

5.30am Monday morning.

There's a barely a car on the streets of Perth, but the city's airport is already humming. Burly men in mining fatigues farewell bleary-eyed partners, bound for far-flung mines at Parraburadoo, Leinster, Barrow Island and Laverton and another fortnight of long days and short nights in the cramped company dongas of the Pilbara.

There's nothing new about the weekly exodus of fly-in, fly-out miners in Western Australia. But the scale of the operation and the incentives for this transient lifestyle are unprecedented. Flights out of Port Hedland on Fridays are booked far in advance. At that end of the journey, roads around the port and Karratha are so overrun with trucks that locals now know what a Sydney rush hour looks like. Rental car companies can't keep up with demand.

The latest mining plays are the centre of conversation at backyard barbecues. Skills shortages have pushed mining wages up by 10 per cent in the past two years. Even the humble cleaner and gardener can earn up to \$70,000 once a \$450-a-week living allowance is factored in. Champagne sales in WA have increased 400 per cent over the past year, with luxury cars, boats and light aeroplanes also hitting record highs. And the Perth housing market is defying the national gloom.

Everyone, it seems, has something to show for the state's new-found riches. Except for one very particular group: the traditional owners of the land from which the wealth is now

being extracted. In the shadow of the graders and the mining trucks, the lot of Aboriginal people has, for the most part, gone backwards. Even compared with indigenous people elsewhere in WA, the plight of those in the Pilbara – the very epicentre of the mining boom – is particularly dire. Aboriginal mortality rates in the region are 6 to 28 per cent higher and alcohol-related deaths account for around 10 per cent of total deaths and 68 per cent of hospital discharges.

And while such statistics have become almost numbingly familiar over recent decades, these figures come from a report released late last year, deep into the resources boom, and commissioned by a mining company. For Rio Tinto – scarred by its experiences in Bougainville and Papua New Guinea, the report rang alarm bells. "I knew there were issues, but I did not know the size of the issues," Rio's Iron Ore chief executive Sam Walsh explains. "I like to think we have had a positive influence and positive effect. It is just that we have not had the wholesale effect we thought."

The report does indeed make for sobering reading: close to 60 per cent unemployment among indigenous people; only a quarter of youth aged 15 to 24 years working in mainstream jobs; more than three quarters (78 per cent) of incomes less than \$500 a week; and almost 50 per cent (\$40 million) of annual payments by Centrelink in the region go to this group. The single largest occupation for indigenous workers

is cleaning: good money if they were paid the going rate, but many are employed through the Community Development Employment Project (CDEP), a work-for-the-dole scheme.

Never before have indigenous Australians had a better chance to develop a sound economic base, thanks to the resources boom and the legislation that might have provided their fair share of it, the 1993 Native Title Act (NTA). As BHP Billiton Iron Ore vice-president external affairs, Stedman Ellis, explains: "For the first three decades we were in the Pilbara, Aboriginal people were treated largely as bystanders and did not enjoy any benefits. The Native Title Act helped change that, and business – mainly the mining companies – are pursuing constructive engagements."

But there's precious little to show for that constructive engagement so far. The money has either been wasted or mining companies have paid only a fraction of the true value of what's been extracted. Even in places such as Tom Price, where Aboriginal groups reached a landmark agreement with Hamersley Iron in 1996 worth millions of dollars, the money has been locked up in trusts for up to 20 years. "We are probably the richest people in the Pilbara but what does that mean?" asks Keith Lethbridge from the Roebourne community, 20 minutes from Karratha. "We can't even subsidise proper wages, we are on CDEP, and we have problems with drugs, housing and domestic violence."

BUSINESS

— STORY BY **MARCUS PRIEST**

— PHOTOGRAPHS BY **TAMARA VONINSKI**

Nor is potential prosperity for indigenous communities the full extent of the opportunities being squandered in the Pilbara. Miners and conservative politicians alike warn that, by blocking access to sites, an unwieldy and uncertain native title system is endangering the future of the boom itself. So concerned are senior WA members of the federal government that they're campaigning to revisit the 1998 Wik amendments, which increased the threshold for registration of native title claims. It particularly rankles that traditional owners have the right to negotiate in relation to a native title claim that has not yet been proved and may be unsuccessful.

Politicians such as Environment Minister Ian Campbell and fellow Liberal senator, Ross Lightfoot, now argue that native title is obstructing the discovery of new mines for a time when existing sites run dry, citing a clutch of statistics, including the fact that the country's share of global mineral exploration has almost halved in the past decade. "We are in danger of exploiting and diminishing existing mines because they are 'pre-native title' and new mines are not being discovered at the same rate," Lightfoot says.

The push has so far been resisted at cabinet level, particularly by Attorney-General Philip Ruddock, who has instead proposed 'technical' changes to the NTA to strengthen agreement-making provisions of the Act and improve dispute-resolution procedures.



BRAND NEW DAY?

AFTER THIRTEEN YEARS, NATIVE TITLE HAS HAD, AT BEST, MIXED RESULTS FOR MINING COMPANIES AND INDIGENOUS COMMUNITIES ALIKE. BUT IF AN HISTORIC OPPORTUNITY HAS BEEN SQUANDERED, THERE ARE SIGNS THE INTERNECINE BATTLES THAT CHARACTERISED THE SYSTEM HAVE FORGED A NEW AND POSITIVE PRAGMATISM ON BOTH SIDES

AT THE HEART OF the problem is a complex and technical piece of legislation which overlays a still-vague common law concept. Since the High Court's Mabo decision in 1993, of 87 determinations, 60 have found title exists in whole or part on 628,299 square kilometres of land. The NTA establishes a piecemeal approach to land management, requiring miners to negotiate every lease, of which there may be hundreds for any project. One of the key problems is that state and federal governments have privatised what is a government responsibility: land management. They have left to miners and aboriginal groups the responsibility to negotiate conditions of the issue tenure.

The buzz term on both sides is 'agreement making'. With goodwill, there's ample opportunity for traditional owners and mining companies to sit down, circumvent the process and provide access to sites while delivering benefits – including training and education – that go far beyond simple remuneration.

But without goodwill, the opportunities are just as extensive for negotiations to become mired. The ambiguity and complexity of the process, too, make it a lawyer's feast. Even one of the original architects of the Act, former Federal Labor attorney-general Michael Lavarch, says he'd probably have done things differently had he known then what he knows now. "What was not perceived at the time was how complicated, involved and difficult these things would be," says Lavarch, who became a solicitor advising companies on how to navigate the Act after losing his seat in the 1996 election.

"I certainly have sympathy for [the mining companies]," he continues, though that sympathy did not change his view "about the fundamental doctrines and principles and what the government had to do after the Mabo decision ... it did bring home to me how very fractured Aboriginal communities are and how very difficult it is from the point of view of a proponent of economic development ... Mining company management should be speaking to Aboriginal people about development on their land and that such developments should proceed in a way that does provide some economic opportunities from that development."

All the broader issues of underprivilege, welfare-dependency and self-determination that have been debated nationally in recent months are present and magnified in the WA native title debate. Land councils and claimants speak of mining companies cynically creating and exploiting divisions within underprivileged communities; paying

thousands of dollars to a few key individuals or factions within communities in order to gain their signature for mining approval or heritage clearance. In one case, an Aboriginal elder in the Pilbara was paid 12 mango trees in return for the necessary heritage clearance.

Says Pilbara Native Title Service (PNTS) chairman Neil Finlay: "Some companies have said they will not deal with a group if the land council is involved. Other companies say that they don't want rep bodies involved because Aboriginal people should make decisions for themselves." Individuals unhappy with land councils are also encouraged away from the community and into the arms of new lawyers paid for by the company. Says one native title lawyer: "We have a ridiculous situation where some claim groups are constantly reaffirming [who will represent them] because some individuals are pushing for new lawyers. It is just a distraction and waste of resources."

Communities have been riven, says Charlie Smith, chairman of Innawonga Banjima Niapaili. "Some families have just been ripped apart by the issues surrounding native title purely by the financial benefits that flow from mining developments. Those conflicts are irreversible."

Such practices are confirmed by senior mining executives, some of whom refer to the deals as "fuck-off agreements". "The richest and worst deal ever was at Ranger Mine – the biggest slice of royalties ever handed over. And what has happened to the Aboriginal people? It has created a generation of despair," says Bruce Harvey, Rio Tinto chief adviser, Aboriginal and community relations. But no agreement has thrown the issues into such stark relief as the deal Fortescue Metals Group struck with the Nyiyaparli people.

GROWING UP ON Mindaroo station in the Pilbara, Andrew Forrest and his brothers were taught to ride a horse by David Stock of the Nyiyaparli. Forrest and his family developed a close relationship with the Aborigines of the area. "They [the family] are good people. They liked to see Aboriginal people come into the country [station]. They would come down and have a yarn with us: have a cup of tea with us and bring some cake," says Stock, who now lives in Port Hedland.

Forrest now heads an ambitious \$2 billion project with his company Fortescue Metals Group (FMG) that plans to be the "third force in the Pilbara". According to the company, when operational, the project will generate \$2 billion in revenue and \$120 million in state royalties. Forrest, a slick salesman, continually refers to his Mindaroo childhood as part of his pitch. "You speak to a Pilbara boy whose family still lives and works up there and feels very passionately about it. We love indigenous people," Forrest tells *The AFR Magazine*. "Fortescue believes in the philosophy that I grew up with in the Pilbara that you sustain and empower people through giving them the ability to advance themselves. We call it giving people a fishing rod not a fish."

The project requires the grant of 112 mining leases, 71 exploration licences, and 27 miscellaneous licences for the mine, port facility and rail line. But to secure them, FMG has had to negotiate with four claim groups: the Nyiyaparli; Palyku; Martu Idja Banyjima; Puutu Kunti Kurrama and Pinikura and Eastern Gurama. For almost 18 months, the company and the groups have negotiated through the PNTS and, by midway through last year, 95 per cent of the agreement had been finalised, according to the company's lawyers. But a dispute over legal bills brought negotiations to a standstill.

THE BYZANTINE COMPLEXITY OF THE CASE ENCAPSULATES THE FRAUGHT AND SHIFTING GROUND ON WHICH SUCH DEALS ARE STRUCK

Then, in August, Stock and the other five named claimants of the Nyiyaparli group flew to Perth and signed a native title agreement with FMG covering 40,000 square kilometres of the Chichester Ranges. The agreement provided a comparatively small royalty rate, 2.5 cents per tonne, and a payment of \$400,000 within seven days of signing, but the company agreed to “maximise vocational, educational, training and employment opportunities” for Aboriginal people and give preferred status to Aboriginal contractors.

“It is very much a philosophy of working to improve the opportunities available to people for training, education and guaranteed employment. That will, in the end, be a much more costly exercise but it will be a far more exciting exercise than just giving people money,” Forrest tells *The AFR Magazine*. But the deal bore no relation to the previously negotiated agreement. Significant heritage, cultural-awareness and environmental provisions were removed. It was signed without legal representation and without prior consultation with the broader claimant group. A meeting of the broader Nyiyaparli group two weeks later disavowed the deal.

All of which has turned the FMG deal into a flashpoint in the Pilbara. It has spawned a high-level federal government investigation into both the agreement and the PNTS. More broadly, too, the Byzantine complexity of the case – and the parts variously played by poor and divided communities, non-indigenous advisers, an under-resourced native title representative body (NTRB) and the mining companies themselves – encapsulates the fraught and shifting ground on which such deals are struck.

The PNTS said they had been instructed by the Nyiyaparli signatories that they did not understand critical terms and

had signed the August agreement under duress. David Stock was quoted in the press the day after the signing saying: “I didn’t know what was going on. I feel like they made me sign; they kept calling me ‘uncle’ ... I’ve done a silly thing.” But Stock and another Nyiyaparli signatory, Gordon Yuline, have now turned their attack on to the PNTS. They say they had previously fought to have their own lawyers, and that they became so frustrated with the representative body that they approached FMG directly about a deal.

It was not the first time that Stock and Yuline had dealt directly with a mining company. They have previously struck deals with BHP Billiton; in 2004 the company paid \$17,000 to their land corporation. “This is our country. They [the mining company] realised this is our country and they want to deal with different [groups]; they don’t want to come to PNTS,” says Yuline. “[And] I don’t want people coming and telling me what to do. We don’t want a charitable trust; [the royalties] belong to us and we should be able to spend it the way we want.”

Yuline, like Stock, is a former stockman, and now earns much of his living from the paintings and leather goods he makes for mine workers. Both have very little to show for the money they have received, living in crowded, run-down houses. “He’s a bad business person but he’s a good leather worker,” says the administrator for the Karlka Nyiyaparli Aboriginal Community, pastor Ross Norling. “He sells the belts for \$40, which is about how much the leather costs.”

A somewhat controversial figure in the Aboriginal community, Norling is so closely involved with Stock and Yuline that he once asked to be put on their native title claim. It was also Norling who instigated the controversial Perth agreement and accompanied the group to the meeting. “They

just wanted to do a deal. They were sick and tried of being messed around,” he says. “There was some faults with FMG: they said ‘you can walk out with money or you can go out with nothing’ ... but there was no pressure. They [the Nyiyaparli] were asked whether they wanted a lawyer and they said ‘no’.”

According to Forrest – who was not at the meeting – the Nyiyaparli “pushed their way into our offices because of their absolute frustration of dealing with PNTS”. As part of the August 10 deal, an \$80,000 cheque handed over on the day was used by Stock and Yuline to buy LandCruisers. “These fellas needed a car to get around in,” says Norling. “It was in recognition for all the work they do.”

The ensuing battle between the PNTS and Nyiyaparli community members, and between the PNTS and FMG, has been as epic as it has been internecine, involving claims by both sides that the other is attempting to undermine the process. FMG has threatened suits for defamation and damages running to millions of dollars.

One of FMG’s strategies in its fight with PNTS was to have the Nyiyaparli represented by Perth lawyer Mark de Kerloy – without much success. One email from FMG’s lawyer Ken Green to the company’s executives after the August 10 agreement, said de Kerloy was having problems speaking to Nyiyaparli people “without the assistance of Ross Norling” – who was on the company’s side. “Like us, he [de Kerloy] appreciates the real battle for the ‘hearts and minds’ on the ground. However, he does not have the resources on the ground to achieve what needs to occur, that is, for the Nyiyaparli People to instruct Mony de Kerloy,” said Green.

And FMG is far from being Forrest’s first native title gambit. Well south of the Pilbara in the north-east Goldfields, a 1998

agreement between Anaconda Nickel – which Forrest sold to Minara Resources in 2002 – and the Goolburthunoo and Bibila-Lungutjarra peoples (just two of 28 claimant groups involved) – has descended into a court suit for alleged unpaid royalties. The claimants allege that a promised \$1 million annually was never paid into a trust. The defendants say the claimants are not the actual owners and are scathing of Forrest's legacy: "There was an awful lot of cash passed around to have groups sign off. We have got no way of being able to prove it but we do know that it caused significant disruption in the Goldfields and made reaching agreements with groups all the more difficult," a Minara Resources spokesman says.

This view is shared by the plaintiffs in the Anaconda case. According to Maria Meredith, Forrest went out of his way to woo individual claim groups, including attending their church, learning their hymns and visiting people at home and in hospital. "That man has a lot to answer for. Our community became completely divided. We could have used native title to our advantage had we all stuck together," says Meredith.

Unfortunately for FMG, it now appears that the fallout from the August 10 agreement has done more damage to the company than to the PNTS. A copy of the report by Ebsworth & Ebsworth partner Philip Hunter – commissioned by the Office of Indigenous Policy Co-ordination, handed to the minister, Mal Brough, in early June and obtained by *The AFR Magazine* – highlights a "real concern that FMG will seek, at some stage in the future, to avoid any financial obligations" to pay royalties under the land access agreements.

Describing FMG's actions in relation to the Perth meeting as "unprecedented", Hunter found that the enforceability of the August 10 agreement was "extremely questionable" and that there was no evidence the six Nyiyaparli had authority to sign on behalf of their group. The report also alleged that one individual consultant with Fortescue had double-dipped from the company and PNTS.

But the report's most savage criticism is reserved for Ross Norling. "In the face of significant future Act activity in the Nyiyaparli claim area and negotiations with major mining companies, including FMG, [the PNTS's] capacity to

effectively and properly represent the Nyiyaparli native title claim group has been seriously undermined by the actions of Ross Norling ... particular members of the Nyiyaparli native title claim group and other lawyers who have purported to represent the interests of the Nyiyaparli native title claim in future Act negotiations," finds Hunter. "Despite FMG's objections and unresolved and ongoing disputes, [the PNTS] has still managed to provide significant assistance to the native title claims group," he found.

AND THEREIN LIES an issue that goes to the very heart of the native title debacle. The role, resourcing and effectiveness of representative bodies such as the PNTS is crucial to the effectiveness of the system. Under the Act, representative bodies are responsible for helping claimants apply to have native title determined and for assisting in negotiations. In 1999, they were also given responsibility for resolving internal disputes and certifying claims to avoid overlapping claims.

But, along the way, they have become the *bête noire* of the mining companies, which see them as akin to trade unions: an unnecessary third party preventing direct relationships. "They are a bit like the CFMEU; you can't do anything unless you have a ticket and they will tell you who to deal with and what you will say and they will keep the money," says one insider.

Others operating in the Pilbara complain that the staff of representative bodies have little knowledge of the commercial realities facing mining companies, making large claims for compensation even in relation to exploration licences that may not prove to be commercially viable. "It has to be a balanced and commercial deal. But the land council lawyers are uncommercial and bloody bleeding hearts," says one executive. "I was continually berated about being a white invader."

A report last year by the Castan Centre for Human Rights Law at Monash University found that more than a quarter of lawyers in NTRBs joined the system last year, and more than half of them had only one to two years of commercial experience. The report, by lawyer Richard Potok, states that "the consequences of high turnover, recruitment difficulties and lack of structured support mechanisms include delays, duplication of work,

less than optimum outcomes for all parties and undue stress on individual lawyers."

Part of the problem is resourcing. Overall, the federal government spends more than \$100 million a year to run the native title system, of which \$12.9 million is spent on wages for in-house lawyers as well as fees for external legal consultants. Facing a shortfall in funding, representative bodies seek to recover their costs of negotiating land access agreements and heritage surveys from the mining companies themselves. This was the original stumbling block in the FMG case. Indeed 48 per cent of the PNTS's revenue in 2004-05 – around \$5.6 million – came from mining companies. For its part, Neil Finlay says in the past year alone the PNTS negotiated 15 agreements on behalf of its clients. "It is a statutory body, accountable to the government for everything it does."

Last year, Rio Tinto told a federal parliamentary inquiry into NTRBs that between 1993 and 2004 it had spent nearly half as much on native title transactions as had the state, territory and federal governments on the system. Much of this went to pay the negotiating bill of the other side. While that is a price that big companies such as BHP Billiton and Rio Tinto can carry, small miners and exploration companies aren't so happy.

In May, Tanami Gold struck a deal with the Tjurabalan people, which the Kimberley Land Council described as the "best mining deal for native title holders anywhere in Australia". While Tanami chairman Denis Waddell is now happy with the deal he describes it as a "difficult and bloody expensive" agreement that took 15 months to reach. "It is not ideal for a small company like Tanami but, unless we did that, we were not going to get an agreement."

Rio Tinto and the Mineral Council of Australia told the Senate inquiry that underfunding of NTRBs by about \$50 million a year meant these bodies were unable to attract properly qualified staff capable of conducting commercial negotiations. "The [Minerals] Council considers NTRBs are the fundamental component of the native title system," the MCA said in its submission. "The experience of the minerals sector to date is that NTRBs are chronically under-resourced. It is simply unacceptable that the private sector is put in

a position where it must meet the costs of doing business with the public sector because governments have failed to adequately fund organisations to deliver services that they are legislatively required to provide.”

The problem for mining companies like Rio is that although the NTRB system is often unable to keep up with the mountain of leases sought by companies, the alternative – dealing directly with native title claimants – is a minefield. Despite the frustration of working through the process, many mining companies are making it work and making agreements. “You are not going to get a sustainable deal if you try to do short cuts and try to be smart in the process and disadvantage the community. There have been recent cases where they thought they had a deal and it is not healthy for either side,” says Rio Tinto’s Sam Walsh.

AND THAT IS THE punchline: despite all the missed opportunities of the past 13 years, there is a sense in the Pilbara that things are about to change. A pragmatic, realistic consensus is forming. “Let’s stop talking about a rights-based agenda, and let’s start talking about an economic agenda,” says Clinton Wolf, an Aboriginal adviser to the Jigalong Aboriginal Community.

Bruce Harvey of Rio Tinto agrees: “If anything, Aboriginal people have shifted further than mining companies – they have almost given up on government.” Bad blood between Rio Tinto and indigenous owners stretches back to 1992 when conflict arose over the Marandoo and in the past two years, the company, communities and the PNTS have been at loggerheads over new native title agreements. But earlier this year, with the extent of Aboriginal poverty highlighted by its own research, the company reassessed its approach and changed its negotiation team.

In May, Rio signed one of the most significant native title

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agreements in Australia, clearing the way for the Hope Downs mine and its future mining operations in the region. While its quantum was undisclosed, the deal is understood to be worth around \$1 billion over 25 years. It also paves the way for a broader regional agreement for the Pilbara later this year that provides for employment, training and business opportunities with the company. “It was a healthy process of stepping back and seeing counter-productive activity was spiralling downwards, probably on both sides,” says Walsh.

Predictably, not all mining companies are so supportive of the new drift. “The welfare state has just been privatised and now mining companies are expected to pick up the bill,” says one executive. Commercial realities, however, demand that such attitudes will perhaps be overridden by a still more pressing issue: the dire skills shortages. Companies are increasingly cognisant of a potential workforce in the region that is growing by 4 per cent a year, if they can just work out how to unlock it. “While we have an ageing population in the broader population, we have an indigenous population which is much younger, local and does not need to be flown in,” BHP Billiton Iron Ore’s Chris Cottier says.

Rio Tinto plans to increase its indigenous workforce to 15 per cent by 2013. And FMG has guaranteed jobs to any Aborigine who completes the program at its newly established Vocational Training Employment Centre. BHP Billiton has a

target of 12 per cent indigenous employment by 2010 – so far, only 7 per cent of its Pilbara workforce is indigenous. It is now grappling with how to breach that gap. “We have grabbed all the ‘low hanging fruit’ – the well-educated and schooled ones – and now we have to work a bit harder for the next generation of our workforce. We can give them jobs, but we have to get them to a particular level,” Chris Cottier says.

Contracting is another key to increasing Aboriginal participation in the mining sector – 50 per cent of BHP’s workforce are contractors. One indigenous company, Ngarda Civil and Mining Pty Ltd – established in 2001 via a grant from ATSIC and equity from Henry Walker Eltin – is now winning work from BHP and Rio Tinto. It has 140 staff and plans to double annual revenue from \$40 million to \$88 million in the next year.

There are still hurdles. “We still get disappointingly small contracts but I have to acknowledge there has been a change in the past two years,” says Ngarda director Barry Taylor. “We still have middle management who don’t understand or support the policies from the top. If the chief executive of BHP says ‘this is what has to be done’ it still takes a while to filter down.”

But all the signs are that it will finally filter down. “Native title is a fact of life. It is disappointing that the Act was not more directive and as a result industry had to develop its own mechanisms to deliver outcomes,” says former Newmont Mining managing director Paul Dowd. “But it was only 10 to 15 years ago that Aboriginal rights in relation to mining was whispered in the corridors. Now it is not just popular, it is the right thing to do.” ■

Marcus Priest worked as an adviser to the WA Select Committee on Native Title in 1998 and as a lawyer at Yamatji Aboriginal Corporation in 2000. His work there did not involve the Pilbara.