



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*

## Response to submissions

October 2023

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## Introduction

The Department of Mines, Industry Regulation and Safety (DMIRS) sought comment on draft guidelines on marking out for conversion applications under section 105(2) of the *Mining Act 1978*.

The draft guidelines were prepared following amendments to section 105, made as part of the *Mining Amendment Act (No. 2) 2022*, which came into effect on 2 November 2022

The amendments allow lease conversion applications to be lodged without first marking out the land when the land cannot be accessed due to exceptional circumstances. The amendments ensure licence holders do not lose priority to the land due to circumstances outside their control.

The guideline provides examples to demonstrate the application of subsections 105(2)-(4) for conversion applications lodged without first marking out the land in particular circumstances where it is not possible for the land to be accessed for the purpose of marking out. Marking out of the application is required when access to the land becomes available and before the application can be granted.

## Consultation

The “Guidelines – Marking out for conversion applications under section 105(2) of the *Mining Act 1978*” were made available for public consultation between 26 May 2023 and 21 July 2023.

On 26 May 2023 emails were sent to Resource Industry Consultative Committee members, tenement management consultants and the parties who had previously lodged a submission regarding the amendments to section 105 in the consultation process for the Mining Amendment Bill (No.2) 2021.

The email notified the commencement of consultation, the consultation period, contact details for enquiries or to request an information session and a link to the Open Consultations page on the DMIRS website containing the guidelines.

DMIRS did not receive any requests for an information session.

One written submission was received from the Association of Mining and Exploration Companies (AMEC).

## Key themes

The receipt of only one submission reflects the limited application and non-contentious nature of the amendments and previous consideration and comment on the amendments during consultation for the Mining Amendment Bill (No. 2) 2021.

The submission received and DMIRS response is set out at pages 4–6 of this document.

## Marking Out for Conversion Applications under subsections 105(2)-(4) of the *Mining Act 1978* Guidelines

### Response to submissions

| Ref | Stakeholder  | Comment  | DMIRS response/action   |
|-----|--|--|---|
| 1   | Association of Mining and Exploration Companies (AMEC) | <p><b>General Comments</b></p> <p>The drafting of this Guideline is comprehensive. The inclusion of a Frequently Asked Questions (FAQ) and multiple examples to step through how the principles will be applied are particularly appreciated. The inclusion of these examples has made it easier to understand how it will be applied.</p> |   |
|     |  | <p><b>Length of time specified under s105(4)(a)(ii)</b></p> <p>There is no upper limit on how long a Registrar can delay marking out.</p> <p>Is there an ability for the time limit on marking out to be amended?</p> <p>We agree with the statement under FAQ 6.4 that the Registrar will apply reasonable judgement.</p>                 | <p>Where the mining registrars are not satisfied with the evidence provided they will apply reasonable judgement to ensure applications are marked out as soon as practicable and without undue delay.</p> <p>Once the mining registrar sets out a date by which the land must be marked out there is no ability to change that date.</p>   |
|     |  | <p><b>Transparency</b></p> <p>Clarification on whether the date specified under s105(4)(a)(ii) will be published and where it will be published.</p> <p>As there may be competing interests, the publication on Tengraph of the timeframe for marking out is needed.</p>   | <p>The application Form 21 is currently publicly available through Mineral Titles Online (MTOL). Information on the Form 21 will disclose if the land has been marked out. Accompanying statements, communications and directions of the mining registrar are not currently publicly available. This will not change. The information provided by applicants may contain matters that cannot be made publicly available due to privacy reasons.</p> <p>Publication of the date set for marking out has limited value for third parties: There is a further recommendation and refusal process before the ground may become available should the applicant not complete marking out by the end of the specified day.</p> <p>The following information will display in MTOL for an application lodged without first marking out the land under s105(2):</p> <ol style="list-style-type: none"> <li>1. There will be no date or time in the Markout field.</li> <li>2. Application tracking - Assessment for Recommendation - More Info will show s105(4) at the field "No Mark Out provisions applicable".</li> <li>3. Application tracking - Action required by applicants - More Info will display "Section 105(4) – No Mark Out".</li> </ol> |

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|-----|-------------|--|--|
|     |             | <p><b>Example F</b></p> <p>In Example F, someone is out of State, but could hire an agent to mark out on their behalf. However, in Example A, someone is in Perth, unable to travel, but cannot hire someone in the Goldfields to do so.</p> <p>What is the threshold for not being able to hire someone to act as a representative? While the example is purely theoretical there are many people who are willing to act as an agent and mark out across the State. What level of evidence is required to be deemed to have made sufficient effort to not mark out?</p> <p>The limitations on movement into and around Commonwealth Biosecurity zones powers, as per section 477 of the <i>Commonwealth Biosecurity Act 2015</i>, that were implemented during the COVID-19 pandemic, are a rare example of where an agent may not be procured.</p> | <p>The mining registrar will assess the evidence provided, including evidence of attempts to engage a person to mark out.</p> <p>Noted</p>   |
|     |             | <p><b>FAQ 6.3</b></p> <p>The second paragraph reads as if, despite their application that the area cannot be marked out is rejected due to insufficient evidence, the Registrar will set a new date for marking out. That appears to reward making an application. If a company applies and it is rejected, the tenement should lapse on the original date.</p>  | <p>The provisions facilitate the conversion of prospecting, exploration and retention licences in circumstances where the land cannot be accessed for the purpose of marking out. The right to convert is set out in sections 49, 67, and 70L of the Act and the licence holder is able to lodge an application without first marking out if it is not possible to access the land for the purpose of marking out.</p> <p>s105(4)(a)(ii) sets out the process when the mining registrar is not satisfied with the evidence provided for an application made in reliance on s105(2). If this is not satisfied, the mining registrar can recommend refusal. There is no mechanism for a rejection of an application in this circumstance.</p> <p>The application for a lease continues until a recommendation is made by the mining registrar and determined by the Minister or the Minister's delegate.</p> <p>DMIRS considers the risk is minimal that the proposed provisions could be used by applicants to extend the time available to them to mark out by making applications under s105(2) that are unable to be supported by acceptable evidence and do not meet the requirements of s105(3).</p> |

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|-----|-------------|--|--|
|     |             | <p><b>FAQ 6.8</b></p> <p>The question clarifies the interpretation of “any law” provisions in s105 (3)(a).</p> <p>An example that would be pertinent, and we ask is included, is the <i>Aboriginal Cultural Heritage Act 2021</i> (ACH Act). There are likely to be a range of unintended consequences that emerge out of application of the ACH Act 2021.</p> | <p>FAQ 6.8 provides a general explanation of the interpretation of “any law” which means a law that prevents access to land for the purposes of marking out.</p> <p>The Government announced the repeal of the ACH Act on 8 August 2023, and the Aboriginal Heritage Legislation Amendment and Repeal Bill 2023 has since been introduced into Parliament.</p> |
|     |             | <p><b>Section 7</b></p> <p>Section 7 of the guideline is a welcome procedural step through of how the process will work. We suggest it may help the flow of the document if it is moved ahead of Section 6.</p>  | <p>Suggestion accepted.</p>  |

Government of Western Australia

**Department of Mines, Industry Regulation  
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8.30am – 4.30pm

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