allows Aurizon to seek an uplift from the regulated WACC if Aurizon can establish that (by virtue of the expansion) it faces risks which are higher than the established network (and therefore not compensated by the regulated WACC).

Where parties' interests are not aligned, relying on voluntary agreements between the parties to facilitate expansions can only serve to cause conflict and subsequent delays. There is an incentive for the owner to engage in tactical delays to any voluntarily agreed expansion project in order to force more favourable access conditions from the user or users. This represents a particular risks to miners when commitments have already been made to mine expansion projects. This may include access prices significantly higher than the market price.

There are examples of regulated assets not being expanded until users agreed to returns above the regulated returns (in circumstances where there was little or no evidence that the owner faced higher risks than on the brownfield assets). Those include:

(a) Dampier to Bunbury Pipeline expansion in WA;

(b) the Goonyella to Abbot Point Expansion (***GAPE***) on the Aurizon Network; and

(c) the Wiggins Island Rail Project (***WIRP***) also on the Aurizon Network.

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[26] Note that currently s44W(1)(d) and (e) of the CCA prevents a regulator from making any determination that requires a user to become an owner of the infrastructure, or that requires an owner to bear the entire cost of an extension. An extension (geographical distance) is defined differently to an expansion (carrying capacity) and is not covered by the CCA, but it is assumed that similar principles would apply to any section dedicated to expansions.

[27] Productivity Commission, *National Access Regime: Productivity Commission Issues Paper* (November 2012).

The achievement of above regulated return on the GAPE and the WIRP was expressly referred to by Aurizon in its ASX Announcement of its 'Interim Results 2013' delivered on 20 February 2013.[28]

While there will be instances where it is not appropriate for a regulator to force or require an owner to complete an expansion project, this should be left to the discretion of the regulator. Any disagreement on the regulator's exercise of its discretion can, of course, be the subject of legal proceedings. In Anglo American's view the economic rationale for providing the regulator to force owners to fund expansions is particularly compelling in the following circumstances:

(a) the owner has entered into contracts selling more capacity than the facility can effectively deliver (this is known as 'over-contracting'), which is particularly problematic where the owner has the ability to compress the capacity made available to each user but still has the legal right to receive 100% of its take-or-pay revenue from each user;

(b) the owner has been paid by users to undertake an expansion of the network and the construction works undertaken or overseen by the owner have not delivered the capacity which was expected to be delivered by the expansion works; or

(c) the capacity of the facility has been degraded or compromised because of actions and/or decisions by the owner.

In each of these cases the owner should be required to invest in the network and the owner should receive its return of capital and return on capital through the access charges in the usual course of business.

In respect of other expansions the regulator should have the ability to force expansions at the regulated WACC where it is clear that the owner has sufficient access to capital. This would be subject to protection of the legitimate owner's business interests.

Anglo American submits that section 44V of the CCA should be amended to explicitly provide the regulator with the discretion to make access determinations which require expansions (and extensions) and also to make access determinations which require the owner to fund the expansion (or extension), subject to the protection of its legitimate business interests. In circumstances where the owner is unable to raise capital (or is only able to raise capital at a cost at which it is not compensated in the WACC) then these matters can be taken into account by the regulator.

There should also be provision for users of an asset to directly fund expansions. An example of this is the currently developing Standard User Funding Agreement (***SUFA***) process in Queensland. Under SUFA users may enter an agreement with an owner to fund aspects of a particular expansion/extension. This may be in order to help realise an expansion sooner than expected, or at all. The intended advantage of SUFA is that if the asset owner is unwilling to undertake an expansion at regulated or agreed rates of return, the users are able to obtain their own funding and fund the expansion.

4. Central Coordination of Supply Chains

Anglo American believes that one critical element of effective access regimes is central coordination. Difficulties have been experienced in most of the East coast coal chains, but particularly the Hunter Valley and the Goonyella coal chains where there has been

[28] In particular see slide 37 of that presentation relating to "Volume Growth" for the GAPE and the WIRP.

insufficient coordination. Coordination is key to ensuring the maximisation of through-put of the supply chain, which is in the interests of all participants.

Anglo American supports the Xstrata submission in respect of the key requirements for sustainable coal chains and its recommendation that the Regime should require the establishment of independent export chain coordination bodies with the objective of ensuring coordinated, independent and impartial system performance assessment, reporting and recommendations in respect of investment.

5. Regulatory Governance Issues

Currently one of the major problems with the Regime is the time taken for decisions to be considered and processed. In some cases, this time has stretched to well over a decade. This clearly does not promote economic development, the efficient use of infrastructure or the objects of the CCA.

A matter that the Commission should consider is the procedural 'red-tape' surrounding the Regime. The current process is complicated and convoluted. The steps include:

(a) recommendation by the NCC;

(b) declaration by the Minister;

(c) review by the Australian Competition Tribunal;

(d) appeals to the Federal Court and High Court;

(e) possible remittance to the Australian Competition Tribunal or Minister;

(f) negotiations between the parties for access;

(g) forced or voluntary arbitration;

(h) possible further review by the Australian Competition Tribunal; and

(i) the possibility of further appeals to be heard in the Federal Court or High Court.

The following table sets out the timeframes involved.

Table: Timeframes of Declaration Decisions

Application	Days from Application to NCC Decision (approx months)	Days to Minster's Decision (approx months)	Days to Tribunal Decision (approx months)	Days to Federal Court Decision (approx months)	Days to Full Court Decision (approx months)	Days to High Court Decision (approx months)
Austudy (1996)	62 (2)	56 (1.8)	367 (12.2)	-	-	-
Australian Cargo Terminal Operations (1996)	486 (16.2) (1.3 years)	53 (1.8)	243 (8.1)	-	-	-
Carpentaria (1996)	154 (5.1)	65 (2.2)	-	-	-	-
SCT – NSW (1997)	132 (4.4)	60 (2)	-	-	-	-
Minerals Council (1997)	150 (5)	60 (2)	-	-	344 (11.5)	-
SCT – WA (1997)	119 (4)	60 (2)	-	-	-	-
Robe River (1998)	-	-	-	277 (from Application to NCC to Federal Court decision) (9.2)	-	-

Application	Days from Application to NCC Decision (approx months)	Days to Minster's Decision (approx months)	Days to Tribunal Decision (approx months)	Days to Federal Court Decision (approx months)	Days to Full Court Decision (approx months)	Days to High Court Decision (approx months)
Freight Australia (2001)	221 (7.4)	54 (1.8)	-	-	-	-
AuIron (2001)	303 (10.1)	54 (1.8)	187 (6.2)	-	-	-
Virgin Blue (2002)	428 (12.3)	58 (1.9)	680 (22.7) (1.9 years)	-	291 (9.7)	135 (special leave) (4.5)
Services Sydney (2004)	272 (9.1)	31 (1)	355 (11.8)	-	-	-
Fortescue (2004)	648 (21.6) (1.8 years)	60 (2)	1499 (49.3) (4.1 years)	210 (7)	278 (9.3)	299 (10)
Lakes R Us (2005)	398 (13.3)	57 (1.8)	-	-	-	-
Tas Rail Network (2007)	104 (3.5)	49 (1.6)	-	-	-	-
Goldsworthy (2007)	286 (9.5)	60 (2)	611 (20.4) (1.7 years)	-	-	-
Hamersley and Robe River (2007)	286 (9.5)	60 (2)	611 (20.4) (1.7 years) From HCA 147 (4.9)	-	308 (10.3)	498 (16.6) (1.4 years)
Herbert River Tram (2010)	117 (3.9)	60 2)	-	-	-	-
Jet Fuel Infrastructure at Sydney Airport (2011)	170 (5.7)	56 (1.9)	-	-	-	-

It can be seen from the above table that:

(a) **NCC Decision Timeframes:** the shortest was 62 days (Austudy), the longest was 648 days (Fortescue) and the average was 253 days (8.5 months);

(b) **Relevant Ministerial Timeframes:** the Minster must make a decision within 60 days and the shortest was 31 days (Services Sydney), the longest was 65 days (Carpentaria) and the average was 56 days;

(c) **Tribunal Timeframes:** the shortest was 147 days (Hamersley and Robe River remitted from the HCA), the longest was 1499 (Fortescue) and the average was 522 days (17.4 months);

(d) **Federal Court Timeframes:** the shortest was 210 days (Fortescue), the longest was 277 days (Robe River) and the average was 243 days (8.1 months);

(e) **Full Court of the Federal Court Timeframes:** the shortest was 278 days (Fortescue), the longest was 344 days (Minerals Council) and the average was 305 days (10.1 months); and

(f) **High Court Timeframes:** the shortest was 135 days (special leave hearing for Virgin Blue), the longest was 498 days (Hamersley and Robe River) and the average was 311 days (10.4 months).

Therefore, the fastest determinations have taken just short of six months and the longest determination has taken six years (Fortescue). Even the lesser of these timeframes is a significant delay to the development of a mining project: the longest delay could be crippling. These timeframes are unacceptable and lead to the ineffectiveness of the Regime.

Anglo American believes that the Commission should focus on the reform options which have been canvassed by a number of the other entities making submissions. Anglo American supports any of the options which results in a significant decrease in the amount of time to have access issues determined. Whilst access issues are complex and important, processes of up to almost 10 years are unacceptable. Such timeframes contribute to Australia being a high cost place to do business and effects its international competitiveness.

Attachment A – Map