ABORIGINAL HERITAGE — FORTESCUE METALS GROUP — PILBARA

Statement

HON ROBIN CHAPPLE (Mining and Pastoral) [6.18 pm]: I rise today to bring to the attention of this house evidence of systematic noncompliance with the state's regulatory requirements for accessing land for resource development. I will be referring to several documents and will seek permission to table all these at the end of my contribution. These documents point to one of the state's largest land users systematically bypassing the state's laws to achieve quick and convenient outcomes. The evidence I shall table in the Parliament today requires a thorough response from government and, if necessary, this Parliament. The company that I am referring to is Fortescue Metals Group, commonly referred to as FMG.

I turn now to the facts at hand. In 2008, FMG received a report from a reputable firm of archaeologists confirming that four Aboriginal sites of importance and significance were recorded on exploration tenement E47/1373. FMG was advised that the four sites were protected by the Aboriginal Heritage Act 1972, and that two of the four sites were proposed as sites that should be preserved because of their potential cultural importance to the state of Western Australia. The archaeologists recommended that if FMG wanted to use the land, it would be required to seek the consent of the Minister for Aboriginal Affairs. All four sites were described as being of cultural significance to the Eastern Guruma. This is not surprising as they are located within 100 metres of the Duck Creek rock art site, which contains over 500 petroglyphs, including ceremonial and sacred sites.

In April 2017, in preparation for the construction of the Eliwana railway, FMG installed an access track through E47/1373 to facilitate access and to carry out hydro-bore testing. The proposed track intersected one or more of the four sites recorded in 2008. Rather than seeking consent from the Minister for Aboriginal Affairs by way of a section 18 application and consulting the native title holders consistent with the expert recommendations, FMG unilaterally decided that the four sites were not protected by the Aboriginal Heritage Act. We know this because, between 1 and 13 March 2017, FMG made a determination that, contrary to the expert findings, these four sites could be impacted without the consent of the minister under section 18 of the Aboriginal Heritage Act. FMG made this determination without any discussion with the government regulator, the traditional owners, or the author of the archaeological recommendations.

As members would be aware, determining what Aboriginal sites and places can and cannot be protected by the Aboriginal heritage laws in WA is a statutory function reserved for the Minister for Aboriginal Affairs' expert committee, the Aboriginal Cultural Material Committee. However, FMG performed the site assessments, not the ACMC. The tabled documents show that rather than referring matters to the ACMC, FMG routinely conducts internal risk-based assessments about Aboriginal sites. This approach is contrary to the requirements of the legislation. FMG does not have a discretion in whether it complies with the law, nor does it have a discretion to carry out the functions of the ACMC at will. This is all quite extraordinary. This apparent modification of process is made worse by FMG devising a system of permits issued by its own heritage manager as authority to destroy sites. These cultural salvage permits authorise FMG staff to salvage Aboriginal cultural objects before ground-disturbing activity commences. FMG has set up a decision-making body and process within its own organisation to make decisions about sites reserved in law to the minister on behalf of the community of Western Australia.

On 13 March 2017, FMG issued a heritage work instruction to the Aboriginal corporation to carry out an Aboriginal heritage survey and participate in the salvage of cultural material from these same four Aboriginal sites. I am advised by that corporation that it had participated in cultural material salvage exercises with mining companies before, and reasonably assumed that FMG had the necessary statutory approvals in place. It did not occur to it to question FMG about whether it had the requisite legal approvals in place. On 10 March 2017, just a few days earlier, FMG had submitted a program of work application seeking approval from the Department of Mines, Industry Regulation and Safety to install an access track on E47/1373, where the four sites were located. Officers are authorised to approve a POW application if the activity will not cause environmental impacts including impacts to Aboriginal heritage sites. FMG did not disclose the four sites in the POW application even though the sites were material to the department's assessment of the application and its ultimate decision, which was to approve it. Had the sites been disclosed, the application would have been decided very differently, requiring FMG to seek a section 18 consent or to avoid the Aboriginal sites.

There is a further example of FMG not disclosing known Aboriginal sites in a program of work application. On 13 August 2018, FMG made a POW application knowing that the proposed work would impact an Aboriginal site of immense significance. The Department of Mines, Industry Regulation and Safety has suspended its assessment since becoming aware of FMG's non-disclosure. I have other examples of noncompliance with government processes. On 30 November 2017, the Minister for Aboriginal Affairs granted a section 18 consent for the Spear Hill area to FMG subject to conditions that FMG invite traditional owners to salvage their ancient cultural

material. I am advised that FMG have proceeded with its heavy earthworks in this area in the last two months without making the invitation, and in doing so, breached its legal consent.

Finally, I note that the documents indicate that FMG continues to mandate in its instructions to heritage consultants undertaking heritage surveys on country the use of guidelines thrown out by the Supreme Court of Western Australia and by the ACMC and by the previous minister in April 2015. The Supreme Court, in the case of Robinson v Fielding, found the guidelines to be inconsistent with the legislation. The documents I am tabling point to FMG having designed a system that has the effect of bypassing the state's laws. This system includes the use of guidelines that incorrectly interpret the statute; a site assessment function that usurps the statutory functions of the ACMC and the minister; the use of a cultural salvage permit that acts as a substitute for the bona fide regulatory authority of the minister, misleading at least one Aboriginal organisation that cultural salvage was sanctioned by the minister; withholding material facts from POW applications with DMIRS; and ignoring the section 18 conditions imposed by the minister.

In my view, it is imperative that the Department of Planning, Lands and Heritage and the Department of Mines, Industry Regulation and Safety undertake a thorough joint investigation to determine the scale of FMG's compliance failure. For example, how many other sites have been assessed by FMG as not being sites and subsequently impacted without regulatory approval? How many POW approvals has FMG secured through non-disclosure of material information? Maintaining the community's confidence in our system of law and public policy requires the Minister for Aboriginal Affairs and the Minister for Mines and Petroleum to use their respective authorities and hold FMG to account.

I seek leave to table a series of documents that will support what I have just identified in my speech. Two maps included in those documents are really important. One shows the sites that are defined as requiring assessment under section 5 of the act, and the other shows those very same sites as having been removed.

Leave granted. [See paper 2131.]