[2018] WAMW 16

JURISDICTION : MINING WARDEN

LOCATION : KALGOORLIE

CITATION : TORIAN RESOURCES LIMITED v KALGOORLIE ORE TREATMENT COMPANY PTY PTD [2018] WAMW

CORAM : WARDEN A HILLS-WRIGHT

HEARD : 23 April 2018

DELIVERED : 8 October 2018

FILE NO/S : Applications for Prospecting Licences 26/4209-26/4215 and Objections 492482, 492484, 492485, 492477, 492478, 492481 and 492483

BETWEEN : **TORIAN RESOURCES LIMITED**
(Applicant)

AND

KALGOORLIE ORE TREATMENT COMPANY PTY LTD
(Objector)

Catchwords: *Prospecting Licences – Objection – Marking Out – Whether Marking Out done prior to ground being open - Accuracy of time of Marking Out on Form 20 – Compliance with marking out requirements – Onus of Proof*

Legislation:

- *Mining Act 1978 (WA)*, s18, s 40, s41, s42, s105, s105A
- *Mining Regulations (1981), r11, r59, r61, r90, r154, r162*
- *Evidence Act 1906 (WA), s79C*

Cases referred to:

- ***Bear-Ring Bore GM v Horizon Mining Limited*** (2002) WAMW 17
- ***Brewer v Stubbs*** (2003) WAMW 11
- ***Sargentson v Brewer*** (2016) WAMW 22
- ***Viskovich v Foley*** (Vol 13, Folio 20)
- ***Sillcock v Brooks and Kookynie*** (Unreported, Warden's Court, 1986, noted 5 AMPLA Bull 50)
- ***Hunter Resources Limited v Melville*** (1988) 164 CLR 234
- ***Waste Stream Management Pty Ltd v Michael Galea*** [2005] WAMW 2
- ***Anglo Gold Ashanti Australia Limited v Whitecliff Nickel Limited*** [2010] WAMW 9
- ***White Cliff Minerals Limited v Lynch*** [2015] WAMW 4
- ***Ex Parte Atkins v Egypt Holdings Limited*** (Unreported, WASC FC 10 July 1988)
- ***In R v Lane; ex parte Pard Holdings Pty Ltd; in Re Goldfan Ltd*** (1990) 2 WAR 486
- ***Michael Ron Van Dongen v KML No 2 Pty Ltd*** (2017) WAMW 17
- ***Pilbara Iron Pty Ltd v BHP Billiton Minerals Pty Ltd and Ors*** (2005) WAMW 25

Result:

1. Applications for prospecting licences refused

Representation:

Counsel:

Applicant	:	Mr T Masson
Objector	:	Mr G Lawton

Solicitors:

Applicant	:	Ensign Legal
Objector	:	Lawton Lawyers

Introduction

1. After midnight on 8 July 2016 the land in relation to which application is made for seven prospecting licences was open for mining.

2. The Applicant purports to have marked out the land at half a second past midnight on 9 July 2016, that is, half a second after the land was open for mining. That time was recorded in Form 20 notices of marking out as "12:00:00.5".

3. It is not in dispute that the land the subject of these proceedings was surveyed land. Accordingly the marking out requirements set out in reg 59 of the *Mining Regulations 1981* (the Regulations) are to be read together with reg 61 which deals with the marking out of surveyed land. In order to mark out the ground the Applicant was required to fix firmly in the ground a datum post and then fix to that datum post a notice of marking out in the form of Form 20. As there are common boundaries in relation to the ground the subject of the applications it is not in dispute that to mark out the seven applications in accordance with the Regulations a datum post was required to be fixed at three corners.

4. In submitting that each of the seven applications should be refused the Objector relies upon three grounds;

    a. **firstly**, that the marking out was not done in compliance with the Regulations because Mr Stehn, a tenement pegging agent, performed acts which ought properly be characterised as acts of marking out prior to midnight and therefore before the land was available to be marked out;

    b. **secondly**, that the time of completion of the marking out as recorded in each of the three Form 20 notices with respect to three of the seven prospecting licence applications (Corner 3) is inaccurate and the true position is that the marking out of Corner 3 was not complete until 1 second past midnight or 1½ seconds past midnight. The Objector submits that this inaccuracy as to the time of completion of the marking out is a defect which ought invalidate the three prospecting licence applications relating to Corner 3;

c. **thirdly**, that the Applicant has not adduced any admissible evidence that the marking out was done in compliance with the Act and Regulations in relation to the other four of seven prospecting licence applications (Corners 1 and 2).

The Legislative Framework

5. Section 18 of the *Mining Act 1978* (the Act) states relevantly:

> *All Crown land, not being Crown land that is the subject of a mining tenement, is open for mining and as such is land –*
>
> *(a) Where any person may set up pegs or otherwise mark out the land pursuant to section 104 in connection with an application for a mining tenement; and*
>
> *(b) …,*
>
> *(c) Which may be made the subject of an application for a mining tenement,*
>
> *Subject to and in accordance with this Act.*

6. Section 105(1) of the Act states relevantly:

> *Before an application for a mining tenement …, is made, the land in relation to which the mining tenement is sought shall be marked out in the prescribed manner and in the prescribed shape …,*

7. Regulation 11 states that an applicant for a prospecting licence shall comply with the regulations in Part V as to marking out and applying for the licence.

8. The prescribed manner of marking out a tenement is set out in reg 59 which is in Part V:

> **59. Manner of marking out tenement (Act s. 105)**
>
> *(1) Land in respect of which a person is seeking a mining tenement shall, except where other provision is expressly made, be marked out —*
>
> *(a) by fixing firmly in the ground —*
>
> *(i) at or as close as practicable to each corner or angle of the land concerned; or*
>
> *(ii) if there is an existing survey mark at a corner or angle of the land concerned, as close as practicable to the survey mark without moving, changing or otherwise interfering with the survey mark,*
>
> *a post projecting at least 1 m above the ground; and*

(b) subject to subregulation (3), by either —

(i) cutting 2 clearly identifiable trenches; or

(ii) placing 2 clearly identifiable rows of stones,

each at least 1 m long from each post in the general direction of the boundary lines; and

(c) then by fixing firmly to one of the posts as the datum post, notice of marking out in the form of Form 20.

(2) Where the land adjoins other land in respect of which the same person is seeking or holds a mining tenement, common posts and, if required, common trenches or common rows of stones may be used for the marking out of each parcel of land.

(3) Where a post is fixed as close as practicable to an existing survey mark under subregulation (1)(a)(ii), marking out in the manner described in subregulation (1)(b) is not required.

9. Regulation 61 deals with surveyed land:

61. Marking out surveyed land

It shall not be necessary to mark out land in respect of which a mining tenement is sought, the boundaries of which are identical with any surveyed land, other than by fixing —

(a) at a corner of the boundaries; or

(b) if there is an existing survey mark at a corner of the boundaries, as close as practicable to the survey mark without moving, changing or otherwise interfering with the survey mark,

a datum post to which the notice of marking out in the form of Form 20 is affixed.

Mentions Prior to the Hearing

10. There were a number of mentions in relation to the objections prior to the substantive hearing.

11. Three separate minutes of consent orders were lodged as the matter progressed to hearing, dated 3 November 2016, 5 April 2017 and 7 July 2017. Whilst the consent orders referred to different proposed dates by which the parties would lodge documents, each minute referred to the Applicant filing and serving statements of evidence or affidavits together with any documents upon which it proposed to rely in support of its applications, with the Objector to file and serve statements of evidence or affidavits together with any documents upon which it

proposed to rely in support of its objections. The final consent minute referred to the Applicant filing its materials by 28 July 2017 and the Objector filing its responsive materials by 1 September 2017.

12. The only material filed and served in light of the consent orders is the affidavit of Anthony Patterson Stehn sworn 31 July 2017 and filed on the same date. That affidavit was filed on behalf of the Applicant. No other statement of evidence or affidavit has been filed by the Applicant. No statement of evidence or affidavit was filed on behalf of the Objector and no evidence was adduced by the Objector at the hearing.

13. Prior to the hearing there was no request by the Applicant for the Objector to file and serve further and better particulars of objection.

14. On 19 April 2018, 4 days prior to the hearing, the Objector filed and served a document entitled "Objectors' Opening Submissions" in which it set out relevant provisions of the Act and Regulations and referred to a number of authorities as to marking out requirements being strictly interpreted by the courts. The document sets out that the issue is whether the Applicant did in fact commence marking out before the land was open for marking out and whether the Applicant's actions can be characterised as preparation for marking out or actual marking out.

15. The "Objectors' Opening Submissions" document evidently relates to the first and only the first of the three grounds it relies upon as set out at paragraph (4) of these reasons.

The Hearing

16. The hearing took place on 23 April 2018.

17. Each of the seven Form 16 Notices of Objection are in identical terms setting out two grounds of objection, namely;

i. The Objectors were first in time to mark out the ground the subject of the application and accordingly have priority for grant of (*the relevant prospecting licence application*);

ii. The application was not marked out in accordance with the requirements of the *Mining Act* and *Regulations*.

18. At the commencement of the hearing (at the request of counsel for the Applicant, Mr Masson) counsel for the Objector, Mr Lawton, clarified that he only relied upon ground (ii) in relation to each objection. The Objector further clarified that there were two issues to be determined, namely the first and second grounds as set out at paragraph (4) of these reasons.

19. The Applicant advised it was content to proceed on that basis.

Evidence in Chief of Mr Stehn

20. The Applicant relied on the affidavit of Mr Stehn as its evidence in chief. He was cross-examined and then re-examined.

21. Mr Stehn is a Senior Field Assistant/Tenement Pegging Agent contracted to the Applicant and has successfully marked out over 200 leases for them.

22. On 8 July 2016 he visited the land the subject of these proceedings in order to assess the ground to prepare for an easier and quicker marking out process. Later that afternoon, at the premises of the Applicant, he met with six other persons whom were to assist him in the marking out of the prospecting licences, namely Michael Brown, Sara Brammall, Lyndal Money, Lily Money, James Sullivan and Kyle Wohlers. There they practiced as a group hitting the peg into the ground with one hit and attaching the Form 20 to the post as soon as the hit was complete. He said they practiced this a number of times until they were confident that they could achieve the task in half a second. He described how the Form 20 is placed in a zip-lock plastic bag which has velcro attached to it which is then fixed to velcro on the datum post.

23. He states "that afternoon we practiced the pegging procedure ***and prepared the paperwork*** for marking out the prospecting licences".

24. To undertake the marking out they divided into three groups.

25. Mr Stehn guided James Sullivan and Kyle Wohlers to the first corner where a datum post was required and assisted them to find a suitable place to hit in the datum post. He states "we did this by stabbing the ground with a strong length of wire near the surveyed post to find the softer spot". He then left in order to prepare the other corners where marking out was required. Sullivan and Wohlers were marking out on the northwest corner of prospective licence 26/4210. 26/4210 and 26/4211 share a boundary and therefore to mark out those two tenements only one datum post was required. **For ease of reference this marking out will be referred to as Corner 1.**

26. Mr Stehn said he then took Lyndal and Lily Money to the northwest corner of the prospective licence 26/4212 which shared a boundary with 26/4213. He helped them find a suitable place to hit in the datum post and did that by stabbing the ground with a strong length of wire near the surveyed post to find the softest spot. Again, because those two tenements share the same boundary only one datum post was required. **For ease of reference this marking out will be referred to as Corner 2**.

27. He then travelled with Michael Brown and Sara Brammall to mark out prospective licences 26/4209, 26/4214 and 26/4215 all of which share a common boundary. They went to the southeast corner of 26/4215. He identified the most suitable place to hit in the datum post by stabbing the ground with a strong length of wire near the surveyed post to find the softest spot. Again, because those three tenements share a common boundary only one datum post was required. **For ease of reference this marking out will be referred to as Corner 3.**

28. Then at half a second past midnight, now on 9 July 2016, he and Michael Brown completed the marking out of Corner 3 by Mr Stehn hitting the post and Mr Brown attaching the Forms 20 whilst Ms Brammall filmed the process.

29. He says that he then travelled by car to complete the mark out in relation to other tenements not relevant to these applications.

30. Later that afternoon he met with his marking out assistants back at the Applicant's premises. He viewed the recordings done of each marking out. In the video he saw of the marking out done by Mr Sullivan and Mr Wohlers (at Corner 1) he recalls that Sullivan hit the datum peg into the ground and Wohlers affixed the papers to the datum peg in the same manner as shown in the video recordings attached to his affidavit (being the video recording of the marking out done by himself at Corner 3, and that done by Lyndal and Lily Money at Corner 2). Having watched the video of the marking out at Corner 1 he says that process occurred in half a second. The recording of that marking out has not been able to be sourced from Mr Sullivan.

31. The affidavit of Mr Stehn became Exhibit 1 with the video of the marking out done by him marked as Exhibit 1A, the 3 Forms 20 in relation to Corner 3 became Exhibit 1B and 2 maps of the relevant tenement areas became Exhibit 1C.

32. The tender through Mr Stehn of the video recording of the marking out done by Lyndal and Lily Money at Corner 2 (referred to as APS3) was objected to and ultimately the Applicant did not seek to tender it nor rely upon it at the hearing.

Cross-examination of Mr Stehn

33. In cross-examination Mr Stehn clarified the marking out procedure whereby one person holds the peg and strikes it whilst another person would then attach the Form 20. He agreed that as Ms Brammell was counting down the seconds to midnight she didn't say "go" after counting down the last second, but denied that

as a result of that omission the striking of the peg was slower than he had expected. He agreed that in the video footage after the marking out is complete he can be heard to say to her words to the effect of "you were supposed to say "go" ".

34. He used the piece of wire to push into the ground near the survey post to find a soft spot as in his experience there was always some soft ground but if there wasn't he has to change the papers (referring to the Form 20) to make it 2 seconds because he would have to hit the datum post twice. He demonstrated with a piece of pin flag wire roughly 28cm in length (bent into the shape of the letter "p") how he pushes it into the ground.

35. When the Exhibit 1A video was played to him he denied that at the point in time he was holding the post, which was tilted on an angle, in the seconds prior to midnight, that it was several inches below the natural surface of the ground in a hole. He denied that it was then drawn out of the hole and then put back into the hole before being struck at midnight. He denied that any hole was prepared by him prior to midnight by use of the wire or otherwise and when he is seen to lift the post it is only to line it up so that he can see it to strike it in order to commence the mark out.

36. Mr Stehn agreed that the Exhibit 1A video showed the GPS device reading one second past midnight at a point when he was yet to hit the post and when the Form 20 had not yet been fixed to the post. He agreed that the form of GPS used by him measured time in seconds but not in points of a second. He agreed that from the time the post was struck and the Form 20 was affixed another half second had elapsed.

37. In re-examination Mr Stehn said that by using a wire to find soft ground he accepts there would have been a hole left but it wouldn't have been distinctive or one you could see after pulling out the wire if the ground is reasonably soft. He denied that there was any hole in existence at the place where he fixed the post in the ground (at Corner 3).

Findings of Fact

38. In my view Mr Stehn presented as a credible and honest witness who did not embellish his evidence. His concessions that the GPS showed a time of one second past midnight immediately prior to his striking of the post and that the marking out task would have taken a further half second were properly made and consistent with my assessment of what was depicted in the video recording and the time taken to complete the acts of marking out.

39. The circumstances in which the recording was made naturally impact upon its quality in the sense that it is footage taken at night, under a reasonably poor source of artificial light and in the bush. There is some visible scrub and some bushes near the post however the surface of the ground in that immediate area cannot be clearly seen. That is not a criticism of any person, however that fact does not assist in reaching any reliable conclusion, on the basis of the objective footage alone, that there was likely a hole or must have been a hole in the ground into which Mr Stehn placed the post prior to striking it. The footage does not show the ground surface in any detail. Whilst Mr Stehn accepted that the ground was reasonably flat in that area, and whilst the footage does depict Mr Stehn, at a point prior to hammering the post, lifting it up and then placing it back in such a way as to appear that the post is in a depression or lower area than the surrounding ground, I am unable to find as a fact from the footage or by inference that there was a hole nor that, if there was, it was a hole created by Mr Stehn prior to midnight.

40. I accept Mr Stehn's evidence that his use of the very thin piece of wire to find soft ground did not create a hole in any meaningful sense and certainly not one into which a post could have been placed such that it was below the level surface of the ground prior to it being struck. His evidence about the nature of the ground near a survey mark is consistent with the need to use such an object to find soft ground and is consistent with the requirement in reg 59(1)(a)(ii) that the post has to be fixed as near as practicable to the survey mark.

41. I am not satisfied that the movement of the post by Mr Stehn as depicted in the video in the seconds prior to his striking it is sufficiently clear to allow me to draw an inference that it was placed into and then drawn out of a hole. Nor does the movement of the post as revealed in the footage cause me to doubt the evidence of Mr Stehn that he did not create such a hole nor place the post in a hole prior to striking it.

42. I do find that it was 1 second past midnight before the post was struck and at least 1 to 1 ½ seconds past midnight when the final act of marking out by attaching the Forms 20 to the post was completed. That is apparent when watching the footage at normal speed and is confirmed when watching the footage at 5 times slower than normal speed, or frame by frame.

43. I find as a fact that the marking out was not complete at half a second past midnight as stated on the Forms 20 in relation to Corner 3.

Ground One

44. In ***Ex Parte Atkins v Egypt Holdings Limited*** (Unreported, WASC FC 10 July 1988) it was held that any single series of purported marking out procedures before the ground became open for mining was not in accordance with the Act and Regulations even if the final act of marking out was performed after the ground became available. The case is authority for the basic proposition that each act comprising the marking out process must be performed at a time when the ground is open for mining.

45. In light of the findings that I have made an issue to be resolved is whether the stabbing action with the piece of wire (as opposed to the creation of a hole into which the post is placed before it has been struck) can be characterised merely as preparation for marking out or whether it can be characterised as an act of marking out intimately connected with the fixing of the post in the ground before midnight and therefore before the ground was open to be marked out.

46. Marking out in this case did not require the cutting of clearly identifiable trenches. In ***White Cliff Minerals Limited v Lynch*** [2015] WAMW4 Warden Tavener said that mining legislation does not prohibit preparation for marking out but it does prohibit marking out before the land is available. The Warden in that case found that preliminary marks in the ground by the use of boots was not such as to constitute a trench although they were identifiable disturbances to the ground.

47. The Objector says reference to disturbance to the ground is relevant in that any physical intervention in the status quo of the ground which is connected to or related to the fixing firmly in the ground of a post is an act of marking out. The Objector says it is a matter of degree.

48. As the present case did not require the cutting of trenches, analogy with marking out and 'disturbances in the ground' caused by boots, for example, begins to break down. However in my view the digging or creation of a hole prior to the land being open for marking out into which the post is then placed before being firmly fixed might well be so connected with the fixing firmly of the post in the ground as to constitute an act of marking out rather than an act of mere preparation. However that is not what I find has occurred in this case. In this case a piece of wire has been used to find soft ground. There is no evidence that the wire created a hole to any meaningful degree nor is there evidence the wire created a hole into which the post was placed before being fixed.

49. Given that finding, in my view the use of the wire was a preparatory act for the purpose of identifying a suitable place in which to firmly fix the post rather than an act of firmly fixing that post in the ground, and therefore an act of marking out. To the extent any hole may have been created it was insignificant and was not such as to facilitate or make easier the actual fixing of the post but was rather to identify the place where the post could be fixed.

50. I am satisfied that there was no act of marking out done in relation to any of the 3 corners prior to the ground being open for marking out and would dismiss this ground of objection.

Ground Two

51. What then is the significance of finding that the marking out was not completed in relation to Corner 3 until at least 1 second past midnight whereas the Form 20 incorrectly states that marking out was completed at half a second past midnight?

52. The Applicant argues the inaccuracy should be characterised as a minor misdescription and ought not invalidate the applications. The inaccuracy is a by-product of the marking out process in relation to which sensible and practical considerations apply.

53. The Objector argues the inaccuracy is not a minor misdescription but is an error which, in the circumstances, ought invalidate the application as Corner 3 cannot be said to have been marked out in the prescribed manner according to the Act and Regulations.

54. Albeit the Objector has not adduced any evidence, the only reasonable inference that can be drawn in the circumstances is that the Applicant's marking out of the seven tenements was done in circumstances where competition was contemplated. It is common ground between the parties, and I have proceeded on that basis, that the ground was not open to be marked out until after midnight on 8 July 2016. Earlier that day Mr Stehn visited the areas to be applied for, as was his practice, to scout out access routes and identify the best locations for marking to ensure the mark-out process was easier and quicker. Later that afternoon he met with the others so they could practice their pegging procedure. They took turns practicing and did it until they were confident it could be done in half a second. They pre-prepared the Form 20 paperwork. The posts and plastic bags in which the Form 20's were to be placed had Velcro to assist quick attachment. Mr Stehn attended the locations prior to midnight and at each corner

he identified soft ground to ensure the fixing of the datum post could be done quickly and easily. As Mr Stehn said in cross-examination, if there's no soft ground the Form 20 papers have to be changed to up to two seconds (rather than half a second) because the post would have to be hit twice.

55. Marking out as quickly as possible can be critical. Section 105A(1) of the Act states that where more than one application is received for a mining tenement the applicant who first complies with the initial requirement has the right in priority to grant over every other applicant. Where a prospecting licence is concerned the initial requirement is a reference to marking out the land in the prescribed manner. A matter of a second or seconds can be determinative. A party who marks out more quickly but not in compliance with the Regulations might gain an unfair advantage by obtaining a right in priority over an applicant who marks out less quickly but in compliance with the Regulations.

56. Regulation 90 is entitled "Forms to be completed in accordance with directions" and states:

> *A form prescribed by these regulations shall be completed in accordance with such directions as are specified in the form as so prescribed.*

57. The various data fields on the left-hand margin of the Form 20 are directions specified in the form for the purposes of Regulation 90. These include details such as the name and address of the applicant through to the type of tenement and "Time and date marking out completed", read together with the words in brackets under the form's heading "(to be fixed to Datum Post to complete marking out)" and the words in the right hand column.

58. It has been held by various wardens that there is nothing improper in the data fields on a Form 20 being filled out, including as to paragraph (g) "Time and date marking out completed", at a stage prior to the Form 20 being fixed to the datum post. ***Viskovich v Foley*** (Vol 13, Folio 20, delivered 29 November 1998) is authority for that proposition.

59. Neither the Act nor the Regulations stipulate, less do they mandate, when, how or by whom the Form 20 must be completed.

60. It is the affixing of the Form 20 to the datum post which is the final act of marking out and which, in light of the ratio in ***Hunter Resources Limited v Melville*** (1988) 164 CLR 234, is a matter of strict compliance the absence of which would be fatal to an application. Dawson J said that the requirement of section 105(1) of the Act necessarily imported the requirements of reg 59, commenting that *"it is not possible, in my view, to speak of the latter being subordinate to the former in the sense that there might be substantial compliance with section 105(1) despite non-compliance with reg 59*". That case dealt with the requirement that pegs be spaced "at intervals not exceeding 300 metres". Dawson J noted the uncertainty that could result if substantial compliance with that requirement was satisfactory and that little inconvenience would result from an insistence upon strict compliance. A conservative approach could be taken by spacing pegs at less than 300 metres such that any difficulty in achieving precision could be overcome by erring on the side of caution. Dawson J said:

> *This would enable an applicant to achieve practical certainty in an area of endeavour where certainty is highly desirable*[1]

61. However the decision in ***Hunter Resources*** does not address the implications of any errors or deficiencies in the Form 20.

62. In ***Sillcock v Brooks and Kookynie*** (unreported, Warden's Court, 1986, noted 5 AMPLA Bull 50) Warden Reynolds suggested what the appropriate procedure might be in a potentially competitive marking out situation. The Warden noted that once the Form 20 notice had been affixed to the post then the marking out was completed and because time had stopped running the applicant could then write the actual time of marking out by endorsing that time on the Form 20 when it was already attached to the datum post. The Warden appreciated that this procedure may be awkward. Whilst it should be done "as soon as practicable

[1] ***Hunter Resources*** at p20

after marking out is completed", the Warden noted that because time had ceased to run it could be done carefully and need not be rushed. By "as soon as practicable" after marking out the Warden had in mind a minute or so. However in ***Sillcock*** the Warden also said at page 8:

> *If an applicant does anticipate the time correctly then clearly there has been no injustice. If the anticipated time is found as a fact to be the precise time that marking out was completed then the notice cannot be said to be deceptive or misleading.*

63. The Warden was considering a situation in which prior to the Form 20 being affixed to the post, in a competitive situation, an anticipated time of marking out is provided on the Form 20. In that regard the Warden noted that when an application may come down to a second or seconds in determining who has the right in priority that anticipated times cause confusion rather than render assistance and that "it is therefore desirable that the times be as precise as possible".

64. As to an anticipated time, Warden Reynolds posed the question how one can provide the precise time of an event until that event has occurred? In ***Sillcock*** the Warden was, in effect, qualifying that statement by saying at page 10:

> *If the anticipated time is in fact the precise time then the Notice cannot be said to be deceptive or misleading.*

65. In ***Viskovich*** Warden Calder pointed to what is an apparent tension between the fact that the act of marking out is not complete until the Form 20 is attached to the datum post on the one hand, and the directions specified on the Form on the other. He said at page 36:

> *In my opinion a Form 20 does not become, for purposes of Regulation 59 (1)(c) a 'notice of marking out' until, pursuant to Regulation 90, it has been completed in accordance with the directions contained in the Form 20 and has been fixed to a corner post. It is when consideration is given to the things which must be entered upon the Form 20 in accordance with the directions contained in the form in order to complete it, that some practical difficulties emerge. Immediately beneath the heading **NOTICE OF MARKING OUT** appears in brackets the words "To be fixed to the Datum Post to complete marking out". At paragraph (e) of the Form 20 the instructions in the margin require the time and date when marking out is*

> *completed to be inserted. The form contains the printed words: "marking out <u>was</u> completed by fixing this at …" Both the direction contained in the margin (which says "time and date marking out completed") are expressed in the past tense. The direction appearing immediately under the heading "**NOTICE OF MARKING OUT**", to which I have made reference, upon a literal interpretation, appears to mean that marking out is only completed upon the fixing of the Form 20 to the datum. If the particulars required at paragraph (e) at the time of marking out are inserted before the Form 20 is fixed to the post and if the time then shown is the time at which paragraph (e) is completed then paragraph (e) must be necessarily be untrue if the literal interpretation of the direction contained under the heading for the Form is to be adopted. Alternatively, if one were to first fix the Form 20 to the post and then complete paragraph (e) and insert at paragraph (e) the time when paragraph (e) itself was completed that, too, would not accord with the literal interpretation of the direction which appears under the heading to the Form 20. It would also appear that if paragraph (e) was completed after the Form 20 was fixed to the datum post and that if the time of marking out was there shown as the time when the notice of marking out was fixed that would not be a true statement because the notification of a significant element of the marking out, namely, the precise time of completion would not have been on the notice when the marking out was "complete"(the Form 20 having been fixed to the datum).*

66. Warden Calder concluded that in his view it was a reasonable, practical and common-sense interpretation and application of the provisions of the Act and Regulations, and of the directions on the Form 20, for all the details within it to be able to be completed prior to the Form 20 being fixed to the post. This practical consideration flows from resolution of the tension identified by Warden Calder in that the time of completing the marking out, as written on the Form 20, must necessarily be an anticipated time when the Form 20 is to be affixed to the datum post.

67. What then, in the face of an objection, is the consequence where the anticipated time as pre-endorsed on the Form 20 is established not to be the actual time marking out was completed?

68. In ***Viskovich*** Warden Calder held the view that what Regulation 59 means and requires, in terms of the information which is endorsed on the Form 20 when an applicant or marking out agent completes the process, is a document which indicates to any person who reads it who the applicant is, what the applicant's address is, the type of tenement which is to be applied for, a description of the

boundaries of the ground to be applied for and its approximate area, and the time and date when marking out was completed. Warden Calder held that the pre-filling out of any information in the Form 20 does not in any way derogate from achievement of the legislative purpose and objective of the completion and placement on the datum post of the Form 20, namely, that of publicity of the actions of the applicant of particulars of the ground marked out[2].

69. Underneath the title of the Form 20 are found the words "NOTICE is given that" under which the date entry fields are set out. It is clear that publicity is an important purpose behind the Form 20 (and Form 21) as those documents provide all the particulars of the application for scrutiny by any person who may be interested in the ground in question.

70. In ***Viskovich*** Warden Calder was of the view that whether time of marking out is inserted after the Form 20 is fixed to the post, or, alternatively, prior to the fixing of the Form 20 to the post, there will have been compliance with regulation 59(1)(c) provided:

> *There is a very close temporal connection between the completion of paragraph (e) and the fixing of the Form 20 to the corner post.* [3]

71. Warden Calder did not find it necessary to nominate a time or a timeframe within which the separate events of completion of the form and the fixing of it to the post should occur, however in the case before him he was satisfied that there was sufficient proximity between those two events. It is apparent from the facts as found in that case that he was dealing with a time period of 5 minutes.[4]

72. Warden Zempilas in ***Waste Stream Management Pty Ltd v Michael Galea*** [2005] WAMW 2 was dealing with an objection where the Form 20 had been pre-drafted, including as to the time, and where there was inaccuracy between the estimated time as endorsed on the Form 20 and the actual time of marking

[2] ***Viscovich*** at p38
[3] At p39. It is to be noted that in ***Viskovich***, paragraph (e) is a reference to the data field 'time and date marking out completed' whereas that data field in current Form 20's is at paragraph (g).
[4] ***Viskovich s***ee p6, 8, 9, 11, and 39

out. The evidence accepted by the Warden was that the actual time of marking out was 10:30am whereas the time on the Form 20 was 11:00am. There was evidence that the Form 20 had been filled out at 9:00am. The Warden noted that a purpose in marking out and attaching the Form 20 upon completion was to identify the time marking out was completed as that may be important in assessing the priority of applications for the purposes of section 105A of the Act. The case involved an application for a mining lease and therefore the Warden determined that she had a discretion to recommend or not recommend grant of the mining lease in spite of any non-compliance with the requirements of regulation 61. The Warden exercised her discretion to recommend grant noting, insofar as pre-completion of the Form 20 was concerned, that the Form 20 was completed only about one and a half hours prior to attaching it to the post and that to the extent the estimate was inaccurate it was not to the advantage of the applicant. Furthermore there was no evidence of the marking out having occurred in a competitive situation or where there was an actual competing claim in time for priority pursuant to section 105A.

73. In ***Anglo Gold Ashanti Australia Limited v Whitecliff Nickel Limited*** [2010] WAMW 9 Warden Zempilas, agreeing with the interpretation and logic of the decision in ***Viskovich*** insofar as the very close temporal connection required between the completion of paragraph (e) and the fixing of the Form 20 to the corner post, was dealing with a situation where the Form 20 was attached to the datum post and then the time of marking out was inserted (as opposed to the time of marking out being anticipated). In that case there was evidence that those involved in marking out were in communication by radio and log in times on a GPS and having regard to that evidence the Warden concluded:

> *In my view the only reasonable inference from that evidence is there was a very close temporal connection between Mr Nugus affixing the Form 20 to the datum post and then being advised by Mr Mulcahy that the time when it occurred was 8:31:06. I am satisfied Mr Nugus then completed the time on*

the Form 20 (twice), affixed it to the datum post, had a conversation with Mr Richards then left the area.[5]

74. So whilst ***Anglo Gold Ashanti*** dealt with the completion of paragraph (e) after the Form 20 was fixed to the datum post, rather than before, there was a finding that the connection between those separate events, based on the manner in which the radio calls were being made to advise of the time of marking out, was a very close temporal connection.

75. In written submissions provided toward the end of the hearing the Applicant's counsel referred to ***Viskovich*** and the Warden's conclusion therein that filling in a Form 20 in advance is not fatal to an application so long as there is a very close temporal connection between the completion of the Form 20 and the fixing of the Form 20 to the datum post.[6] In reliance on the concept of "a very close temporal connection" counsel for the Applicant went somewhat further in oral submissions and posed the question that if a one-second or half-second differential doesn't constitute a very close temporal connection in light of the practical realities then what would?[7]

76. However, it would appear that in ***Viskovich*** Walden Calder in referring to a "very close temporal connection" was dealing with that period of time between when the anticipated time of marking out is written on the Form 20 and the fixing of the Form 20 to the corner post. They were the two separate acts in relation to which a very close temporal connection is required. Warden Calder, in referring to a very close temporal connection in light of the practical realities associated with completing the Form 20, was not referring to the gap between an estimate of time endorsed on the Form 20 and the actual proven time of marking out. The Warden did not conclude that any inaccuracy as to the time on the Form 20 when compared with the proven time of marking out would be compliant provided

[5] ***Anglogold Ashanti*** at p18
[6] Applicant's submissions dated 13 April 2018 at para 44
[7] Transcript p50

there was a very close temporal connection between the inaccurate time and the proven time.

77. Whilst the decision in ***Viskovich*** was canvassed in their written submissions provided during the hearing, the Applicant did not adduce any evidence as to precisely when the Form 20's were filled out. The only evidence was that of Mr Stehn at paragraph 8 of his affidavit in which he states "***that afternoon*** we practiced the pegging procedure and ***prepared the paperwork*** required for marking out the prospecting licences". It must be inferred that the paperwork is a reference to the Form 20's and clearly reference to 'that afternoon' is a reference to the afternoon of 8 July. Afternoon is generally understood to encompass from midday to evening, or approximately 6pm depending on the time of year. As marking out took place after midnight it follows from the state of the evidence that there was a period of at least 6 hours, or potentially more, between the completion of the Form 20 and it being fixed to the datum post.

78. The consequence of an error or misdescription in a Form 20 has been the subject of several decisions. ***In R v Lane; ex parte Pard Holdings Pty Ltd; in Re Goldfan Ltd*** (1990) 2 WAR 486 there was an error in the description of one of the boundaries. The Court found that, unlike with the strict compliance requirements set out in reg 59 as determined by the High Court in ***Hunter Resources***, additional content has to be given to the words "description of boundaries" in the Form 20 in order to determine precisely what is intended thereby. It was common ground that the accompanying map contained no misdescription and was accurate. Wallace J concluded that no one could have been misled by the misdescription in the Form 20. Ipp J said at 495-496:

> *Form 20, as I have indicated, requires only that a description of the boundaries of the land marked out be given. Nothing is said as to what that description should contain or what accuracy it should display…,*
>
> *It is furthermore significant that the Form 20 notice requires only that the "approximate area" be given. The reference to "approximate" area makes it plain*

that absolute accuracy in regard to area – and therefore in regard to length of the boundaries – is not required.

Further light is cast upon what is required in describing boundaries in the Form 20 notice by the requirement that, together with the Form 20 notice, a map on which are "clearly delineated the boundaries" is to be fixed to the datum post.

In my view, all that is intended by the requirement in the Form 20 notice relating to the description of boundaries is that the boundaries should be described with sufficient detail and accuracy to enable a reader, by making reasonable use of the Form 20 notice as a whole, and the map affixed tom the datum post, to determine where the boundaries lie.

79. Whether a misdescription as to boundaries will constitute a failure to comply with the marking out requirements and so invalidate an application is a matter of degree. Referring to ***Pard Holdings***, Warden O'Sullivan said in ***Michael Ron Van Dongen v KML No 2 Pty Ltd*** (2017) WAMW 17 at para 18:

> *Whether a deficiency in a Form 20 can be characterised as a misdescription or a failure to mark out will of course depend on the nature and extent of the error. The determining feature seems to be whether the deficiency deprives the reader of the ability to use the Form 20 to identify the location of the correct boundaries.*

80. In ***Ron Van Dongen*** Warden O'Sullivan found that the complete failure to identify the boundaries in the Form 20, when regard is had to the purpose of the Form 20, could not be described as a misdescription and constituted a failure to mark out.

81. In the present matter I have found as a fact that the Form 20 was not fixed to the post at Corner 3 at half a second past midnight. Marking out was not in fact complete until at least 1 second past midnight, but was complete before 2 seconds past midnight. Whether there was confusion between Mr Stehn and his assistant who was counting down the seconds because she did not say "go" at midnight, or whether Mr Stehn was not quick enough in striking the post for some other

reason, the fact remains the post was not yet struck when the GPS read 1 second past midnight.

82. The Forms 20 in relation to Corner 3 (and also in relation to Corners 1 and 2) were filled out, including as to paragraph (g) 'time and date marking out completed', at the least not less than 6 hours before the Form was fixed to the Corner 3 post. It is to put a significant strain on the plain and ordinary meaning of the words to suggest that a period of at least 6 hours amounts to a 'very close temporal connection'.

83. The Applicant was under no obligation to approach the marking out in a conservative or cautious manner. Speed in marking out can be essential, especially where competition is anticipated. In estimating that marking out could be achieved in half a second the Applicant, through Mr Stehn, left itself with no margin for error. Mr Stehn was not as quick after midnight as he anticipated he would be when the Form 20's were completed the previous afternoon. The requirement for a very close temporal connection between the completion of the Form 20 (as to time of marking out) and the fixing of it to the datum post has the benefit of discouraging abuse and avoiding the spectre of a Form 20 being deceptive or misleading as to time of marking out. It discourages potential abuse by the pre-filling of forms at a time well before the actual marking out occurs. Whether any error on the form is calculated to deceive or not is irrelevant. Conditions might change as between the time of completion of the Form 20 and the fixing of it to the post. A post might snap or some other unforeseen event may intervene. The risk that some unforeseen event might occur which impacts upon the reliability and accuracy of the anticipated time with the actual time of marking out increases as the temporal connection between those two events decreases.

84. It is not out of the bounds of possibility that the situation could occur whereby a person in competition for the same tenement who has marked out a second or two after midnight and who, on inspection of a competitor's Form 20, which

notifies him that his competitor marked out at half a second past midnight, then determines not to proceed with his application as he was not first in time. If in fact his competitor did not mark out by that time as the Form 20 was inaccurate then an injustice is potentially done. In that way the requirement of a very close temporal connection is likely to be productive of accuracy in a field of endeavour where seconds can be determinative. It is a sensible and practical consideration that balances the tension that was identified by Warden Calder in complying with the directions on the form. Otherwise, as Warden Reynolds posed, how can one provide the precise time of an event until the event has occurred?

85. In my view the error on the Form 20 in combination with the lack of a close or very close temporal connection between completion of the Form 20 and the fixing of the Form 20 to the datum post amounts to a failure to comply with the provisions of the Act and Regulations to such a degree to result in the refusal of the application in relation to Corner 3.

86. The lack of a close or very close temporal connection similarly taints the applications in relation to Corners 1 and 2 and, in my view, on that basis alone is also grounds for refusing the applications in relation to those corners.

Ground Three

87. The Objector submits the Applicant has not adduced any, or any sufficient, admissible evidence that the marking out was done in compliance with the Act and Regulations in relation to four of seven prospecting licence applications (Corners 1and 2).

88. Resolution of this third ground of objection requires consideration of two issues;

a) Which party bears the onus of proof in these proceedings;

b) Whether the various forms which are required to be lodged prior to grant of a prospecting licence (and which form the basis of a grant by a Mining Registrar in the absence of objection) themselves stand as evidence of compliance with the Act and Regulations in relation to the marking out of an application for a prospecting licence which is the subject of objection.

89. In written submissions provided at the conclusion of the hearing under the heading "**Onus of Proof on the objector**" the Applicant submits that wardens have previously required an objector to provide proper proof that there was a failure to mark out properly and the Objector in the present case has "failed to discharge its burden of proof". The Applicant points to the failure by the Objector to produce any evidence of proof of a failure to mark out the applications properly and that, as there is no evidence to the contrary, the applications ought be granted.

90. The issues in relation to Ground Three concern Corners 1 and 2 although the issue about onus of proof also concerns Corner 3. Whether the various forms required to be lodged with the Registry stand as evidence of compliance with the Act and Regulations is relevant to determination of the applications in relation to Corners 1 and 2 only. That is because, putting to the side for the moment whether there is admissible evidence with sufficient weight in relation to Corners 1 and 2 arising of our Mr Stehn's evidence, the Applicant did not call witnesses or adduce any direct evidence from any of the four persons whom were actually involved in the marking out of Corners 1 and 2.

91. In support of its argument the Applicant referred to what is set out by the authors of Hunt on Mining Law of Western Australia (fifth edition) at page 207 where it is said that the courts have required an objector to provide proper proof that there was a failure to mark out properly. The Applicant refers to the case of ***Bear-Ring Bore GM v Horizon Mining Limited*** (2002) WAMW 17 where the Warden said at paragraph 58:

> *The obligation to satisfy me that the Applicant has failed to properly mark out the application rests upon the Objector.*

92. However, in my view the case is not authority for the proposition that the Objector bears an onus of proof in proceedings before a Warden to determine a prospecting licence application. The Warden goes on, at paragraph 59, to say:

> *I do not accept the evidence of the Objector that the Applicant failed to properly mark out the application. I find credible evidence from Telfer as to his method of marking out the application.*

93. In that case the Warden was commenting upon the quality, or lack thereof, of the evidence adduced by the Objector and what inferences could be drawn from it. It could not be ruled out that there had been rain which caused the rows of stones to appear as if they had been there longer or that there had been some other interference with the post. The Warden's comment that the obligation rests upon the Objector to satisfy him that the Applicant had failed to mark out the application was made in the context of a hearing where the Applicant had adduced evidence of compliance with the marking out requirement which was accepted as credible, however the Objector's evidence was not accepted. ***Bear-Ring Bore GM*** was not a case where the Applicant failed to adduce admissible evidence of compliance with the marking out requirements.

94. It is apparent from the text of the relevant provision that it is the application for the prospecting licence which is being heard. Section 42(3) of the Act states:

> *(3) Where a notice of objection —*
>
> *(a) is lodged within the prescribed time; or*
>
> *(b) is not lodged within the prescribed time but is lodged before the mining registrar has granted or refused the prospecting licence under subsection (2) and the warden is satisfied that there are reasonable grounds for late lodgment,*
>
> *and the notice of objection is not withdrawn,* ***the warden shall hear and determine the application for the prospecting licence*** *on a day appointed by the warden and may give any person who has lodged such a notice of objection an opportunity to be heard.*

95. In ***Brewer v Stubbs*** (2003) WAMW 11 Warden Calder stated (at paragraphs 31-32):

> *There is no onus on an Objector in the hearing of the application by the Warden to prove that there has not been compliance. The Objector does not have the carriage of the application even though, for practical procedural reasons, the evidence of the Objector may be heard first. It is the application for the tenement that is before the Warden and the Minister. The application is the proceeding, which is before the Warden. The*

> *objection is not a proceeding as such – it is merely an aspect of the process of tenement application and determination which causes the application to become an application that must be dealt with by the Warden before the Minister may consider it …,*
>
> *In the present case there is, in my opinion, insufficient factual material before me which is capable of supporting a conclusion, either on the basis of direct evidence or by way of inference, that the Applicant Brewer has complied with the provisions of s.105(1) of the Act and thereby established any priority entitlement pursuant to s.105A.*

96. In ***Sargentson v Brewer*** (2016) WAMW 22 Warden Maughan said (at paragraph 3):

> *The Applicant bears the burden of satisfying me that each of the prospecting licences were marked out in accordance with s.105 of the Mining Act 1978 read in conjunction with regulation 59 of the Mining Regulations 1981.*

97. Warden Maughan went on to state at paragraph 4 that:

> *…,notwithstanding that Mr Sargentson (the Applicant) bore the evidentiary onus, it was agreed between the parties that Mr Brewer (the Objector) would testify first, setting the basis of objections, such that the issues at the hearing could be narrowed.*

98. In ***Pilbara Iron Pty Ltd v BHP Billiton Minerals Pty Ltd and Ors (***2005) WAMW 25 Warden Temby stated at paragraphs 45-49:

> *45 Strict compliance with the legislation is required by the Applicant and the area rests with the Applicant. It is put by the Objector that the Applicant has not discharged that onus, that the Applicant has relied on hearsay rather than best evidence, that is, direct evidence, with regard to a number of compliance issues and in this particular instance the question of the pegging of the tenement, for example, where the pegging took place, whether or not the peg was a metre high, which is required by the legislation, that there is no evidence whether a map was attached to the Form 20, whether that was attached to the datum post at the first pegging and no evidence at all whether or not a Form 21 was subsequently affixed.*
>
> *46 The evidence of Edwards does not satisfy the proof requirements borne by the Applicant. Section 93(2) of "the Act" says:*
>
> > *"The application for the grant of the miscellaneous licence shall be made by reference to a written description of the area of land in respect of which the miscellaneous licence is sought and be accompanied by a map on which are clearly delineated the boundaries of that area."*

> *47 The Applicant's position is that the only evidence that I have has come from the Applicant. The Objector has not called any rebuttal evidence. Counsel concedes that the evidence of Edwards in regard to the Form 21 is hearsay but it is the only evidence that is before the Court.*
>
> *48 The Objector contends that the obligation of proof that the Applicant must discharge is that the mandatory considerations contained in the legislation such as pegging, Form 20 compliance and Form 21 compliance issues are before the Court and are satisfactorily so, no evidence, that is, direct evidence, has been given by Mr Cochrame or Mr Hannan in these proceedings evidencing compliance with the "papering issues" is before the Court, that the evidence therefore does not go far enough and that I cannot be satisfied on the evidence of Mr Edwards that these mandatory elements have in fact been satisfied. On the evidence before me I cannot be satisfied that the Applicant has met its evidentiary responsibilities in satisfying the Court to the requisite standards that these compliance issues have been undertaken and again I would dismiss the applications on this ground alone.*

99. As set out earlier, in the present matter no direct evidence was adduced by the Applicant from those persons marking out Corners 1 and 2, nor has the Objector adduced evidence that the marking out requirements were not complied with. In his affidavit Mr Stehn says he watched the recording of the marking out done at Corner 1 by Sullivan and Wohlers at 5pm on 9 July 2016 and observed that the process of Sullivan hitting the peg and Wohlers affixing the papers was done in half a second. At this time he also watched the recording done by Lyndal and Lily Money at Corner 2.

100. At the commencement of the hearing the Objector clarified the two issues in dispute as being whether the Applicant commenced marking out prior to the ground being open for marking out and whether the Applicant failed to correctly mark out in that it failed to correctly complete a Form 20 by inserting the actual time of marking out or actual time of completion of marking out.[8] There was no further clarification sought, nor was any given, as to whether those two grounds of objection were limited to the marking out in relation to Corner 3. There was no abandonment by the Objector of reliance upon those grounds in relation to Corners 1 and 2. The Objector noted that hitherto there had been no request for

[8] Transcript pp4-5

further and better particulars of objection sought by the Applicant. Counsel for the Applicant then advised that he was happy to proceed by way of adducing evidence and that he proposed to call only one witness, being Mr Stehn.

101. Counsel for the Objector then objected to the tender of a video recording of the marking out procedure done by those at Corner 2, referred to as APS3. As set out at paragraph 32 of these reasons the Applicant, having advised that he was not put on notice that an objection would be taken to the tender of that recording, ultimately did not rely upon it. In supplementary written submissions lodged by the Applicant in relation to ground 3 the Applicant, having abandoned reliance on the recording APS3 during the hearing, seeks to reintroduce it as a business record. The Applicant sets out in those supplementary submissions that had notice of objection to the tender of the recording been provided by the Objector then the Applicant could have adduced evidence via another witness.

102. Pursuant to Regulation 162 a party may, in the absence of objection, adduce the evidence of a witness at a hearing by tendering an affidavit of the witness. Provided it is lodged and served within a prescribed time the affidavit may be tendered in the absence of the deponent unless an objection is lodged. A party served with the affidavit may "lodge a written objection to the affidavit being tendered in the absence of the deponent".[9] In supplementary submissions the Applicant states that no notice of objection was lodged by the Objector pursuant to reg 162(4). Notably reg 162(4) refers to lodging a written objection to the affidavit being tendered "in the absence of the deponent" as opposed to the lodgement of an objection to the admissibility of a discrete part of an affidavit. The Applicant attached to their supplementary submissions a letter from the Objector to the Applicant dated 10 October 2017 which states, relevantly;

> *We refer to the Affidavit of Anthony Peter Stehn served on us by email on 31st July 2017. We also acknowledge receiving two video files. Do you propose calling any further evidence? If not, we advise that we require Mr Stehn for*

[9] Regulation 162(4)

> *cross-examination at a hearing which we propose be conducted in Kalgoorlie. If you do, then we may review the need to cross-examine Ms Stehn. It is possible that we will seek a demonstration of the claimed marking out technique.*

103. The Applicant submits in its supplementary submissions that had any notice of objection to the admissibility of the recording APS3 been given, that evidence could have been adduced by the Applicant via another witness. The Applicant submits that in the absence of notice of objection in relation to APS3 (and more widely, the absence of notice as to the issues now raised by Ground 3) it has been prejudiced by the Objector's conduct at the hearing.

104. Whether or not the recording APS3 at Corner 2 is admissible pursuant to s79C of the *Evidence Act 1906 (WA)* and whether, if it were admissible, it is capable of establishing compliance as to marking out at Corner 2, the fact remains that the Applicant was given the opportunity to consider its position when the objection was raised to the admissibility of the recording but elected to proceed without adducing further evidence.

105. At transcript page 8 I said:

> *… and it seems to me, Mr Masson, given that that issue has now been raised, the Applicant – I'm not sure precisely when you were notified of it – might seek to meet that objection – that particular, by some evidence, which might involve calling a further witness involved in that aspect of the marking out that the video 2 relates to…*

106. At transcript page 9 I advised counsel for the Applicant that before I made a ruling on the admissibility of the recording that he may wish to consider whether he might want to adduce further evidence. At page 10 counsel for the Applicant said:

> *Otherwise it would be possible to obviously deal with that evidentially through another means.*

107. At page 12 counsel for the Objector submitted that the onus was on the Applicant to prove, on the balance of probabilities, that there has been compliance and that:

> *One would have expected the evidence to be adduced properly in support of what the applicant has to prove.*

108. At page 13 I then said:

> *Given the objection to this material without particulars, there might be some prejudice occasioned to the Applicant by an inability to adduce that evidence, which leads me to whether there might be some application by the Applicant for an adjournment to remedy any potential prejudice.*

109. Then at page 14, after making reference to what is the second ground and movement of the goal posts, I said:

> *Which might require Mr Masson, if he wished to do so – and I would have to hear his application – to meet it.*

110. Then at page 17 when counsel for the Applicant confirmed that he was only advised of the objection to the recording at the hearing I said:

> *Well, do you want to take some instructions, Mr Masson, as to whether you wish to take any particular course?*

111. Then, following a short adjournment, counsel advised that the Applicant did not seek to tender the recording APS3 in relation to Corner 2 and re-affirmed his position that there "can't be a finding against the forms that have been lodged because there is no evidence to the contrary in any event".[10]

112. These exchanges reveal that the Applicant was given the opportunity to make an application to adjourn the hearing in order to adduce further evidence and so meet the objection which was made to the tender of the recording. It is apparent from the exchanges that counsel for the Objector made his position clear that it would have expected the Applicant to adduce evidence in support of the matters that it has to prove. It is equally clear that counsel for the Applicant held the view, in not seeking to call further witnesses or pursue reliance on the recording, that there can't be a finding against the forms which have been lodged by the Applicant because the Objector is not adducing any evidence to the contrary.

[10] Transcript p18

113. Procedural fairness requires a party to proceedings to have the opportunity to be heard. The exchanges reveal that the Applicant was given the opportunity to make an application to adjourn the hearing if it wished to do so. Ultimately the Applicant did not wish to do so and the hearing proceeded.

114. Regulation 159(2) sets out that an affidavit may contain statements based on information received by the person making the affidavit, and believed by that person to be true, if the affidavit contains the sources of the information and the grounds for believing that the information is true.

115. Regulation 154 sets out how hearings are to be conducted;

> *Conduct of hearings generally*
>
> *(1) In conducting any hearing the warden —*
>
> *(a) is to act with as little formality as possible; and*
>
> *(b) is bound by the rules of natural justice; and*
>
> *(c) is not bound by the rules of evidence; and*
>
> *(d) may inform himself or herself of any matter in any manner he or she considers appropriate."*

116. As to the admissibility of the video recording in relation to Corner 2 pursuant to s79C of the *Evidence Act,* section 79C(2a) states:

> *"(2a) Notwithstanding subsections (1) and (2), in any proceedings where direct oral evidence of a fact or opinion would be admissible, any statement in a document and tending to establish the fact or opinion shall, on production of the document, be admissible as evidence of that fact or opinion if —*
>
> *(a) the statement is, or directly or indirectly reproduces, or is derived from, a business record; and*
>
> *(b) the court is satisfied that the business record is a genuine business record."*

117. Even assuming for present purposes that the recording is a "business record" (as defined), on the basis that it is a "document" (as defined, which includes a record of information which embodies visual images), there remains an issue as to what statement in the document is relied upon which tends to establish a fact or an opinion which is relevant to these proceedings. I have taken the liberty of

viewing APS3. The recording is apparently taken by a third unknown person and shows one person (presumably either Lyndal or Lily Money) striking a post after another person whom, having counted to ten, then attaches something to the post immediately upon it being struck. That second person appears to be counting down whilst looking at a device which she holds in her hand. Unlike in relation to the recording taken at Corner 3, there is no visible GPS or other device in the foreground or visible in the recording, nor from the recording can it be established where the recording took place or when the images depicted in the recording took place. The recording does not tend to establish the fact that the marking out occurred before or after midnight, or that it was commenced immediately upon midnight nor that marking out was completed half a second past midnight. In its supplementary written submissions the Applicant has not set out how the recording tends to establish a fact or opinion which is relevant to the applications the subject of Corner 2.

118. Regardless of whether the recording is admissible as a business record, and I have considerable doubt that it is, there is a significant limit to the weight that can be given to the recording insofar as it tends to establish compliance, or is logically probative of there having been compliance, with the marking out requirements at Corner 2.

119. Furthermore, there would be procedural unfairness to the Objector should the recording be admitted in circumstances where, having abandoned reliance upon the recording during the hearing the Applicant seeks in supplementary submissions to reintroduce the evidence after completion of the hearing and when the Objector is unable to be heard further in relation to it.

120. That the Forms 20 and 21 in relation to Corners 1 and 2 were not tendered by the Applicant during the hearing is not, of itself, fatal to those applications in my view. They are documents received by the Department and they are documents which, absent objection, are lodged together with a Certificate of Compliance and which a Mining Registrar will have regard to in being satisfied that an

applicant has complied with the provisions of the Act, or not. In the context of proceedings pursuant to s42(3) of the Act however, in my view, those documents are not of themselves evidence of compliance with the marking out requirements set out in the Act and Regulations.

121. Notwithstanding that a warden in conducting hearings is not bound by the rules of evidence, taking the evidence of Mr Stehn at its highest in relation to Corners 1 and 2, he saw video recordings of marking out done which he says occurred in half a second. There is no basis from which it can be inferred from that evidence that the marking out occurred at or by any particular time nor at any particular place.

122. In my view the onus in these proceedings is upon the Applicant to establish compliance with the marking out requirements. That onus has not been discharged.

123. In my opinion there is insufficient factual material before me which is capable of supporting a conclusion, on the balance of probabilities, either by way of direct evidence, hearsay or inference, that the Applicant complied with the provisions of s105(1) of the Act with respect to Corners 1 and 2.

124. Accordingly I would refuse applications for Prospecting Licences 26/4209 to 26/4215.

125. There is liberty to apply with respect to costs.