Our ref: RB:CND:120888

28 February 2025

Johnston Withers Lawyers

The Principal Legal Officer
Australian Law Reform Commission

By Email: [redacted]
nativetitle@alrc.gov.au

Dear Sir

Issues Paper: Review of the Future Acts Regime

I refer to your email of 11 February 2025 in reply to mine of the same date and thank you for agreeing to an extension of time to 28 February for lodging a submission.

I confirm that we act for Dambimangari Aboriginal Corporation (**DAC**). DAC represents the traditional owners and common law holders of native title in relation to Dambimangari land and waters in the North-West of the Kimberley region of Western Australia (*Barunga v State of Western Australia [2011] FCA 518*). The PBC for the Dambimangari Determination Area and also for the Warnambal Gaambera and Wilinggin Determination Areas is Wanjina-Wunggurr (Native Title) Aboriginal Corporation RNTBC (**WW-PBC**). DAC is a Related Corporation of WW-PBC under the latter's Rulebook and has its delegated authority in relation to principal parts in the native title decision making process, including the conduct of negotiations etc. with resource companies wishing to explore or mine within the Dambimangari Determination Area.

DAC welcomes the opportunity to make a submission to the Australian Law Reform Commission in relation to the above Issues Paper.

The submission is focused on the so-called expedited procedure under Subdivision P (Right to Negotiate) (**Subdivision P**) in Division 3 of Part 2 of the *Native Title Act 1993* (Cth) (**Native Title Act**) and its interrelationship with section 24(1)(f) and (7A) to (7C) of the *Mining Act 1978* (WA) (**Mining Act**) and section 31 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) (**AAPA Act**). It is designed to demonstrate the significant (if not absurd) incongruity between the operation of Subdivision P in Western Australia and the effective right to prevent a proponent mineral explorer/miner's entry to the mining tenement area where it lies within Part III AAPA Act Aboriginal Reserve land – resulting, in many cases in relation to such land within the Dambimangari Determination Area, in a substantial waste of the time and resources of not just DAC, WW-PBC and the Kimberley Land Council (**KLC**), but also of the State and the proponent. The submission is further designed to demonstrate the desirability of changes to the Native Title Act to remove such incongruity and to suggest what those changes should provide for.

On behalf of DAC, we submit as follows:

1. In WA it is the Department of Energy, Mines, Industry Regulation and Safety (**DEMIRS**) which issues notices under section 29 of the Native Title Act to initiate negotiations under section 31 (where appropriate) or the expedited procedure under section 32. Such a notice follows upon DEMIRS's receipt of an application for a mining tenement which gives a 'right to mine' over native title land. Where the mining tenement applied for is an exploration licence (**EL**) or a prospecting licence (**PL**), DEMIRS applies a 'blanket approach' by including – see its relevant Guidelines[1] - by including with the section 29 notice a statement (for the purposes of section 32) that the Government party (through DEMIRS) considers the proposed act attracts the expedited procedure. DEMIRS does not apply a considered approach that takes into account the impact of mining on Aboriginal people and culture.

2. It seems from the Guidelines that the only potential exceptions are the EL or PL application areas within which a so-called 'Hot Spot' as determined by DEMIRS is located. DEMIRS may consider the following matters when it determines whether an area is a Hot Spot:

   - whether there has been a previous determination by the National Native Title Tribunal (**NNTT**) under section 32(5) that the expedited procedure does not apply because of the existence of a 'Hot Spot' (presumably a particular site or other location) that overlaps or is connected with the area of the tenement applied for;

   - where DEMIRS has withdrawn an expedited procedure statement on a previous occasion for some reason; or

   - any site known to DEMIRS and considered particularly significant pursuant to section 237 of the Native Title Act

   Where an area is treated by DEMIRS as a 'Hot Spot', this will not automatically result in an application being notified without an expedited procedure statement. It will merely (according to the Guidelines) trigger DEMIRS's further assessment in the course of which the number, age and reason of previous decisions will be taken into account.

3. The Guidelines do not provide an exception for Part III Aboriginal Reserve land (except to the extent of any 'Hot Spot' which may happen to exist within that land). This is despite section 24 of the Mining Act and section 31 of the AAPA Act.:

4. In addition to the requirement to apply for and obtain a mining tenement under the Mining Act, the Minister for Mines and Petroleum's separate consent under section 24 of the Mining Act is required before a mineral explorer or miner may conduct any exploration or mining where the land in question comprises certain Reserve land. In the case of Part III AAPA Act Aboriginal Reserve land, such as the sizable Wotjalum and Kunmunya Reserves within the Dambimangari Determination Area, the Minister for Mines and Petroleum must consult the Minister for Aboriginal Affairs[2] and obtain his recommendation before being able to give such

[1] https://www.dmp.wa.gov.au/Documents/Minerals/Guidelines_Assessing_Hot_Spots_for_Exploratory_Titles.pdf

[2] In those circumstances, the Minister for Aboriginal Affairs, before giving his recommendation seeks the views of the ALT (which for this purpose seeks the views of the traditional owners/common law holders of native title through DAC, where the relevant land is within the Dambimangari Determination Area).

consent: section 24 (7B). However, that consent "does not prevent or in any way affect the application of section 31 of the [AAPA Act] to any person acting under that consent": section 24 (7C).

5. Section 31 of the AAPA Act prohibits any non-Aboriginal person[3] from entering or remaining on Part III Aboriginal Reserve land without permission from the Minister for Aboriginal Affairs granted under Regulation 8 of the AAPA Act Regulations. Whilst it is that Minister who has the discretion under Regulation 8 whether or not to grant a permit, he must consult the Aboriginal Lands Trust (**ALT**), and therefore it is in effect invariably the ALT which grants permits[4] in accordance with the wishes in this regard of the "Aboriginal inhabitants of the area so far as that can be ascertained and is practicable": section 23(c). In practice, in relation to Part III Aboriginal Reserve land within the Dambimangari Determination Area, the wishes are those of the Dambimangari traditional owners/common law holders of native title which are then conveyed by DAC to the ALT, resulting in the permit being either granted or withheld (depending on those wishes). In effect DAC holds a right of veto for mineral exploration and mining activities on ALT Reserve land within the Dambimangari determination area.

6. Returning to the process under Subdivision P, where DEMIRS gives notice under section 29 of the Native Title Act with an expedited procedure statement under section 32, then in the case, for example, of Wotjalum Aboriginal Reserve, DAC's response in the name of WW-PBC is to have an objection lodged with the NNTT by the KLC on the basis that the necessary criteria set out in section 237 are not satisfied. At the same time however, careful consideration is given by the Dambimangari traditional owners/common law holders of native title through DAC as to whether or not there is sufficient confidence that the land under application for an EL or PL within the Reserve may (on suitable conditions) be safely explored for minerals by the particular proponent without damage to cultural heritage. If the conclusion is that such exploration on the Reserve land will be safely carried out by that proponent, then a decision is likely to be made to provide a draft Heritage Protection Agreement (**HPA**) to the proponent with a view to entering into that Agreement which (amongst other things) allows for exploration in areas within the EL or PL land - where heritage clearances will be given where appropriate, following an on ground Aboriginal heritage clearance survey.

7. Where the proponent and DAC (on its own behalf and on behalf of WW-PBC) enter into a HPA:

   - the objection lodged with the NNTT will be withdrawn;
   - the relevant EL or PL will proceed to be granted by DEMIRS; and
   - the concordant wishes of the traditional owners/common law holders of native title will be conveyed to the ALT by DAC with a view to:

[3] Other than a member of either House of the State or Commonwealth Parliament or a "person lawfully exercising a function under [the AAPA] Act or otherwise acting in pursuance of a duty imposed by law": section 31(b), (c).
[4] If the Minister's decision differs from the ALT's views (i.e. reflecting the wishes of the "Aboriginal inhabitants"), the Minister must report accordingly (including as to his reasons) to the ALT and to both Houses of State Parliament: Regulation 8(3).

(i) a recommendation by the Minister for Aboriginal Affairs in support of 'consent to mining' being given by the Minister for Mines and Petroleum under section 24 (7A) of the Mining Act; and

(ii) the issuing of a permit to the proponent for the purposes of section 31 of the AAPA Act and Regulation 8 of the AAPA Act Regulations.

8. If however an HPA is either not offered to, or is not entered into, by the proponent, then ultimately the objection to the expedited procedure will be determined by the NNTT, having regard to the criteria in section 237 of the Native Title Act – on the papers or following a hearing.

9. Where the objection is dismissed by the NNTT, the EL or PL is granted by DEMIRS, but there remain the requirements for the proponent to obtain 'consent to mining' from the Minister for Mines and Petroleum under section 24 (7A) of the Mining Act and a permit under section 31 of the AAPA Act etc. before being lawfully entitled to enter the Part III Aboriginal Reserve land to commence its exploration activities. As indicated in 5 above, DAC's experience is that permits are always withheld where the expressed wishes of traditional owners/common law holders of native title are to that effect.

10. Where the objection is upheld by the NNTT, then section 31(1) of the Native Title Act applies as if the section 29 notice had not included an expedited procedure statement: section 32(5). Amongst other things therefore, as per section 31(1)(b), "the negotiation parties must negotiate in good faith with a view to obtaining [their] agreement" to the grant of the EL or PL applied for – an obvious absurdity where the wish of the traditional owners/common law holders of native title is for the issuing of an entry permit to be refused and this has been made readily apparent to the proponent from an early stage.

11. As it happens, in these circumstances, for the most part each of the negotiation parties tends to accept the inevitable and 'run dead' with the tenement application by not pursuing the matter further, save that the proponent may be keen to 'park'[5] it (at no cost) for as long as possible so as to prevent any other mineral explorer or miner from applying for a mining tenement over that land.

12. DAC would like to see the following changes made to the Native Title Act in consequence:

- a provision in section 32 excluding Part III AAPA Act Aboriginal Reserve land in WA and in its equivalents in other State and Territories from the operation of the expedited procedure;

- alternatively, the addition of a further paragraph in section 237 to the effect that a future act is an act attracting the expedited procedure if the act will not affect any land reserved for the use and benefit of Aboriginal or Torres Strait Islander people;

[5] The expedited procedure can be seen to facilitate tenement 'parking' which surely defeats the purpose of section 32. See highlighted passages in the attached Australian Financial Review article titled "Twiggy's Land Grab".

- a provision in section 31 or thereabouts excluding the obligation on the negotiation parties to negotiate in good faith with a view to an agreement consenting to the grant of a mining tenement where the relevant land is Part III AAPA Act Aboriginal Reserve land in WA or its equivalents in other States or Territories, but allowing them to negotiate such an agreement where the native title party gives free, prior and informed consent to the proposed grant;

- complementary provisions excluding the application of section 35 (application for arbitral body determination) and related sections in relation to such land.

We will be pleased to respond to any queries you may have or provide further clarification in relation to this submission.

Yours sincerely
JOHNSTON WITHERS

Richard Bradshaw
Special Counsel
Email: [redacted]

Perspective

Photo Jacky Ghossein

TWIGGY'S LAND GRAB

It's called tenement parking, it's barely legal, yet is used by some of our biggest miners to lock out competitors from the heart of the mining boom in the mineral-rich Pilbara.

Jonathan Barrett

In 1878, Western Australia's first premier, Sir John Forrest,and his brothers established a vast pastoral property in the south-west Pilbara that would become home to four generations of the family, most latterly Andrew "Twiggy" Forrest.

Called Minderoo,the 230,000 hectare station was lost to the family in 1998 as drought and doubt conspired against Andrew's father, Don, before his mining magnate son reclaimed the prized land for $12 million in 2009.

Little wonder that Andrew Forrest, chairman and founder of $18 billion iron ore miner Fortescue Metals Group, sought to reclaim his pastoral heritage. What excites attention, however, is the incestuous corporate manoeuvring that ensued.

The *Weekend Financial Review* has discovered numerous exploration tenement applications to explore Minderoo. This is no surprise, as the Pilbara is synonymous with mining fortune but, interestingly, many of the applications are from Fortescue.

So far the story makes sense but the plot thickens when it turns out the applications are being opposed by a private company called Forrest & Forrest,owned by Andrew Forrest and his brother David.

Why is one hand of Forrest trying to do something that the other hand seems determined to block? Critics believe it is a complicated tactic to lock up the land and avoid "use it or lose it" rules that are supposed to apply to exploration licences.

In mining parlance, it's called tenement parking – and Fortescue is an exemplary practitioner, having locked up as much as 57,000 square kilometres of land and coastal waters across north-west Australia, rent- and tax-free. It's barely legal.

Tenement parking – or purposefully delaying the granting of an exploration licence – has been used by some of the country's biggest miners to stifle competition by locking out opponents from the heart of the mining boom in the mineral-rich Pilbara.

Rio Tinto's head of iron ore Sam Walsh is well known for telling employees and analysts that Fortescue's reach is "real estate, not mining".

Securing tenements in the Pilbara has become the name of the game in a mining sector that has grown in sophistication ever since Asian steel mills' demand for iron ore began heating up about a decade ago.

Now, an army of independent and in-house specialists across Perth scour data, hoping to snatch a key tenement from a competitor, secure land for a mine or infrastructure, frustrate a rival or any combination of the above.

Tenement parking is not limited to iron ore reserves, nor the Pilbara. But with Pilbara iron ore sales in 2010-11 climbing to a record $57.3 billion, in a sector that represents Australia's biggest export with forecast offshore sales of 460 million tonnes in fiscal 2012, it's easy to see why companies aim to lock up the lucrative land.

At Minderoo, Fortescue's application limits other miners from exploring it: the objection raised by Forrest & Forrest stops Fortescue exploring it.

"You would have to think it's a delaying mechanism," one Perth tenement manager says. "You put the application in to stop others doing it; then you oppose it. I'm

Continued next page

Perspective

Twiggy's land grab

From previous page

going to make a wild prediction that negotiations between Fortescue and Forrest & Forrest will take some time."

But a Fortescue spokesman says the miner has serious intentions to mine Minderoo. "Fortescue's exploration team identified an area north-east of Carnarvon which may be prospective for mineral extraction," the spokesman says. In a statement from the company's media relations department, Minderoo pastoral operations director Greg Parker explains that the lodging of an objection is used to trigger discussions about the terms of access to a property.

Yet whatever ambiguity surrounds the Minderoo case, the same does not apply to several large parcels of land around the Yule River,several hundred kilometres east of the property. There, native title holders are as confused as anyone as to why several tenements pegged by Fortescue have been in a "pending" state since 2006, when the process can take as little as six months.

Kariyarra elder Donny Wilson, representing the region's native title holders, says there is an agreement with Fortescue that means the miner can explore. "In simple terms, this means that the native title aspects of these tenements have all been agreed to and face no obstacle from the Kariyarra people," Wilson says.

As Fortescue has had the Kariyarra tenements in a parked state since 2006, the miner has paid no rates to the local shire or rent to the state government. And it has not spent a cent on exploring the land in that period.

"Five or six years is an inordinate amount of time for an exploration licence to be granted," one tenement manager says. "If it goes beyond two or three years, you have to be taking the piss out of the system."

Asked why the tenements in the Kariyarra agreements, such as tenement numbers E47/1665 and E47/1666, had not yet been granted, the Fortescue spokesman says: "Fortescue adheres to the WA Department of Mines and Petroleum process for the application and granting of tenements and also the retention of those tenements."

The principles behind WA's tenements system, which are governed by the Mining Act, are colloquially summed up by experts as "first in, first served" and "use it or lose it".

The system is designed so a resources company can stake a broad claim before promptly moving to an exploratory phase where it identifies precisely where it wants to mine, if at all. The transition from having a "pending" exploration licence to a "granted" one should take about six months, according to the department, as long as there are no extenuating circumstances.

Once an exploration licence is granted, a miner is required by law to drop excess tenure, leaving other resource companies to explore the land for their own purposes, for the good of the sector and the broader economy.

All the while, a miner must pay rent to the shire and the WA government, and adhere to minimum expenditure requirements to prove it is exploring the land. If it fails to pay the rent or progress its claim, other companies can swoop and snatch the tenements in a process called "plainting".

Yet the principle designed to promote competition in the sector – "use it or lose it" – is often abused. Experts say there are several ways industry participants do so, such as purposeful stalling on an agreement with indigenous groups over land access, which is among the most common.

"You just don't agree with the detail of the Aboriginal heritage agreement," one Perth-based mining executive says. "Once you get lawyers involved, it slows everything. It just goes into suspended animation."

Lengthy negotiations with indigenous groups should rightfully occur before a mining licence is granted, not during the far less intrusive process of applying for an exploration licence.

One tenement manager says: "All you really need to do is put in bad applications and the department says, 'this is crap' and it goes to the bottom of the pile."

It is some pile. At last count, the department had 6672 outstanding applications – which is actually an improvement on the 11,000 it had at the turn of the century.

Fortescue is not the only miner with long-term pending tenements. All up, the industry has 268 exploration licences made between six and 10 years ago that are pending and 86 dating back more than a decade.

Asked to account for the very long-term pending applications, a department spokesman says 31 of the 86 are tied up in native title procedures, while 55 are held up by conflicting plans for the land by miners and the WA government.

Meanwhile, tens of thousands of square kilometres of land remains unproductive. Miners should use retention licences for long-term tenure, which does require that fees are paid.

In mining circles, Fortescue's strategy is met with a mix of awe and mockery. First, there are the bragging rights.

Consider Fortescue's 2011 annual report, which reads: "The key to our growth plans is utilising the world-competitive infrastructure platform that Fortescue has established over its Pilbara tenement footprint. A footprint that, put simply, has no parallel in the global mining industry: 85,000km^2 of the most prospective and profitable iron ore mining region in the world, dwarfing the size of all competitors."

That footprint includes a huge coastal strip from close to Exmouth stretching 500 kilometres up the coastline north of Port Hedland, which Fortescue has pegged with pending applications. The strip is about 30km from World Heritage-listed Ningaloo Reef.

The area – presumably a distant iron sands play whereby ore is extracted from coastal waters – is an impressive entry on the company's résumé presented to Chinese customers and backers.

"You have to remember who's looking at this – the Chinese," one rival mining executive says. "They are not looking at your lifetime; they are thinking in terms of their grandchildren's children."

A parked exploration tenement application along coastal waters can also frustrate plans by rivals to use the all-important coastline for shipping routes or port structures.

"If you are trying to build a port, the last thing you want is someone with a tenement interest," a tenement manager says. "If anyone

Shelf companies unfairly stack the odds

Beating the ballot box

In years gone by, mining company representatives would nudge one another out of the way as they burst through the doors of a desolate mining office and slam their paperwork on the front counter to register their claim.

These were the laws of the wild west – when a lucrative tenement suddenly became vacant, it was "first come, first served" and there was no prize for being second in line.

The introduction of online systems several years ago meant that miners didn't need to dispatch representatives to the middle of the Pilbara to claim a tenement at the local mining registry.

Instead, claims lodged overnight were treated equally, resulting in the creation of a ballot system whereby the winning tenement application was plucked from a hat.

But according to ballot experts, there is a weakness in the system.

In a pot-luck ballot, juniors have as much probability of getting the tenement as an iron ore giant – yet there is a way to improve your odds.

Through the use of shelf companies, miners are known to submit several applications, even though if they are found out, they are thrown out of the process.

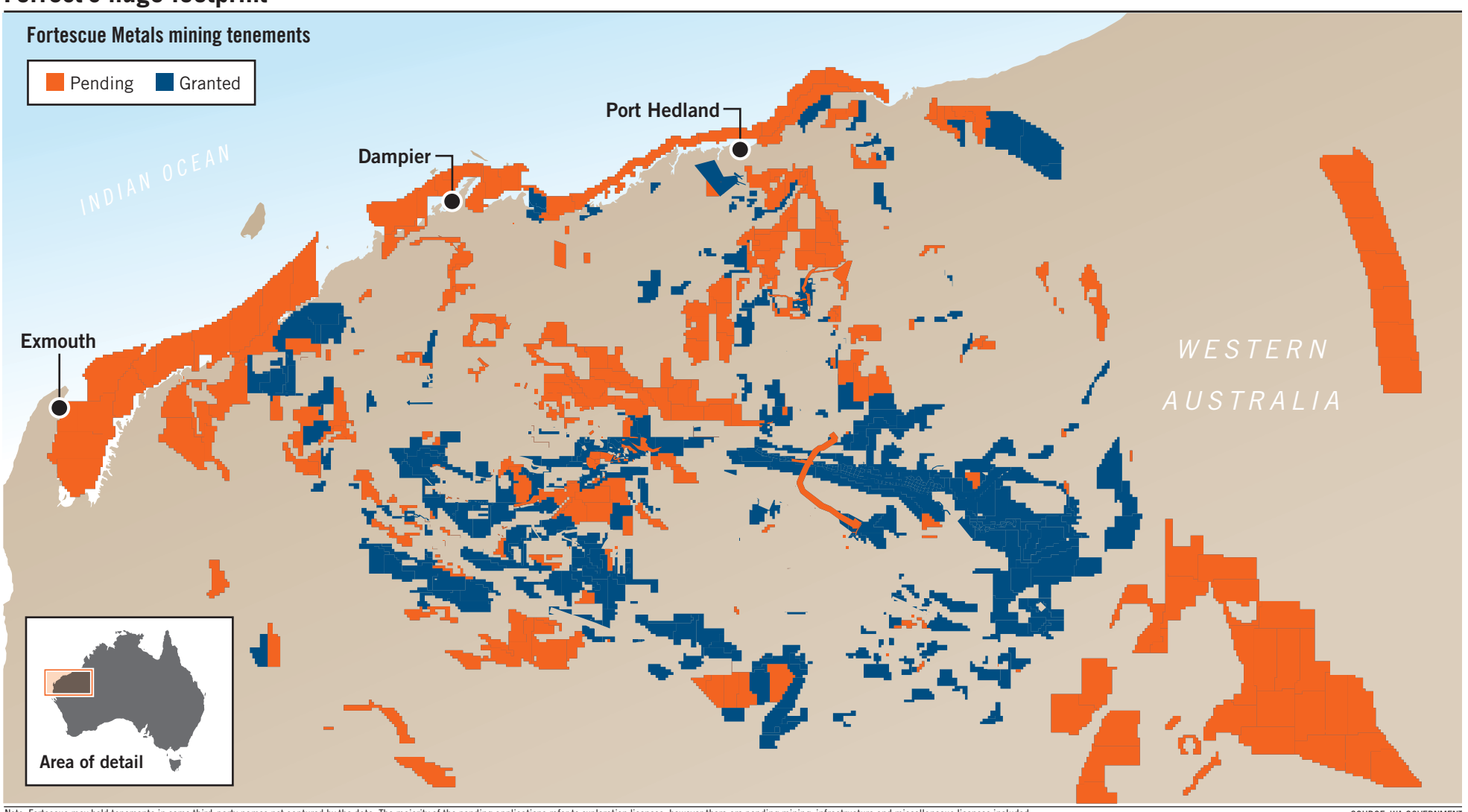
By listing different directors with the shelf companies, the odds can be massaged to favour one miner over another.

"It happens enough that if we are in a ballot, we do company searches on everyone else," one prominent tenement specialist says.

Jonathan Barrett

The principles behind WA's tenements system, which is governed by the Mining Act, are colloquially summed up as 'first in, first served' and 'use it or lose it'.

Forrest's huge footprint



Note: Fortescue may hold tenements in some third-party names not captured by the data. The majority of the pending applications refer to exploration licences, however there are pending mining, infrastructure and miscellaneous licences included.

SOURCE: WA GOVERNMENT

If you are trying to build a port, the last thing you want is someone with a tenement interest. If anyone wants to do anything along the coast, Fortescue gets a seat at the table without paying for it.
Tenement manager

Nathan McMahon and Clive Jones of Cazaly Resources outside the Perth Supreme Court after a judge ruled against them and in favour of Rio Tinto in 2007. **Photo** Erin Jonasson

The Shovelanna affair

Small miners lose out to big timers

The long-term hold of mining giants Rio Tinto and BHP Billiton over the mineral-rich Pilbara has only been severely tested twice.

Once was at the hands of the pioneering Andrew Forrest, who created enough political pressure to force the giants to let go of some of their long-held tenure for his Fortescue Metals.

The second test was orchestrated by two knockabout Perth brothers, one of whom drives a Holden ute with a St Kilda AFL logo plastered across its bonnet.

On Friday, August 26, 2005, Rio's hold over an iron ore deposit called Shovelanna, which it had sat on for more than 30 years, expired.

One of the best tenement specialists in the game, Shannon McMahon, picked up Rio's administrative oversight and passed the information to his ute-driving brother Nathan, who had started a company called Cazaly Resources.

A Cazaly representative "pegged" the tenement at 1.50pm on Monday, August 29, which involved physically lodging a claim at the mining register in Marble Bar – renowned as among the hottest inhabited places on Earth.

Rio's renewal application was running late, and sat second in line behind Cazaly's. "Rio wasn't the only one to miss it," says one miner present during the week's events. "BHP and Fortescue missed it too."

The "first in, first served" principle applied and Nathan McMahon's Cazaly had the rights to Shovelanna.

Within weeks, Nathan McMahon formed a joint venture to get the site developed and reached an offtake agreement with BHP whereby the ore would be delivered over the hill to BHP's operations (Rio had no infrastructure nearby).

Cazaly would swim in its mineral wealth to the tune of about $85 million a year and Nathan McMahon would be able to upgrade his ute.

Panic ensued at Rio. It wasn't going to let go of an important piece of real estate over which it had control, thanks to generous state agreements that were initially designed to entice miners into the desolate Pilbara.

Despite having had a full 12 months to renew its licence, the mining giant argued that its formal paperwork got delayed on its way to the Marble Bar mining register.

In other words, it was the postman's fault.

The argument wasn't going to stand up in court, so Rio approached the then state resources minister, John Bowler, to use his ministerial powers to terminate Cazaly's application and put Rio back on top.

Bowler complied, citing that the "public interest is best served by policies and decisions that promote investment", which he argued entailed giving companies secure tenement holdings that aren't put at risk by an honest oversight.

BHP showed itself to be a fair-weather friend and opted against backing Cazaly in the subsequent litigation. But proving that in business "the enemy of my enemy is my friend", Fortescue backed Cazaly.

The legal attempts to overturn the ministerial order failed.

"I still have a bitter taste in my mouth, as I can guarantee we would have been producing ore from Shovelanna by now," says one person with ties to Cazaly.

In his decision-making, Bowler supported the idea that major players like BHP and Rio needed long-term certainty over tenure.

Yet juniors are frustrated by the seemingly constant flow of exemptions the big players receive from developing an area.

In one 16-year period alone, Rio was granted partial exemption from required expenditure at Shovelanna no fewer than 10 times.

A prominent tenement lawyer says: "The designers of the state agreements would be dumbfounded by how the miners have been allowed to sit on such lucrative tenure."

The *Weekend Financial Review* can reveal that Rio has applied – and received – partial exemptions from expenditure over two of the four mining leases that make up Shovelanna since it retrieved control.

A Rio spokesman says the state government has always honoured the idea of "sequential development" and that the Pilbara doesn't need to be dug up in a day.

Cazaly might still make it as an iron ore player, although probably not in a saga that resembles anything like Shovelanna.

In the aftermath of the whole affair, Rio instituted an internal review designed to prevent it getting impaled again by weaknesses in its own tenement renewal systems.

Australia might be in the midst of a mining boom, but most junior miners can't get access to the Pilbara.

Even if a big miner fails to spend the necessary money to keep its exploration or mining licence, a company interested in challenging for that tenement is in for an expensive fight.

"To have a crack it will cost $200,000 and take several years," a mining lawyer says. "And even then, the Shovelanna episode shows that you never know what political pressure will come to bear."

Instead of creating mining investment certainty, the Bowler decision may have actually undermined confidence in the system by spooking juniors from challenging for tenements.

Jonathan Barrett

wants to do anything along the coast, Fortescue gets a seat at the table without paying for it."

Fortescue very nearly frustrated BHP Billiton's plans to build a 4km jetty at Port Hedland. A spokesman for the Port Hedland Port Authority says it formally objected to a Fortescue exploration application for the strategic site, resulting in the area being excised from Fortescue's control and leaving BHP to negotiate with the Port Authority, rather than with its rival, Fortescue.

Detailed mapping shows that Fortescue also has an application for an exploration licence just offshore from the proposed Anketell Point port site, 30km east of Karratha, where Aquila Resources is aiming to be the lead developer.

Rio and BHP like to promote themselves as good Pilbara citizens, while they deride Fortescue's perceived image as "real estate, not mining", but Fortescue chief executive Nev Power disputes the assertion.

"We've been compared unkindly, I think, to being in the real estate business and just collecting tenements across the Pilbara," he told an overseas mining conference in late February, in a thinly veiled swipe at Rio's Sam Walsh. "Let me show you what we've been doing on our real estate plots. We've been adding more than 1.5 billion tonnes of resources to our portfolio every year from that real estate."

Just a few years ago, it was Forrest accusing Rio and BHP of wrongdoing. Backed by state agreements designed to entice Rio and BHP to develop the desolate Pilbara in the 1960s, the mining behemoths had a duopoly over the region until Forrest started pressing for change.

The WA government had a rubber stamp on hand to exempt BHP and Rio from expenditure requirements and from surrendering tenure they were unlikely to mine any time soon, meaning huge tracts of Pilbara land were still in the hands of BHP and Rio 10 years ago.

In a telling manoeuvre, Forrest plainted two tenements near Roy Hill on which BHP had sat for decades. BHP had spent less than 7 per cent of the $750,000 it needed to in order to keep its tenement rights, although it held government expenditure exemptions.

In 2004, Forrest said the ground was highly prospective and BHP should lose the right to it because it had "done very little work on the area".

The legal action was eventually withdrawn but Forrest had made his point. Political pressure ensued and now several Pilbara mines can trace their ownership back to one of the two big miners letting land go.

As the tenements became available, Fortescue started pegging the Pilbara – but it went one better than Rio and BHP. By keeping the exploration applications in a pending state, Fortescue could peg the region for free, with no threat of being plainted.

As for BHP and Rio, their Pilbara land banks are much more modest than they once were and their tenements tend to be near their railway infrastructure.

Companies do not release in-depth analysis of their tenements, which means the data had to be retrieved from public records. The caveat to our research is that miners may hold some other tenure in third-party names not captured in the analysis.

But according to detailed analysis of public records the *Weekend Financial Review* can reveal that BHP has 11,070 sq km of granted and pending exploration, mining, infrastructure and miscellaneous leases in the Pilbara, while Rio has 15,261 sq km. Yet Fortescue has a massive 93,880 sq km, 57,590 sq km of which is "pending".

The *Financial Review* does not imply that there are no valid reasons for some of the pending tenure but industry participants hoping to reform the sector have long expressed dismay at the inability of government departments to keep up with companies' stalling tactics.

Last year, after sustained lobbying from parts of the mining and legal fraternity, improvements were made to a realm of the tenement process that squatters have long used to prolong their right to a tenement without paying for it.

The WA government began funding a full-time, dedicated mining warden to adjudicate over mining titles to complement the existing system whereby magistrates – often with little experience in mining matters – participated in a part-time warden circuit around the state.

Often on a warden's court hearing day in a Pilbara town, the magistrate would oversee local matters, such as a case of petty theft, before informing the mining parties to "go slow" as it was their first time overseeing a mining title dispute.

"It was a joke," says one mining company lawyer. "The magistrate would be dealing with drug charges and then, suddenly, put on a mining hat. The matter would, of course, be adjourned."

Even in Perth, the magistrate would only have four days a month to adjudicate over often exceptionally complicated material, creating another bottleneck for tenement disputes that could be exploited.

There are calls for the state government to fund two or three full-time wardens, in the knowledge that the mining sector contributes billions of dollars in royalties every year to state coffers.

The same logic applies to improving the resources of the WA Department of Mines and Petroleum, which is swimming in outstanding tenement applications, despite periodic attempts to clear the backlog.

Former WA development minister Clive Brown says the industry risks attracting increased legislation if abuses of the system prove to be widespread.

"Miners need to be careful they are not overstepping the mark," Brown says. "If an investigation revealed this is problematic for the state, the state will look to legislate against it.

"You have to ask yourself, is the state and country missing out if there's another company that is prepared to develop parked tenements?"