



SUPPLEMENTARY SUBMISSION

An inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia

**Commonwealth Joint Standing Committee on
Northern Australia**

16 NOVEMBER 2020

Doc # 100-RP-HE-2037.001 Rev #

SCOPE OF SUPPLEMENTARY SUBMISSION

1. Fortescue Metals Group Ltd (Fortescue) makes this supplementary submission in addition to its submission of 7 August 2020 (Doc 100-HE-1011) and following oral submissions made to the Joint Standing Committee on Northern Australia (Committee) on 13 October 2020 by representatives of Yindjibarndi Aboriginal Corporation RNTBC (YAC) and Wintawari Guruma Aboriginal Corporation RNTBC (WGAC), and further written submissions from WGAC dated 5 November 2020. Fortescue's previous submission is numbered by the Committee as Submission 85.
2. This supplementary submission addresses specific matters raised with the Committee by WGAC and YAC subsequent to Submission 85 and in relation to the Committee's terms of reference (a) and (f) to (j).

WINTAWARI GURUMA ABORIGINAL CORPORATION

CONTEXT OF NATIVE TITLE AGREEMENT NEGOTIATION

3. Agreements between mining companies, registered native title claimants and native title holders typically arise out of the operation of the *Native Title Act 1993* (Cwlth) (NTA). Specifically, Subdivision P of Part 2, Division 3, which affords native title holders the 'right to negotiate' about certain 'future acts', including the intended grant of a mining lease. Fortescue is a party to seven native title agreements.
4. Fortescue and WGAC are parties to a native title agreement in the form of a Land Access Agreement (LAA) executed in December 2009, following negotiations with the Eastern Guruma People which started in 2006. WGAC was formally registered in February 2007.
5. The Eastern Guruma People selected their own legal representation and were represented by a firm of specialist native title solicitors.
6. The legal team that negotiated the LAA for the Eastern Guruma People/WGAC, comprising a partner of a Perth legal practice, a solicitor employed by that legal practice and consulting senior counsel, is the same legal team which successfully secured recognition of the Eastern Guruma People's native title rights and interests in the form of a determination. During the negotiations, WGAC was assisted by Economics Consulting Services, who are economic analysts and advisors, as well as an accounting advisor.
7. WGAC's legal team included Mr Greg McIntyre SC, who was part of the legal team that represented Mr Eddie (Koiki) Mabo.
8. The Fortescue legal team was led by an in-house lawyer, though whilst matters were before the National Native Title Tribunal, Fortescue was assisted by external legal counsel.
9. At the commencement of negotiations in 2006, Fortescue was a junior explorer with no production revenue.

10. In financial year 2008-2009, Fortescue exported 27.1 million tonnes of iron ore in its first full year of production from the Cloudbreak Mine (on Nyiyaparli and Palyku country). Operations at Fortescue's Solomon Hub on Eastern Guruma country did not commence until late 2012.
11. At the time LAA negotiations were completed, the company had attained the status of a junior producer. Nonetheless, Fortescue met WGAC's legal, advisory, and meeting costs incurred during the course of the negotiation of the LAA.
12. During the negotiations of the LAA with the Eastern Guruma People/WGAC, Fortescue's view is that the Eastern Guruma People/WGAC had competent legal representation.
13. In response to requests from native title holders, Fortescue has undertaken reviews and negotiated amendments to its LAAs, including the WGAC LAA which was varied in December 2019. The December 2019 amendments to the WGAC LAA included additional exclusion zones in areas of land that WGAC advised Fortescue were of particular importance and significance to the Eastern Guruma People.

TYPICAL LAND ACCESS AGREEMENT

14. The specific content of the LAAs are confidential, but in general Fortescue's various LAAs include the following:
 - 14.1. Governance structures established to regularise ongoing and continuous communication between Fortescue and the native title party about all matters arising under the LAA.
 - 14.2. Processes and procedures for the identification of Aboriginal cultural heritage and prescribed consultation and disclosure obligations relating to the submission of Section 18 applications. Fortescue's LAAs do not hinder nor restrain the native title party from opposing Section 18 consents over any culturally, spiritually, or scientifically significant place, from seeking relief under Federal laws, or from making public commentary.
 - 14.3. Environmental management and protection processes, including consultation on the preparation and submission of environmental approvals and other specified mining approvals. Fortescue's LAAs explicitly allow for the native title party to make representation to environmental authorities on any of Fortescue's approval applications.
 - 14.4. Agreement to compensate the native title party for the effect that the grant and use of mining tenure will have on the native title party's ability to use and enjoy their native title rights and interests. It is agreed that this compensation is in full and final settlement of any claim to native title compensation. Compensation typically takes the form of:
 - 14.4.1. Compensation payments based on production and operations.
 - 14.4.2. Financial and/or in-kind support for: heritage management; cultural heritage research programs; Aboriginal Ranger programs; housing provision; and Elder support.

- 14.5. Preferential access to contracting opportunities through Fortescue's Billion Opportunities procurement program (which has awarded contracts valued at in excess of \$2.7 Billion to Aboriginal businesses and joint ventures). Under the program, native title parties receive active business development support and preference in relation to commercial contracting opportunities.
- 14.6. Preferential access to Fortescue's Vocational Training and Employment Centre program (VTEC) which provides vocational training for a guaranteed job with Fortescue.
- 14.7. Native title party consent to the future grant of Fortescue mining tenure and to execution of State Deeds when required.

OUTSTANDING STATE DEEDS AND WITHHELD WGAC COMPENSATION PAYMENT

- 15. Certainty in the grant of mining tenure is the primary benefit accruing to Fortescue under its LAAs. Subdivision P of the NTA affords registered native title claimants and native title holders the right to negotiate in good faith with a view to reaching agreement about, among other things, the effect of the grant of the mining lease on the native title party's rights and interests.
- 16. In Western Australia, the agreement between the parties relating to mining leases is formalised in a State Deed. Once the Minister receives and signs a copy of the State Deed, the mining lease may be granted.
- 17. The grant of the mining lease does not constitute an approval to undertake ground disturbing activity and these activities remain subject to the relevant approvals, statutes and regulations. In the case of Fortescue's LAAs, including the WGAC LAA, the native title party is not hindered nor restrained from opposing these subsequent approvals over any culturally, spiritually, or scientifically significant place, nor from seeking relief under Federal laws, or from making public commentary.
- 18. The provision of the State Deed to the Minister through the Department of Mines, Industry Regulation and Safety (DMIRS) is therefore a critical step to Fortescue receiving its central benefit from the LAA.
- 19. The failure of the native title party to provide its formal consent to the grant of mining tenure (in this case, by signing a State Deed), is the only provision in the LAA that affords Fortescue with the right to withhold compensation payments. In the fifteen years since Fortescue has been a party to its various LAAs, it has only taken this step on one occasion. The calendar year 2019 compensation payments withheld amounted to approximately \$1.9 million, which is the amount referred to in WGAC's supplementary submission and evidence.
- 20. As Table 1 demonstrates, Fortescue has been requesting WGAC to sign relevant State Deeds since September 2018. It is only the failure to comply with this contractual obligation over a prolonged period that resulted in Fortescue taking the decision to temporarily withhold calendar year 2019 compensation payments.

Table 1 - State Deeds Timeline

| Date | Action |
|-----------|---|
| 4-Sep-18 | Email from Fortescue to WGAC requesting WGAC execute a State Deed for four mining leases (MLs) |
| 13-Feb-19 | Fortescue meet with WGAC Board to explain likely activity on MLs |
| 4-Apr-19 | Fortescue meet with WGAC to discuss a range of matters including State Deeds |
| 14-May-19 | Second email from Fortescue to WGAC requesting WGAC execute a State Deed for four MLs |
| 14 May-19 | Email requesting WGAC execute a second State Deed for an additional five MLs |
| 10-Jul-19 | Email letter from WGAC claiming Fortescue has not given information regarding ML applications |
| 24-Jul-19 | Fortescue offers to meet with WGAC at place and time of their choosing |
| 1-Aug-19 | Fortescue meet with WGAC to discuss various matters, including State Deeds |
| 9-Jan-20 | Fortescue confirmed to attend WGAC Board meeting on 5 March to discuss MLs |
| 15-Jan-20 | Email from Fortescue to WGAC requesting WGAC execute State Deeds: Repeat of 14 May 2019 requests |
| 31-Jan-20 | Email letter from Fortescue to WGAC regarding State Deeds, noting that a meeting is to be organised between WGAC and Fortescue to discuss long term planning relevant to tenure |
| 4-Feb-20 | Email from Fortescue to WGAC requesting meeting with WGAC Board. WGAC proposed 25 Feb |
| 24-Feb-20 | WGAC cancel 25 February meeting |
| 26-Feb-20 | Letter from Fortescue to WGAC advising compensation payments will be withheld pending execution of the outstanding State Deeds |
| 3-Mar-20 | WGAC cancel the 5 March meeting due to COVID-19 lockdown |
| 9-Jun-20 | Fortescue and WGAC meet in Perth to discuss State Deeds |
| 11-Jun-20 | Following 9 June meeting, WGAC and Fortescue make joint request to WA State Government for nine individual State Deeds (one per ML) instead of the current two, so WGAC can consider each piece of tenure |
| 11-Jun-20 | DMIRS provided individual State Deeds to WGAC and Fortescue |
| 18-Jun-20 | Fortescue meet with WGAC in Perth to discuss multiple issues including State Deeds |
| 25-Jun-20 | Fortescue meet with WGAC in Perth to discuss multiple issues, including State Deeds |
| 20-Jul-20 | Fortescue meet with WGAC in Perth, including mine planning discussions. WGAC advised that the WGAC Board would consider the State Deeds within one week |
| 20-Aug-20 | Fortescue meeting with WGAC in Perth, multiple issues discussed including MLs and State Deeds |
| 27-Aug-20 | WGAC email to Fortescue requesting Fortescue develop "roadmap" proposal for resolving State Deeds matter |
| 17-Sep-20 | WGAC telephone Fortescue to advise it of the significant bereavement of Director and notify that due to sorry business, discussions with Fortescue are suspended |
| 4-Nov-20 | Having provided a respectful period for sorry business, Fortescue emailed WGAC in relation to WGAC's request for further information relating to six of the nine outstanding State Deeds and advised Fortescue is prepared to meet to discuss roadmap to resolution at WGAC's convenience |
| 5-Nov-20 | WGAC advise Fortescue by telephone to expect a response by 6 November at the latest (no response received to date) |

21. Table 1 demonstrates that Fortescue has provided WGAC with details about the proposed mining leases, and about the activities that it eventually may undertake on the leases (if granted and subject to further approvals including heritage, environmental and mining

approvals). Fortescue will continue to engage with WGAC in good faith to assist in its considerations.

22. Fortescue has continued to deliver other benefits of the LAA to Eastern Guruma People.

23. Since 2015, Fortescue has awarded contracts with a value of more than \$110 million to businesses owned by WGAC and joint ventures involving businesses owned by WGAC. The actual procurement spend with businesses or joint ventures involving Eastern Guruma People totals \$633 million to date. Contracting opportunities are not impacted by the resolution of the issues relating to State Deeds. Fortescue considers that Eastern Guruma People continue to benefit demonstrably from mining on determined native title land.

THE EXTENT OF FORTESCUE OPERATIONS WITHIN THE EASTERN GURUMA DETERMINATION AREA

24. Fortescue respects the views expressed by Aboriginal people regarding the perceived scale of impact of mining operations on the native title lands of the Eastern Guruma People.

25. WGAC informed the committee that 93% of the Eastern Guruma People's native title lands is covered by mining-related tenure.

26. Existence of tenure is not an indicator of probable future mining activity or ground disturbance. This is illustrated by Table 2, which describes the extent of Fortescue's exploration, mining tenure and ground disturbance on the Eastern Guruma People's native title lands.

Table 2 - Land Usage Statistics Within Eastern Guruma 'Part A' Native Title Determination Area

| | |
|--|------------------------------|
| Total area of Eastern Guruma 'Part A' native title determination | 6225 km ² |
| Fortescue exploration tenure | 1984 km ² (31.9%) |
| Fortescue exploration tenure subject to ground disturbance | 28.7 km ² (0.46%) |
| Fortescue mining lease tenure | 619 km ² (9.9%) |
| Fortescue mining lease tenure subject to ground disturbance | 26.6 km ² (0.43%) |

27. As Table 2 demonstrates, Fortescue's exploration activities have disturbed 0.46% of Eastern Guruma native title lands, and mining activities have disturbed 0.43%.

28. Fortescue listens to the concern of Eastern Guruma People and consistently attempts to ensure that avoidance of significant places and access to country is part of consultation discussions. The development of the Eliwana Rail Spur involved Fortescue agreeing to avoid significant places such as a rock art precinct, a dancing ground, and a pastoral station homestead of contemporary significance to Eastern Guruma People. In addition, we recognise that linear infrastructure can present a barrier to access and we have consulted with WGAC to install access culverts under rail for vehicles and/or pedestrians to allow freedom of movement without requiring rail inductions or access through locked gates.

29. Fortescue acknowledges that mining has an impact on land and, post-closure and rehabilitation, can result in altered landforms. Fortescue's approach to mine closure planning focuses on returning the land to a state that provides for future use. Fortescue works with its stakeholders including native title holders, communities, pastoralists, and government agencies when considering post-closure land use and developing achievable outcomes. Financial provisions for closure are developed for all operations and revised every six months. These provisions are reported in financial reports available publicly.
30. Fortescue has applied for 17 Section 18 consents on Eastern Guruma native title lands, with 16 approved and one pending. One application was assessed as containing no sites. The land subject to the section 18 consents contains 35 registered sites. Of these 35 sites, three ethnographic sites (ephemeral creek lines) have been partially impacted, two archaeological sites (artefact scatters, one of which archaeologically salvaged by WGAC) have been partially impacted and one archaeological site (artefact scatter archaeologically salvaged by WGAC) has been fully impacted. Therefore, 29 of the 35 sites have not been impacted either partially or fully. Fortescue considers that it has a strong record of avoiding and protecting significant cultural heritage on Eastern Guruma native title lands in close consultation with the Eastern Guruma People.

NGAJANHA MARNTA (SPEAR HILL)

31. Fortescue's rail and infrastructure corridor, traversing the Solomon Hub and linking the Solomon Spur to the Fredericks mining area and the Eliwana Mine, has been designed to avoid all direct impact to the ethnographic site known as Spear Hill. The history of Fortescue's awareness of, and commitment to avoid, this significant place dates to 2010 when respected senior Eastern Guruma Elders who were traditional knowledge holders identified *"a small hill...north of Hamersley Gorge Road to the east of the Castle Camp as having a traditional name in Guruma language, a known mythological narrative"* whilst conducting an ethnographic heritage survey. On being provided with a spatial boundary for the place, Fortescue avoided ground disturbance within the boundary.
32. In December 2011, and again in February 2012, the Eastern Guruma People and their then advisor, anthropologist Dr Edward McDonald, provided Fortescue with revised spatial boundaries for the place (named as Spear Hill), and Fortescue amended the boundary to encompass a land area of 7.86 km². Dr McDonald was the consulting anthropologist for the Eastern Guruma native title claim and therefore had extensive knowledge of both people and country.
33. In July 2014, Fortescue commenced consultation with WGAC on the Solomon Hub expansion, including provision for the infrastructure corridor adjacent to Spear Hill. WGAC did not raise concerns in relation to the indicative corridor during the consultation.
34. In March 2015, Fortescue wrote to WGAC advising that Fortescue would commence a Public Environment Review process for the expansion of the Solomon Hub including the provision of the infrastructure corridor set out on a map and seeking to commence consultation. WGAC did not raise concerns in relation to the indicative corridor during the consultation nor in its two written submissions to the Environment Protection Authority.

35. In September 2016, during ongoing consultation on the infrastructure corridor, Fortescue commissioned WGAC to conduct a further ethnographic survey to formally and finally delineate the boundary of Spear Hill. This work was concluded with no change to the boundary, Fortescue committed that no ground disturbing activities would occur within the boundary, and the place was registered as a site by the then Department of Aboriginal Affairs.
36. The EPA recommended approval of the Solomon Hub Expansion Project including the infrastructure corridor in November 2016. During the mandatory public appeal notice period, no appeals were received by the EPA.
37. In May 2017, in accordance with the terms of the LAA, Fortescue provided WGAC with a draft copy of a Section 18 application to disturb land adjacent to the Spear Hill site boundary for the purposes of constructing and operating the infrastructure corridor. It was at this time that WGAC first raised concern about the proposed infrastructure corridor. Given the lengthy and detailed consultation process that had been undertaken to identify and agree the boundary of Spear Hill, and the advanced stage of the project, Fortescue proceeded to submit the application on the basis that the ethnographic heritage values of Spear Hill were understood and protected.
38. In November 2017, the Western Australian Minister for Aboriginal Affairs consented to Fortescue's Section 18 application.
39. In December 2017, WGAC lodged applications under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cwth) (ATSIHPA) for protection of an area around Spear Hill outside of the site boundary. Fortescue was first informed of this action in January 2018.
40. During 2018, and with the assistance of a Reporter and Mediator appointed pursuant to the ATSIHPA, Fortescue and WGAC continued to discuss the alignment of infrastructure within the corridor around Spear Hill to avoid all significant archaeological heritage sites on the land adjacent to Spear Hill and outside the agreed site boundary. Fortescue gave an undertaking to ensure that the Eastern Guruma People could retain access to significant places in the area including through the installation of a culvert under the rail line suitable for pedestrian access.
41. On 5 December 2018 the Federal Environment Minister formally declined to make the ATSIHPA declarations.
42. Fortescue notes that post closure of the relevant operations, the infrastructure corridor will be rehabilitated, and the significant places will remain intact on the land.

QUEENS VALLEY (WEELAMURRA)

43. In its submission to the Committee, WGAC expressed concern about heritage places within the Queens Valley area. The Queens Valley mining area is part of Fortescue's Solomon Hub development. WGAC expressed concern that:

WGAC's work completed within this area has so far found that (sic) first two rockshelters excavated contained evidence of use and occupation by humans dating to 47,800 years ago in one, and approximately 60,000 years ago in the second. A third site contains petroglyphs - engraved rock art on a series of five stone panels – that depict animal and human figures, animal tracks and geometric motifs. Eastern Guruma traditional owners describe the

petroglyphs as the Guruma “sacred text”, as figures representing the major Dreaming narratives in the area are all contained within the same site.¹

44. Fortescue has committed to protect and avoid the rock shelters referred to by WGAC in its submission and supplementary submission. WGAC’s characterisation of Fortescue’s behaviour and approach to Aboriginal heritage is refuted.
45. Fortescue has at all times consulted closely with WGAC in relation to Section 18 applications and heritage management.
46. Fortescue lodged the relevant Section 18 application in December 2019, based on information from 14 heritage survey reports provided by WGAC.
47. Importantly, the final Section 18 application excluded the site containing petroglyphs and the site WGAC advised the Committee was dated to “approximately 60,000 years ago”. Within the final Section 18 application Fortescue confirmed its support for the ongoing Section 16 research, removed from the scope of the application those sites subject to Section 16 study, and committed to ongoing consultation and provision of access for the Eastern Guruma People to their significant sites.
48. The 22 April 2020 letter from Green Legal, referred to in WGAC’s second supplementary submission, related to points of law for consideration by the Aboriginal Cultural Material Committee (ACMC), and does not reflect Fortescue’s close consultative approach with Aboriginal people. The letter also explicitly advised the ACMC that the rock shelter WGAC refer to as dated to 47,800 years ago was to be removed from the scope of Fortescue’s Section 18 application. Notwithstanding the letter, Fortescue continued to consult with WGAC about heritage management.
49. In June 2020, Fortescue agreed with WGAC to allow further time for consultation in relation to the scope of the Section 18 application. On 17 June 2020 Fortescue made a request to the Department of Planning Lands and Heritage (DPLH) that it pause its consideration of the Section 18 application.
50. On 30 September 2020, following further detailed consultation on Fortescue’s Section 18 application, and with the agreement of WGAC, Fortescue made a request of DPLH to resume consideration of the Section 18 application. WGAC provided a letter of non-objection in relation to the application.
51. The Queens Valley is bisected by an ephemeral tributary of Weelamurra Creek, which is itself a registered Aboriginal site. The Section 18 application seeks consent to impact 0.42% of the registered site (creek system) for the purpose of mining and associated infrastructure development. A timeline of the consultation process leading up to the submission of the Section 18 Notice is provided at Table 3.

Table 3 - Timeline of Solomon Mining and Infrastructure Phase 8 Section 18

| DATE | EVENT |
|----------------------|---|
| 1-Mar-08 to 1-May-19 | Extensive heritage survey work conducted by Eastern Guruma people with Fortescue. A total of 14 separate reports of Aboriginal heritage surveys conducted which relate partly or wholly to an area known as the “Phase 8 area”. |

¹ Submission 050 Wintawari Guruma Aboriginal Corporation, page 6

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|------------------------|--|
| 1-May-19 | Fortescue gives notice to WGAC of its intent to give notice under section 18 of the <i>Aboriginal Heritage Act 1972</i> (WA) for the purpose of seeking Ministerial Consent in respect of the Phase 8 area (Section 18 Notice). The notice to WGAC includes maps and digital spatial data. |
| 29-Oct-19 | WGAC requests Fortescue to contribute a minimum of \$1.2 million to assist WGAC conduct various excavations and related studies permitted by a Section 16 Permit dated 10 October 2019. |
| 31-Oct-19 | Fortescue gives further notice to WGAC of its intent to seek Ministerial Consent in respect of the Phase 18 area. The notice to WGAC includes maps and digital spatial data. The notice to WGAC invites WGAC to undertake “fresh” site visits and ethnographic consultation in relation to any potential Aboriginal sites on the Phase 8 area. |
| 14-Nov-19 | Fortescue meets with WGAC’s specialist heritage committee and discusses the Section 18 Notice. At the meeting, Fortescue commits \$1.22 million to assist WGAC undertake the excavations and related studies referred to in WGAC’s letter dated 29 October 2019. |
| 15-Nov-19 | WGAC advises Fortescue that WGAC wishes to undertake certain excavations and studies on the Phase 8 area prior to 6 December 2019. |
| 22-Nov-19 | Fortescue advises WGAC that Fortescue will: <ol style="list-style-type: none"> 1. support WGAC’s endeavours to complete additional excavations and studies of the seven heritage sites proposed in WGAC’s email of 15 November 2009. 2. exclude from the section 18 application certain areas to allow WGAC additional time to undertake the above studies. 3. avoid direct physical impact to a heritage site known as [REDACTED], but cannot wholly avoid indirect impact (i.e. vibration) to that site, thus necessitating that heritage site [REDACTED] be the subject of the Phase 8 Section 18 Notice. 4. ensure that WGAC can access heritage sites in the Queens area now and into the future. |
| 26-Nov-19 | Fortescue provides copies of the 14 WGAC heritage survey reports to WGAC. |
| 28-Nov-19 | Fortescue provides WGAC with draft printed and electronic copies of the section 18 application together with all supporting attachments. |
| 6-Dec-19 | Fortescue provides to WGAC full draft electronic copies of Heritage Information Submission Forms (HISFs) which it proposes lodging with DPLH. The HISFs were prepared by Fortescue from information provided by WGAC. |
| 11-Dec-19 | Fortescue gives its final draft section 18 Notice to WGAC. |
| 11-Dec-19 | Fortescue gives its section 18 application to the ACMC and WGAC. |
| 4-Feb-20 | DPLH provide Fortescue with a copy of WGAC’s submission to the ACMC in response to the Section 18 Notice. |
| 7-Feb-20 | Fortescue provide DPLH with a response to the procedural fairness submission by WGAC. |
| 5-Mar-20 | DPLH provide Fortescue a copy of various resolutions of the ACMC. |
| 22-Apr-20 | Fortescue’s lawyer writes to ACMC advising Fortescue will excise site [REDACTED] from the Notice and noting that some of the ACMC resolutions are beyond its powers. |
| 9-Jun-20 | Fortescue meet with WGAC – Queens section 18 discussed. |
| 17-Jun-20 | Fortescue requests DPLH to pause consideration of the section 18 application to allow time for further consultation with WAGC. |
| 25-Jun-20 to 20-Aug-20 | Five further meetings between WGAC and Fortescue which included discussion of the section 18 application. |
| 30-Sep-20 | With WGAC’s agreement, Fortescue requests DPLH to resume consideration of the section 18 application. WGAC provides a letter of non-objection. |

WESTERN HUB INFRASTRUCTURE PHASE 1 SECTION 18

52. The purpose of the Western Hub Infrastructure Phase 1 Section 18 was to widen and improve sections of the existing public Mt Brockman Road and Homestead Link Road for the purpose of access by oversize loads to the Eliwana Mine Project.
53. There were no comments or objection received by Fortescue in relation to the draft Section 18 application shared with WGAC.
54. The Green Legal correspondence to the APMC of 9 April 2020 related to points of law and does not reflect Fortescue's close consultative approach with Aboriginal people. Notwithstanding the letter, Fortescue continued to consult with WGAC about heritage management before, during and after the Section 18 consent was granted, including by commissioning an additional ethnographic comment and accepting all recommendations of WGAC in terms of the development. Fortescue also offered the opportunity for Eastern Guruma monitors to be present for the works.
55. The works are now complete with partial impacts to two registered sites (artefact scatters – previously partially impacted by the construction of the public road) and partial impact to one ethnographic site (ephemeral creek lines) already intersected by the public road. A timeline of the consultation process leading up to the submission of the Section 18 application is provided at Table 4.

Table 4 - Timeline of Western Hub Infrastructure Phase 1 Section 18

| DATE | EVENT |
|-----------|---|
| 15-Jan-20 | Fortescue notifies WGAC of the areas over which it will likely apply under section 18 of the <i>Aboriginal Heritage Act 1972</i> (WA) during 2020. The areas include the Western Hub Infrastructure Phase 1 Area. The notice to WGAC includes a request that WGAC's specialist Heritage Committee meet with Fortescue to discuss the identified areas. |
| 15-Jan-20 | Fortescue gives formal notice under the Land Access Agreement between Fortescue and WGAC that it intends to apply under section 18 of the <i>Aboriginal Heritage Act</i> for Ministerial Consent to use the Western Hub Infrastructure Phase 1 Area (Section 18 Notice). The notice to WGAC includes maps and digital spatial data. |
| 6-Feb-20 | Fortescue provides to WGAC full electronic copies of the 17 heritage survey reports provided to Fortescue by WGAC and which form the basis of its Section 18 application. |
| 7-Feb-20 | Fortescue provides to WGAC full draft electronic copies of: 1. a draft Section 18 Notice; and 2. Heritage Information Submission Forms (HISFs) which Fortescue proposes lodging with DPLH (DPLH policy is that lodgement of HISFs is mandatory when seeking Ministerial Consent). |
| 13-Feb-20 | WGAC requests additional information concerning Fortescue's proposed use of the Western Hub Infrastructure Phase 1 Area. |
| 14-Feb-20 | Fortescue provides to WGAC the additional information requested on 13 February 2020. |
| 14-Feb-20 | Fortescue gives a map to WGAC identifying spatially the areas referred to in Fortescue's email sent 15 January 2020, being those for which Fortescue will likely give a notice under the <i>Aboriginal Heritage Act</i> during 2020, including the Western Hub Phase 1 Area. |
| 19-Feb-20 | Fortescue gives its Section 18 Notice (in final form) to WGAC. |
| 19-Feb-20 | Fortescue gives its Section 18 Notice (in final form) to the Aboriginal Cultural Materials Committee (APMC). |

| | |
|-----------|--|
| 3-Apr-20 | DPLH provides Fortescue with a copy of WGAC's submission in response to its Section 18 Notice. |
| 9-Apr-20 | Fortescue's lawyer writes to ACMC in response to WGAC submission. |
| 13-May-20 | Minister grants Ministerial Consent. |

YINDJIBARNDI ABORIGINAL CORPORATION

NATIVE TITLE

56. Fortescue remains open to entering into a native title agreement with the Yindjibarndi People on terms similar to its agreements elsewhere in the Pilbara. Fortescue notes YAC's statement to the Committee that YAC would reject such an agreement now as it did in 2010.
57. In the absence of an agreement, YAC and its sister organisation the Yindjibarndi Ngurra Aboriginal Corporation (YNAC), like all registered native title bodies corporate, have a statutory right to seek compensation for effects on native title rights and interests. Any such claim would be brought against the State. There will be important matters of law to be clarified in any such proceeding.
58. There are differing views on the quantum and form of native title compensation in these circumstances. YAC has a differing view on the quantum and form of compensation. It is unfortunate that this difference of opinion in relation to compensation has led YAC/YNAC to continuously refuse invitations by Fortescue to participate in Aboriginal cultural heritage processes on Yindjibarndi native title lands. Fortescue has consistently invited and will continue to invite YAC/YNAC to participate in all relevant Aboriginal cultural heritage processes, as described below.

WIRLU MURRA YINDJIBARNDI ABORIGINAL CORPORATION (WMYAC)

59. WMYAC is a highly competent, professional, independent Aboriginal corporation which (according to the Office of the Registrar of Indigenous Corporations) has more than 450 Yindjibarndi members.²
60. Fortescue categorically rejects the allegation that Fortescue encouraged or orchestrated the creation of the WMYAC. At the time YAC first made this assertion in 2011 it was examined by the National Native Title Tribunal and rejected as follows:

There is no evidence that FMG suggested a breakaway group be created or that it would enter into negotiations with a breakaway group if one were to be created (at 35)....It is open on the facts to assume that the reason for the dissension within the native title party related not to the machinations of the grantee party, but to genuine disagreement within the group as to whether or not to accept the agreement proposed by the grantee party..... In the circumstances where the native title party had broken into factions, FMG was entitled to enter into discussions with both groups (at 37).³

² Membership lists accessed at <https://www.oric.gov.au/>, on 13 November 2020.

³ FMG Pilbara Pty Ltd/Ned Cheedy & Ors/WA [2011] NNTTA 107

61. In 2018, the Supreme Court of Western Australia⁴ found that YAC had engaged in “conduct that is properly described as unfair, burdensome and wrongful”⁵ toward individual WMYAC members, and that by excluding Yindjibarndi people who were also WMYAC members YAC “did not act in good faith”⁶. YAC’s conduct was found to be “oppressive to a minority of the members of YAC, namely to those existing members of YAC who were also members and supporters of WMYAC, and who did not support the incumbent board.”⁷
62. Fortescue has not entered into a native title agreement with WMYAC, nor does Fortescue make native title compensation payments to WMYAC.
63. Fortescue does however ensure that its VTEC training and employment program is open to all Yindjibarndi people, despite the absence of a native title agreement.
64. In the context of its Billion Opportunities procurement program Fortescue has, through open commercial tender processes, awarded contracts to Yindjibarndi businesses and joint ventures, including businesses in which the WMYAC has an interest.
65. WMYAC’s 2019 consolidated financial reports transparently show that the corporation received revenue for services provided of \$23.5m and had operating expenses of \$20.3m.⁸ This is not a corporation receiving tens of millions of dollars in handouts. Rather, it is a highly successful Yindjibarndi-owned corporation.

FORTESCUE’S APPROACH TO MANAGING ABORIGINAL HERITAGE ON YINDJIBARNDI #1 DETERMINED NATIVE TITLE LAND

66. Fortescue’s previous submission to this Committee sets out Fortescue’s approach to identifying and protecting significant Aboriginal cultural heritage. Fortescue will not repeat the extent of this comprehensive regime in this submission.
67. Fortescue has conducted 163 km² of archaeological survey and 496 km² of ethnographic survey on Yindjibarndi native title lands. Fortescue’s approach is for surveys to be led by Yindjibarndi people accompanied by independent consultant heritage professionals.
68. Fortescue consistently invites YAC/YNAC to nominate Yindjibarndi people to participate in heritage surveys. YAC and YNAC consistently decline or ignore the invitations.
69. Fortescue has applied for 26 Section 18 consents on the Yindjibarndi native title lands. Fortescue consistently provides YAC/YNAC with advance copies of the applications prior to submission and invites YAC/YNAC to make comment to Fortescue. YAC/YNAC consistently decline or ignore the invitations.
70. On the occasions where it has been a condition of the Section 18 consent that Fortescue conduct further excavations or investigations of heritage places on the land the subject of the

⁴ Sandy -v- Yindjibarndi Aboriginal Corporation RNTBC [No 4] [2018] WASC 124

⁵ Ibid, 82 [254]

⁶ Ibid, 221 [699]

⁷ Ibid, 223 [707]

⁸ 2019 Annual Financial report accessed at the Office of the Registrar of Indigenous Corporations <https://register.oric.gov.au/Document.aspx?documentID=720732&concernID=552034>, on 25 October 2020.

application, it is Fortescue's practice to invite YAC/YNAC to participate in the investigation work. YAC/YNAC consistently decline or ignore the invitations.

71. YNAC has undertaken a survey at Solomon on one occasion. In March 2018, Fortescue facilitated a heritage survey conducted by YNAC as part of procedural fairness for the Solomon Mining and Infrastructure Phase 23 Section 18 application.

72. Fortescue rejects the suggestion that it is not providing reasonable access to active mining tenure for Yindjibarndi people. It is a condition attached to Fortescue's mining leases⁹ that:

Any right of the native title party (as defined in Sections 29 and 30 of the Native Title Act 1993) to access or use the land the subject of the mining lease is not to be restricted except in relation to those parts of the land which are used for exploration or mining operations or for safety or security reasons relating to those activities.

73. Fortescue has no record of YAC/YNAC making a request for Fortescue to provide safe and secure access for any of its members on to the mining leases for the purpose of exercising native title rights and interests since 2013. For the avoidance of doubt, should such a request be made, Fortescue would facilitate such a visit.

74. Fortescue's heritage processes are effectively and appropriately led by Yindjibarndi people and Fortescue is open and proactive in inviting others to work with it, including continuing to attempt to engage with YAC/YNAC. Fortescue rejects the suggestion that YAC/YNAC is prevented or excluded from participating in heritage processes related to Fortescue's activities.

REGISTERED SITES AND OTHER HERITAGE PROTECTED AREAS

75. The Yindjibarndi #1 Native Title Determination area comprises 2461 km² of land. Fortescue-commissioned ethnographic surveys have covered 11.8% of the area, and approximately 5% of the land has been archaeologically surveyed for Fortescue. Fortescue holds Section 18 consents over 3.37% of the Yindjibarndi #1 Determination area.

76. There are 365 Registered Aboriginal Heritage Sites and Other Heritage Places within the boundaries of the Yindjibarndi #1 Native Title Determination land area. 307 of those Registered Aboriginal Heritage Sites and Other Heritage Places have been identified and registered as a result of heritage surveys conducted for Fortescue. As is typical of the inland Pilbara, only those areas being considered for development are comprehensively surveyed for places of cultural significance. By comparison, there are 4297 Registered Aboriginal Heritage Sites and Other Heritage Places (DPLH 2020) within the boundaries of the coastal Ngarluma/Yindjibarndi Determination.

77. As set out in paragraph 69 above, Fortescue has applied for 26 Section 18 consents within the Yindjibarndi #1 Determination area. There are 61 registered sites within the land covered by Fortescue's Section 18 application. 26 have been impacted by Fortescue as a result of using the land.

⁹ Safety on mine sites in Western Australia is principally regulated by the *Mines Safety and Inspection Act 1994* (WA) which imposes an appropriately onerous burden on employers and mine managers making the mine manager personally liable and responsible for the safety of all persons on the mining lease.

78. Following consultation with the Yindjibarndi people Fortescue has avoided significant places on the Yindjibarndi #1 Determination land area. Table 5 sets out examples of such places.

Table 5 - Examples of places avoided and protected on Yindjibarndi #1 Determination land

| SITE ID | DESCRIPTION |
|--------------------------|---|
| [REDACTED] | Rock shelter with artefacts and archaeological deposit dated 52,000 to 44,000 years before present (BP) |
| [REDACTED] | Rock shelter with artefacts and archaeological deposit dated 41,250 to 40,450 years BP |
| [REDACTED] | Rock shelter with artefacts and archaeological deposit dated 35,155 +/- 461 years BP |
| [REDACTED] | Rock shelter with artefacts and archaeological deposit dated 19,591 +/- 92 years BP |
| [REDACTED] | Rock shelter with artefacts and archaeological deposit dated 14616 +/- 44 years BP |
| [REDACTED] | Rock shelter with artefacts and an archaeological deposit dated 4,723 +/- 25 years BP |
| [REDACTED] | Artefact Scatter and object on rock ledge - avoided due to ethnographic significance |
| [REDACTED] [REDACTED] | Rock Shelters, Significant Ethnographic and Rock art sites; [REDACTED] engraving dated 520 +/- 45 years BP; [REDACTED] dated 380 +/- 25 years BP; Rock shelters have potential for further excavation |
| [REDACTED] | Rock Art Site: three rock shelter complex, not dated but considered to have high potential for excavation |
| [REDACTED] | [REDACTED] Rock Shelter; Artefact [REDACTED] [REDACTED] no dating |
| [REDACTED] [REDACTED] | Highly significant ethnographic site to Yindjibarndi people [REDACTED] [REDACTED] – no excavation or dating |
| [REDACTED] | Potential [REDACTED] Site |
| [REDACTED] | Rock Shelters Complex: [REDACTED] [REDACTED] This area is of extreme cultural significance [REDACTED] [REDACTED] [REDACTED] |
| [REDACTED] | Artefact Scatter, Waterhole, Scarred Tree |
| [REDACTED] | Rock shelter, Walled Niche, Cache |
| [REDACTED] | Highly significant ceremonial place [REDACTED] [REDACTED] |

ROCK SHELTERS

79. YAC's evidence to the Committee was that:

... two rock shelters have been destroyed in the Solomon project area, one of which returned a date exceeding 50,000 years and had evidence of use. The other one exceeded 46,000 or 48,000 years

80. Fortescue confirms two rock shelters have been impacted which match the descriptions provided to the Committee: [REDACTED]
81. [REDACTED] returned an earliest date exceeding 50,000 years ($53,000 \pm 6,000$ years) from Optically Stimulated Luminescence of a soil sample¹⁰. [REDACTED] returned an estimated date range of 49,146 – 42,178 years respectively from radiocarbon (C14) dating of a charcoal sample.
82. Each of the rock shelters returned a number of artefacts (predominantly rock flakes) – [REDACTED] – eight from the initial test excavation and 15 from subsequent salvage and [REDACTED] – 643 from salvage (including five pieces of grinding material). [REDACTED] did not include a hearth. [REDACTED] included a 'potential hearth' that was 'fully investigated'. These places were not associated with burials, engravings, paintings, stone arrangements, quarries, modified trees, mythological sites, ceremonial sites, or culturally important natural features, according to the archaeological reports informed by traditional knowledge holders.
83. Details about these places, including dating, have been provided to YAC/YNAC.
84. Each of the rock shelters was determined to be an Aboriginal site at the time that Fortescue made the relevant Section 18 applications. Each of the rock shelters continues to be recorded as an Aboriginal site in the systems maintained by DPLH.
85. Each of the rock shelters was archaeologically salvaged to the satisfaction of Yindjibarndi people.
86. [REDACTED] has been impacted by mining and [REDACTED] has been subsumed by a rock storage facility where non-ore bearing rock is stored for use in future mine void rehabilitation.
87. Table 6 below outlines key dates relevant to the rock shelters.

Table 6 - Key Dates

| | Identified | Draft S18 | S18 submitted | S18 Consent | Salvage | Impact |
|------------|------------|-----------|---------------|-------------|----------|----------|
| [REDACTED] | 2011 | Feb 2012 | Apr 2012 | Jul 2012 | Nov 2013 | Dec 2013 |
| [REDACTED] | 2013 | Nov 2013 | Dec 2013 | Apr 2014 | Sep 2014 | Apr 2019 |

88. As set out in paragraphs 66-74 above, Fortescue follows a process by which it provides YAC/YNAC with a notice of intention to submit a Section 18 application, a copy of the draft Section 18 application and then a copy of final Section 18 application at or shortly following submission for consideration by the Aboriginal Cultural Materials Committee. YAC/YNAC is invited to provide comments, either to Fortescue in relation to the draft Section 18 application or to Fortescue or DPLH in relation to a final Section 18 application.

¹⁰ Optically Stimulated Luminescence is a technique used to date when quartz sediment was last exposed to light

89. No comment was provided to Fortescue by YAC/YNAC in relation to the Section 18 processes for the two rock shelters.
90. No comment was received by Fortescue from YAC/YNAC subsequent to the Section 18 consents being granted and prior to impact occurring in relation to the two rock shelters.
91. Fortescue has a strong record of removing or excluding significant sites from Section 18 land or avoiding impacts to significant Aboriginal cultural heritage at Solomon when requested by Yindjibarndi people (refer Table 5 for examples). These include multiple rock shelters, rock art sites, burial sites, ethnographic places, walled niches and caches.
92. The research into [REDACTED] and [REDACTED] yielded information that assists in understanding the settlement patterns of Australia and the lifestyles of Aboriginal people over time. This information is retained by Yindjibarndi people.