



## POSITION PAPER 14

# Marking out the land – A pre-condition of making certain mining tenement applications

## MINING REGISTRARS' OBLIGATION TO CONSIDER JURISDICTION

### ISSUE

What is the consequence of the decision of the Supreme Court of Western Australia in *Forrest & Forrest Pty Ltd v O'Sullivan & Ors* [2020] WASC 468 (Forrest 2020 decision) on marking out and the Mining Registrars' obligation to consider jurisdiction?

### BACKGROUND

Two prospecting licence applications made by Quarry Park Pty Ltd attracted objections by Forrest & Forrest Pty Ltd on the grounds that the applicant failed to mark out the land in the prescribed manner.

The Warden refused the prospecting licence applications as it was determined the marking out provisions were not strictly complied with. It was found the trenches commenced between 25cm and 75cm away from the posts, rather than being cut from each post, in the general direction of the boundary.

Forrest & Forrest Pty Ltd appealed the Warden's decision to the Supreme Court, successfully arguing that:

- the marking out requirements are a pre-condition to the making of a valid application;
- the Warden, therefore, had no jurisdiction to refuse the applications; and
- consequently, the applicant had no jurisdiction to appeal to the Minister against the refusal of the prospecting licence applications.

The Supreme Court found that the Warden committed jurisdictional error in determining the prospecting licence applications as the tenement applicant had failed to mark out the land in strict compliance with the *Mining Act 1978* (Mining Act) and *Mining Regulations 1981* (Regulations).

This decision overturned previous interpretations of the law on marking out as a precondition to the making of a valid application.

### POSITION

Mining Registrars do not have the jurisdiction to determine applications for prospecting licences, special prospecting licences, mining leases, mining leases for gold and general purpose leases under Part IV, Division 1, 3 and 4 of the Mining Act where the applicant has failed to mark out in strict compliance with section 105 and with Part V, Division 1 of the Regulations.

The Mining Registrar must be satisfied that they have jurisdiction to make an assessment of the application. An assertion made in an affidavit or statement that the land has been marked out in accordance with the regulations is unlikely by itself to be sufficient for the Mining Registrar to determine they have jurisdiction to consider the application.

The Mining Registrar is obligated to establish that the precondition to marking out has been satisfied before considering the application for the mining tenement.

**Evidence should, therefore, be provided by the person who marked out the land that the marking out was done in strict compliance with the Mining Act and Regulations.**

It is paramount all of the provisions of the Mining Act and the Regulations pertaining to marking out are strictly complied with to ensure that the application is validly made.

If it is determined the application is invalid in respect to marking out, the Warden also has no jurisdiction to consider the matter. In these instances where the application has been deemed to be invalid the application will be disposed of and the objection would not be put before the Warden.

### **What are the marking out pre-conditions to make a valid mining tenement application?**

Part V, Division 1 of the Regulations prescribe how the land is to be marked out.

### **Additional Requirements Prior to Marking Out Some Land**

The Mining Act provides that some land cannot be marked out until certain pre-conditions are satisfied.

#### **Reserve Land**

Certain classifications of reserved land under Division 2 of Part III of the Mining Act require consent to mark out the land, as per section 26(2) and (4).

- Land to which section 24(1)(a) or (b) refers may be marked out only with the consent of the Minister for Mines and the Minister responsible for the reserved land.
- A marine nature reserve or marine park may be marked out only with the consent of the Minister and the conservation Minister as defined in section 24A(9).
- Land to which section 24(1)(d) refers may be marked out only in accordance with such conditions and restrictions, if any, as are lawfully prescribed pursuant to section 128(1)(h) of the *Conservation and Land Management Act 1984*.
- In relation to any application for a mining tenement in respect of Commonwealth land, the Commonwealth land may be marked out only with the consent of the Minister and the Minister of the Commonwealth responsible for the control and management of the land, but otherwise the land is to be marked out as a mining tenement in accordance with the Mining Act.

**The applicant should provide evidence that consent was given in accordance with section 26(2) or section 26(4) to satisfy the Mining Registrar that the pre-condition for marking out certain reserve land and Commonwealth land has been met.**

#### **Private land**

Section 28 of the Mining Act provides that no person shall enter or remain upon the surface of any private land unless he is the owner in occupation of that private land or is authorised to do so, by a permit issued under section 30, or by any other provision of the Mining Act, or by virtue of a mining tenement.

**Where private land has been entered for the purpose of marking out, evidence that the applicant for a mining tenement is the owner in occupation of the private land, or evidence that a permit to enter upon private land has been granted pursuant to section 30 and served pursuant to section 31 may be required.**

### **How is the land to be marked out?**

An applicant for a prospecting licence, special prospecting licence, mining lease, mining lease for gold or general purpose lease shall comply with the regulations in Part V as to marking out and applying for the tenement.

#### **Regulation 59 – Manner of marking out tenement**

- (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.

Note:

Neither the Mining Act nor the Regulations provide a definition for the word "post" nor the word trench "trench".

The Department adopts the Macquarie Dictionary definition which describes each as:

- "Post – A strong piece of timber, metal or the like, set upright as a support, a point of attachment, a mark, a place for displaying notices, etc."
- "Trench – A long, narrow excavation in the ground. A deep furrow, ditch or cut."

### **Regulation 60 – Stones used to support posts**

Where, because of the nature of the ground, it is not practicable to fix posts firmly in the ground as required by regulation 59(1), stones may be used to support the posts.

### **Regulation 61 – Marking out surveyed land**

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

- (a) at a corner of the boundaries; or
- (b) if there is an existing survey mark at a corner of the boundaries, as close as practicable to the survey mark without moving, changing or otherwise interfering with the survey mark, a datum post to which the notice of marking out in the form of Form 20 is affixed.

Note: The datum post is described at regulation 59, being a post that is firmly affixed to the ground and projects at least 1 metre above the ground.

**Regulation 61 may be relied upon for the purpose of marking out only where the boundaries of the land in respect of which the mining tenement is sought are identical with any surveyed land.**

### **Regulation 92 – Shape of tenement**

The shape of a mining tenement other than a graticular exploration licence, a miscellaneous licence or one marked out pursuant to regulation 61 shall be in the form of a rectangle, but if the presence of boundaries of mining tenements, other boundaries or natural features make it necessary or desirable to vary this shape, each side of the tenement shall be a straight line and where possible at right angles to an adjacent side or parallel to an opposite side.

## **What evidence is required to demonstrate strict compliance with the marking out requirements of the Mining Act and Regulations?**

The Mining Registrar has the authority to require further information or evidence from the applicant to demonstrate that the marking out of the land has been carried out in strict compliance with the provisions of the Mining Act and Regulations.

As noted above, evidence may be required of **consent given in accord with section 26(2) or section 26(4)**.

Written information or evidence should describe in detail the sequence of the marking out of the land as set out at regulation 59 of the Regulations. The information and evidence should include:

1. the time for commencement of marking out;
2. the location details of each corner or angle of the boundary of the land marked out;
3. the height that each post projects above the ground;
4. the length and general direction of either any trench cut, or row of stones placed, from each firmly fixed post;
5. the location of the post that the completed Form 20 is attached; and
6. the time that the Form 20 is attached to that post.

The written information or evidence should be accompanied by photographs showing each sequence of marking out the land, as described above.

The following photographs should be provided:

1. A photograph of each post firmly affixed to the ground showing the measured height of the post should be taken **before** any trenches are cut or identifiable row of stones are placed.
2. A photograph clearly showing the measured length of the trenches cut or row of stones placed from each post firmly affixed to the ground.
3. A photograph clearly showing the Form 20 attached to the datum post.

If regulation 59(1)(a)(ii) is applicable at any corner or angle of the land that is marked out, information or evidence, including a photograph of the existing survey mark must be provided.

Where the boundaries of the land applied for are identical to any surveyed land as per regulation 61, the following information or evidence should be provided:

1. Details of the location of the datum post firmly affixed to the ground and details of the height of the datum post should be included in the information or evidence provided.
2. A photograph of the post firmly affixed to the ground at the corner of the surveyed boundary should be taken. The photograph should clearly show the survey marker and the post that is firmly affixed to the ground.
3. A photograph of the Form 20 firmly affixed to the datum post.

**Recommendation: Use a rigid measuring device such as a metal tape measure or brand mark metric stick to stand next to secured posts clearly showing the height of the post measured from the surface of the land.**

**Recommendation: Apple or Android compatible applications that record time and date details along with location coordinate details on digital photographs are readily available to download and are useful for the purpose of recording evidence of marking out.**

### **What happens if I cannot provide evidence that the land has been marked out in accord with the Mining Act and Regulations?**

Mining Registrars do not have the jurisdiction to determine applications for prospecting licences, special prospecting licences, mining leases, mining leases for gold and general purpose leases under Part IV, Division 1, 3 and 4 of the Mining Act in circumstances where the applicant has failed to mark out the tenement in strict compliance with section 105 and Part V, Division 1 of the Regulations.

The question of jurisdiction to consider an application for a mining tenement is a factual based assessment. If the Mining Registrar is not satisfied on the facts that the land has been marked out in strict accordance with the provisions of the Mining Act and Regulations, the application will be invalid and disposed of as being invalid.

A record of the invalid application will be made in the mining tenement register.

It is very much in the interest of the applicant to ensure that land is marked out in strict accord with the provisions of the Mining Act and Regulations, and that the comprehensive evidence of marking out the land is gathered at the time of marking out the land, and presented with the lodgement of an application for a mining tenement.

Government of Western Australia

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and Safety**

8.30am – 4.30pm

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