

Jurisdiction to deal with an application requiring marking out

Mining registrars' obligation to consider jurisdiction

Issue

The decision of the Supreme Court of Western Australia in **Forrest & Forrest Pty Ltd v O'Sullivan & Ors** [2020] WASC 468 (Forrest 2020 decision) clarifies the mining registrars' obligation to consider whether their jurisdiction has been enlivened, insofar that they must be satisfied that marking out has been completed in strict compliance with the *Mining Act 1978* (the Act) and Mining Regulations 1981 (Regulations).

If a mining registrar cannot be satisfied that marking out has been conducted in compliance with legislation, then they will not have jurisdiction to determine the purported application – in fact, there will not legally be an application, and the purported application would be marked as invalid on the Department of Energy, Mines, Industry Regulation and Safety (DEMIRS) systems.

As was the case in the Forrest 2020 decision, a statement made in an affidavit or a statement that **'to the best of the applicant's or agent's belief'** the land has been marked out in accordance with the regulations' is unlikely to be sufficient to 'satisfy' a registrar.

It is the position of DEMIRS that an affidavit or statutory declaration **'signed by the person marking out the land or a witness thereto'**, affirming that marking out has been done in strict compliance with the Act and Regulations, would be more appropriate evidence to satisfy mining registrars.

Background

In the Forrest 2020 decision, 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 mining 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 and Regulations.

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

Position

For prospecting licences, special prospecting licences, mining leases, mining leases for gold and general purpose leases an applicant must mark out in strict compliance with section 105 of the Mining Act and with Part V, Division 1 of the Regulations.

If the marking out requirements are not met, then mining registrars do not have the jurisdiction to assess applications under Part IV, Division 1, 3 and 4 of the Mining Act.

Before considering an application, a mining registrar must be satisfied that marking out requirements have been met. If the mining registrar is not satisfied, then there is no jurisdiction to determine the purported application and it shall be marked as invalid in the department's systems.

Evidence of marking out should be provided in the form of an affidavit or statutory declaration, which states that the marking out was done in strict compliance with the Mining Act and Regulations, completed by either:

- the person who marked out the land; or
- a direct witness to the marking out of the land.

It is paramount that 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.

What are the marking out provisions that need to be complied with in order to make a valid mining tenement application?

Part V, Division 1 of the Regulations prescribe how the land is to be marked out. The Mining Act also contains additional requirements.

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.

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.

Reserve Land

Certain classifications of reserved land under Division 2 of Part III of the Mining Act require consent to mark out the land, pursuant to 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 for Mines and the relevant 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*.

Commonwealth Land

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 for Mines and the Minister of the Commonwealth responsible for the control and management of the land. The land is to be marked out as a mining tenement in accordance with the Mining Act.

Private land

Section 28 of the Mining Act provides that no person shall enter or remain upon the surface of any private land unless either:

- they are the owner in occupation of that private land; or
- they are 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 of compliance with section 28 may be required.

Crown land not open for mining

Crown land is generally open for mining and can therefore be marked out. Crown land that is subject of a mining tenement is not open for mining under section 18 of the Mining Act and cannot be marked out.

Exceptions are where the marking out is to enable:

- an application for a special prospecting licence;
- conversion of the licence; and
- the conditional surrender of a general purpose or mining lease.

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 needs to comply with Part V of the Regulations 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
- (2) Form 20. 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.

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.

Neither the Mining Act nor the Regulations provide a definition for the word “stone”. The decision in *Camin Resources Pty Ltd v Monument Exploration Pty Ltd* [2024] WAMW 24 may provide guidance.

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.

The datum post is described at regulation 59, being a post that is firmly affixed to the ground and projects at least one 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 applicant needs to provide evidence 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.

For certain reserve land and Commonwealth land, evidence will be required of consent given in accordance 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.

If regulation 59(1)(a)(ii) is applicable at any corner or angle of the land that is marked out, information about the existing survey mark should 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. Information whether the datum post was fixed at a corner of the boundaries as required by regulation 61(a) or as close as possible to the survey mark as required by reg 61(b).
3. Confirmation that the survey mark was not moved, changed, or otherwise interfered with – if the datum post was fixed as close as possible to the survey mark as required by regulation 61(b).

This information and evidence should be provided by a person who was marking out or who had directly witnessed the marking out. If one person did not carry out or witness the entire marking out, then multiple affidavits or statutory declarations are required to attest to the marking out of each post. Each affidavit or statutory declaration needs to specify to which post or posts it applies and reference a plan showing the designated points.

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

Mining registrars do not have the jurisdiction to assess applications for certain mining tenements 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 mining tenements in question are prospecting licences, special prospecting licences, mining leases, mining leases for gold and general purpose leases.

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 compliance with the provisions of the Mining Act and Regulations, then the purported application is not regarded as an application under the Mining Act and will be 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 accordance with the Mining Act and Regulations, that satisfactory evidence is submitted with the application, and that comprehensive contemporaneous evidence is gathered and retained.

Suggested practice

Although not required for the purposes of the application, it is good practice to keep photographic evidence of marking out, should there be an objection to the application based on compliance with the marking out provisions.

Apple or Android compatible applications (apps) 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.

This could include:

- The post firmly affixed to the ground at the corner of the surveyed boundary, clearly showing the survey marker and the post that is firmly affixed to the ground.
- The Form 20 firmly affixed to the datum post.
- A rigid measuring device, such as a metal tape measure or brand mark metric stick, stood next to the secured post and clearly showing the height of the post measured from the surface of the land.
- A rigid measuring device, such as a metal tape measure or brand mark metric stick, lain next to each trench or line of stones, clearly showing the length of the trench or line.