



5 September 2011

Senator Trish Crossin
Chair
Senate Standing Committee on Legal and
Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Senator Crossin

Native Title Amendment (Reform) Bill 2011

Thank you for your letter dated 23 August 2011 inviting Fortescue to respond to matters raised in submissions to the Senate Standing Committee on Legal and Constitutional Affairs (the Committee) in its inquiry into the *Native Title Amendment (Reform) Bill 2011* (the Bill).

The Committee has provided Fortescue with a 'selection' of submissions containing comments about Fortescue and its Chairman Andrew Forrest and about the way in which Fortescue has dealt/is dealing with the Yindjibarndi People.

Your letter advises that the Committee has for the time being decided to keep most of these and similar submissions confidential and that the Committee has provided Fortescue until 5 September 2011 to provide a response.

As set out below, Fortescue respectfully requests that if the Committee decides to release the submissions, it also publish Fortescue's response.

Fortescue's Response

The submissions make assertions to the effect that:

- (1) Fortescue failed to act in good faith in its dealings with Yindjibarndi People and has made untrue statements;
- (2) Fortescue's alleged failure has caused the Yindjibarndi People to lose an opportunity to access funds to increase their standard of living; and
- (3) the amendments proposed by the Bill to the Native Title Act 1993 (Cth) (NTA) would result in a better outcome for the Yindjibarndi People.

Fortescue rejects these assertions and responds as follows:

(1) *Fortescue has negotiated in good faith with the Yindjibarndi People*

Fortescue has been negotiating with the Yindjibarndi People since 2007. Despite having successfully negotiated land access agreements with six other native title groups across the Pilbara, Fortescue has not been able to conclude an agreement with that portion of Yindjibarndi People represented by Yindjibarndi Aboriginal Corporation, Mr Michael Woodley, solicitors Slater & Gordon and barrister, Mr George Irving (collectively YAC).

The National Native Title Tribunal (NNTT) has on a number of occasions considered the negotiations between the parties and on each occasion found that Fortescue has negotiated in good faith.

The NNTT (via President Neate) and the Federal Court (via District Registrars) have provided separate mediation services to Fortescue and Yindjibarndi Claimants. In none of those processes, has the mediator made any negative statement or conclusion concerning Fortescue's conduct.

The NNTT and the Federal Court have on a number of occasions considered whether mining tenements should be granted to Fortescue, and if so, on what conditions. The most recent decisions are those of the Full Court of the Federal Court in *Cheedy on behalf of the Yindjibarndi People v State of Western Australia* [2011] FCAFC 100 and the NNTT in *FMG Pilbara Pty Ltd/Ned Cheedy and Others on behalf of the Yindjibarndi People/Western Australia* [2011] NNTTA 107. Each of those decisions was favourable to Fortescue.

From Fortescue's perspective, a recurring theme is apparent. Fortescue participates in good faith, but YAC's conduct is less than exemplary. Most recently:

- (1) the Full Federal Court (North, Mansfield and Gilmour JJ), in the course of their 48 page unanimous judgment noted:

"The conduct of the appeals [by YAC] in these respects was so disorganised and below an acceptable standard that we have reluctantly drawn attention to the matter." (para 82 on page 22); and

- (2) the NNTT, in reaching its decision that Fortescue had negotiated in good faith noted that:

"...three of the seven named [Yindjibarndi] applicants, and 13 members of the claimant group deposed to the fact that they had not been consulted about the native title party's decision to challenge the good faith of the grantee party [Fortescue] in the negotiation process, and they had been ignored in their assertion that the agreement proposed by the grantee party [Fortescue] was acceptable, they agreed that the current action before the Tribunal should be discontinued and the current agreement proposed by the grantee party [Fortescue] should be entered into." (para 33, pp 28 -29).

The point is that statements made on behalf of or in support of YAC (as defined above) which has failed to consult with or represent the wishes of the majority of the Yindjibarndi People should not be relied on as grounds to amend the NTA. The process has been protracted and difficult but the analysis has shown that Fortescue has consistently negotiated in good faith and it is now clear that certain claims by Mr Woodley were not true. See, for example, paras 98 – 99, 105 of the decision of the NNTT referred to above.

YAC has run a misleading and defamatory media campaign against Fortescue and its officers. Fortescue believes this campaign has been designed to mislead the Australian public and force

Fortescue, first, to ignore the wishes of the vast majority of the Yindjibarndi people and, secondly, negotiate with a media savvy but unrepresentative and untruthful minority.

We urge the Committee to take notice of the fact that YAC has lost the confidence of the majority of the Yindjibarndi People. That majority has entered into an agreement with Fortescue and notwithstanding the fact that Fortescue now has the tenure required to develop its Solomon mine and rail, Fortescue is proud to be working with the Yindjibarndi community. Only in this way will real and long-term benefits ensue.

As a further suggestion that Fortescue lacked good faith, a number of submissions allege that a meeting of the Yindjibarndi People held in March 2011 was tainted by Fortescue providing funds to the Wirlu Murra Yindjibarndi Aboriginal Corporation that were used to pay for transport for attendees and by the manner in which the meeting was conducted.

Fortescue notes:

- (1) those attendees were Yindjibarndi People. It is perverse to suggest they should not have attended the meeting;
- (2) its understanding that YAC did not intend assisting those Yindjibarndi People to attend the meeting;
- (3) it is standard practice for mining companies to pay for all costs associated with meetings at which native title parties discuss dealings with the companies. It is a reality of the state of the native title system that such meetings would otherwise not occur: see the following *good faith* determinations of the NNTT:
 - (a) *Magnesium Resources Pty Ltd; Anthony Warren Slater/Puutu Kunti Kurrama and Pinikura People; Puutu Kunti Kurrama and Pinikura People #2/Western Australia*, [2010] NNTTA 211 (19 December 2010);
 - (b) *Austmin Platinum Mines Pty Ltd and Weld Range Metals Limited/Western Australia/Ike Simpson and Others on behalf of Wajarri Yamatji* [2010] NNTTA 212 (19 December 2010).

Fortescue strongly refutes any suggestion that assistance provided to the Wirlu Murra Yindjibarndi Aboriginal Corporation in any way tainted the meeting proceedings or that the results of the meeting were other than as represented by Fortescue in its public statements.

In any event, before the outcomes of that meeting can be implemented, the meeting itself will need to be considered by the Federal Court in line with the requirements of the NTA. It is accordingly surprising that the meeting would be so strongly criticised if those outcomes are ultimately destined to be examined by the Federal Court.

Assessments of how the meeting was conducted appear to be based on a highly edited, and consequently misleading, video released by YAC following the meeting. Fortescue and the Wirlu Murra Yindjibarndi Aboriginal Corporation have previously responded to that video and that response can be seen at <http://thetruthtitlestory.com.au/>.

- (3) *Yindjibarndi People are not losing an opportunity to benefit, they are gaining an opportunity to break the welfare cycle by engaging in careers, training and business development*

A number of the submissions assert that Fortescue's settlement with the majority of the Yindjibarndi People is unfair, and that higher royalty payments would deliver greater benefits to the community.

First, as a major mining company operating in the Pilbara, Fortescue takes its obligations very seriously.

For that reason, Fortescue has publicly noted the ease with which native title consent can be obtained by *writing a cheque*. Many companies have buckled to the pressure to do this but Fortescue believes its responsibility includes endeavouring to break the vicious cycle of welfare poverty by creating agreements focussed primarily on training, careers and business development opportunities for Aboriginal people. The historical welfare experience is that *writing cheques* acts as a disincentive to individual independence. It is the opportunity to work, obtain housing and educate children that will make a real difference.

One of Fortescue's key initiatives has been the Vocational Training and Employment Program delivered through the Vocational Training and Employment Centre ("VTEC"), which was established in 2006 in Port Hedland after extensive consultation with native title claimant groups. VTEC has recently expanded its operations to include Roebourne and Fitzroy Crossing. VTEC identifies job opportunities within Fortescue and its contractors and then develops courses in partnership with the Western Australian TAFE and other training organisations to provide people with the skills they need to do the job. The training programs are also supported by the Department of Employment and Workplace Relations under their skills programs.

Under the VTEC program, participants who successfully complete relevant training and/or work preparation activities are guaranteed employment with Fortescue, its contractors or service providers.

VTEC's employment-focused strategies are complemented by the specific and targeted delivery of personal support. Aboriginal people can experience a range of barriers to meaningful employment. Fortescue has equipped VTEC to help address these difficulties and provide the necessary tools for achieving sustainable employment. VTEC staff are available to both Fortescue employees and contractors to provide support, identify training needs, assist with family concerns and promote understanding of cultural factors which affect Aboriginal people in the workplace. Since 2006 VTEC has provided training and employment opportunities and assistance to over 1,000 people.

Fortescue currently employs around 300 Aboriginal people directly (comprising around 10 per cent of Fortescue's total workforce). At Fortescue's Herb Elliott Port in Port Hedland, 35 per cent of the workforce is Aboriginal. Fortescue is currently paying more than \$30 million per year to Aboriginal employees and this amount is growing.

Secondly, Fortescue's settlement with the majority of the Yindjibarndi People came at a time when Fortescue was likely to be granted the tenure required to develop its Solomon mine and rail. That is, Fortescue's settlement with the majority of the Yindjibarndi People could be viewed as the opportunity otherwise lost to YAC, rather than an unfair settlement. Fortescue emphasises that no decision maker (whether the Full Federal Court, the Federal Court, the National Native Title Tribunal, the Wardens Court of Western Australia or the Minister for Indigenous Affairs (WA)) has found fault with Fortescue.

(3) *Amending the NTA will not improve outcomes for Aboriginal people*

In Fortescue's view, the belief that the amendments are required to improve outcomes for Aboriginal people is misguided. The Bill if enacted will likely lead to a range of unintended and deleterious consequences, including slowing the rate of native title claim resolution and disincentivise parties from reaching negotiated settlements. In this regard, Fortescue draws the Committee's attention to the submission of the Minerals Council of Australia, to which Fortescue contributed through the Chamber of Minerals and Energy of WA.

The NTA in its current form has ultimately provided protections to the majority of the Yindjibarndi People who were not being consulted or represented. Their fear was that a large cash settlement with YAC would not have been used for the benefit of the whole community; rather it would have increased the power of the controlling minority. A number of Yindjibarndi people have expressed concerns about the behaviour of the YAC leadership. See Four Corners program for comments from Ms Allery Sandy: <http://www.abc.net.au/4corners/content/2011/s3272125.htm>.

Fortescue rejects the simplistic notion that higher royalty payments will deliver increased community benefit. Mining has occurred in the Pilbara for at least the past 50 years. Mining companies operating in this region have entered into royalty-based agreements with Aboriginal people: some of these agreements have resulted in tens of millions of dollars flowing into communities, and yet the standard of living of the majority of Aboriginal people in the Pilbara has stagnated or reversed over the same period.

Fortescue does not offer agreements based primarily on royalty payments because it does not accept that such agreements will end Aboriginal disparity. Fortescue does not want to be part of disincentivising another generation of Aboriginal people with the result that they opt out of the mainstream workforce. Our agreements with Aboriginal communities will continue to focus on training, careers and business opportunity. In addition to training and direct employment, we proactively seek contracting and joint venture opportunities on our projects with those with whom we have native title agreements, and the scale of this aspect of our operations is growing rapidly.

Indeed, Fortescue believes that in future massive cash payments controlled by a handful of people, that could otherwise have been invested directly in education, training, housing and employment, will be viewed in the same manner as cash payments to political regimes in other countries.

Comment by Mr Forrest

One further criticism raised in one submission referred to a recent comment by Fortescue Chairman, Mr Andrew Forrest, about young girls offering themselves for sale on the streets of Roebourne late at night.

Fortescue respectfully draws the Committee's attention to an answer during Parliamentary question time by the Western Australian Minister for Child Protection on Tuesday 30 August 2011. The Minister advised that between September 2009 and March 2011, the Department for Child Protection and the Western Australian police in Roebourne investigated reports that young girls were offering sex to gain money for drugs. This investigation led to 10 local men being charged with sexual offences against children. The Minister also said a further referral was made recently. (Hon Robyn McSweeney MLC, *Hansard*, Legislative Council, 30 August 2011, www.parliament.wa.gov.au).

In making his comments Mr Forrest exposed these activities to the glare of the national spotlight. Some people were not happy that he did so but in our view it is totally unacceptable that this happens at all. We urge the Committee to support every effort to protect young people in our community.

Publication

Fortescue respectfully requests that if the Committee publishes adverse comments about Fortescue and Andrew Forrest, the Committee also publish this letter. Fortescue and its officers have been repeatedly defamed by YAC through the publication of the video referred to above as well as materials posted to the YAC website. YAC has alleged, among other things, that Fortescue is perpetrating a massive swindle against Yindjibarndi people and that Fortescue is attempting to dupe Yindjibarndi people into giving FMG open slather to their land and that Fortescue disgracefully manipulated a meeting of Aboriginal people, including bribing a splinter group of Yindjibarndi people and stacking the meeting with non-Yindjibarndi people, for the purpose of swindling Yindjibarndi people out of their land.

Fortescue refutes each and every allegation and has received advice from the Sydney bar that they are defamatory and/or misleading and deceptive. Fortescue has however chosen not to commence proceedings at this time as we are concerned that would have the effect of prolonging the acrimony already generated by the publications and giving YAC another platform from which to continue their campaign. These allegations have been intended to be harmful to Fortescue's business and Fortescue is concerned that publication of essentially the same defamatory allegations by the Committee under parliamentary privilege will simply promote this purpose.

Conclusion

Fortescue's commitment to the Yindjibarndi People and to the other Aboriginal communities in which we operate is absolute. We are investing in business development, training and a range of other initiatives which we believe will deliver long-term and sustainable developments to the communities and individuals, and we will continue to do so.

It is evident that in all cases the confidential and public submissions containing comment adverse to Fortescue are based on misconceptions drawn from a deliberate campaign against Fortescue in relation to its dealings with the Yindjibarndi People. In particular, most of the adverse submissions refer to, or rely, on misinformation propagated by the misleadingly named "Friends of the Yindjibarndi". Fortescue strongly rebuts the manner in which this organization characterizes Fortescue's dealings, and urges the Committee to take a balanced and dispassionate view of all of the facts.

Fortescue notes that the majority of the Yindjibarndi People want to work with Fortescue. We reiterate our commitment to the Yindjibarndi People and will continue to work with them to deliver long-term, sustainable benefits.

We thank you again for the opportunity to address the matters raised in the submissions forwarded to us. If you require any further information please do not hesitate to contact Native
Title Manager . We would also be available to appear
before the Committee if required.

Yours sincerely
FORTESCUE METALS GROUP LTD

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