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Our ref: FMGLTD310

22 April 2020

BY EMAIL

Department of Planning, Land and Heritage
Gordon Stephenson House
140 William Street
Perth WA 6000

Dear Aboriginal Cultural Material Committee

NOTICE BY FMG PILBARA PTY LTD UNDER S 18(2) OF THE ABORIGINAL HERITAGE ACT 1972 (WA) - SOLOMON MINING AND INFRASTRUCTURE PHASE 8

I act for FMG Pilbara Pty Ltd (**FMG**) in relation to the notice given by FMG to the Aboriginal Cultural Material Committee (**ACMC**) on 11 December 2019 pursuant to s 18(2) of the *Aboriginal Heritage Act 1972 (WA)* (**AH Act**) having Form submission number S18-22777726-720 (**S18 Notice**).

I refer to the resolutions of the ACMC made on 11 February 2020 in relation to the S18 Notice (**Resolutions**).

The Resolutions were advised to FMG by letter dated 5 March 2020 from the Registrar of Aboriginal Sites, a copy of which accompanies this letter (**Registrar's Letter**).

As to Resolution 1, at this time, FMG cannot definitively say that Aboriginal site ID 37740 (S08-032) (**Site 37740**) cannot be avoided. Having revisited the comments of Wintawari Guruma Aboriginal Corporation RNTBC (**WGAC**) attached to the email from [REDACTED] (DPLH) sent 4 February 2020, and in particular WGAC's request for additional time to complete certain research regarding Site 37740, FMG elects to excise the area of Site 37740 from the land described in the S18 Notice.

Please accordingly find accompanying this letter a .zip file containing revised geospatial files (in ESRI shape file format) which show the revised land for which FMG seeks Ministerial Consent by way of the S18 Notice.

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As to Resolutions 2 to 4, they purport to direct FMG to complete various actions and/or outcomes (**Actions**).

The ACMC does **not** have power under the AH Act, or otherwise, to direct FMG (or any owner of land) to complete any Action.

FMG does **not** intend completing the Actions.

The Registrar's Letter states in part:

Please note that the Notice will not be considered until the above resolution is actioned accordingly.

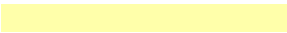
Sub-section 18(2) AH Act sets out the function of the ACMC following receipt of the S18 Notice (**Function**).

The ACMC has a **duty** to perform its Function. That is made clear by the words therein: "the Committee shall, as soon as it is reasonably able ...".

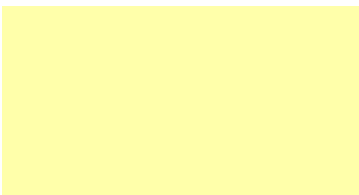
The Registrar's Letter makes clear that the ACMC intends (improperly) **not** to perform its Function.

FMG hereby demands that the ACMC perform its Function, including delivering to the Minister both the S18 Notice and a written recommendation as to the matters referred to in s 18(2) AH Act.

Unless the ACMC confirms in writing on or before 19 May 2020 that the Function is complete, FMG intends taking steps to compel the ACMC to perform its Function, including petitioning the Minister and/or commencing legal proceedings to that effect. FMG reserves its rights.

Any questions concerning this letter should be directed to the author, including by way of email to 

Yours faithfully



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9 April 2020

Aboriginal Cultural Material Committee
c/- Registrar of Aboriginal Sites
Department of Planning, Land and Heritage
Gordon Stephenson House
140 William Street
Perth WA 6000

BY EMAIL

Dear Aboriginal Cultural Material Committee

NOTICE BY FMG PILBARA PTY LTD UNDER S 18(2) OF THE ABORIGINAL HERITAGE ACT 1972 (WA) - WESTERN HUB INFRASTRUCTURE PHASE 1

I act for FMG Pilbara Pty Ltd (**FMG**) in relation to the notice given by FMG to the Aboriginal Cultural Material Committee (**ACMC**) on 19 February 2020 pursuant to s 18(2) of the *Aboriginal Heritage Act 1972 (WA)* (**AH Act**) having Form submission number S18-23764154-746 (**S18 Notice**).

I have been provided with a copy of the letter from Wintawari Guruma Aboriginal Corporation RNTBC (**WGAC**) dated 3 April 2020 which addresses the S18 Notice (**WGAC Letter**).

Having reviewed the WGAC Letter, I note the following:

- 1 the land the subject of the S18 Notice (**Land**) is an **existing track** or areas immediately adjacent thereto: see Attachment 4 to the S18 Notice;
- 2 as early as 15 January 2020, FMG:
 - (1) **advised** WGAC of the proposed lodgement of the S18 Notice; and
 - (2) **invited** WGAC to visit the Land to discuss the minimisation or mitigation of disturbance or damage to any place on the Land;(see Attachment 8 to the S18 Notice);

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- 3 on 7 February 2020, FMG provided to WGAC a draft S18 Notice: see Attachment 10 to the S18 Notice;
- 4 FMG has provided to the ACMC a number of reports of ethnographic surveys conducted by WGAC over the Land;
- 5 those reports have been provided by FMG to the ACMC for the sole purpose of assisting the ACMC meet its obligations of procedural fairness. Relevantly, Justice Chaney stated in *Robinson v Fielding* [2015] WASC 108.

The scheme of the AH Act is such that the ACMC is obliged, as a matter of procedural fairness to ensure that it has sufficient information from the Aboriginal persons who might be affected by a decision as to the existence, significance and importance of sites which might be affected by a proposal under s 18. That does not mean that it is necessary, as a general rule, to specifically invite persons who might be affected by the decision to make either written or oral submissions before a s 18 decision is made. It may be sufficient to meet the obligation of the ACMC that it invites the proponent to provide appropriate reports which canvass the inquiries made of, and views expressed by, those Aboriginal groups with a connection to the land. Whether anything more might be required in any particular case is a matter to be considered in light of the individual circumstances of each case.

- 6 WGAC has been invited by the ACMC to provide, and has provided, a written submission as to the existence, significance and importance of sites which might be affected by the purpose identified in the S18 Notice. That is apparent from the WGAC Letter;
- 7 the WGAC Letter does not allege that any report provided by FMG to the ACMC is inaccurate;
- 8 FMG does **not** have a duty to commission an ethnographic survey as to a particular activity, or at all. Accordingly, whether it has, or has not, done so is **irrelevant** to the function of the ACMC;
- 9 the function of the ACMC when considering the S18 Notice is to consider only the Land. When considering the S18 Notice, it is not the function of the ACMC to consider whether there are Aboriginal sites outside of the Land, or the impact that might occur to Aboriginal sites outside of the Land. That is because s17 of the AH Act applies to places outside of the Land;
- 10 if there is a “longstanding practice and procedure of the ACMC and the Registrar that ethnographic surveys [must be] undertaken when there will be impacts to ethnographic sites” then such “practice and procedure” is improper;
- 11 the ACMC does not have power under the AH Act, or otherwise, to direct or compel FMG (or any owner of land) to complete any action;
- 12 there is no entitlement under the AH Act that Aboriginal people be permitted to develop measures to mitigate, manage and minimise impacts of any place on the Land. Accordingly, whether they have, or have not, done so is **irrelevant** to the function of the ACMC; and
- 13 the WGAC Letter does not propose, by way of condition, any possible measures to mitigate, manage or minimise impact of any place on the Land. To the extent that

WGAC is aware of such measures, it could have, and should have, identified such measures in the WGAC Letter; and

- 14 the WGAC Letter fails to acknowledge WGAC's prior advice to FMG that its members and staff **will not be** undertaking ethnographic surveys for the foreseeable future: see attached email sent 19 March 2020.

Please ensure the minutes of any proceeding at which the S18 Notice is considered record agreement with the above.

The ACMC has a **duty** to perform its Function. That is made clear by the words of s 18(2) AH Act: "the Committee shall, as soon as it is reasonably able, ...".

In the circumstances, nothing prevents the ACMC from completing its function as set out in s 18(2) AH Act, including delivering to the Minister both the S18 Notice and a written recommendation as to the matters referred to in s 18(2) AH Act

FMG requests that the ACMC do so on or before 23 April 2020.

Any questions concerning this letter should be directed to the author, including by way of email to **kgreen@green.legal**.

Yours faithfully



Ken Green