



Government of **Western Australia**
Department of **Mines, Industry Regulation and Safety**

GUIDELINES

Marking Out for Conversion Applications under section 105(2) of the *Mining Act 1978*

Version 1.0

May 2023

Document Hierarchy

| | |
|---------------------|---|
| Legislation | <i>Mining Act 1978</i> |
| Statutory Documents | This document provides information to licence holders with priority to lodge conversion applications on the application of sections 105(2), 105(3) and 105(4) of the <i>Mining Act 1978</i> . |

Version History

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Contents

| | |
|--|----|
| 1. Purpose | 4 |
| 2. Scope | 4 |
| 3. Background | 4 |
| 4. Conversion applications can be lodged without first marking out the land..... | 4 |
| 5. Examples..... | 6 |
| 6. Procedural process – application lodged and not marked out | 12 |
| 7. Frequently asked Questions..... | 13 |
| 8. Marking out and applying for tenements online brochure..... | 14 |
| 9. Business systems..... | 14 |
| Appendix A – Section 105 | 15 |

1. Purpose

The purpose of this document is to provide information on the application of sections 105(2), 105(3) and 105(4) to the marking out process for conversion applications.

All legislative references refer to the *Mining Act 1978* and subsidiary legislation.

2. Scope

This document relates to amendments to the marking out provisions for conversion applications to ensure licence holders do not lose priority to the land due to circumstances outside their control.

- Section 105(2) sets out the requirements for an application to be lodged without first marking out the land.
- Section 105(3) sets out circumstances under which an application can be made under section 105(2) where it is not possible for the land to be accessed for the purpose of marking out.
- Section 105(4) sets out the requirements for marking out for an application lodged under section 105(2).

3. Background

The *Mining Amendment Act (No.2) 2022* received Royal Assent on 1 November 2022, and the amendments to section 105 came into effect on 2 November 2022.

During the passage through parliament, it was known as the Mining Amendment Bill 2022.

This document focuses on changes to **section 105** (Marking out a mining tenement) which allow lease conversion applications to be lodged without first marking out if the land cannot be accessed due to a significant event.

Examples are provided to demonstrate the application of section 105.

The rationale for changing the marking out requirements was in response to the regional travel restrictions declared by the Government during the COVID-19 State of Emergency, which highlighted potential risks to the security of the State's resource sector.

The restrictions highlighted the potential for licence holders to lose priority to the ground if they were unable to access the land for the purposes of marking out.

4. Conversion applications can be lodged without first marking out the land

The amended section 105 allows for the holder of a prospecting licence, exploration licence or retention licence to lodge an application for a mining lease or general purpose lease without first marking out the land if certain events occur which are outside the licence holder's control.

The new subsections 105(2), 105(3), 105(4) and 105(5) only apply to conversion applications made under sections 49, 67, 70L, and granted under 75(7), which give the holder of a prospecting licence, exploration licence or retention licence priority for the grant of a mining lease or general purpose lease over land the subject of an existing licence.

Subsection 105(2) allows a licence holder to lodge an application for a mining lease or general purpose lease over all or part of the existing licence area without first marking out the land. The application must include both a **statement** of the grounds of the application, and **evidence** to support the statement.

The **statement** must specify that, in the opinion of the holder of the licence, it is not possible to access the land for the purposes of marking out by or on behalf of the licence holder as a result of one or more of the circumstances listed in subsection 105(3).

The **evidence** is to provide proof of why the land cannot be accessed. Some examples of evidence that may be provided in support of the statement are:

- A state of emergency declaration
- Media statement
- Road closure advice
- State of emergency or other government direction on closure of regional boundaries

The mining registrar must be satisfied that the evidence provided supports the statement as to why the land cannot be accessed.

The circumstances listed in subsection 105(3) include significant and **exceptional events**, such as a natural disaster or emergency, industrial dispute or civil disturbance.

Those exceptional events which are outside a person's control and prevent access to the land by the licence holder, or anyone acting for the licence holder are detailed as follows:

- Any law
- Any order of a court, tribunal or person acting judicially
- An act or omission of a department of the Public Service, State Agency or instrumentality, or a local government, regional local government or regional subsidiary, or a body, whether incorporated or not, or the holder of an office, post or position, that is established or continued for a public purpose under a written law or a brigade as defined in the *Fire Brigades Act 1942* section 4(1)
- Any disaster or emergency caused by a fire, storm, flood, lightning, landslide or earthquake caused by:
 - fire, storm flood, lightning, landslide or earthquake; or
 - the holder or any other person.
- Any revolution, insurrection, riot or other civil disturbance.
- Any vandalism, sabotage or other form of malicious damage of property.
- Any war (whether declared or undeclared) or military operation.
- Any strike, lock-out or other industrial dispute.
- Any other circumstance beyond the control of the holder of the licence.

The licence holder will be required to mark out the land as soon as practicable after it becomes possible for the land to be accessed. When completed, the licence holder is to provide the mining registrar with evidence that the land has been marked out.

A conversion mining lease or general purpose lease lodged without marking out under subsection 105(2) **cannot be recommended for grant** unless the land is marked out.

5. Examples

The following examples provide a number of scenarios to demonstrate how subsections 105(2), 105(3) and 105(4) will be applied.

Examples A-H come from the explanatory memorandum for the *Mining Amendment Act (No. 2) 2022*. Further examples I-L have been added.

Example A – A State of Emergency is declared, travel restrictions prevent access to the land to be marked out and the licence holder is unable to engage anyone with access to the area to mark out the land.

'A' is the holder of an exploration licence located near Laverton. The licence is due to expire in two weeks. 'A' plans to apply for a mining lease under section 67 by lodging an application prior to the expiry of the underlying exploration licence.

Two days before 'A' is due to travel to Laverton to mark out the land, intra-state travel restrictions are declared across Western Australia as part of a state of emergency. These restrictions will prevent movement between regions and limit movement of residents within the regions to essential activities. The restrictions will remain in place for the next six weeks.

'A' lives in Perth and is unable to travel outside of the Perth and Peel regions for the next six weeks, during which time, 'A's' exploration licence will expire.

'A' lodges the mining lease application without first marking out the land. The application is accompanied by a statement that travel restrictions are preventing access to the land to mark out. The statement is supported by evidence in the form of directions released by the Government on the closure of regional boundaries, as well as evidence that 'A' was unable to engage anyone in the Goldfields region to mark out the land on their behalf.

The mining registrar is satisfied under subsections 105(2) and 105(3) that it is not possible for the land to be accessed for marking out and accepts the application and accompanying statement and related evidence.

The mining registrar will review the application for the lifting of travel restrictions.

If the intra-state travel restrictions are lifted and the licence holder has not yet provided evidence of marking out, the mining registrar will specify a day by which the land must be marked out under subparagraph 105(4)(a)(iii).

If the travel restrictions remain in place the mining registrar will continue to review the situation.

Example B – A State of Emergency is declared however travel restrictions do not prevent access to the land to be marked out.

'B' lives in Marble Bar, and holds an exploration licence 100 kilometres east of the town. 'B' plans to lodge an application for a mining lease over ground covered by the existing exploration licence. The exploration licence is due to expire in two weeks.

The day before 'B' is set to travel out to the exploration licence area to mark out the land, intra-state travel restrictions are declared across Western Australia as part of a state of emergency. The restrictions will remain in place for the next six weeks.

'B' is able to travel within their designated region, and is able to leave Marble Bar and travel to the area to mark out the land as planned.

As the travel restrictions do not prevent 'B' from travelling to the exploration licence area, marking out must be completed before lodging the conversion application for the mining lease.

If 'B' does lodge an application, including with the application a statement and evidence of the travel restrictions which are in place, the application will be accepted under subsection 105(2).

The statement and evidence does not satisfy the mining registrar that it is not possible for 'B' to access the land for marking out under subsection 105(3). The mining registrar will specify a day by which the land must be marked out under subparagraph 105(4)(a)(ii).

Example C – A State of Emergency is declared, travel restrictions prevent access to the land to be marked out and the licence holder is unable to engage anyone to mark out the land.

'C' lives in Wiluna and plans to apply for a mining lease over ground covered by their existing exploration licence. The exploration licence is due to expire in three weeks.

The exploration licence is located to the south east of Wiluna, extending across the Mid-West and Goldfields regional boundaries. The intended mining lease will extend across the boundaries of the two regions.

Shortly before 'C' is due to mark out the land, intra-state travel restrictions are declared across Western Australia as part of a state of emergency. The restrictions will remain in place for the next six weeks.

'C' is able to travel within the Mid-West region, but travel restrictions prevent access to the Goldfields region and 'C' is therefore unable to mark out the area prior to the expiry of the exploration licence.

'C' may lodge the mining lease application without first marking out the land, accompanied by a statement that travel restrictions prevent access to part of the subject land for the purposes of marking out. 'C' provides evidence to support the statement, in the form of directions released by the Government on the closure of regional boundaries and a map showing the location of the licence and intended lease area in relation to regional boundaries. 'C' also provides evidence to the satisfaction of the mining registrar that it is not possible for 'C' to engage anyone in the Goldfields region to mark out that portion of the land within the Goldfields region while 'C' marks out that portion of the land within the Mid-West region.

The mining registrar is satisfied under subsection 105(3), that the statement provided by 'C' demonstrates that it is not possible for the land to be accessed for marking out purposes and accepts the application.

When travel restrictions end 'C' should mark out the land as soon as practicable under subparagraph 105(4)(a)(i).

Example D – A fire results in several road closures by DFES which prevents access to the land to be marked out.

'D' holds a prospecting licence 120 kilometres east of Cue. 'D' plans to apply for a general purpose lease over ground covered by the prospecting licence. The prospecting licence expires in three weeks.

On the way to mark out the area, 'D' stops in Cue for supplies. While 'D' is purchasing supplies in town, severe weather hits the area, with a lightning strike igniting a catastrophic scrub fire. The fire is out of control and conditions are extremely hazardous. The Department of Fire and Emergency Services (DFES) directs that people only undertake essential travel in the area, and closes numerous roads in the vicinity. 'D' is unable to travel to the prospecting licence area before the licence expires.

'D' lodges the general purpose lease application without first marking out the land, accompanied by a statement that travel restrictions have prevented the marking out of the land, with evidence of DFES's road closure advice to support the statement.

The mining registrar is satisfied under Section 105(3), that the statement provided by 'D' demonstrates that it is not possible for the land to be accessed for marking out and accepts the application. When the roads reopen 'D' should mark out the land as soon as practicable under subparagraph 105(4)(a)(i).

Alternatively, the mining registrar can specify a day by which the land must be marked out under subparagraph 105(4)(a)(iii).

Subsection 105(3) does not include actions or circumstances affecting the individual, such as illness or personal or business commitments, or misadventure as these circumstances do not restrict access to the land for the purpose of marking out.

Example E – Licence holder lodges a tenement application which is not marked out under subsection 105(2) due to being overseas on a business commitment.

'E' holds a prospecting licence and plans to apply to convert part of the area to a mining lease prior to the expiry of the licence in four weeks.

'E' travels overseas for a two week business trip. 'E' misses the flight back to Australia and is unable to return for another two weeks.

'E' lodges an application for mining lease without first marking out the land. The application is supported by a statement that the land could not be accessed because 'E' was stranded overseas. 'E' provides details of the availability of flights and a log of attempts to secure a flight back to Australia as evidence.

The mining registrar considers the statement under subsection 105(3) and is not satisfied that it is not possible for the land to be accessed. Even though 'E' was overseas, 'E' could have hired someone to mark out the land.

The mining registrar sets a date by which marking out must be completed under subparagraph 105(4)(a)(ii).

If 'E', or someone else acting on E's behalf, does not mark out by the date set by the mining registrar under subparagraph 105(4)(a)(ii), the mining registrar will recommend the refusal of the application for the mining lease.

If the licence holder is personally unable to access the land for the purpose of marking out, the circumstances set out under subsection 105(3) do not apply where the licence holder can appoint someone else with access to mark out on their behalf.

Example F – State Border closure prevents the licence holder, who resides interstate, accessing the land to be marked out however other parties could be engaged to mark out the land.

'F' resides in Queensland and holds an exploration licence in the West Pilbara mineral field in Western Australia. The licence is nearing expiry and 'F' plans to submit an application for a general purpose lease over part of the area of the exploration licence.

State border closures prevent 'F' from entering Western Australia to mark out the land before the exploration licence expires.

The land can still be accessed for the purposes of marking out because 'F' can engage someone located in Western Australia to mark out the land prior to lodging the application for the general purpose lease.

If 'F' does lodge an application for a general purpose lease, with a statement and evidence, but the evidence is that 'F' can't mark out the land due to the border closures, the mining registrar will not be satisfied that the evidence is sufficient to show that it is not possible for the land to be accessed for the purpose of marking out under subsection 105(3). The mining registrar will specify a day by which the land must be marked out under subparagraph 105(4)(a)(ii).

Requirement to Mark Out

Subsection 105(4) sets out the requirements for marking out where a licence holder has lodged an application under subsection 105(2).

The licence holder must mark out the land in relation to which the lease is sought:

- Subparagraph 105(4)(a)(i) – As soon as practicable after it becomes possible for the land to be accessed;
- Subparagraph 105(4)(a)(ii) – If the mining registrar is not satisfied that the evidence provided under subsection (2)(b) demonstrates that it is not possible for the land to be accessed, and specifies, in writing, a day by which the land must be marked out. If the licence holder does not mark out the land by the end of the specified day the mining registrar will recommend the application for refusal; or
- Subparagraph 105(4)(a)(iii) – If the mining registrar is satisfied that it has become possible for the land to be accessed, and specifies, in writing, a day by which the land must be marked out. If the licence holder does not mark out the land by the end of the specified day the mining registrar will recommend the application for refusal.
- Paragraph 105(4)(b) – The licence holder must provide the mining registrar with evidence that the land has been marked out as soon as practicable after the marking out has been completed.

Example G – The licence holder does not mark out the land, as directed by the mining registrar under subparagraph 105(4)(a)(iii), once it became possible to access the land.

'G' holds a prospecting licence, and plans to submit an application for a mining lease before the licence expires on 12 July.

A major bushfire in the vicinity of the prospecting licence prevents 'G' from accessing the area due to dangerous fire conditions and road closures.

'G' lodges an application for a mining lease without having first marked out the land. The mining registrar considers the statement and evidence provided and accepts the application.

The fire is brought under control and extinguished on 20 July. Emergency services lift road closures and allow access to the area from 22 July.

The mining registrar directs 'G' to mark out the land by 30 July under subparagraph 105(4)(a)(iii).

'G' does not mark out the land until 2 August.

The mining registrar is not bound to recommend the grant of a mining lease (under section 75), and if the mining registrar has information that the land has not been marked out by the date set, can recommend refusal of the application as early as 31 July.

The mining registrar can recommend refusal even if evidence of marking out is provided, as 'G' has not marked out by the end of the specified day.

Example H – The licence holder fails to mark out the land in accordance with the mining registrar's instructions – marking out does not match the description of the ground applied for.

'H' holds an exploration licence and lodges an application for a mining lease under subsection 105(2). The mining registrar considers 'H's' evidence and is satisfied that it demonstrates the land cannot be accessed.

When the land is able to be accessed the mining registrar directs 'H' to mark out the land by 1 June under subparagraph 105(4)(a)(iii). 'H' marks out the land and on 25 May and provides evidence to the mining registrar under paragraph 105(4)(b).

However, the mining registrar identifies that the area marked out by 'H' does not match the "description of ground applied for" on the Form 21 Application for Mining Tenement.

'H' has therefore not marked out the land in accordance with the mining registrar's direction as 'H' has not marked out the land applied for in the mining lease application.

'H' still has until 1 June to mark out the land and to provide evidence that this has been done. The restriction in regulation 63(1) on the marking out of the same land within 21 days would not apply as 'H' has already lodged the application for a mining lease.

Example I - The licence holder is unable to mark out the land, as directed by the mining registrar under subparagraph 105(4)(a)(iii) as a second incident occurs to prevent access to the land.

'I' holds a prospecting licence, and plans to lodge an application for a mining lease before the licence expires on 12 July.

A major bushfire in the vicinity of the prospecting licence prevents 'I' from accessing the area due to dangerous fire conditions and road closures.

'I' lodges an application for a mining lease without having first marked out the land. The mining registrar considers the statement and evidence provided and accepts the application.

The fire is brought under control and extinguished on 20 July. Department of Fire and Emergency Services (DFES) lift road closures and allow access to the area from 22 July.

The mining registrar directs 'I' to mark out the land by 30 July under subparagraph 105(4)(a)(iii).

'I' prepares to travel to the area to mark out the land on 28 July, however before 'I' can access the land to mark out wind conditions cause smouldering fire areas to flare again. DFES closes roads due to the reoccurrence of dangerous fire conditions and 'I' still cannot get to the licence area to mark out.

'I' marks out on 2 August, just after the roads are reopened and the land can be accessed, however the marking out is done after the end of the day specified by the mining registrar. 'I' provides evidence of the further road closures when lodging evidence of marking out.

There is no provision for the mining registrar to change or extend the specified day by which the land must be marked out. Section 162B does not apply as the mining registrar's direction to mark out the land by 30 July is not a prescribed time or a prescribed period.

The mining registrar will recommend refusal of the application under subsection 75(3) as they cannot be satisfied 'I' has complied in all respects with the provisions of the Act. 'I' has not complied with subparagraph 105(4)(a)(iii).

However the Minister may grant or refuse the mining lease under subsection 75(6) irrespective of whether the application was recommended for grant or refusal and whether the applicant has or has not complied in all respects with the provisions of the Act. 'I' would need to make a submission to the Minister for the grant of the mining lease.

Example J – The licence holder is unable to complete marking out of the land due to emergency evacuation of the area

'J' is marking out a mining lease application to convert 'J's' prospecting licence which is due to expire on 28 February.

'J' has just completed the marking out requirements for the datum post when ordered to evacuate by DFES due to the approach of a category 2 cyclone with heavy rains and flooding predicted for the area. 'J' abandons the marking out and moves to safety.

On 27 February 'J' lodges a mining lease application under subsection 105(2) with a statement and evidence of the requirement to evacuate the area and road closures due to flooding. The mining registrar accepts the application.

Roads are damaged and access to the area will be restricted until interim repairs can be made by 14 March.

'J' should mark out as soon as practicable after the roads reopen under subparagraph 105(4)(a)(i) and provide evidence of marking out to the mining registrar under paragraph 105(4)(b).

The restriction in regulation 63(1) on the marking out of the same land within 21 days would not apply as 'J' has already lodged the application for a mining lease.

Example K – The licence holder marks out as soon as practicable after it becomes possible to access the land under subparagraph 105(4)(a)(i) – marking out does not comply with subsection 105(4) and regulation 59

'K' holds an exploration licence and lodges an application for a mining lease under subsection 105(2). The mining registrar considers 'K's' statement and evidence and is satisfied that it demonstrates the land cannot be accessed under subsection 105(3).

When the land is able to be accessed 'K' sets out to mark out the land under subparagraph 105(4)(a)(i) and provides evidence to the mining registrar under paragraph 105(4)(b).

However, the mining registrar identifies from 'K's' evidence that the marking out was not done in the manner prescribed by regulation 59.

Although 'K' has purportedly marked out the land under subparagraph 105(4)(a)(i), the marking out does not comply with paragraph 105(4)(a) as it has not been done in the prescribed manner. The mining registrar can now specify a date for 'K' to mark out under subparagraph 105(4)(a)(iii).

Example L – Conversion application lodged under subsection 105(2) – Mining Act objection lodged before the licence holder can access the land for marking out

'L' lodges a conversion application on 1 August. The statement and evidence included with the application shows the land cannot be accessed for the purpose of marking out due to travel restrictions declared as part of a state of emergency.

The mining registrar is satisfied under subsections 105(2) and 105(3) that it is not possible for the land to be accessed for marking out and accepts the application and accompanying statement and related evidence.

Travel restrictions will remain in place until 15 September.

An objection to the application is lodged on 30 August. Under subsection 75(5) the warden is responsible for making a recommendation to the Minister regarding the application. A recommendation cannot be made until marking out has been completed.

After the travel restrictions are lifted, the mining registrar directs 'L' to mark out the land by 30 September under subparagraph 105(4)(a)(iii).

'L' does not mark out by 30 September.

Under subparagraph 105(4)(iii) the mining registrar remains responsible for specifying a day by which the land must be marked out.

Under paragraph 105(4)(b) evidence of marking out is to be provided to the mining registrar.

The mining registrar will provide the evidence of marking out to the warden to assist their decision making.

The mining registrar will advise the warden that marking out has not been done by the date required under subparagraph 105(4)(a)(iii). The warden will take this into account when making a recommendation on the mining lease application.

6. Procedural process – application lodged and not marked out

6.1 The mining registrar assesses the application under subsections 105(2) and 105(3).

- The application must be a conversion of a prospecting, exploration or retention licence.
- The application must include a statement of the grounds of the application and evidence supporting the statement.
- The grounds must be under subsection 105(3).
- The evidence must satisfy the mining registrar the land cannot be accessed for marking out under subsection 105(3).

6.2 If the mining registrar is satisfied the application complies with subsections 105(2) and 105(3).

- Review for the expected date the land will be available to access for the purposes of marking out.
- When satisfied it has become possible to access the land, send written notification by email and registered post to the licence holder specifying a day by which the land must be marked out.
- Review for receipt of evidence the land has been marked out.

6.3 If the mining registrar is not satisfied the statement and evidence complies with subsection 105(3).

- Send written notification by email and registered post to the licence holder specifying a day by which the land must be marked out.
- Review for receipt of evidence the land has been marked out.

6.4 The mining registrar assesses the evidence of marking out provided by the licence holder.

- Marking out complies with subsection 105(4) and regulation 59.
- Marking out is completed by the specified day where the mining registrar has specified a day by which the land must be marked out.
- The mining registrar to recommend for grant if satisfied the application complies with all requirements of the Mining Act.

6.5 The licence holder does not mark out by the specified day or does not provide evidence of marking out.

- The mining registrar recommends for refusal as the application does not comply with subsection 105(4).

6.6 Objection lodged against application made under subsection 105(2).

- The mining registrar is responsible under subparagraphs 105(4)(a)(ii)-(iii) for specifying the day by which the land must be marked out and evidence that the land has been marked out is provided to the mining registrar under paragraph 105(4)(b).
- The mining registrar informs the warden that the application has been made under subsection 105(2) and not yet marked out.
- The mining registrar provides the warden with the evidence, when lodged, that the land has been marked out.
- The mining registrar informs the warden if the application is not marked out by the specified day.

6.7 Updates will be required to the following documents:

- Statement of Compliance for Mining Lease and General Purpose Lease
- Guidelines for completing Statement of Compliance
- Schedule of Compliance for Mining Lease and General Purpose Lease
- Application Checklist

7. Frequently asked Questions

7.1 Will the application be recommended for grant before the marking out of the tenement takes place?

No. The usual determination process applies, whereby the mining registrar must be satisfied that the licence holder has complied in all respects with the provisions of the *Mining Act 1978* (the Mining Act) before making their recommendation. This includes the marking out of the land.

7.2 Does the application lapse if the marking out is not completed by the date specified by the mining registrar?

No. There is no provision for lapsing of an application in the Mining Act. If the land is not marked out by the end of the day specified by the mining registrar, the mining registrar will recommend the application for refusal. On refusal of the application, any underlying licences being kept live by the conversion application will expire and the land will become available for application by other parties.

7.3 When should the marking out occur?

An application accepted as meeting the requirements of subsection 105(2) must be marked out as soon as practicable after it becomes possible for the land to be accessed. The licence holder can mark out and provide evidence of marking out to the mining registrar, or the mining registrar will set a day by which the land must be marked out. The application must be marked out by the end of the specified day, being midnight on the day set by the mining registrar.

If the mining registrar is not satisfied that the evidence provided by the licence holder demonstrates that the land cannot be accessed for marking out purposes, the mining registrar will set a day by which the land must be marked out. The application must be marked out by the end of the specified day, being midnight on the day set by the mining registrar.

7.4 How long will the applicant be given to mark out the land once the land is able to be accessed?

The mining registrar will act reasonably when setting the date by which marking out should occur, taking into account factors such as the location of the land, the distance from which parties need to travel to mark out the land and the impact of the circumstances that prevented access to the land in the first place. Before specifying a day, the mining registrar may contact the applicant to discuss the date by which marking out should be completed.

No set timeframe is proposed for marking out as the circumstances relevant to access and the ability to mark out the land may vary.

It is not foreseen that timeframes will be unreasonable, nor will they be excessive, and the mining registrar will exercise judgement, based on knowledge, circumstance and a reasonable person standard.

7.5 Who determines the evidence submitted under paragraph 105(2)(b) is satisfactory?

The mining registrar will determine if the evidence presented demonstrates that it is not possible to access land for the purposes of marking out a conversion tenement application. If the mining registrar is not satisfied with the statement and the evidence presented by the licence holder, the mining registrar will direct the licence holder to mark out the land.

The mining registrar's decision will be based on the statement and evidence provided by the licence holder demonstrating the circumstances that prevent access to the land. These circumstances are set out in subsection 105(3).

A conversion application can be accepted without first marking out the land if a statement and evidence are included with the application as set out in subsection 105(2).

7.6 Will these amendments change how marking out is completed under normal circumstances?

No. The amendments do not change the requirement to mark out or how this is carried out under normal circumstances. The changes will only apply when access to the land is prevented due the circumstances detailed in subsection 105(3).

7.7 Considering the outcomes of *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30, will there be any potential future mining tenement validity issues?

The amendments remove marking out as a precondition for making a conversion application in specific

circumstances. Therefore a conversion application, lodged with a statement and evidence, where the marking out has not occurred due to circumstances set out in subsection 105(3), and subject to compliance with other provisions of the Mining Act is a valid application due to these amendments. The requirement to complete the marking out of land as part of the determination process still remains and the application cannot be recommended for grant until the land has been marked out.

7.8 What does “any law” mean in paragraph 105(3)(a)?

The explanatory memorandum defines the circumstances preventing access to the land for marking out, as “any event that prevents legal access to land (under the law of Western Australia) by an applicant, or anyone acting for the applicant.” The Hon Martin Aldridge raised the question of what is the definition of ‘any law’ during the Second Reading debate of the Mining Amendment Bill 2022 as detailed in the [Parliamentary Hansard \(Legislative Council sitting 27 October 2022\)](#). At page 5147 the Parliamentary Secretary said “Anyone interpreting this provision can use the ordinary plain language, so it is any state law, commonwealth law, local law, common law ...”

‘Any law’ means a law that prevents access to land for the purpose of marking out.

A Commonwealth law expressly forbidding access to the land in question is such a law.

A law of a foreign jurisdiction preventing a licence holder from travelling to Western Australia is not such a law. This is because such a foreign law does not prevent the licence holder from engaging someone in Western Australia to mark out the land.

Usually, laws of foreign jurisdictions will not have jurisdiction over land in Western Australia, so they will not be about access to land in Western Australia.

7.9 What evidence of marking out will be required?

A Procedural Paper on the evidence required for marking out will be provided for consultation and comment when completed.

8. Marking out and applying for tenements online brochure

The [Marking Out and Applying For Mining Tenements brochure](#), currently available on the DMIRS website, will be updated to incorporate information relating to subsections 105(2), 105(3) and 105(4). Until the update is completed the brochure will operate in conjunction with this document.

9. Business systems

Enhancements to eMiTS and MTOL will be made for lodgement of conversion applications not marked out under subsection 105(2).

Appendix A – Section 105

105. Marking out of mining tenement

- (1) Except as provided in subsection (2), 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.
- (2) The holder of a prospecting licence, exploration licence or retention licence may make an application for the grant of a mining lease or general purpose lease in respect of any part of the land the subject of the licence without first marking out the land in relation to which the lease is sought if the holder includes with the application –
 - (a) a statement of the grounds of the application; and
 - (b) evidence supporting the statement.
- (3) The statement must specify that, in the opinion of the holder of the licence, it is not possible for the land in relation to which the lease is sought to be accessed by or on behalf of the holder for the purpose of marking out as a result of 1 or more of the following –
 - (a) any law;
 - (b) any order of a court, tribunal or person acting judicially;
 - (c) an act or omission of –
 - (i) a department of the Public Service; or
 - (ii) a State agency or instrumentality; or
 - (iii) a local government, regional local government or regional subsidiary; or
 - (iv) a body, whether incorporated or not, or the holder of an office, post or position, that is established or continued for a public purpose under a written law; or
 - (v) a brigade as defined in the *Fire Brigades Act 1942* section 4(1);
 - (d) any disaster or emergency, including a disaster or emergency caused by –
 - (i) fire, storm, flood, lightning, landslide or earthquake; or
 - (ii) the holder or any other person;
 - (e) any revolution, insurrection, riot or other civil disturbance;
 - (f) any vandalism, sabotage or other form of malicious damage of property;
 - (g) any war (whether declared or undeclared) or military operation;
 - (h) any strike, lockout or other industrial dispute;
 - (i) any other circumstance beyond the control of the holder of the licence.

- (4) If the holder of the licence makes an application in reliance on subsection (2), the holder must –
 - (a) mark out the land in relation to which the lease is sought in the prescribed manner and in the prescribed shape –
 - (i) as soon as practicable after it becomes possible for the land to be accessed; or
 - (ii) if the mining registrar is not satisfied that the evidence provided under subsection (2)(b) demonstrates that it is not possible for the land to be accessed and specifies, in writing, a day by which the land must be marked out – by the end of the specified day; or
 - (iii) if the mining registrar is satisfied that it has become possible for the land to be accessed and specifies, in writing, a day by which the land must be marked out – by the end of the specified day;
 - and
 - (b) as soon as practicable after the land is marked out, provide the mining registrar with evidence that the land has been marked out.
- (5) The activities involved in marking out under subsection (4)(a) are taken to be activities relating to prospecting and to constitute mining for the purpose of any claim under section 123 for compensation for loss or damage suffered, or likely to be suffered, resulting or arising from marking out –
 - (a) under subsection (4)(a); or
 - (b) for the purposes of an order under section 124(2).

Government of Western Australia

**Department of Mines, Industry Regulation
and Safety**

8.30am – 4.30pm

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