

To: Department of Mining, Industry Regulation and Safety

Re: Position Paper 14: Marking out the land – A pre-condition of making certain mining tenement applications

18 September 2023

Introduction

AMEC appreciates the opportunity to provide industry feedback on *Position Paper 14: Marking out the land – A pre-condition of making certain mining tenement applications* (the Paper).

The guidance was considered necessary following the Supreme Court of Western Australia's decision in *Forrest & Forrest Pty Ltd v O'Sullivan & Ors [2020] WASC 468* (Forrest & Forrest 2020 decision) on the marking out requirements and the Mining Registrars' obligation to consider jurisdiction. The decision found that Mining Registrars lack jurisdiction to determine certain mining tenement applications if the applicant fails to strictly comply with section 105 of the Mining Act and Part V, Division 1 of the Regulations. The Mining Registrar must ensure jurisdiction before assessing the application, these guidelines attempt to set out what is necessary for valid marking out. AMEC considers that the proposed methodology should be simplified through amendments to the Statement of Compliance.

About AMEC

The Association of Mining and Exploration Companies (AMEC) is a national industry association representing over 540 member companies across Australia. Our members are mineral explorers, emerging miners, producers, and a wide range of businesses working in and for the industry. Collectively, AMEC's member companies account for over \$100 billion of the mineral exploration and mining sector's capital value.

Mineral exploration and mining make a critical contribution to Australia's economy, directly employing over 274,000 people. In 2021/22 Industry generated a record high \$413 billion in resources exports, invested \$3.86 billion in exploration expenditure to discover the mines of the future, and collectively paid over \$63 billion in royalties and taxes.

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 humour 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 DMIRS as correct marking out.

Specific Commentary

AMEC encourages DMIRS 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.

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 DMIRS throughout this process. We would welcome an opportunity to comment on any further drafts, confidentially or otherwise.

For further information contact:

Neil van Drunen

Director WA, NT and Commonwealth Policy

Neil.vandrunen@amec.org.au

Nicolas Parry

Policy Advisor WA, NT, SA

nicolas.parry@amec.org.au