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

GOVERNMENT OF WESTERN AUSTRALIA

Response to submissions

Position Paper 14 – Jurisdiction to deal with an application requiring marking out

Note: Draft position paper previously titled *Draft Position Paper 14 – Marking out the land a pre-condition of making certain tenement applications*

20 January 2025

Introduction

The Department of Energy, Mines, Industry Regulation and Safety (DEMIRS) sought comment on draft *Position Paper 14 – Marking out the land a pre-condition of making certain tenement applications – The Mining Registrar's obligation to consider jurisdiction.*

The draft position paper was prepared following the decision of the Supreme Court of Western Australia in *Forrest & Forrest Pty Ltd v O'Sullivan & Ors [2020]* WASC 468 (Forrest 2020 decision).

The *Forrest* 2020 decision found that Mining Registrars do not have the jurisdiction to determine applications where the applicant has failed to mark out the tenement in strict compliance with the *Mining Act 1978* (Mining Act) and Mining Regulations 1981 (Regulations).

The draft position paper set out what evidence registrars will expect going forward, to satisfy themselves that their jurisdiction has been enlivened. Specifically, the draft position paper included a recommendation for applicants to provide photographic evidence of marking out.

Consultation

The draft position paper was made available for public consultation between 18 July and 15 September 2023.

The department emailed the Resource Industry Consultative Committee members, tenement management consultants, government agencies, native title representative bodies and law firms. The email notified the commencement of consultation and provided a link to the department's website containing the guidelines and further information, including details of public information sessions.

The department conducted information sessions in Perth (28 July 2023), Kalgoorlie (27 July 2023) and Leonora (26 July 2023).

Twelve written submissions were received. The submissions and the department's response are set out in Appendix A.

Following the updates to the draft position paper, there was further targeted consultation with peak industry bodies in the period 9–25 October 2024. No further submissions were received on the updated position paper.

Key themes

1. Consequences of the Forrest 2020 decision

Some submissions voiced the view that marking out can only be judged to be non-compliant with the Mining Act if there is an objection challenging the marking out.

The department accepts the decision of the Supreme Court in the *Forrest* 2020 including its finding in paragraph 51, which states: "The precise and prescriptive language suggests not only that marking out is a preliminary step in the application process but that it is an essential preliminary step, that is, a pre-condition to the making of a valid application."

This means that no valid application can be made without compliant marking out. Registrars and wardens do not have any jurisdiction to determine an application unless they are satisfied that marking out complies with the Mining Act.

2. Changing the Mining Act

Two submissions were of the view that the legislation should be amended to deal with this matter.

To ensure timely availability of information, the department is committed to delivering guidance by way of publicly stating its views through position papers. Legislative change is a more protracted process, however suggestions will be considered.

3. Photographic evidence

Eight submissions addressed the proposed photographic evidence requirement in the draft position paper.

One was in favour, while seven regarded it as impractical.

The department has amended the position paper as a result. The position paper does not require that photographic evidence be submitted at the same time as the application. Keeping of photographic evidence is still encouraged as good practice.

4. Use of affidavits

There were five submissions remarking on the use of affidavits.

Two submissions considered the current use of affidavits as sufficient. This is not a stance that can be supported following the Forrest 2020 decision. In that case, there were affidavits of compliance, sworn by the mining title consultant as agent of the applicant that "to the best of [his] knowledge, information and belief [the] application complies with the relevant marking out provisions of the Mining Act and Regulations thereto". That was not sufficient in the case to enliven the jurisdiction of the warden to determine the application. The same would apply to the jurisdiction of the mining registrar.

Several submissions recommended that the use of affidavits continue, with the proviso that affidavits must be completed by either the person undertaking the marking out or a direct witness, who can attest to the strict compliance with the marking out conditions. The department accepts this suggestion.

To that end, the requirement in the final Position Paper 14 is for the person undertaking the marking out, or a person witnessing the marking out, to provide an affidavit or statutory declaration attesting to the strict compliance with marking out provisions.

5. Marking out provisions

Marking out requirements themselves were raised by five out of twelve submissions. These submissions claimed that the process of marking out that was set out in the draft position paper is not required by the Mining Act or Regulations. These contentions arise from the belief that the Regulations do not provide that marking out has to be in a specific sequence, other than the requirement to place the Form 20 on the datum post as the final action in the marking out process.

The position of the department is that the Regulations set out a prescribed sequence of steps that need to be carried out in order for marking out to be valid. For example, reg 59(1) requires that trenches are cut, or rows of stones placed, from a post. This requires that there must be a post firmly fixed in the ground before trenches are dug or rows of stones placed. Trenches cut in the absence of a post are not cut in accordance with reg 59(1)(b). In addition, the word "then" in reg 59(1)(c) indicates that the actions mandated by reg 59(1)(c) must occur after the actions mandated by reg 59(1)(b).

Response

- The department welcomed the submissions, which were generally positive and constructive.
- In response to the submissions, the department has reconsidered its position and removed the requirement for photographic evidence of marking out to be submitted to registrars.
- The finalised version of the position paper recommends that evidence of compliant marking out to be by way of an affidavit or statutory declaration signed by either the person who conducted the marking out or by a direct witness.
- The title of the position paper was also changed from *Position Paper 14 – Marking out the land a precondition of making certain tenement applications* to *Position Paper 14 – Jurisdiction to deal with an application requiring marking out*. This is to clarify that the subject matter is about jurisdiction.
- The finalised version of the position paper can be accessed on the department's website.

Appendix A - Submissions and responses

Stakeholder	Comment	Department response
Amalgamated Prospectors and Leaseholders Association of WA Inc (APLA)	The contentious issue arises when it comes to the Affidavit and to the actual identity of the pegger or pegging company/agent or tenement manager. APLA suggests a simple change to the Affidavit would solve the problem for MR to be satisfied the pegging has been carried out correctly. A simple tick box for the actual pegger with the statement that "To the best of my knowledge and information this application complies…" A simple tick box for the pegging company/agent or tenement manager with a statement that "To the best of my knowledge, information and belief this application complies…" Once one of the boxes has been ticked the MR will know who they are dealing with and request any further information or clarification as required. Once the MR is satisfied with the provided information the application can then be accepted and processed. If, on the other hand, the MR has a problem with the presented information the MR can direct the applicant to remedy the problem before the application can be accepted and processed.	The consequences of the *Forrest* 2020 decision are that compliance with marking out provisions is a pre-condition to making a valid application. The mining registrar must satisfy himself or herself that the marking out was carried out correctly. It is not beyond doubt that the proposed tick box method is different from the current method, which was insufficient in the *Forrest* 2020 decision, to enable the mining registrar to be satisfied that the marking out was carried out correctly. The Department has adopted the submission that the actual person marking out be required to complete an affidavit.

Stakeholder	Comment	Department response
Association of Mining and Exploration Companies (AMEC)	**General Remarks** Physical marking out is a passionate subject for AMEC and membership. It provides a competitive advantage to smaller, nimbler companies to compete with larger and otherwise better resourced organisations. The realities of pegging a tenement and the first in time principles that drive marking out are integral to the success of the Western Australian tenure system. The practice of marking out is a key ingredient in the vitality of the Western Australian resources sector and must not be curtailed. AMEC and its Mining Legislation Committee had a robust conversation with the drafters of this Position Paper. We appreciate the professionalism and good humor of the staff who came in person to discuss marking out to a full committee. **Recommendation:** 1. Amend the compliance affidavit (statement of compliance) so that the person undertaking the marking out confirms the pegging was performed correctly. 2. Remove all requirements for photographs or other evidence other than the statement of compliance to be provided at lodgment; and 3. Update the Position Paper 14 to include multiple photographs and details of what is considered by DEMIRS as correct marking out. **Specific Commentary** AMEC encourages DEMIRS to please reconsider their approach regarding the need for photographic evidence to prove marking out compliance. Photographic evidence is not mandated by the Mining Act. To require it via administrative procedure introduces a further ambiguous element in the process that will fuel future conflict. It is critical for AMEC that the validity or otherwise of pegging is not determined by the provision of additional evidence at the time of lodgment. Following the *Forrest & Forrest Pty Ltd v Wilson (2017)262 CLR 510* High Court case there have been substantial invalidity issues for Western Australian mining tenure. We consider it contrary to the interests of Industry (and the Government) to introduce further possible avenues for invalidity by demanding a new form of evidence.	In response to recommendations: 1. This position has now been adopted. 2. This position has now been adopted. 3. Noted, but the photographic evidence requirement has not been adopted in the final version of the position paper. Refer to Key Theme 3 at page 2.

Stakeholder	Comment	Department response
	Industry has highlighted a few concerns with the use of photographs for compliance, which we have listed below for completeness: • Marking out often happens at night, making photographs challenging to interpret. • Technology is subject to failure: battery's fail, photographs are blurry, and shadows can create confusion. • Requiring photographs erodes the time advantage smaller companies enjoy. • Greater detail is needed on the precise specifications of what is a valid photograph than what has been provided. We consider it more streamlined if the compliance statement requirements were amended to hold applicants more accountable without necessitating the submission of photos of marking out to support their applications. **Final Remarks** AMEC appreciates the opportunity to provide comment on Position Paper 14. We appreciate the engagement of DEMIRS throughout this process. We would welcome an opportunity to comment on any further drafts, confidentially or otherwise.	
Cement Concrete & Aggregates Australia (CCAA)	CCAA welcomes efforts to streamline administrative processes and reduce unnecessary red tape. CCAA **supports** the details outlined in the paper that mobile phone photographic evidence is provided by the persons who marked out the land to prove that the marking out was done in compliance with the Mining Act and Regulations.	Noted.
Central Desert Native Title Services (CDNTS)	Each determination of native title that underpins the above PBC's native title holdings, does not include any right to third parties, such as mining companies, to access native title land without a proper process being followed under the *Native Title Act 1993* (Cth), or by private agreement with the PBC. This includes for the purpose of 'marking out' under the *Mining Act 1978* (WA). Therefore, to the extent that 'marking out' requires access to native title land, absent some other form of authority, we submit that there is currently no process that allows 'marking out' to occur on determined native title land, either under the *Native Title Act 1993* (Cth) or *Mining Act 1978* (WA). It follows that, absent some other form of authority, and absent an appropriate process under both the *Mining Act 1978* (WA) and the *Native Title Act 1993* (Cth), accessing native title land for the purpose of 'marking out' is impermissible and is likely to constitute a trespass against the native title held by the relevant PBC.	Access to the land to mark out is outside the scope of the position paper, which is concerned with the jurisdiction of the warden or mining registrar to determine applications and evidence of marking out required for the application to be valid.

Stakeholder	Comment	Department response
Eastern Goldfields Prospectors Association (EGPA)	E.G.P.A. recommends the following regarding the current developments in "Marking Out and Lodging" applications. 1. Amend the legislation so that an affidavit is acceptable as reasonable proof of compliance for the "Registrar" when there is no objection. This would simplify the process and remove the added work requirements within DEMIRS and applicants. Further those who wish to object to the application can still do so, but the burden is with the objector. It would also have the benefit of protecting the "Registrar" from any legal ramifications. In other words, is it necessary for the whole industry to modify long held practices, to ensure the small percentage of objections have better surety? 2. Avoid introducing even the slightest of legal complexity, where possible to "Marking Out" requirements. So that the industry as a whole can enjoy certainty and avoid the costly legal engagements that delay and can derail progress of the industry, particularly in the small mining and prospecting sector. 3. As identified in the DEMIRS Kalgoorlie workshop, participants identified that the position paper introduces more complexity and totally unnecessary burdens and will be barrier to many stakeholders. The position paper has been ill conceived from a practical point of view and should be abandoned. We ask that DEMIRS consider our submission with the merit which has been earned through many years of lived experience in the matter of "Marking Out" and "Lodging Applications" for mining tenements.	1. This would require legislative amendments. In the meantime, the proposed position paper would provide guidance on how to comply with the *Forrest* 2020 decision. 2. and 3. The *Forrest* 2020 decision was that there was no jurisdiction to accept applications where the applicant has failed to mark out the tenement in strict compliance with the Mining Act and Regulations. Compliance with marking out is a pre-condition to making a valid application. The *Forrest* 2020 decision is about jurisdiction to accept applications, rather than about marking out rules. The marking out rules remain unaffected by both the *Forrest* 2020 decision and the position paper.

Stakeholder	Comment	Department response
ER Law	Re text on page 2: "As noted above, evidence may be required of consent given in accord with section 26(2) or section 26(4)." What I comprehend that to mean is this: "As noted above, for reserve or private land, evidence will be required of consent given in accord with section 26(2) or section 26(4)." The use of the word 'may' in the original draft makes it unclear whether these are the only times where DEMIRS will require evidence of consent (which is how I understand it). If, however, 'may' entails other issues or discretions, it may be useful for those to also be identified in the paper.	The relevant sentence is reworded for clarity in the final version of the position paper.
Les Lowe	1. The demand that a Registrar be given a photo of the post BEFORE the trenches are dug is impractical if the applicant is to meet the requirements of Reg 59. … the post wouldn't remain erect more than a day or two because the soil/gravel supporting the post will be removed from at least two sides of the post in order to ensure that the trench meets/touches the post. Additionally, if the trenches were dug after the insertion of the posts then there could be a gap of even one millimetre of dirt/rock adhering to the post that could lead to invalidity. This is impractical nonsense that is actually leading to invalidity. Furthermore, due to the likelihood that a post would fall over within the Objection period for a tenement application, there will be an increase in those Objections because the posts are not visible and not actually in the ground but laying n top of the ground. This is nonsensical. 2. I have always recommended that the trenches be dug prior to the insertion of the posts into the ground. This method achieves two objectives. First, is that the trenches are truly "from the post" as stipulated by Warden O'Sullivan's decision; it can't physically be any other way. Secondly, the post will have the support of the rock/soil on all four sides as it is now driven into much firmer ground 100mm under the loose top soil. 3. The method stated above at 2, cannot be carried out due to the chronological order that is seemingly required by a Registrar to ensure validity of an application. This statement by DEMIRS on this point not only makes a nonsense of practicality it also stands at odds with Reg 59 wherein there no chronological order is specified. … the wording at Reg 59(1) (a)(ii) states "and". It does not state the word "then". Therefore, they can do carried out in no particular order. The Registrars are not empowered to work outside of the Regulations but this statement of defining "before" the trenches are dug is making the Registrars operate ultra viries. As such it is totally unacceptable because it is unfair, illegal and will certainly lead to further challenges in the Warden's Court and beyond.	Noted. 1. A firmly fixed post required by reg 59(1)(a) is one that would be inserted sufficiently deep into the ground so that trenches dug from the post would not cause it to fall. A post that falls over after digging the trench would not be regarded as being fixed firmly in the ground pursuant to reg 59(1)(a). 2. and 3. Reg 59(1)(b) requires that trenches are cut, or rows of stones placed, from a post in the general direction of the boundary lines. That is, reg 59(1)(b) requires that there be a post present when the trenches are cut or the stones are placed. By necessary implication that means that the actions required in reg 59(1)(b) occur after those in reg 59(1)(a). Trenches cut in the absence of a post, are not cut in accordance with reg 59(1)(b).Rows of stones placed in the absence of a post are not placed in accordance with reg 59(2).

Stakeholder	Comment	Department response
	So, by demanding that some kind of chronological order be displayed in a photograph, DEMIRS and its Registrars outside of the WA Mining Act in its Regulation 59. This not only adds impracticality to the marking out procedure, it's also a step too far. It is overreach and is therefore illegal.	The policy position proposed is supported by the Regulations and therefore within the power of the Registrar.
McMahon Mining Title Services Pty Ltd	We acknowledge the views of Tottle J in the *Forrest* 2020 decision (Decision) that marking out of land in compliance with the Act conditions the jurisdiction of a Mining Registrar or Warden. We are concerned that the current draft of PP14 is an overcorrection of the issues raised in the Decision and may create more issues than it seeks to address. **Is PP 14 directive?** The Act and Regulations do not set out what is required for a Mining Registrar to be satisfied that a tenement applicant has complied with marking out requirements. Therefore, PP14 seeks to create this standard without being directive. This, respectfully, is confusing. If PP14 is adopted, we aren't sure if Mining Registrars (and tenement applicants) must then follow this process or not. It is not completely clear if failure to follow PP14 leads to automatic invalidity of an application. There is no express statement that this evidence must be provided… A determination of invalidity can have serious consequences for tenement applicants. In the absence of clear and directive language in legislation and policy, it is not fair that an application should be made invalid, and incapable of being cured, for failure to comply with PP14. If this is DEMIRS' intention it should be stated more clearly and directly. **No clear legislative requirement** We are concerned that PP14 will create requirements which are not in the Act or Regulations and cause Mining Registrars to deem invalid application that were in fact marked out in compliance with the Act and Regulations. For example, the Act and Regulations do not provide that marking out has to be in a specific sequence, other than that the Form 20 must be placed on a datum post at the end of the sequence. Therefore a picture of pegs standing alone before trenches is extraneous to statutory requirements. The real issue of concern should be that marking out is correct, and not the creation of a burden on DEMIRS officers and mining industry. The new burden may create a risk of compliant applications being deemed invalid because of minor issues related to proof of compliance and not actual compliance. We believe that creating further requirements, additional to the Act and Regulations and to the statements made in the decision is unnecessarily burdensome for tenement applicants and DEMIRS.	Noted. The draft position paper is a guide to applicants that addresses the matters raised in the *Forrest* 2020 decision. It does not seek to impose fetters on the discretion available to registrars. Instead, the draft position paper suggests a minimum standard of compliance with the principle in *Forrest* 2020. A purported application that does not comply with the marking out provisions is not an application under the Mining Act. It is not an application that is "made invalid" – it was never an application to begin with, legally. However, in the Department's online system, such a purported application would be denoted as "invalid". The *Forrest* 2020 decision stated that "The precise and prescriptive language suggests not only that marking out is a preliminary step in the application process but that it is an essential preliminary step, that is, a pre-condition to the making of a valid application." (paragraph 51) and further, at paragraph 81: "marking out in the prescribed manner and in the prescribed shape is an essential precondition to the warden's jurisdiction to determine an application for a prospecting licence". What has been said of a Mining Warden's jurisdiction is equally valid for a registrar's jurisdiction, given that marking out is a "pre-condition to the making of a valid application."

Stakeholder	Comment	Department response
	• The more compliance steps that are added, the more likely there will be issues. For example, issues with the upload or format of photographs taken to evidence marking out. • Creating an additional trove of documents for a Mining registrar to review before processing a tenement application would add further time to processing tenement applications. • If an application doesn't exist before the Mining Registrar is satisfied via PP14 and if it is not plotted for this reason, the ground will appear available for longer on DEMIRS software, causing further unnecessary marking out and application lodgement by other parties. • If the intent of PP14 is to eliminate marking out disputes, it may backfire. The documents and photographs files with DEMIRS will give potential objectors further opportunity to review and scrutinise and applicant's marking out and nitpick perceived errors and non-compliance. Further, if PP14 is to be adopted, it should be made very clear that the 'evidence' is to be provided contemporaneously with the tenement application. The timing requirement is currently buried in the last sentence of PP14. **Alternative proposal** We respectfully suggest an alternative option to PP14, which requires something more than an assertion of compliance by any person but is much less burdensome. We propose that: • DEMIRS marking out guidelines are clarified so that they are more helpful to tenement applicants. Updated guidelines should include photographic examples to illustrate compliant and non-compliant marking out; and • A new pro-forma statement of compliance is created (SOC). The SOC should be signed by a person that undertook the marking out and state that an applicant has complied with the marking out provisions, by specific reference to the Act and guidelines. We acknowledge that the above proposal is also extraneous to the requirements of the Act but suggest it is a more workable alternative to PP14.	Noted, but the photographic evidence requirement has not been adopted in the final version of the position paper. Refer to Key Theme 3 at page 2. The updated position is similar to this suggestion. Noted.

Stakeholder	Comment	Department response
	Priority of PP14 over other issues MMTS manages approximately 15% of all tenements in Western Australia. Whilst we have seen several disputes relating to marking out compliance, we respectfully submit that compliance difficulties relating to exploration licences occupy more industry time and resources. The relative importance of exploration licences to the State is illustrated by the fact that expenditure on exploration licences over the last 12 months is more than 20 times the expenditure reported on prospecting licences. The absence of s58 guidelines and finalised guidelines relating to issues raised in the Blue Ribbon case are of more pressing concern than the perceived issues that PP14 seeks to address. Our view is that State resources should be allocated to resolving these matters instead.	Noted. The draft guidelines regarding the *Blue Ribbon* case were released for consultation on 17 November 2023.
Odyssey Gold Ltd	Clarity is required to assist people pegging general purpose leases, mining leases and prospecting licences in ensuring applications are valid and meet the requirements of the Mining Act and Regulations. The expectation of strict compliance with the Act, Regulations, policies and precedents set by Warden's Court decision places a high burden on prospectors and explorers that discover the resources that drive the state's economy. A marking out cannot be found to be non-compliant unless evidence can be provided demonstrating it is non-compliant. Adding a requirement for persons marking out to not only compliantly mark out but to also provide evidence that the mark out is compliant provide further avenues for lawyers to challenge not only the marking out and the application, but also the evidence of the marking out. The Department cannot hope to foresee or eliminate the creativity of lawyers to challenge an application that follows the intent of the legislation. The onus should be on the objecting party to provide evidence of a non- compliant application by being forced to collect the evidence. It is likely photography, video or otherwise could be challenged. Inadequate lighting, photography at night, unclear angles, tress/scrub blocking images could all be grounds to object to insufficient evidence of compliant pegging, even if the pegging is compliant. This will cause more grounds for objection, not less.	Noted. The consequences of the *Forrest* 2020 decision are that compliance with marking out provisions is a pre-condition to making a valid application. Proof of compliance with marking out provisions is needed for every application. It is not the case that proof of compliance with marking out provisions is only required when there is an objection against an application. In the *Forrest* 2020 decision, there was an affidavit of compliance. This, however, was not sufficient for the Mining Registrar to be satisfied that marking out was completed in accordance with the Mining Act. The applicant needs to provide evidence to satisfy a Mining Registrar that marking out complies with the Mining Act and the Regulations.

Stakeholder	Comment	Department response
	Recommendation – There should be a suggestion to those marking out to collect evidence, such as photos with measuring sticks/tapes as evidence in the Wardens Court if required. This recommendation should not be a requirement. Recommendation – The current requirement of the Warden for an affidavit to be filed in support of proof of the application should be adequate evidence to allow the fulfillment of the requirement of the mining registrar and Regulation 59(3)(a). If required, this affidavit may need to include a reference to compliance to Regulation 9 & 60 or restate Regulation 59 and 60. There are already appropriate Acts to give recourse against those that provide false affidavits. Adding further red tape complexity for the whole of the industry for the sake of trying to stifle the creativity of lawyers to find legal technicalities will result in more non-compliant applications. More evidence provides more avenues of technicalities. This only wastes prospectors and explorers time and resources and also those of the Department. With reference to the consultation document the Regulations do not prescribe pegging prior to the digging of a trench or laying of stones. The Regulations only require the fixing of the form to the datum following pegging and trenching. There is not a requirement to record the time of commencement of marking out. The Department should not be making the prescription of the sequence of activities which is not stated in the Act or Regulations.	This position has been adopted. Noted. Reg 59(1)(b) requires that trenches are cut, or rows of stones placed, from a post in the general direction of the boundary lines. That is, reg 59(1)(b) requires that there be a post present when the trenches are cut or the stones are placed. By necessary implication that means that the actions required in reg 59(1)(b) occur after those in reg 59(1)(a). Trenches cut in the absence of a post, are not cut in accordance with reg 59(1)(b). Reg 59(1)(c) contains the word "then" indicating that the actions required by reg 59(1)(c) occur after those in reg 59(1)(b).
Peter Milne	It is my submission that the interpretation of Mining Act ("Act") by the High Court is erroneous as the intent of the Act and Regulations is to have the applicant clearly identify the area marked out so that others marking out the ground nearby will also know it has been marked out and surveyors may record it if and when the time comes to do so. It must be noted that the core of the Act and Regulations was created before the time of portable cameras and when a lot of people where illiterate or semi-illiterate. Allowances must have been made for them. It has always been cognizant of that, and allowances made unless a more correct application was made and contested. This is identified in Section 105A of the Act deals with the priorities between applicants for tenements. Relevantly it states: (1) Subject to section 111A, where more than one application is received for a mining tenement … in respect of the same land or any part thereof, the applicant who first complies with the initial requirement in relation to his application has, subject to this Act, the right in priority over every other applicant.	The *Forrest 2020* decision sets a legally binding precedent.

Stakeholder	Comment	Department response
	Subject to certain exceptions, for the purposes of an application for a prospecting license and a mining lease, the 'initial requirement' referred to in s 105A is marking out in the prescribed manner. In light of the above it was not envisioned that slight errors would not negate an application and indeed many Wardens and Magistrates have agreed with that interpretation. It is only where there is a competing correct application that that has priority over an application with errors. Where there is no competing application and it is clear on the intent of the boundaries of the application that, in the interests of the State, the economy and fairness to the applicant (who may be semi or fully illiterate) that the application should be accepted as it has been in the past. It is only when a competing application can show errors in the application that it could be objected to, which is also in the interest of fairness. An objection by a non-competing party such as a pastoralist, should not be accepted as a challenge to the initial application on the grounds of slightly erroneous marking out. Note that it is impossible to comply with all parts of the marking out requirements of the Act and Regulations, namely the "requirement" in Regulation 92 that where possible all corners shall be marked at right angles. Although there might be land available to make out an area in the shape of a rectangle and at right angles to an adjacent side, it is NOT possible to do so as even if the marking out of a corner was less than or equal to a small fraction of one second of an angle greater or less than 90 degrees it would not comply with the Act as that is NOT a right angle. A right angle is exactly 90 degrees, and a rectangle has four right angles. In light of the fact that all non-compliant applications must be accepted with this minor error in application it sets the standard that other minor non-compliant errors must also be accepted. It has never been the duty of the Registrar to accept the validity of marking out as they could never know. They can only assess the validity of the paperwork of the application. It is up to the competing objectors (and not pastoralists or activists) to challenge the validity of the marking out. For the applicant to have proof in the form of photographs for the application to be accepted is an unfair burden on the applicant as it is possible that their camera may fail prior to or after taking the photos of a valid application.	The consequences of the *Forrest 2020* decision are that compliance with marking out provisions is a pre-condition to making a valid application.

Stakeholder	Comment	Department response
The Chamber of Minerals and Energy of Western Australia (CME)	CME recognises the recent efforts of the Department of Mines, Industry Regulation and Safety (DEMIRS) in the provision of new, and the update of existing, guidance to provide clear direction to proponents regarding obligations and process expectations under the Mining Act. We understand that DEMIRS is working through a variety of issues arising from determinations of various court cases since 2017 related to strict compliance with the Mining Act.	Noted.
	We note that Position Paper 14: Marking out the land a pre-condition of making certain tenement applications (Position Paper) seeks to address matters arising from the Forrest & Forrest Pty Ltd v O'Sullivan & Ors [2020] WASC 468 decision by the Supreme Court. The requirement for the Position Paper is unclear given the decision indicates that the Warden has the power to hear matters within its own jurisdiction. We interpret this to mean that if an application was challenged based on whether it was compliant with the strict compliance requirements for marking out, a Warden could still determine this. If non-compliant, they could strike it out, enabling it to be dealt with on appeal to the Supreme Court. If compliant the matter could be dealt with by the Warden.	The draft position paper recommends evidence to satisfy a mining registrar or warden that land is marked out in compliance with the Act and Regulations. Such evidence would be required to ensure the validity of the application is valid. It would also ensure that the registrar or warden has jurisdiction to determine the application.
	We recommend that Government undertakes further consultation with industry, utilising existing industry consultative processes, like the Resources Industry Consultative Committee, to identify practical solutions arising to issues arising from various court cases with the aim of introducing a consolidated Amendment Bill. This approach would require significant consultation and engagement with industry to avoid unintended consequences and would facilitate a more permanent fix, so long as validity issues were addressed. With respect to marking out, this approach may also provide an opportunity to reassess the purpose of marking out, the various methods contemplated in the Act, and whether alternative approaches could be introduced that capitalize on advances in technology and processes.	The consequences of the *Forrest 2020* decision are that compliance with marking out provisions is a pre-condition to making a valid application. Proof of compliance with marking out provisions is needed for every application. It is not the case that proof of compliance with marking out provisions is only required when there is an objection against an application.
	The Position Paper introduces additional burdensome requirements which creates practical difficulties for proponents. It also changes the current practice of submitting an affidavit with an application to affirm compliance.	Cases where there is objection to an application due to marking out requirements may still occur, where the initial information had enlivened jurisdiction for an application to be assessed.

Stakeholder	Comment	Department response
	The paper does not clearly outline the rationale for these changes, and further we note the Supreme Court decision WASC 468 does not indicate that an affidavit is insufficient for a Mining Registrar to determine if they have jurisdiction to consider the application. If a proponent affirms via an affidavit they have marked out in strict compliance, there is no barrier to the Registrar determining the application on this basis. If validity is contested, determination of compliance would sit with the Supreme Court in the event the Warden is unable to satisfy themselves that marking out was done in strict compliance with the Act. Based on the above interpretation of WASC 468 there does not appear to be a need to alter current practice. The change in practice and additional requirements proposed in the Position Paper undermines the principle that demonstration of compliance with the marking out provisions of the Act is done at the proponent's risk. If contested, the affidavit and other supporting information is eligible to be submitted in court. We are also unclear why the court decision necessitates the provision of photos with an application instead of an affidavit to affirm compliance. Given that marking out is a time sensitive activity and critical to many proponents. It is unclear what benefit the additional obligations proposed in the Position Paper achieve. **CME recommends that DEMIRS reconsider their approach with respect to the drafting of this Position Paper and consider redrafting the 2013 guidance document on how to mark out correctly accompanied by an affidavit template that a proponent can submit with their application affirming their compliance.**	The Department engaged with the members of the Resources Industry Consultative Committee as part of its consultation and is happy to continue to engage with CME and other members. In the *Forrest 2020* decision, there was an affidavit of compliance. This, however, was not sufficient for the mining registrar to be satisfied that marking out was completed in accordance with the Mining Act. The applicant needs to provide evidence to satisfy a Mining Registrar that marking out complies with the Mining Act and the Regulations. Noted.
Wayne Craig Van Blitterswyk	I respectfully submit that the most intelligent approach to addressing the circumstances that have arisen from the various Court decisions relating to the Warden's power relating to tenement applications, is to make a simple change to the law that does give the power to the Warden to determine if a tenement application is valid or not. This can simply be done by adding a section in the appropriate spot, or spots, within the Act, to states a tenement application is deemed to be valid unless objection is raised and evidence is presented to the Warden to the contrary. It is to be taken on good faith that the applicant has marked out the tenement properly and that the tenement application is valid in all ways, allowing the tenement to progress in the fashion as has always been the case. Should objection be raised then the Act provides the Warden the power to hear the evidence in relation to the matter and to adjudicate accordingly.	Noted. This would require legislative amendments. In the meantime, the position paper will provide guidance.

Stakeholder	Comment	Department response
	The path to having to prove to the Registrar the application is valid with photographs and measurements, etc is ridiculous and impractical. There is no way such things can be done by an individual in a race against others to peg highly contested ground, particularly in bad weather and at night. Should there be a desire to unblock the Wardens Court Objections, I suggest attention be turned to all the spurious objections against miscellaneous licences. The Act has always allowed different title to co-exist and work together. Most of these miscellaneous licences have no infrastructure on them and will never have so. It is the tenement managing services that are responsible for these objections. They claim to be acting in the best interests of their clients but in reality they are chasing fees. There should be costs awarded against objectors who object without valid reason. For example, if there is no infrastructure on the L or there is no granted programme of work to build any infrastructure. Once, a tenement manager is liable for costs for unnecessary objections, that cost will go straight back to the tenement manager. Thus, that will stand as serious deterrence for the lodging of spurious objection and massively free the Warden's Court system.	

Government of Western Australia

Department of Energy, Mines, Industry Regulation and Safety

8.30am – 4.30pm

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