

Known Unknown Noongar

By
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IT seems I have been one of the few lonely voices banging the drum on what’s coming with the new cultural heritage laws, this being my fourth article in the *Farm Weekly* on the topic in two years, (look for them on my Linked in or FaceBook) ‘*Looking for a Lost Heritage*’, ‘*Aboriginal Cultural Heritage Act – have you got any culture*’ and ‘*Rent seeking disguised as sacred sites.*’

Also see my article ‘*The Voice will make some more equal than others*’ and Peta Credlin’s opinion piece in The Australian ‘*A modest Indigenous voice to parliament? Take a look out west to consider its far reaching consequences.*’

Putting aside my efforts to warn the WA farming community of what’s coming and the failure of the Opposition to do its job in calling this out, let me attempt to map out what I think will come post 1 July, 2023 when the new regulations kick in.

Firstly, like the passing of the Native Title Act in 1993 or the recently passed state Industrial Manslaughter Laws, the reality is nothing changes overnight once new legislation kicks in.

Native Title did not shut down the mining or pastoral industry and the industrial manslaughter laws have not seen employers carted off to gaol as if they were serial killers.

The reality is big changes like these are a slow burn, it takes years for the bureaucrats to gear up to administer complex new laws and just as long for the lawyers to explore the potential of the lavish new bounty that has dropped into their laps.

But given time, eventually the slow grind of the machinery of government gears up and the enforcement mechanisms come into play, at the same time the lawyers go to work through the courts to explore every avenue to extract rents from business.

In the case of Native Title, it took at least five years before the first big cases had been heard.

The same thing will happen with the industrial manslaughter laws, most farmers have settled back into business as usual kicking the need for a safety system down the line, but fear not WorkSafe is on the job, with more money and more people and will be prowling around farms soon enough.

As it stands the Department of Lands, Planning and Heritage is nowhere near ready to administer the new laws. It has no electronic working approvals system ready to manage the hundreds of civil works that are ready to commence.

Which means come July 1 everything from council road works, exploration drilling to the construction of new sheds, dams, fences on farms will have to be put on hold or run the risk of being hit with large fines and possible removal of completed works should down the track (up to 7 years) they be found to have destroyed cultural heritage.

Even if they were ready to administer the rush of applications, none of the Indigenous Local Aboriginal Cultural Heritage Services (LACHS) are up and

running, or trained to process applications, which means it’s currently almost impossible to work quickly through the approvals process.

My guess is it will take two years for the systems to be ready to accept your payment to get heritage approval for your next infrastructure upgrade.

In the meantime like farm safety ignore it at your peril, as should something go wrong and a human or mythical being be destroyed then expect to be dragged through the courts.

Until then sit back and watch how quickly your local LACHS office gets set up, take note of who is running it and who are the appointed cultural knowledge holders. Even better, make sure you stay close to them as sooner or later they will be kicking the dirt on your farm, passing judgement on what’s there and what’s not.

Not that every shire will fall under a functioning LACHS, my guess is some will never get off the ground, just as some Native Title groups, after 30 years, are non existant, forcing the explorers and miners to hunt around for someone, anyone to give them approval to go ahead.

Which is where the Department will come in, as it under the regulations will take it upon itself to fill the gap even when none of the locals are that interested in stomping around looking for heritage sites.

In other cases a LACHS will exist, but long delays will be the norm as there will be a dispute between families of who is the right cultural knowledge holder, disputes that can drag out for years in the courts or the town square.

If you don’t believe me or think it’s inappropriate to point it out, then go and talk to the junior miners and explorers and ask them what it’s been like dealing with native title groups. They have some horror stories of inefficiency.

On the other side of the equation will be the emergence of highly organised LACHS that will base themselves in Perth and will, with their high powered lawyers, be highly efficient at working the system. Again ask the miners and they will give you horror stories with the cost.

As to what you end up with in terms of the professionalism of the LACHS or how they interpret cultural heritage within your community be it Wudjari, Njunga or Balardong, it’s going to be luck of the draw.

Just like we saw with the recent Tony Maddox property case in Toodyay. He got pinged under the old Act for upgrading for a third time his culvert over a creek running into the Avon River.

Why him and not all the neighbours? It’s luck of the draw. Why now and not last time the roadway was upgraded. It’s luck of the draw.

If you feel lucky yourself you can always undertake your own self assessment and determine if you are disturbing the land to a Tier 1, 2 or 3 level and if what you are disturbing has any heritage value, thereby avoiding paying the local mob to tell you what you already know.

If you are certain there is no heritage (no unknowns) then you are still obliged to prove you know that there is nothing there, but how do you know if you are not supposed to know as only those in the know are allowed to know.

But get it wrong, try running the defence

in court that you know there is no unknowns. You have to prove it, but how can you when some sites are not supposed to be known to anyone but the knowledge holders.

Anyone recall the Hindmarsh Bridge controversy in South Australia and the fictional secret women’s business. If not look it up.

Self assessments are full of risks. It will take years before there is a judicial decision of what might constitute ‘reasonable and practicable’ measures that are acceptable as part of self assessments to avoid harm to cultural heritage.

In practice, a proponent will need to undertake ‘due diligence’ in advance of deciding whether to shelve out plus or minus \$5000 and adopt a precautionary approach and pay to get confirmation there is nothing there or take it upon themselves to do an assessment by checking on the government map, searching for artifacts and taking a couple of notes and photos to prove they went through the exercise.

Problem is ‘proponents’ must consult the government maps as part of any due diligence, but they advise that the directory may be incomplete, inaccurate or deliberately obscure, so that complete information about the presence or absence of ACH can only be discovered by direct contact with LACHS or other knowledge holders.

In other words you are almost forced to go to the local mob and get their sign off that there is nothing there, noting also that over time things change and heritage can move. Again, ask the miners how common it is to find heritage where explorers want to drill.

My reading is we simply don’t know how far you can go with self-assessments and we won’t until tested in court. Hence it may be better to round up your neighbours and pay the local elders to come and map out what is and what is not important across your farms and register it. If nothing else, it gives you a defence and a base line that hopefully won’t move with time.

So what’s the take away? Firstly members of the Opposition have failed us and they should be reminded at every opportunity and told we expect to see a policy from them which funds a State-wide survey to establish the definitive map of every last heritage site, once and for all.

Secondly, the world won’t end on 1 July, but the legislation does exist and it’s incredibly intrusive, so like farm safety, build it into your costs and business planning. Maybe map all your projects for the next decade in one hit.

Thirdly, think about getting in front of the game and organising a multiple farm survey with your neighbours. It might be cheaper to do it collectively but just cull out the farming with the big rocky outcrops, creeks and the fresh water well.

Fourth do your own reconciliation with your local mob, as they are now part of your farming future.

Finally, odds on most farms will slip under the radar for the next few years, but like the booze bus, the tax man, farm safety and oversized farm machinery on roads, if the government decides to pour resources into hunting those who are not following the law then there is no hiding, you will be forced to comply.

One last point. The Department of Lands, Planning and Heritage is running workshops. Take the opportunity to front up but don’t arc up at them, or if someone does who is sitting next to you, tell them to pull their heads in. These people are public servants, they are not politicians, they are there to do the government’s bidding. If you want to have a crack, then there are 97 State MPs that voted for, against or abstained for this legislation, go yell at them. The same applies for the independent panel for live exports. Farmers abusing people paid to do a job in public forums ends up in the media and makes us all look bad. Show some respect and ask yourself why aren’t the politicians sitting up the front answering questions, save your wrath for them.



Hon. Dr Antonio (Tony) De Paulo Buti MLA
Minister for Aboriginal Affairs

Dear Minister

CLARITY ON ABORIGINAL CULTURAL HERITAGE

Recently I attended one of your department’s workshops on the roll out of the new Aboriginal Cultural Heritage Legislation.

While the department was keen to downplay the impact of the new regulations on farmers, a close reading of the publication provided titled ‘Activity Tiers’ (<https://www.wa.gov.au/system/files/2023-06/20230427-activity-tiers.pdf>) highlights the huge degree of uncertainty that exists within the detail.

As a case in point can I request that your department review the following examples so that the farming community can have some comfort that the government has thought through the real-world implications of this new Act.

- 1: Can a farmer undertake a full determinant survey to determine what cultural heritage sites are located on their property. This would be done to future proof certainty of what needs to be left undisturbed. Would such a map remain static over time and be a valid legal defence of not requiring future surveys, or can heritage move over time?
- 2: Section (8) of the publication ‘Activity Tiers’ states that a Tier 1 activity only exists if it is sited on an area that results in land use that — (a) is no greater in surface area or height than existing land use or development in the area. On that basis is deep ripping below 500mm classified as a Tier 2 activity if that land has not been deep ripped to that depth before?
- 3: Section (9) states temporarily placing equipment on an existing area of ground disturbance is a Tier 1 activity. If a farmer parks up static farm machinery like mobile field bins and augers, is that then classified as a Tier 2 activity and would need a heritage due diligence assessment?
- 4: Section (22) states erecting or installing a fence in a way that does not involve clearing is a Tier 1 activity. What level of clearing is the threshold if a farmer must clear a small amount of bush on the boundary line?
- 5: Under Tier 2 Activity Section (33) states that a farmer does not have to undertake a survey to maintain existing infrastructure only if it does not involve any of the following — (a) removing more than 20kg of material; (b) disturbing more than 200m² of ground in total; (c) disturbing more than 10m² of contiguous ground. Does that mean a farmer needs to undertake a heritage survey to clean out dams, or fill in potholes on a roadway?
- 5: Section (29) states that a Tier 2 activity is building a residential building on a lot larger than 1100m². Does that mean farmers have to undertake a full survey to install a temporary donga for farm workers?
- 6: Section (102) states that field investigative activities that require a survey, include removing more then 20kg of material or excavating to a depth of more than 1m is a Tier 3 activity. Does that mean a farmer would face having to complete a Tier 3 level heritage survey before undertaking a full carbon soil base line survey?
- 7: Section (36) states that an activity that will, through repetition by the proponent, result in a new track being formed is classified as Tier 2. Does that mean a farmer can’t reroute a farm track down a firebreak or through some remnant bush even if the ground is already disturbed and no vegetation needs to be removed?
- 8: Section (39) states that burning is Tier 2 activity, other than as part of an activity described in Divisions 1 to 8 which relates to housing and subdivisions. Does that mean farmers can’t undertake stubble burns on a new property/paddock that has never had a stubble burn carried out in the past without a due diligence assessment?
- 9: Section (92) deals with erecting or installing new agricultural infrastructure on existing agricultural land including watering points, new yards etc. Does this mean that during a drought installing temporary watering points or confinement yards will be classified as a Tier 2 activity?
- 10: Section (124) deals with landform re-contouring or reshaping. Would using a Reefinator to crush and level rocky ground be classified as a Tier 3 activity?
- 11 Tier 2 activity is defined as low ground disturbance activities, and the proponent is required to notify Aboriginal parties where the proposed activity may harm ACH (including if unsure whether the activity will harm ACH.)
How can a farmer ever be certain that there is no cultural heritage if some of it is culturally secret, or it has moved or evolved onto the site over time? Without a full state-wide survey to establish a definitive map there will always be a degree of uncertainty which means all Tier 2 activities will need to be actively surveyed to ensure legal certainty. Is this correct?
- 12: Farmers have infrastructure projects ready to go post July 1, what guarantees are there that the department and the LACHS are in a position to quickly and efficiently process applications.

Kind Regards,

John Hassell
President WAFarmers

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ABORIGINAL GROUPS OF THE SOUTH WEST OF WESTERN AUSTRALIA

