JURISDICTION	:	MINING WARDEN
LOCATION	:	PERTH
CITATION	:	ANGLOGOLD ASHANTI AUSTRALIA LIMITED v MONUMENT EXPLORATION PTY LTD [2019] WAMW 13
CORAM	:	WARDEN J O'SULLIVAN
HEARD	:	13 December 2018
DELIVERED	:	14 August 2019
FILE NO/S	:	Application for Prospecting Licences 39/5875, 39/5876, & 39/5877 and Objection No.'s 532188, 532189, & 532190 Application for Prospecting Licences 39/5884, 39/5885, & 39/5886 and Objection No.'s 522347, 522348, & 522349
BETWEEN	:	**ANGLOGOLD ASHANTI AUSTRALIA LIMITED** (Applicant/Objector) AND **MONUMENT EXPLORATION PTY LTD** (Objector/Applicant)

Catchwords:	*Prospecting Licence; Marking Out Requirements; Time when Marking Out completed; Identification of Boundaries; Jurisdictional fact.*

Legislation:

- *Mining Amendment Act 1994 (WA) ss7 & 9(1)*
- *Mining Regulations (1981) (WA) regs 11, 59, 61, 64, 66 & 90*
- *Mining Act 1978 (WA) ss40, 41; 43; 44; 105, 105A*
- *Environmental Planning and Assessment Act 1979 (NSW)*
- *Threatened Species Conservation Act 1995 (NSW)*
- *National Health Act 1953 (Cth)*
- *Environment Protection (Impact of Proposals) Act 1974 (Cth)*
- *Australian Heritage Commission Act 1975 (Cth)*

Result:

1. *Upon confirmation of compliance with the Native Title Act 1993 (Cth) applications for Prospecting Licences 39/5875, 39/5876 and 39/5877 by Anglogold Ashanti Australia Limited are to be granted.*

2. *Applications for Prospecting Licences 39/5884, 39/5885 and 39/5886 by Monument Exploration Pty Ltd are refused.*

Representation:

Counsel:

Applicant/Objector	:	Mr D R Chandler
Objector/Applicant	:	Mr M F Gerus

Solicitors:

Applicant/Objector	:	Austwide Legal Pty Ltd
Objector/Applicant	:	Mining Access Legal

Cases referred to:

- ***Anglogold Ashanti Australia Ltd v White Cliff Nickel Ltd*** [2010] WAMW 9
- ***Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources*** [2007] 243 ALR 784
- ***Australia Heritage Commission v Mount Isa Mines Limited*** (1997) 187 CLR 297
- ***Colonial bank of Australasia v Willum*** (1874) 5 PC 417
- ***Commissioner of Taxation v Woodhams*** (2000) 199 CLR 370
- ***Crocker Consolidated Pty Ltd v Willie (***1988) WAR 187
- ***D M & A J Bell Pty Ltd v Motor Fuel Licensing Appeal Tribunal*** (1988) 50 SASR 39
- ***Deputy Commissioner of Taxation v Woodhams*** (2000) 199 CLR 370
- ***Ex parte Mullen***; ***Re Hood*** (1935) 35 SR (NSW) 289

- ***Forrest & Forrest v Wilson*** [2017] HCA 30
- ***Forrest & Forrest v Wilson*** [2016] WASCA 116
- ***Hunter Resources Ltd v Melville*** (1988) 164 CLR 234
- ***Mohammadi v Bethune*** [2018] WASCA 98
- ***Parisienne Basket Shoes Pty Ltd v Whyte*** (1938) 59 CLR 369
- ***Pharmacy Guild of Australia v Australian Community Pharmacy Authority*** (1996) 70 FCR 462
- ***Plaintiff M70/2011 v Minister for Immigration and Citizenship*** (2011) 244 CLR 144
- ***Project Blue Sky Inc v Australian Broadcasting Authority*** (1998) 194 CLR 355
- ***R v Federal Court of Australia; Ex parte WA National Football League*** (1979) 143 CLR 190
- ***R v Lane; Ex-parte Pard Holdings Pty Ltd; in Re Goldfan Ltd*** (1990) 2 WAR 486
- ***Re Adams v Tax Agents' Board*** (1976) 12 ALR 239 at 242
- ***Russell v The State of Western Australia*** [2011] WASCA 246
- ***Starwest Management Pty Ltd & Anor v The Director of Liquor Licencing*** [2003] WASCA 271
- ***Tasmanian Conservation Trust Inc v Minister for Resources*** (1995) 55 FCR 516
- ***The King v Commissioner of Patents: Ex parte Weiss*** (1939) 61 CLR 240
- ***Thredgold v Australian Community Pharmacy Authority***(1999) 93 FCR 465
- ***Timbarra Protection Coalition Inc v Ross Mining NL*** (1999) 46 NSWLR 55
- ***Torian Resources Limited v Kalgoorlie Ore Treatment Company Pty Ltd*** [2018] WAMW 16
- ***Viskovich v Foley*** [1998] Vol 13, Folio 20
- ***Waste Stream Management v Galea*** [2017] WAMW 2
- ***Woolworths Ltd v Pallas Newco Pty Ltd*** (2004) 61 NSWLR 707, [49]
- ***Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd*** [2010] WASCA 132

Texts:

- Applying Project Blue Sky – When Does Breach of a Statutory Requirement Affect the Validity of an Administrative Decision; G Hill; AIAL (May) 2015.
- The Resurgence of Jurisdictional Facts; M Aronson; Public Law Review – Vol 12 March 2001; 17.
- Judicial Review of Administrative Action 3rd Ed (2004); Aronson, Dyer & Groves.
- Jurisdictional Facts and Hot Facts: Legal Formalism, Legal Pluralism, and the Nature of Australian Administrative Law; E Fisher; [2015] Melbourne University Law Review 7.

Introduction

1 This matter involved the joint hearing of prospecting licence applications in relation to surveyed land lodged by Anglogold Ashanti Limited and Monument Exploration Pty Ltd and the objections each had lodged to the other's applications.

2 The parties have lodged a statement of agreed facts and issues. As a consequence there are no factual disputes. The determination of all of the objections turn on questions of statutory construction related to the procedures for marking out the ground the subject of the respective applications.

3 For present purposes the only issues in dispute concern the time at which Monument completed marking out and Anglogold's description of the boundaries of the land sought.

The Statutory Framework

4 The power to grant a prospecting licence is conferred on the mining registrar and the warden by s40 of the *Mining Act 1978 (WA).* Section 40 relevantly provides:

> "**40. Grant of prospecting licence**
>
> *(1) Subject to this Act, the mining registrar or the warden, in accordance with section 42, may, on the application of any person grant to that person a licence to be known as a prospecting licence which shall be subject to such conditions as are prescribed or are imposed pursuant to section 24, 24A or 25 or are specified in the licence.*
>
> *(2) The area of land in respect of which any one prospecting licence may be granted shall not exceed 200 ha.*
>
> *(3) A person may be granted more than one prospecting licence."*

5 Section 41 of the *Mining Act* deals with the requirements for an application for a prospecting licence:

> "**41. Application for prospecting licence**
>
> *(1) An application for a prospecting licence —*

> ***(a) shall be made in the prescribed form[1]; and***
>
> *(b) shall be accompanied by the amount of the prescribed rent for the first year or portion thereof as prescribed; and*
>
> *(c) shall be made by reference to a written description of the area of land in respect of which the licence is sought, and be accompanied by a map on which are clearly delineated the boundaries of that area; and*
>
> *[(d) deleted]*
>
> *(e) shall be lodged in the prescribed manner; and*
>
> *(f) shall be accompanied by the prescribed application fee.*
>
> *(emphasis added)*

6 Section 42 sets out how applications for prospecting licences are to be determined. Where an objection is lodged, the warden is to hear and determine the application for a prospecting licence and may give the objector an opportunity to be heard. Where no objection is lodged or it is withdrawn, the mining registrar may grant the prospecting licence if satisfied that the applicant has complied in all respects with the provisions of the *Mining Act* or refuse it if not satisfied.

7 Section 105(1) of the *Mining Act* deals with marking out:

> "**105. Marking out of mining tenement**
>
> *(1)* ***Before an application for a mining tenement other than an exploration licence, a retention licence or a miscellaneous licence 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,*** *and for the purpose of any claim for compensation for loss or damage suffered or likely to be suffered resulting or arising therefrom under section 123, or for an order under section 124(2), the activities involved in the marking out shall be taken to be activities relating to prospecting and, as such, to constitute mining."*
>
> *(emphasis added)*

8 The issue of priority between those applying for a prospecting licence over the same or part of the same ground is dealt with in s105A. Subject to an exception

[1] The prescribed form is a Form 21.

not presently relevant, the applicant who first complies with the initial requirement in relation to his or her application has, subject to the Act, the right of priority over every other applicant to have his or her prospecting licence granted.

9 Where two or more applicants have complied with the initial requirement in relation to their application at the same time or within the prescribed period, unless there is a written agreement between the applicants, priority is determined by way of a ballot (see s105A(3)).

10 For the purposes of s105A a reference to compliance with the initial requirement in relation to an application for a prospecting licence is a reference, subject to some presently immaterial exceptions, to marking out the land concerned in the prescribed manner (see s105A(4)(b)(i)).

11 Regulation 11 of the *Mining Regulations 1981 (WA)* requires that an applicant for a prospecting licence shall comply with the regulations in Part V as to marking out and applying for the licence.

12 Regulation 59 specifies the manner of marking out:

> "**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."

(emphasis added)

13 As is made clear by s59(1)(c) the final act of marking out involves affixing to the datum post a notice of marking out in the form of a Form 20.

14 Regulation 61 provides an abbreviated method of marking out in relation to 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;

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

15 Because the survey identifies the boundaries of land the subject of the application, those marking out the land simply adopt the description of the land in the survey and are not required to fix a post at each corner of the land.

16 Regulation 61 contemplates two scenarios. First, where there are no survey marks delineating the surveyed land, a datum post is to be fixed in the ground at a corner of the boundaries (see reg 61(a)).

17 Second, if an existing survey mark is already in place at a corner of the boundaries, then the datum post should be fixed as close as practicable to the survey mark.

18 It is apposite to observe that in the scenario envisaged by reg 61(a), the boundaries would not be identifiable on the ground by locating the survey marks. Thus the boundaries of the surveyed land referred to in the Form 20 could only be located by reference to a map or GPS co-ordinates.

19 Regulation 64 provides that an application for a mining tenement (which includes a prospecting licence) shall be in the form of a Form 21.

20 Regulation 66 is headed "Description of boundaries" and provides that the boundaries of every mining tenement applied for, other than an exploration licence, shall be described from either –

(a) An existing survey mark; or

(b) A prominent ground feature shown on the public plans of the Department; or

(c) Latitude and longitude; or

(d) Map Grid of Australia 1994 co-ordinates.

21 Regulation 90 requires that a form prescribed by these regulations shall be completed in accordance with such directions as are specified in the form as is so prescribed.

22 A Form 20 is headed: "NOTICE OF MARKING OUT (to be fixed to Datum Post to complete marking out)".

Item (a) refers to the name of the applicant.

Item (b) requires the identification of the type of tenement applied for. It is followed by the words: "and the following is a description of the ground being

applied for (this description is to be identical to that included in Form 21 – Application For A Mining Tenement – when lodged)".

It is followed by the following items directed to providing particulars of the ground applied for;

(c) Locality;

(d) Datum peg

(e) Description of boundaries

(f) Area (hectares)

The Form 20 further provides the "marking out was completed by fixing this notice to the Datum Post at:

(g) Time and date marking out completed (g)..... M. on the ..... day of 20...."

The Monument Applications

The Agreed Facts

23 On 18 December 2017 Monument marked out and on 21 December 2017 applied for PLA's 39/5884-6.

24 The Monument applications were marked out by Michael John Mulcahy and relate to land previously comprising P39/5351-3 held by Razbel Pty Ltd which expired at 23.59.59 on 17 December 2017.

25 There is an existing survey mark from former mineral claims MC 39/2216F, MC 39 2217F and MC 39/1752 F.

26 Prior to 23:59 on 17 December 2017, Mr Mulcahy pre-prepared a Form 20 in respect of each of the Monument applications except for the entries for item (g) (time and date marking out completed).

27 Each Form 20 sought the identical surveyed land comprising previously surveyed mineral claims MC 2216F, MC 2217F and MC 1752F

28 The Form 20s were folded and put into a piece of PVC tube and placed over the datum post in such a manner so that the Form 20s were not yet affixed to the datum post.

29 Upon the land becoming "open for mining" in accordance with s18 of the *Mining Act* at midnight on 18 December 2017, Mr Mulcahy hammered the datum post firmly into the ground.

30 Upon the datum post being firmly fixed in the ground, an elastic band around the PVC pipe tube containing the Form 20 for each of the Monument applications was released and the PVC pipe, together with the Form 20, was affixed to the datum post.

31 Mr Mulcahy noted that the datum post was appropriately fixed in the ground with the three Form 20s at 00:00:06 on 18 December 2017, however, he did not complete item (g) on the Form 20s until 00:25:00 on 18 December 2017.

32 When Mr Mulcahy returned to the datum post he noticed the Form 20s in the possession of Phillip Heyhoe (Anglogold's representative). The Form 20s were returned to Mr Mulcahy. When completing item (g) on each of the Form 20s at 00:25:00 on 18 December 2017, Mr Mulcahy recorded the time of marking out as 00:00:06 on 18 December 2017.

Were the Monument applications marked out in the prescribed manner?

33 For the purpose of considering whether Monument applications were compliant it is important to appreciate the marking out was completed in two stages.

Although the Form 20s were affixed to the datum post at 00:00:06 on 18 December 2017, item (g) on the Form 20s was not completed at that time.

34 The second stage involved Mr Mulcahy returning to the datum post and at 00:25:00 of 18 December 2017 and recording in item (g) that marking out was completed at 00:00:06 on 18 December 2017.

35 Any person reading the Form 20s immediately after they were affixed to the datum post at 00:00:06 of 18 December 2017 would either have concluded that marking out was not completed or would not have known the time or date marking out was said to have been completed.

36 It follows that any person who read the Form 20s after 00:25:00 on 18 December 2017 (when Mr Mulcahy returned to the datum post) would not have known that the time and date was entered in item (g) at 00:25:00 on 18 December 2017 not 00:00:06 on 18 December 2017 as the Form 20s record.

37 The central question arising from the agreed facts is whether the Monument applications complied with the initial requirement in that the land was marked out in the prescribed manner (see s105A(4)(b)).

38 Monument argues that neither regs 59 nor 61 prescribe that a Form 20 must be fully completed before it is affixed to the datum post.[2]

39 Monument says further, that the time of marking out was 00:00:06 on 18 December 2017, when the datum post with the Form 20s affixed was hammered into the ground, not when the time and date was entered in item (g) on the Form 20s.

40 It follows, according to Monument, that marking out is complete and thereby the initial requirement has been complied with as at the time the datum post with the

[2] Monument's written submissions; 27 November 2018 at [36]

Form 20s affixed is fixed to the ground, even though the time and date has not yet been recorded in item (g) on the Form 20.

41 The principles of statutory construction have been summarised by the Court of Appeal in ***Mohammadi v Bethune.***[3] I adopt those principles without repeating them.

42 In my view, the construction advanced by Monument must be rejected for the following reasons.

43 First, the language used in the *Mining Act* and *Mining Regulations* supports the conclusion that marking out is not completed until the datum post is firmly fixed in the ground with the Form 20 affixed to the datum post with, inter alia, the time and date entered on the Form 20 as directed by item (g).

44 ***Hunter Resources Ltd v Melville***[4] concerned an application for a prospecting licence. The respondent conceded it had intervals in excess of 300 metres between pegs despite the legislation requiring that pegs be fixed in the ground at intervals not exceeding 300 metres along each boundary. The High Court held by majority (Wilson, Dawson & Toohey JJ) that the failure to comply with the requirement that pegs not exceed 300 metres apart rendered the application invalid.

45 As Wilson J observed in ***Hunter Resources Ltd:***[5]

> *"[s]ection 105 of the Act is mandatory in its terms. The applicant shall mark out the land in the prescribed manner and he shall do it before he applies for the licence."*

46 The "prescribed manner" referred to in s105 is a reference to regs 59 and 61. It includes "fixing … a datum post to which the notice of marking out in the form of a Form 20 is affixed.

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[3] [2018] WASCA 98 at [31]-[36]
[4] (1988) 164 CLR 234
[5] At 245

47 Wilson J[6] noted that the requirements of s105(1) necessarily imports the requirements of reg 59 and it is not possible to speak of the latter being subordinate to the former in the sense that there might be substantial compliance with s105(1) despite non-compliance with reg 59.

48 Regulation 11 provides that an applicant for a prospecting licence shall comply with the regulations in Part V (General Regulations) as to marking out.

49 Part V includes regs 59 and 61. Importantly, it also includes reg 90 which stipulates that a Form 20 shall be completed in accordance with the directions specified in the form.

50 The Form 20 directs that "*marking out was completed by fixing this notice to the datum post at the time and date marking out was completed.*"

51 The final act of marking out envisioned by reg 59(1)(c) is the firmly fixing to the datum post, notice of marking out in the form of Form 20. Sensibly, a Form 20 must be completed according to the directions in the form, lest it serves no purpose. The legislature can hardly have intended that the initial requirement had been met by attaching a Form 20 to the datum post that did not specify, in accordance with item (g), the time and date at which marking out had been completed.

52 Second, the construction for which Monument contends is not consistent with the objects and policy of the *Mining Act*.

53 In considering whether substantial compliance was sufficient, Dawson J in ***Hunter Resources***,[7] made the following observations about the policy of the *Mining Act*:

> *"It is apparent from other decisions of the Warden that in some areas of Western Australia there is fierce competition for mining tenements. More than one application may be received in respect of the same ground. Under s105A of the Act the applicant who first marks out the land in the prescribed*

[6] At 250
[7] At 252

manner has priority. The only practical course is for the Warden to deal first with the application which, on the face of it, is first in time. If (assuming it to be possible notwithstanding the wording of the regulation) substantial compliance with the marking out requirements were sufficient, then an application which was first in time because short cuts were taken in marking out might achieve priority over an application which was made later because of the delay involved in complying strictly with the requirements. Moreover, (again assuming it to be possible) if substantial compliance with the requirement in question were sufficient, it is likely the Warden would be led by necessity to fix some limit over 300 metres beyond which compliance would not be substantial. That would effectively establish a new maximum distance, greater than that clearly set by the legislature. Yet until some such limit was fixed there could be uncertainty about the extent of substantial compliance.

On the other hand, little, if any convenience would result from insistence upon a strict compliance with the marking out requirements. The specified interval of 300 metres between pegs is a maximum distance so that any difficulty in achieving precision might be overcome by erring on the side of caution. This would enable an applicant to achieve practical certainty in an area of endeavour where certainty is highly desirable."

54 These passages from ***Hunter Resources*** are instructive. In an industry where there is competition for tenements and priority is determined on the basis of who is first to comply with the initial requirement, the time at which marking out is completed can prove critical.

55 As occurred in this case marking out commonly occurs immediately after midnight when land becomes open for mining.

56 Any prospective applicant wanting to or having marked out the land who wants to know if it is first in time, would not be able to ascertain when its competitor completed marking out in the absence of item (g) being completed on the Form 20. [8]

57 Furthermore, given seconds can prove significant when marking out occurs, if compliance with the marking out requirements is achieved notwithstanding the fact item (g) has not been completed, an application which was first in time because short cuts were taken might secure priority over an application which

[8] ***Torian Resources Limited v Kalgoorlie Ore Treatment Company Pty Ltd*** [2018] WAMW 16 [84]

was made later because of the delay involved in complying strictly with the requirements (ie entering the time and date in item (g)).

58 Monument also rely on ***Viskovich v Foley***[9] wherein Warden Calder discussed recording the time marking out was completed by entering the time in item (g) before the Form 20 is affixed to the datum post or alternatively filling in item (g) once the Form 20 is affixed to the datum post, when (according to his Honour) neither option is entirely consistent with the directions provided in the Form 20.

59 Ultimately, Warden Calder concluded that whether the Form 20 with items (a) to (d) completed is affixed to the datum post and then items (e)[10] and (f) are completed or paragraph (a) to (f) are completed before the Form 20 is fixed to the post, compliance with reg 59(1)(c) will have been achieved as long as there is a very close temporal connection between the completion of paragraph (e) and the fixing of the Form 20 to the datum post. His Honour did not nominate a specific time frame.

60 Monument argues that a "very close temporal connection" exists in this case because the time that elapsed between the Form 20 being affixed to the datum post and the completion of paragraph (g) did not affect the integrity of the record.

61 In my view, ***Viscovich v Foley*** does not assist Monument.

62 First, even adopting the "very close temporal connection" test, from a practical perspective whatever may be the logistics of completing item (g) on the Form 20 and affixing it to the datum post, it would not take nearly 25 minutes to complete the task.

63 Second, as was observed by Dawson J in ***Hunter Resources***,[11] if substantial compliance was deemed sufficient, it is likely the warden would be led by necessity to fix some limit over 300 metres beyond which compliance would not

[9] [1998] Vol 13, Folio 20 at 36
[10] At the time, the time marking out was completed was recorded in item (e) on the Form 20.
[11] At 252

be substantial. That would effectively establish a new maximum distance, greater than that set by the legislation. Yet until some such limit was fixed there would be uncertainty about the extent of substantial compliance.

64 Similar uncertainty would arise concerning the time of marking out. If a very close temporal connection is sufficient to constitute substantial compliance, how close is close enough?

65 Third, whatever may be the infelicities in language used in the Form 20 and the practical problems associated with entering the time of marking out on a form that must be affixed to the datum post, any difficulty can be overcome by erring on the side of caution as was suggested by Dawson J in ***Hunter Resources***.[12] Nothing in the legislation requires the time of marking out to be specified to half a second.[13]

66 This, as his Honour points out, would enable an applicant to achieve practical certainty in an area of endeavour where certainty is highly desirable. In reality little, if any inconvenience would result from insistence that item (g) record when all the requirements of marking out had actually been completed.

67 Whether the Form 20 is completed in advance or at the time of marking out, what is important is that item (g) not record marking out had been completed before it was in fact completed, as occurred in this case.

68 Monument further contends that the misdescription as to the time did not mean there had been a failure to comply with the marking out requirements.

69 Reliance is placed by Monument on two authorities.

70 In ***Waste Stream Management v Galea*** [14] objection was taken to a Form 20 that had been pre-drafted, including as to the time at which marking out was completed. There existed an inconsistency between the estimated time endorsed

[12] At 252
[13] See for example ***Torien Resources Limited v Kalgoorlie Ore Treatment Company Pty Ltd*** [2018] WAMW 16 nat [43]
[14] [2017] WAMW 2

on the Form 20 and the actual time of marking out. Importantly, however, the actual time of marking out was 10.30 am whereas the time endorsed on the Form 20 was 11:00 am. As Warden Zempilas observed in recommending the grant of the application for a mining lease, to the extent the estimate as to time was inaccurate, it did not advantage the applicant.

71 ***Galea*** can be readily distinguished. In this case the failure to record the correct time was to Monument's advantage.

72 In ***R v Lane; Ex-parte Pard Holdings Pty Ltd; in Re Goldfan Ltd (Pard Holdings)*** [15] the Full Court of Western Australia upheld a decision of the warden to grant a miscellaneous licence despite the description of one of the boundaries in the Form 20 being some 10° out. There was no suggestion that the tenement was not "marked out" in the sense of defining the area of the land in question.

73 The Full Court distinguished ***Hunter Resources,*** concluding that the error or misdescription did not constitute a failure to comply with the marking out requirements. In ***Hunter Resources*** the legislation was very prescriptive in requiring that pegs be no more than 300 metres apart. Whereas, in ***Pard Holdings*** additional context had to be given to the words "Description of Boundaries" in the Form 20 in order to determine precisely what degree of accuracy was intended.[16]

74 Ipp J[17] remarked:

> *"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 the length of the boundaries – is not required.*

[15] (1990) 2 WAR 486 at 490
[16] At 495
[17] At 495-496

> *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 of the area concerned' 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 to the datum post, to determine where the boundaries lie."*

75 While the requirement to comply with s105 is expressed in mandatory terms as is the requirement in reg 59(1)(c), what constitutes a Form 20 that complies with the directions therein depends on the language of the particular direction.

76 As Ipp J observed in ***Pard Holdings***, at that time not every item in the Form 20 was expressed as demanding the same exactitude. The same observation can be made in relation to the various requirements of marking out set down in reg 59(1).

77 A similar observation was made by Dawson J in ***Hunter Resources***:[18]

> *"Had reg 59 required the intervals to be 300 metres in length, then it is perfectly conceivable that there might have been substantial compliance with the requirement. But it did not. It prescribed a maximum length – a limit – which was either observed or was not."*

78 In my view, ***Pard Holdings*** does not assist Monument for two reasons.

79 First, the error in describing the boundary in ***Pard Holdings*** occurred in circumstances where the Form 20 required only that the approximate area[19] be included. The requirement to record the time and date of marking out in item (g) is not expressed in the same indeterminate language.

80 Second, in ***Pard Holdings*** the Form 20 was accompanied by a map of the area that contained an accurate description of the boundaries. Bearing in mind the object of the Form 20 is to, inter alia, inform any interested person as to the

[18] At 249

[19] The Form 20 was amended (see the Government Gazette; 9 November 2012; 5428) by removing the word approximate.

boundaries of the land, that objective was achieved, hence the Court of Appeal held the marking out requirements had been met.

81 The object of item (g) on the Form 20 is to inform any interested person when marking out was completed bearing in mind priority is afforded to the first party to comply with the initial requirement.

82 As I have already explained any person reading the Form 20s after 00:00:06 on 18 December 2017 would not have known what day let alone what time marking out it was completed. On the other hand, any person reading the Form 20s after 00:25:00 on 18 December 2017 would have been misled into believing marking out was completed at 00:00:06 of 18 December 2017. Thus, in my view, the failure to initially include any date or time followed by the inclusion of an incorrect time, in the circumstances of this case, constitutes a failure to comply with the marking out requirements.

83 Finally, Monument argues that in the event marking out is completed only when the time of marking out is entered in item (g) on the Form 20, then marking out was completed by Mr Mulcahy at 00:25:00 on 18 December 2017 when he completed filling out the Form 20s.

84 Had Monument entered "00:25:00 on 18 December 2017" in item (g) on the Form 20s, I would agree.

85 However, at 00:25:00 on 18 December 2017, Mr Mulcahy entered "00:00:06 on 18 December 2017" in item (g) on the Form 20s. This did not accurately reflect when the Form 20 was completed and affixed to the datum post.

86 In ***Deputy Commissioner of Taxation v Woodhams***[20] the High Court said:

> *"It is the legislative purpose to be served by the giving of a ... notice that determines the nature and extent of the information necessary to satisfy the requirement to set out details ... Absence of information will involve a failure*

[20] (2000) 199 CLR 370 at 384

to provide necessary details if, without such information, the notice will not fulfil the purpose for which it is required to be given."

87 It is difficult to reconcile how a Form 20 that includes the wrong time as to when marking out was completed can be said to have fulfilled its purpose, which is, in part, to determine priority which depends on when the initial requirement (marking out in the prescribed manner) was completed.

88 The importance of accurately completing the time marking out was completed on the Form 20 is also reinforced by reg 74:

> *"A person who posts up a false document or notice affecting a mining tenement or an application therefore with the intent to deceive or mislead any other person commits an offence."*

Determining the consequences of non-compliance?

89 In the event that Monument has not complied with the marking out requirements, the next question is what is the effect of non-compliance with the requirements?

90 When analysing issues concerning the validity of an exercise of power it is necessary to distinguish between a pre-condition to the exercise of a power (or jurisdictional fact) and a condition regulating the exercise of a power. The former is an essential preliminary or condition precedent to the exercise of the jurisdiction, authority or power to act. The failure to comply with a pre-condition to the existence of a power must always result in invalidity, however minor or technical.[21]

91 If the marking out requirements are not conditions precedent to the existence of the warden's jurisdiction, they would be conditions of the exercise of the power which may, but must not, result in invalidity. The delays, cost and other prejudice is relevant to both issues.[22]

[21] ***Russell v The State of Western Australia*** [2011] WASCA 246 at [28]; ***Forrest & Forrest Pty Ltd v Wilson*** [2016] WASCA 116 at [29] & [40] per McLure P (with whom Newnes & Murphy JJA agreed)

[22] ***Forrest & Forrest Pty Ltd v Wilson*** [2016] WASCA 116 at [30] per McLure P (with whom Newnes & Murphy JJA agreed)

92 The relevant test is that set down by the majority of the High Court in ***Project Blue Sky Inc v Australian Broadcasting Authority.***[23]

> *"An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment ... There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.*
>
> *Traditionally, the courts have distinguished between acts done in breach of an essential preliminary to the exercise of a statutory power or authority and acts done in breach of a procedural condition for the exercise of a statutory power or authority. Cases falling within the first category are regarded as going to the jurisdiction of the person or body exercising the power or authority. Compliance with the condition is regarded as mandatory, and failure to comply with the condition will result in the invalidity of the act done in breach of the condition. Cases falling within the second category are traditionally classified as directory rather than mandatory."*
>
> *(footnotes omitted)*

93 The usual difficulties in ascertaining legislative intention are magnified in this context. Very often the courts are required to impute a legislative intention to a Parliament that has not addressed the issue.[24]

94 The constructional exercise is frequently one of considerable difficulty. The authorities yield no general rule and are quite irreconcilable upon any general principle.[25] Rarely is the issue straightforward.[26] As will become apparent this case is no exception.

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[23] (1998) 194 CLR 355 at [91]

[24] Applying Project Blue Sky – When Does Breach of a Statutory Requirement Affect the Validity of an Administrative Decision; G Hill; AIAL (May) 2015; 2.

[25] ***Ex parte Mullen; Re Hood*** (1935) 35 SR (NSW) 289 per Jordan CJ at 298 & 300.

[26] ***D M & A J Bell Pty Ltd v Motor Fuel Licensing Appeal Tribunal*** (1988) 50 SASR 39 per King CJ at 64 (see generally; The Resurgence of Jurisdictional Facts; M Aronson; Public Law Review – Vol 12 March 2001; 17 at 31

95 In addition, since the High Court's decision in ***Forrest & Forrest v Wilson***[27] the question as to the extent to which the principles elucidated therein apply to marking out and other licences is yet to be resolved.

96 Not surprisingly both parties adopted opposing positions on the question of whether compliance with s105 is a jurisdiction fact, with neither party making detailed submissions. Nonetheless, the issue having been raised as Brennan J said in ***Re Adams v Tax Agents' Board*** [28]:

> *"An administrative body with limited authority is bound, of course, to observe those limits. Although it cannot judicially pronounce upon the limits, its duty not to exceed the authority conferred by law upon it implies a competence to consider the legal limits of that authority, in order that it may appropriately mould its conduct. In discharging its duty, the administrative body will, as part of its function, form an opinion as to the limits of its own authority."*

97 The answer to this question also has important implications for the parties. In the event the mining registrar or warden has jurisdiction to determine an application for a prospecting licence and it is refused, the applicant has a right of appeal to the Minister.[29] However, judicial review is not available if the mining registrar or warden simply makes a wrong finding of fact.

98 If, however, the provision has not been complied with and compliance is a pre-condition to the exercise of jurisdiction, neither the mining registrar nor the warden are empowered to further hear the application. The mining registrar or warden, not having heard and rejected the application, the applicant has no right of appeal.

99 Of course, if the mining registrar or warden makes a wrong decision as to the existence or non-existence of jurisdiction, judicial review will lie. [30] In that case the Supreme Court will decide for itself whether the provision is a jurisdictional

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[27] [2017] HCA 30
[28] (1976) 12 ALR 239 at 242
[29] See s56 *Mining Act*
[30] ***The King v Commissioner of Patents: Ex parte Weiss*** (1939) 61 CLR 240 at 256

fact. A consequence of finding that a particular fact is a jurisdictional fact is that the Supreme Court can re-open the factual inquiry and hear evidence on it.[31]

Searching for indicators of legislative intent

100 The starting point in looking for signs of legislative intent is neatly summarised by Professor Aronson:[32]

> *"It is not enough that the Act indicate that a particular fact's existence is critical, nor that that the decision-maker can, or even must, 'determine' it, nor even that the power in question is conditional upon the fact's existence. To make the fact jurisdictional the Act must do two things. First, it must condition the power on the fact's existence and, second, it must condition the validity of the decision-maker's act or conduct upon that existence."*

101 A jurisdictional fact is a fact so essential to the power of an administrative decision-maker that the decision-maker can only exercise the power if that fact exists.[33] In this sense the existence of the face enlivens the power of the decision-maker.[34]

102 In addition to being essential, the fact needs to be legally antecedent to a decision-maker exercising their power. For a fact to take on this role it needs to be clearly identifiable and objective – discrete criteria that can be identified and thus the application of them policed. [35]

103 As Spigelman CJ observed in ***Woolworths Ltd v Pallas Newco Pty Ltd*** [36]:

> *"A factual reference that is appropriately characterised as preliminary or ancillary to the decision-making process or which is, in some other manner, extrinsic to the facts and matters necessary to be considered in the exercise of the substantive decision-making process itself, is a reference of a character that the Parliament intended to exist objectively."*

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[31] ***Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources*** [2007] 243 ALR 784 at [59]
[32] The Resurgence of Jurisdictional Facts; Public Law Review – March 2001;Vol 12, 17 at 31
[33] ***Timbarra Protection Coalition Inc v Ross Mining*** NLGP (1996) 46 NSWLR 55, [37] Spigelman CJ
[34] ***Corporation of the City of Enfield v Development Assessment Commission*** (2000) 199 CLR 135; [28]; Gleeson CJ, Gummow Kirby and Hayne JJ; see generally Jurisdictional Facts and Hot Facts: Legal Formalism, Legal Pluralism, and the Nature of Australian Administrative Law; E Fisher; [2015] Melbourne University Law Review 7; 7
[35] Jurisdictional Facts and Hot Facts, Legal Formalism, Legal Pluralism, and the Native of Australian Administrative Law; E Fisher; [2015] Melbourne University Law Review 7; 9
[36] (2004) 61 NSWLR 707, [49]

104 An objective fact is said to be one that has an objective existence as opposed to a subjective existence according to the opinion or satisfaction of the decision-maker.[37]

105 A review of the authorities reveals there are a number of indicators of legislative intention none of which are dispositive.

106 In ***Timbarra Protection Coalition Inc v Ross Mining NL*** the question was whether a species impact statement should have been included in a development application. The question turned on whether the development was "likely to significantly affect threatened species" in accordance with s77(3)(d1) of the *Environmental Planning and Assessment Act 1979 (NSW).* According to Spigelman CJ:[38]

> *"The authorities suggest that an important and usually determinative indication of parliamentary intention, is whether the relevant factual reference occurs in the statutory formulation of a power to be exercised or necessarily arises in the course of the consideration by that decision-maker of the exercise of such a power. Such a factual reference is unlikely to be a jurisdictional fact. The conclusion is likely to be different if the factual reference is preliminary or ancillary to the exercise of the statutory power."*

107 In holding that s77(3)(d1) is a jurisdictional fact Spigelman CJ [39] observed that s77 does not involve, either explicitly or implicitly, the exercise of any statutory power by a consent authority. Section 77 is directed to the making of development applications by applicants not the making of the decisions by a consent authority.

108 Spigelman CJ [40] went on to observe that:

> *"The making of an application by an applicant is preliminary to and quite distinct from the process of 'determination' by the consent authority. A factual reference in a statutory formulation relating to the instigation of a statutory decision-making process, is more likely, in my opinion, by reason of its extrinsic nature, to turn on an objective fact, than is a factual reference*

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[37] Judicial Review of Administrative Action 3rd Ed (2004); Aronson, Dyer & Groves at 228
[38] ***Timbarra Protection Coalition Inc. v Ross Mining NL*** (1996) 46 NSWLR 55 per Spigelman CJ at [44] (with whom Mason P & Meagher JA agreed)
[39] At [48]
[40] At [50]

arising in, or in relation to, the conduct of the decision-making process itself."

109 Particular reference is made by Spigelman CJ [41] to the fact that where the section applies to "critical habitat", no issue arises as to how the matter appears to the consent authority. A "critical habitat" has by s4(1) of the *Environmental Planning and Assessment Act* the same meaning as in the *Threatened Species Conservation Act 1995 (NSW)*. Critical habitat under that Act is declared under Part 3 after an elaborate decision-making process. As a consequence no issue of appearance or opinion or satisfaction can arise in this respect. Whether or not a development is proposed to occur on critical habitat is entirely a matter of objective fact.

110 As Professor Aronson[42] points out some of the authorities focus less on the objective or subjective drafting of the factual requirement, as on the nature of the facts required. If they contain a significant evaluative component, this is said to point against their being jurisdictional.

111 As Fisher notes the need to determine that a fact exists does not stop it being jurisdictional but the more complex a fact, the less likely it is to be so.[43]

112 In ***Thredgold v Australian Community Pharmacy Authority***[44] a Commonwealth Scheme for subsidising pharmacies was rationalised under the *National Health Act 1953 (Cth)* ("the NHA") directed to reducing the overall number of accredited pharmacies, whilst ensuring that they remained adequately dispersed geographically.

113 Rules made under s90 of the NHA provided that approval to relocate must be recommended by the Australian Community Pharmacy Authority where the

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[41] At [62]

[42] Judicial Review of Administrative Action 3rd Ed (2004); Aronson, Dyer & Groves at 233

[43] Jurisdictional Facts and Hot Facts: Legal Formalism, Legal Pluralism, and the Nature of Australian Administrative Law; E Fisher; [2015] Melbourne University Law Review 7; 7; see also ***Plaintiff M70/2011 v Minister for Immigration and Citizenship*** (2011) 244 CLR 144; [57] French CJ; and ***Woolworths Ltd v Pallas Newco*** (2004) 61 NSWLR 707; [53]-[59] Spigelman CJ

[44] (1999) 93 FCR 465

applicant is already an approved supplier, has a legal right to occupy the proposed premises and those premises:

> *"are situated not more than one kilometre, measured door to door by the shortest lawful access route, from the premises in respect of which the pharmacist is currently approved ..."*

114 It was submitted that the Authority lacked jurisdiction to make its recommendation because such a recommendation was contingent as a matter of fact on the relevant distance being less than 1km. The fact that the Authority made a finding that the distance was less than 1km was said to be irrelevant if, in reality, the distance was greater. Importantly, the distance was expressed in terms of the shortest lawful access route, a concept requiring some degree of evaluation.[45]

115 O'Loughlin J held that this was a clear example of a fact finding tribunal being entrusted with the responsibility of satisfying itself about various issues, one of which being the issue of distance, and that it would not be appropriate to describe the Authority's task as being empowered to make its recommendation contingent upon the actual existence of a state of facts. Such a proposition would leave unanswered how one would ascertain the relevant fact. O'Loughlin J agreed with the observation of Branson J in ***Pharmacy Guild of Australia v Australian Community Pharmacy Authority***[46] that jurisdiction to consider an application and to make a recommendation is not by the Act made subject to the existence of any fact other than the existence of the application.

116 It was the lodging of the appropriate applications by National Pharmacies that gave the Authority jurisdiction to consider whether it would recommend approval. The question of the distance between two doorways was then a matter of evidence upon which the authority was to make a determination.

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[45] The Resurgence of Jurisdictional Fact; M Aronson; Public Law Review – March 2001 - Vol 12, 17 at 34
[46] (1996) 70 FCR 462

117 Another frequently cited interpretive factor is whether the relevant Act expects or requires the decision maker to determine the (purported) jurisdictional fact for itself. If it does, this suggests the fact is not jurisdictional.[47]

118 ***Tasmanian Conservation Trust Inc v Minister for Resources***[48] concerned whether the Minister in granting a licence to export up to 200,000 tonnes of woodchips and in principle approval to export a further 200,000 tonnes subject to the issue of annual export licences, failed to comply with the requirements of the Administrative Procedures made pursuant to the *Environment Protection (Impact of Proposals) Act 1974 (Cth)*.

119 A question arose as to whether the obligation on the Minister to designate a proponent in accordance with para 1.2.1 of the Administrative Procedures arises only if the proposed action, as a matter of fact, affects the environment to a significant extent.

120 The alternative view, is that it was for the Minister to determine that question and therefore it is not a jurisdictional fact.

121 Although para 1.2.1 did not specify that a proposed action affects the environment in the opinion of the Minister, Sackville J[49] concluded that the structure and language the *EP Act* and the Administrative Procedures did not compel the conclusion that the Administrative Procedures were intended to apply whenever the objective facts established that the proposed action affects the environment to a significant extent, as distinct from when the Minister makes a determination that the environment would be affected.

122 Sackville J[50] remarked that the jurisdictional fact approach would create practical difficulties. In the event the Minister determined that a proposal does not affect the environment to a significant extent but overlooks relevant material, the

[47] The Resurgence of Jurisdictional Fact; M Aronson; Public Law Review – March 2001 - Vol 12, 17 at 34
[48] (1995) 55 FCR 516
[49] At 538
[50] At 539

determination could be successfully challenged only by adducing evidence objectively establishing that the proposal does have that effect:

> *"Such proceedings might be prolonged and complex and canvass in a judicial forum the very question for which the Administrative Procedures specifically establish processes."*

123 In ***The King v Commissioner of Patents; Ex parte Weiss*** [51] the High Court examined whether the Commissioner had power to hear and determine a notice of opposition to the registration of a patent which was lodged in the name of a firm and not a person and thereby required amendment. The High Court rejected the contention that the existence of a valid notice was a condition precedent.

124 Latham CJ[52] observed by way of example that when a court is empowered to impose a penalty for an assault, the court has to determine the question as to whether there has been an assault, but it is a mistake to say that the actual objective happening of an assault is a condition of jurisdiction of the court to impose a penalty.

125 His Honour[53] went on to remark:

> *"... where a court which or a person who is required to act judicially is authorised to hear and decide a case, the whole matter of 'the case' is submitted for the consideration of the court or person."*

126 Ultimately Latham CJ[54] concluded that where an objection is taken that no notice of opposition has been given, the Commissioner decides upon that objection as he decides upon any other question that arises in the opposition.

127 Similar observations were made by Starke J.[55] A statute may provide that if a certain state of facts exists a tribunal shall have jurisdiction not otherwise. In that case the tribunal cannot conclusively decide whether that state of facts exists or not. On the other hand, the statute may entrust the tribunal with a jurisdiction

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[51] [1939] 61 CLR 240
[52] At 249
[53] At 249
[54] At 250
[55] At 256

which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further.

128 His Honour[56] said:

> *"In such a case it is an erroneous application of formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist because the legislation gave them jurisdiction to determine all the facts ... and if they were given jurisdiction so to decide then there is no excess of jurisdiction."*

129 Evatt J[57] held that to treat the lodgement of a valid notice of objection as a condition precedent to the exercise of jurisdiction would involve the Commissioner determining in advance that which he or she is required to determine in hearing and deciding the case.

130 In ***Australia Heritage Commission v Mount Isa Mines Limited***[58] the High Court considered s23(1) of the *Australian Heritage Commission Act 1975 (Cth)* which required the Commission to enter a place in the Register of the National Estate where the Commission considers a place should be registered. The majority (Beaumont & Beazley JJ) of the Full Federal Court concluded that the status of a particular place as one having significant or other special value for future generations as well as for the present community in accordance with the definition of "national estate" in s4, is an objective fact ascertainable by reference to those qualities.[59]

131 The High Court[60] unanimously endorsed the dissenting judgment of Black CJ:

> *"Black CJ concluded that the power of the Commission to enter a place upon the Register depended upon the Commission's own view of the matter rather than the 'objective' ascertainment of a 'jurisdictional fact', namely the identity of the place in question as part of the national estate. His Honour concluded:*

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[56] At 256
[57] At 261
[58] (1997) 187 CLR 297
[59] At 302
[60] At 303 – 304

> *In determining, according to law, whether or not a place is part of the national estate, the Commission will of course need to make a proper assessment to determine whether a place is, in fact, within the definition of national estate in s4. In doing so it will need to make assessments and value judgments but its ultimate task is to determine whether, in fact, a place is within the definition. The final determination of that question is however one that is committed by the Act to the Commission. It is not, in my view, a jurisdictional fact.'"*

132 ***Starwest Management Pty Ltd & Anor v The Director of Liquor Licencing***[61] involved an appeal against an order of the Liquor Licensing Court imposing a bond for a period of three years on Mr Saffron, a person holding a position of authority in two licensee companies, who was found not to be a fit and proper person to hold that position.

133 The appellants argued[62] that the question as to whether Mr Saffron was in a position of authority or not, was a jurisdictional fact and that as a consequence the Supreme Court was obligated to decide for itself whether that fact had to be established or not.

134 Pullin J[63] said:

> *"In **R v Federal Court of Australia; Ex parte WA National Football League** (1979) 143 CLR 190 at 214, Gibbs J said:*
>
> > *'A legislature in conferring jurisdiction upon a court, may make the existence of a state of facts a condition upon which the jurisdiction of the court depends, and in that case the court cannot give itself jurisdiction by erroneously deciding that the facts exist. On the other hand the legislature may entrust the court with the power to determine whether such a state of facts exists, and if so the court has jurisdiction to determine all the facts, including the preliminary facts on the existence of which jurisdiction depends.'*
>
> *Whether or not a person has a position of authority in a company which holds a licence and whether that person is a fit and proper person to hold that position, are facts which must be established before the power in s96 of the Act may be exercised. The legislature has, however, in s95, entrusted the Liquor Licensing Court with the power to determine the facts."*

[61] [2003] WASCA 271
[62] At [19]
[63] At [19] (with whom Malcolm CJ & Steytler J agreed)

135 The final factor identified by Professor Aronson etal[64] as relevant to determining the intention of the legislature is the inconvenience that may arise from classifying a fact as jurisdictional. Statutes are construed on the basis that parliament did not intend to cause inconvenience even though they often do.

136 It seems there are two kinds of inconvenience.

137 First, there is inefficiency in having the superior court investigate the jurisdictional fact for itself. Concomitantly, there is the propensity that the superior court and the decision maker may consider different material. There is also the delay between the decision maker reaching a view as to the jurisdictional fact and the superior court doing the same thing.

138 Second, whether or not a fact is jurisdictional may have implications for the public interest. This includes the public who will be disadvantaged, through no fault of their own. In addition, the determination may affect those responsible for the administration of the statute.

139 Although not recent there are two decisions that have considered whether marking out in accordance with the *Mining Act* is a condition precedent.

140 ***Crocker Consolidated Pty Ltd v Willie***[65] concerned an application for an exploration licence within the boundaries of which was land already the subject of previously granted prospecting licences.

141 The Statement of Claim alleged that the marking out of each of the prospecting licences was defective in that it is not in compliance with the marking out requirements contained in Part V of the *Mining Regulations*. Apart from an oblique reference to "defective pegging"[66] the nature of the defect is not explained.

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[64] Judicial Review of Administrative Action 3rd Ed (2004); Aronson, Dyer & Groves; at 236
[65] (1988) WAR 187
[66] At 190 & 191

142 The argument was based on the proposition that the requirements of s105 of the *Mining Act* are an essential pre-condition to the grant of any mining tenement other than an exploration licence.

143 An application to strike out the statement of claim was rejected at first instance. The Full Court upheld the appeal and the High Court dismissed an application for special leave to appeal.

144 Burt CJ [67] relied on the following considerations for concluding that although marking out in the prescribed manner and shape will establish priority as between competing applicants in accordance with s105A, it does not condition the warden's power to grant the licence.

(a) An applicant acquires no title to land under the *Mining Act* by marking out. The mining tenement lies in grant.

(b) A warden has no authority to grant a licence with respect to land that is not open for mining. However, the warden's power to grant a licence with respect to land which is open for mining is not controlled by the warden being first satisfied that the applicant has marked out the land in the prescribed manner.

(c) Absent a valid objection, the warden's approval to the grant is deemed to have been given upon satisfying the mining registrar of the matters in s40(4).

145 Wallace J[68] held that there is no statutory duty imposed upon a mining registrar or warden to enquire whether or not there has been due compliance with the marking out provisions, save in those circumstances where called upon to resolve a dispute between applicants: s105A or the need to call for a survey arises: s47.

[67] At 190-191 (with whom Olney J agreed)
[68] At 194

To hold otherwise would be to deny the clear language of s40(4) of the *Mining Act*.

146 His Honour [69] went on to question how a mining registrar or warden could check compliance with marking out provisions in the absence of contrary evidence to that effect:

> *"It is one thing to have regard to a statutory requirement of compliance with marking out regulations and entirely another to draw therefrom the implication of a statutory duty upon the awarding authority to carry out an audit of such requirements. The statute does not require it and indeed, the very provisions of s116(2) expressly exempt a person dealing with a registered holder from in any way being concerned to enquire into or ascertain the circumstances under which he or she became registered ..."*

147 I pause to note that the operation of s40(4) was central to the reasoning of all the members of the Full Court.

148 At the time ***Crocker Consolidated*** was decided s40(4) provided that where an applicant for a prospecting licence satisfies the mining registrar, that the application relates to unoccupied Crown land or is Crown land used for grazing only, no notice of objection has been lodged and all persons required to be served have been served and that 30 days have elapsed:

> *"the approval of the warden to the grant of the licence may be deemed to have been given and a licence in the prescribed form may thereupon be issued by the mining registrar ..."*

149 The fact that the warden's approval was deemed to exist upon the satisfaction of four conditions, none of which included marking out, supported the conclusion that marking out was not a pre-condition to the exercise of the power to grant a prospecting licence. If a prospecting licence could be granted without proof of marking out, it could hardly be said marking out was a pre-condition to jurisdiction.

150 In ***Hunter Resources***, although the majority did not consider in detail whether compliance with the marking out requirements is a pre-condition to the exercise

[69] At 195-195

of power, as McLure P observed in ***Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd,***[70] Dawson J accepted that the warden's jurisdiction was not conditional on the applicant complying with the prescribed marking out requirements and such a conclusion was also implicit in the reasons of Wilson J.

151 Although in the minority, Mason CJ and Gaudron J, did give the question of jurisdiction detailed consideration even though the case was not decided on that basis. Their Honours' reasoning can be summarised as follows:-

(1) The *Mining Act* did not specifically require the warden to be satisfied that an applicant has marked out in the prescribed manner and shape.[71]

(2) The *Mining Act* does not require an applicant to furnish with its application details of its marking out or to establish that marking out has taken place.[72]

(3) The warden has power to require information in addition to that which accompanies the application and to give such evidence as he or she may require: s41(3). However, the existence of this discretionary power to call for evidence with respect to marking out is a fragile foundation for an implication that in all cases the warden must be satisfied that the applicant has marked out in the manner and shape prescribed let alone that such satisfaction is a condition precedent to the grant of a licence.[73]

(4) The operation of s40(4) is at odds with the suggestion that a discretionary power to call for evidence on the matter of marking out is a foundation for an implication that in all cases the warden must satisfy himself that the applicant has marked out in the manner and shape prescribed let alone an implication that such satisfaction is a condition precedent.[74]

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[70] [2010] WASCA 132 at [31] (with whom Owen & Buss JJA agreed)
[71] At 241
[72] At 241
[73] At 242
[74] At 242

(5) In the light of s42(1) it is to be implied that the warden will inquire into the matter of marking out if an objection is lodged to that effect. But it does not follow that there is also to be implied a condition on the warden's power to grant a licence that he or she is satisfied that the applicant has marked out in the manner and shape prescribed.[75]

(6) The reference in s116(2) to "proceedings previous to the grant or renewal of the tenement" is wide enough to comprehend an irregularity in the proceedings before the warden and in marking out.[76]

(7) Section 57(3) which deals with exploration licences, expressly provides that the warden shall not recommend the grant of such a licence unless satisfied that the applicant is able to effectively explore the land the subject of the application. This is an example where the *Mining Act* expressly conditions the power of the warden.[77]

(8) Section 75(4)[78] empowers the Minister to grant or refuse an application for a mining lease despite it not having in all respects complied with the *Mining Act*. The absence of an equivalent provision applicable to prospecting licences is explained by the legislature's desire to protect the validity of mining leases because they are a particularly valuable class of tenement.[79]

(9) Regulation 119, like s40(4) proceeds on the basis that a licence may be granted notwithstanding a failure to comply in all respects with s105. Where a surveyor finds that any mining tenement or application therefore is not marked out in the prescribed shape, where practicable, the boundaries may be adjusted.[80]

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[75] At 242
[76] At 243
[77] At 243
[78] Now s75(6)
[79] At 243
[80] At 243

152 Since the authorities to which I have referred were decided there have been two significant developments.

153 First, s40 was amended in 1994[81] resulting in the repeal of subsection (4). Applications with respect to which there are no objections are now dealt with in accordance with s42(2) which says:

> *"Where no notice of objection is lodged within the prescribed time, or any notice of objection is withdrawn, the Mining Registrar may –*
>
> *(a) grant the prospecting licence if satisfied that the applicant has complied in all respects with the provisions of this Act; or*
>
> *(b) refuse the prospecting licence if not so satisfied.*

154 Both the Full Court in ***Crocker Consolidated*** and the minority judgment in ***Hunter Resources*** make specific reference to s40(4). Of course the repeal of s40(4) does not inexorably result in a different outcome. In addition to the other reasons for concluding marking out is not a pre-condition, attention must now be directed to the impact of s42(2) on the statutory scheme.

155 Second, although not concerned with marking out the majority (Kiefel CJ, Bell, Gageler and Keane JJ) of the High Court in ***Forrest & Forrest v Wilson***[82] held that a requirement that a mineralisation report accompany an application for a mining lease was a condition precent. The reasoning of the majority can be summarised as follows.

156 First, sections 74(1)(ca)(ii), 74A(1) and 75(4a) imposed essential preliminaries to the exercise of the power conferred by s71 of the *Mining Act*. That this was so was made clear by both the express terms and the structure of the provisions as sequential steps in an integrated process leading to the possibility of the grant of a mining lease by the Minister.[83] The tenor of s74(1)(ca)(ii), in particular, was

[81] *Mining Amendment Act 1994 (WA)*, ss 7 & 9(1)
[82] [2017] HCA 30
[83] At [63]

both precise and prescriptive, conveying an intention not to countenance any degree of non-compliance with the requirement.[84]

157 Second, the relevant provisions were not expressed in indeterminate terms; they imposed rules which could be easily identified and applied.[85]

158 Third, unlike ***Project Blue Sky*** any inconvenience suffered by treating the requirements of the *Mining Act* as conditions precedent to the exercise of the Minister's power would only be visited upon those with some responsibility for the non-observance. The contrary view would disadvantage both the public interest and those who were within the protection of the *Mining Act*:

i. The public interest is advantaged by compliance with the legislative regime as it was apt to improve administrative efficiency and to avoid backlogs for reducing the number of defective applications for mining leases that mining registrars, wardens, Directors, Geological Survey and officers of the Department[86] administering the Act have to manage and follow up.[87] Officers of the Department should not have to be troubled by the uncertainty and expense of attending to an application that was not accompanied by the documentation necessary to allow it to proceed.[88]

ii. The reduction of the problems of management of applications for mining tenements is an object of the prescriptive regime constituted by ss74, 74A and 75 of the *Mining Act*.[89]

iii. Where non-observance of a condition bearing upon the exercise of a statutory power would work to the material disadvantage of individuals for whose protection the condition exists, considerations of justice and

[84] At [67]
[85] At [63]
[86] The Department of Mines, Industry Regulation and Safety
[87] At [84]
[88] At [85]
[89] At [84]

convenience tell strongly in favour of holding invalid acts done in neglect of the condition.[90]

iv. The requirement that a mineralisation report accompany an application served the purpose of ensuring that owners and occupiers of the land to which the application relates were not troubled unnecessarily or prematurely by half-baked proposals.[91]

v. Bearing in mind an owner or occupier of the land affected by an application for a mining lease is required to object within a prescribed time, after service of the application, the requirement that it be accompanied by a mineralisation report enabled the owner or occupier to rely upon the mineralisation report to support an objection.[92]

vi. Non-compliance with the *Mining Act* was apt to operate to the disadvantage of miners in competition for access to the State's resources. Compliance with the legislative regime was necessary to prevent land banking, whereby holders of existing prospecting, retention or exploration licences that were soon to expire, who had not yet located a specific geological foundation for lodgement of a mineralisation report, might be minded cynically to use the delay in the provision of a mineralisation report to extend their time for exploration.[93]

159 Fourth, the statutory regime was concerned with the grant of rights to exploit the resources of a State. There is a line of authority which establishes that where a statutory regime confers power on the executive government of a State to grant exclusive rights to exploit the resources of the State, the regime will, subject to a provision to the contrary, be understood as mandating compliance with the requirements of the regime as are essential to the making of a valid grant. When a statute that provides for the disposition of interests in the resources of a State

[90] At [85]
[91] At [86]
[92] At [87]
[93] At [89]

prescribes a mode of exercise of the statutory power, that mode must be followed and observed. The statutory conditions regulating the making of a grant must be observed. A grant will be effective if the regime is complied with, but not otherwise.[94]

160 Fifth, the approach explained by Dixon J in ***Parisienne Basket Shoes Pty Ltd v Whyte***[95] does not give rise to a presumption that a decision by the warden as to whether facts exist is within his or her jurisdiction.

Is marking out in the prescribed manner a jurisdictional fact?

161 I turn now to consider whether, as a matter of statutory construction, compliance with s105 of the *Mining Act* is a pre-condition to jurisdiction. Relevant to that inquiry is whether the repeal of s40(4) and the introduction of s42(2) of the *Mining Act* and the principles set down by the majority of the High Court in ***Forrest & Forrest*** produce an outcome contrary to that in ***Crocker Consolidated*** and the obiter dicta of four of the five members of the High Court in ***Hunter Resources***.

162 Central to the Full Court's reasons in ***Crocker Consolidated*** (and the obiter comments of the minority in ***Hunter Resources***) is the acknowledgement that s40(4) meant the warden's approval to grant a prospecting licence expressly did not depend on the applicant having marked out in the prescribed manner. In that sense s40(4) ensured there was no essentiality. As I foreshadowed earlier, s40(4) having been repealed, for present purposes, consideration of s42(2) is required.

163 In addition, care must be taken to not indiscriminately apply the remarks made by the majority of the High Court in ***Forrest & Forrest*** with respect to mining leases to marking out prospecting licences for two reasons. First, while the two regimes have some obvious similarities, there are significant differences. In

[94] At [64]
[95] (1938) 59 CLR 369 at 391

particular, the operation of s74A(1) and 75(4a) in combination with s74(1)(ca)(ii) were critical to the reasoning of the majority in ***Forrest & Forrest***.

164 The statutory regime with respect to applications for mining leases is far more sophisticated than that which applies to prospecting licences. The clarity provided by ss74(1)(a)(ii), 74A(1) and 75(4a) so far as applying for a mining lease is concerned is not replicated when it comes to marking out the ground the subject of a prospecting licence. For example, the marked contrast between s75(4a) and s75(3) so far as a mining lease is concerned[96] does not apply to prospecting licences.

165 Second, the observations of the majority that where a statutory regime empowers the grant of exclusive rights to exploit the resources of the State, the regime will, subject to provision to the contrary, be understood as mandating compliance with the requirements of the regime essential to the making of a valid grant, does not inevitably mean every requirement is a jurisdictional fact. The failure to comply with a requirement may well prove fatal even though it is not a pre-condition to jurisdiction. ***Hunter Resources*** is one such example.

166 At first blush s105 has the appearance of a jurisdictional fact. It is a direction to the applicant that is preliminary to the exercise of the statutory power to grant a prospecting licence. In addition, s105 makes no mention of marking out in the prescribed manner being subject to the opinion or satisfaction of the mining registrar or warden. I acknowledge also that s105 uses mandatory language and that s40 is prefaced by the words "subject to this Act".

167 Notwithstanding those observations, in my view, marking out in the prescribed manner is not a jurisdictional fact for the following reasons.

168 First, while the question as to the timing of marking out (ie was it before the lodgement of the application) is clearly preliminary to the exercise of the power

[96] At [80]

to grant a prospecting licence,[97] whether marking out is in the prescribed manner is a matter that necessarily arises in the consideration of the exercise of the power.

169 Section 42(2) requires, in the absence of an objection, that the mining registrar may grant a prospecting licence "if satisfied that the applicant has complied in all respects with the provisions of this Act". This must include s105 and reg 59.

170 Curiously, s42(3) says, where an objection is lodged, the warden "shall hear and determine the application for the prospecting licence ... and may give any person who lodged a notice of objection an opportunity to be heard".

171 If, s42(3) is construed to mean the warden's inquiry is confined to the grounds of objection, then if marking out is not a ground of objection, there is no need for the warden to consider that issue. Such a construction would produce an obvious inconsistency. Applications with respect to which there is no objection must comply with all the provisions of the *Mining Act* whereas those to which there is an objection need not.

172 The better view may be that the warden's inquiry is not confined to the grounds of objection. This is consistent with the language of s42(3) which requires the warden to "hear and determine the application" in addition to possibly hearing from an objector. If the warden's enquiry is limited to only hearing the grounds of objection, the words "hear and determine the application" would have no work to do.

173 Assuming this to be the correct interpretation, it is apparent that s42(2) and (3) call upon the mining registrar or the warden to examine the question as to whether there has been compliance with s105. Consistently with ***Tasmanian Conservation Trust Inc v Minister Resources***,[98] if s105 is a jurisdictional fact,

[97] There may be an argument that a failure to purportedly mark out before lodging an application is a jurisdictional fact (even though marking out in the prescribed manner is not). However, it was not contended by either party that marking out did not take place before lodgement of the applications nor was it the subject of submissions be either party.
[98] (1995) 55 FCR 516

it may result in proceedings in a judicial forum that canvass the very question for which the *Mining Act* specifically establishes a process.

174 This is reinforced by the terms of s105A which contemplates, in the event there are competing applications, the need to determine which applicant was first to comply with the initial requirement (ie marking out in the prescribed manner). This is done by lodging an objection to an application in accordance with s42(1) and (3).

175 The process set down in s42 for the determination of applications is consistent with the view that the legislature intended not only that the mining registrar or the warden determine whether an applicant has marking out in the prescribed manner but also, so far as the warden is concerned, who was first to do so in accordance with s105A.[99]

176 Consistent with the observations of Evatt J in ***Weiss*** if marking out in the prescribed manner is a jurisdictional fact, it would involve the mining registrar or warden determining in advance that which he or she is required to determine in hearing and deciding the case.

177 Second, marking out in the prescribed manner inherently involves some evaluation thereby supporting the view it may not be an objective fact.[100]

178 In contrast to the circumstances in ***Forrest & Forrest*** where the application for a mining lease was either accompanied by a mineralisation report or it was not; a fact which is objective and easily identifiable, marking out involves an evaluative component.

179 As is clear from the language used in reg 59(1) questions arise as to whether a post is fixed firmly in the ground "at or as close as practicable to each corner or angle of the land concerned" (reg 59(1)(a)(ii)), and whether either trenches or an

[99] See ***Starwest Management Pty Ltd & Anor v The Director of Liquor Licensing*** [2003] WASCA 271 at [19]-[20]
[100] ***Thredgold v Australian Community Pharmacy Authority*** (1999) 93 FCR 465

identifiable row of stones, each at least 1m long extend "from each post in the general direction of the boundary lines", (reg 59(1)(b)(i) or (ii)).

180 A further example is provided by ***Anglogold Ashanti Australia Ltd v White Cliff Nickel Ltd***,[101] wherein Warden Zempilas determined that the trenches required by reg 59(1)(b) must:

> *"represent a substantial breaking of the ground, having both sufficient width and depth to constitute a 'ditch'. In other words it must have the appearance, to the ordinary observer, of a trench within the ordinary meaning of that word and be a clearly identifiable trench ..."*

181 Third, not unlike ***Thredgold v Australian Community Pharmacy Authority***, this is an example of a fact finding tribunal being entrusted with the responsibility of satisfying itself not only as to whether the marking out requirements have been complied with but who was first to do so. Consistent with the view of O'Loughlin J it would not be appropriate to describe the warden's task as being empowered to grant an application for a prospecting licence contingent upon the actual existence of a state of facts. As His Honour remarked such a proposition would leave unanswered how one would ascertain the relevant facts.

182 The Form 21 application for a prospecting licence sets out, inter alia, the ground applied for and when marking out is said to have been completed.

183 The Form 21 itself does not objectively establish that marking out has occurred in the prescribed manner.

184 In the absence of an objection where evidence of a failure to mark out in the prescribed manner is provided or a request for further information or evidence (s41(3)), the mining registrar or warden only have recourse to the representation in the Form 21 that marking out has been completed.

[101] [2010] WAMW9 at [16]

185 Fourth, the inefficiencies identified by Professor Aronson [135] & [137] above apply with equal force in the event the Supreme Court has to revisit the question as to whether marking out was in the prescribed manner.

186 Fifth, although s40(4) of the *Mining Act* was central to the reasoning of the Full Court in ***Crocker Consolidated*** and the joint judgment of Mason CJ and Gaudron J in ***Hunter Resources***, its repeal does not necessarily negate all the other observations made.

187 For example, it remains the case that neither ss40 nor 41 require an applicant to furnish with its application details of its marking out or to establish that marking out has taken place.[102]

188 In addition, an applicant continues to acquire no title to land under the *Mining Act* by marking out. The mining tenement lies in grant.[103]

189 As Mason CJ and Gaudron J observed in ***Hunter Resources***, s57(3) expressly provides that the mining registrar or the warden shall not recommend the grant of an exploration licence unless satisfied the applicant is able to effectively explore the land.

190 By implication had the legislature wanted to be similarly prescriptive with respect to marking out, it could have done so.

Does the failure to mark out in the prescribed manner invalidate the Monument applications?

191 If marking out in the prescribed manner is not a jurisdictional fact, any non-compliance may but not must result in invalidity. Whether Monument's non-compliance results in invalidity directs attention once again to the language of the statute, its subject matter and objects and the consequences for the parties.[104]

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[102] ***Hunter Resources Ltd v Melville*** (1998) 164 CLR 234 at 241; Note: At the time ***Hunter Resources*** was decided the Form 21 Notice of Application (item b) required the applicant to specify when marking out was completed, just as it does now.

[103] ***Crocker Consolidated Pty Ltd v Willie*** (1988) WAR 187 at 190

[104] ***Project Blue Sky v Australian Broadcasting Authority*** [1998] 194 CLR 355 at [91]

192 In my view, the requirement in s105(1) that before an application for a prospecting licence is made, the land in relation to which the prospecting licence is sought shall be marked out in the prescribed manner is not expressed in indeterminate terms.

193 Furthermore, nothing in the language used in reg 59 or the Form 20 suggests that the process of marking out is complete until, inter alia, item (g) has been filled in. Nor is there any reason to believe that any time other than the time marking out was actually completed can be included in item (g).

194 The time at which marking out was completed is central to the statutory scheme and in particular the question of priority in accordance with s105A. As I have already explained nothing in the language used in the Form 20 renders the direction therein with respect to time difficult to identify or apply.

195 Importantly, any inconvenience arising from treating completion of item (g) in the Form 20 as mandating compliance is only visited upon those who failed to mark out in compliance with the legislation. The alternative would disadvantage competitors who had taken the time to insert the time marking out was completed.

196 Finally, no public inconvenience would be a result of mandating compliance such that those affected by the non-compliance were neither responsible for, nor aware of the non-compliance.

197 Monument contend that in the case of a prospecting licence marked out over surveyed land the following factors are relevant to the question of whether the act done in breach of condition regulating the exercise of statutory power is not invalid and of no effect.[105]

198 First, it is said that the extent to which a Form 20 affixed to a datum post informs the public at large is perhaps diminished by the requirement that the same

[105] Monument's written submissions; 27 November 2018 at [42]

information be endorsed on the Form 21 and then entered onto the electronic register made available on eMiTis.

199 In my view, the fact that the Form 21 ought to replicate the information on the Form 20 is of no practical assistance to any interested party. Both the Form 20 and 21 were misleading.

200 As I said earlier a competitor having observed that no time and date was entered on the Form 20s would not know when it was that Monument had completed marking out. Alternatively, had a competitor seen 00:00:06 on 18 December 2017 on the Form 20, it may have concluded not only that the time was accurate but that Monument had priority.

201 Second, Monument says that the integrity of the time entry of affixing the Form 20 to the datum post is critical, rather than the time of completion of the endorsement.

202 It cannot be the case that marking out is complete despite the Form 20 not being filled in. If, as Monument accepts, the purpose of a Form 20 is to identify when marking out was completed to assist in assessing priority, a Form 20 with no time entry or an incorrect time entry has not achieved its statutory purpose.

203 Third, Monument argues that factors may delay the time of endorsement due to the competitive nature of pegging, often after the turn of midnight when land becomes available, in remote and challenging locations.

204 The fact that marking out may on occasion prove challenging is something all those competing for tenements must negotiate. Moreover, it does not change the fact that a party who complies with the requirements may be disadvantaged if short cuts are taken by a competitor.

205 Fourth, Monument points out that the very language and requirements of regs 59 and 61 and the Form 20 regarding the time of marking out are not necessarily

easy to apply given the logistics of filling out a form that must be fixed to a post in order to complete marking out.

206 This argument ignores the fact that the marking out requirements apply to all those competing for land. As I have already explained the solution to any perceived problem with the logistics of completing marking out is negated by adopting a cautious approach as identified by Dawson J in ***Hunter Resources***.[106]

207 Fifth, Monument asserts that questions of priority fall inevitably to a contested hearing before a warden by reason of objections by a competing tenement applicant whereupon the precise time of marking out will be revealed by the evidence.

208 But for Phillip Heyhoe being present when Mr Mulcahy returned to complete the Form 20s, Anglogold may never have known that the Form 20s were not in fact completed until some 25 minutes after the time endorsed in item (g).

209 Had Anglogold only had the information in the Form 20 to go on, it may not have objected and the true facts may never have come to light?

210 The statutory regime requires that the time of marking out be accurately reflected in the Form 20, not revealed only in the event there is a contested hearing. A competitor should not be required to endure the delay and costs associated with a contested hearing to ascertain when the applicant completed marking out. Nor should those responsible for the administration of the *Mining Act* be burdened with the resultant objections the practice would encourage.

211 It follows from what I have said that the Monument applications are invalid.

[106] At 252

The Anglogold's Applications

The agreed facts

212 On 18 December 2017 Anglogold marked out and on 20 December 2017 applied for PLAs 39/5875-77.

213 The Anglogold applications were marked out by David and Phillip Heyhoe and relate to land previously comprising P39/5352-5 held by Razbel Pty Ltd which expired at 23:59:59 on 17 December 2017.

214 There are existing survey marks at points Datum AGA1 and Datum AGA2 from former mineral claims MC 39/2217, MC 39/1752 and MC 39/2313 (see Attachment 4 to the Agreed Statement of Facts).

215 Prior to midnight on 17 December 2017 the Heyhoes endorsed the Form 20 for each of the Anglogold applications with descriptions of the applicant, type of tenement, locality, datum peg, description of boundaries, area and signed the forms.

216 By 00:00:03 on 18 December 2017, Phillip Heyhoes placed a stake into the ground beside Datum AGA2 to which the endorsed and signed Form 20 for PLA 39/5877 was attached by Velcro, in a plastic bag.

217 The Form 20 for PLA's 39/5875-6 were signed by David Heyhoe and just prior to 1:08:00 he endorsed the Forms with the time of 01:08:00.

218 At 01:08:00 on 18 December 2017, David Heyhoes placed into the ground a stake beside Datum AGA1 to which was affixed with flagging tape in a plastic bag and endorsed and signed the Form 20.

219 The respective Forms 20s for the Anglogold applications included the following notations:

(a) PLA 39/5875 – the land sought was "identical to MC 39/2217F but excising land available to M 39/747 …"

(b) PLA 39/5876 – the land sought was "identical to MC 39/1752F but excising land available to M 39/747 …"

(c) PLA 39/5877 – the land sought was "identical to MC's 38/2313 – 14T but excising land available to M 39/747 and M 39/443".

Were the Anglogold Applications marked out in the prescribed manner?

220 As was made clear in ***Hunter Resources*** one of the purposes of the marking out requirements is to identify the boundaries of the land the subject of an application for a mining tenement.

221 Monument's position is that reg 61 provides an exception to the usual strict requirement (in reg 59) that a post must be fixed to the ground at each corner or angle of the prospecting licence and that the shape be as prescribed in reg 92.

222 Monument says the opening words of reg 61 are significant in that marking out can only occur by placing a post (the datum post) at one corner of the land where the boundaries of land in respect of which mining tenement is sought are identical with any surveyed land.

223 Monument says further that reg 61 requires that the land described in the Form 20 must be identical to the surveyed land. Monument contends that the Anglogold applications do not refer to land that is identical to previously surveyed land because the applications purport to excise variously M 39/747 and M 39/443 which at least in part are included within the boundaries of the surveyed land. According to Monument, once Anglogold did not strictly follow the requirements for marking out in accordance with reg 61, the applications were non-compliant.

224 Anglogold point to the fact that consistent with s43 as at the (hypothetical) time of grant of PLAs 39/5875-7, the land the subject of M 39/747 and M 39/443 must be excised.

225 Anglogold relies on the fact that the legislation allows for and contemplates the marking of mining tenement applications over an area of land within which there exist granted tenements over some of that land.[107]

226 The significance of Anglogold's notations on the Form 20s are to be considered in light of the statutory regime.

227 Section 18 stipulates that all Crown Land, not being land that is the subject of a mining tenement, is open for mining.

228 Section 43 acknowledges that land already the subject of a mining tenement (and therefore not open for mining) can be included in an application for a prospecting licence but cannot be the subject of the grant.

229 Section 44, provides that subject to section 43, a prospecting licence may be granted in respect of all or part of the land to which the application relates.

230 In my view, as ss43 and 44 make clear, the *Mining Act* contemplates that land can be the subject of an application even though a part thereof is not open for mining and unavailable.

231 That being so, it follows that the boundaries of the land marked out represent the external boundaries of the land sought. There is, therefore, no requirement to mark out around mining tenements that exist within the boundaries of the land applied for, whether it be in accordance with reg 59 or 61.

232 Monument contends that the notations that the mining leases are to be excised is representative of Anglogold no longer applying for land that is identical to the surveyed land. I do not agree with Monument's characterisation. In reality, Anglogold was doing no more than acknowledging that certain land within the boundaries of the surveyed land applied for, as a matter of law, was not available to it.

[107] Anglogold's written submissions at [10]

233 The notations on the Form 20s with respect to the land to be excised in no way undermined to objects of the marking out requirements which is to enable the reader to identify where the boundaries of the land the subject of the applications lie. Any person wishing to object to the Anglogold applications would not have been misled by the description provided.

234 The Anglogold Form 20s expressly refer to land that is identical to the surveyed land specified. Thus any person wanting to identify the land the subject of applications could readily do so by locating the survey marks.

235 The notations identifying the land to be excluded, while perhaps unnecessary, served only to provide the reader with a clearer picture of what land was actually available to Anglogold within the area of the surveyed land at the time of grant.

236 Monument argues that as the mining leases had not been surveyed at the time Anglogold marked out, any person reading the Form 20 would not have been able to identify the land sought.

237 As I pointed out earlier there is no obligation on an applicant for a prospecting licence to mark out around or otherwise refer to mining tenements that are within or overlap the boundaries of the land sought.

238 The legislation contemplates that as long as the boundaries of the land the subject of an application are delineated, that is sufficient information for any interested party whether they are an adjoining tenement holder or otherwise.

239 It is also important to appreciate that the inclusion of the notations on the Form 20s did not disadvantage any competitor. Nothing Anglogold did could be considered a short cut. Nor could it be said that the task of those responsible for the administration of the *Mining Act* has been rendered more difficult.

240 For these reasons, in my view, the Anglogold applications are valid.

Conclusion

241 Upon confirmation of compliance with the *Native Title Act 1993 (Cth)* Anglogold's applications for Prospecting Licences 39/5875, 39/5876 and 39/5877 are to be granted.

242 Monument's applications for Prospecting Licences 39/5884, 39/5885 and 39/5886 are refused.

Warden J O'Sullivan

14 August 2019