



WAFARMERS
Shaping the Future of Agriculture

Buti blew it for the Government

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WHAT a mess the cultural heritage roll out is turning out to be for the new Premier. Picking a fight with farmers, pastoralists, property developers and potentially every landholder who has a block larger than 1100m² is not a good way to start his time as leader.

By now it is clear that the raging debate which has emerged in the last few weeks has marked the end of the dream run of the McGowan years. Worse still it's attracted the attention of the likes of columnist Paul Murray and the editor of The West Australian, putting the Minister for Aboriginal Affairs, Tony Buti, on the reshuffle watch list.

By failing to sit down personally with key stakeholder groups and work through the new regulations, Minister Buti has missed the opportunity to have a fresh set of eyes including lots of smart lawyers, to save the government from itself. He has made a rookie's error by trusting his department to deliver a good outcome while basking in the accolades of the progressive left who don't live in the real world.

No doubt the minister confused the flawed consultation and wrongly named the co-design process as a process that would produce a workable set of regulations. By not taking a long hard political and pragmatic look at the end result, he has left the government exposed when the full weight of the peak bodies mobilised and put their lawyers on the job of pulling the regulations apart.

The fact that the Premier had to step in and take over in the days before the July 1 start date is a sure sign of political failure. The announcement of a 12-month deferral to fix a problem identified by the miners, stumping up of half a million dollars on a PR campaign, the roll out of an implementation advisory committee and promising to go soft on prosecutions for 6 months, is a clear sign that the penny has dropped that the legislation was undercooked.

A competent minister would never have put the government in this position. Experienced ministers know the gremlin is in the detail, and you never leave an activist department to finalise regulations that are likely to be politically contentious. The final version needs the political smarts of the minister's office to take over and review and consult and if required delay and demand more funding from Treasury to smooth the implementation to ensure none of the above happens.

The best ministers, when dealing with difficult legislation, need to be as good as Peter Costello and his forensic understanding of the GST legislation, as tough as Wilson Tuckey when he repeatedly fronted angry crowds when rolling out the Regional Forest Agreement and as clever as Norman Moore when reforming the State's Mining and Fishing Acts.

Minister Buti might be a nice guy and very book smart as the highly educated person he is, but he is politically naive and rapidly needs to learn from the masters of the art of politics if he is to survive as a minister. He needs to find himself a past minister to mentor him through the next steps which includes clarifying exemptions for agriculture, winding back the powers of the Local Aboriginal Cultural Heritage Services (LACHS) to prevent abuse of process, and co-founding heritage site studies if he is to salvage what is a slow train wreck that has only just begun.

To be clear, this train wreck started years ago under the previous government and continued with the deathly silence of the Liberal party and The Nationals WA. Buti inherited this mess and has compounded it by rolled out confusion, but could well be the one to make his mark by making the Act workable for all. The following is aimed as much as advice to the Minister, as it is to the farming community.

Darren West MLC: Labor's lonely only farmer member of Parliament yet again at Northam bravely did the minister's job and fronted the mob, lecturing them that there is much misleading information out there and they have nothing to fear. Only problem few would have left the meeting with a clear idea of what there is not to fear. Few of the attendees would pass a test if asked what is a Tier 1, 2 and 3 activity and when a survey is required.

Old Act vs New: It's true the old act applies to farmland, and farmers have had a good run for the past 70 years as government after government has not enforced the letter of the law when it comes to heritage. Mind you if they had, I'm sure the old Act would have been made workable for the agriculture sector unlike the new Act which is clearly not.

Like for Like: The Department repeatedly tells us 'like for like', that we can rely on the definition in Division 1 of **General Activities** Section 8, which states that you can undertake an activity in an area that results in land use or development that is no greater in surface height than existing land use and no greater in depth than 10m below ground level. If a proposed activity is 'like for like' (as compared to a prior disturbing activity) and does not cause 'new and additional disturbance', then it is exempted from the having to do a Due Diligence Assessment (DDA). But.....

Like is not always Like: Despite what Section 8 states, the lawyers tell us it's not quite the get out of gaol card we were hoping for. If you go to the **Agricultural Activities** section, Division 5 Section 88 (page 56), it puts a limit of 4kg, disturbing 10m of ground and excavating to a depth of up to 500mm. Anything more and you need to do a DDA. So now it depends if you are operating under the General or Agricultural sections? Unless that is, your activity falls under Division 6, Section 100, the **Field Investigation** section and you plan to do soil sampling. Is soil sampling a General or Agricultural

or a Field Investigation activity? Confused, then the answer is on page 5 Section 1 'Fall back for overlap activities' which states that the most specific activity in the schedule applies. See it's all there in black and white, only problem is the lawyers tell me these guidelines don't count for much when you end up in court and a LACHS has claimed you have damaged heritage. Go figure.

What's Exempt: We were told normal farming activities like seeding, deep ripping, fence clearing, fence building, rock removal etc is all exempt; no DDA is required. But if the fence or rock removal is in a heritage site then you have a problem. Or if the soil sampling is deep and takes more than 4kg then you may need a full heritage survey. Legal tells us to be safe, you should do a full farm DDA every year which may require a full survey for certain activities.

Legal Clarity Please: Minister to note, add a clause that classifies all farming activities as exempt and limit the need to undertake a heritage survey on freehold farmland to large scale ground disturbance such as land clearing, earth moving and dam building. We can live with that.

Spell it Out: Where is the nice simple A3 brochure which spells out what is exempt and what is not. I suspect it's not been produced as it's impossible to get the State Solicitor's Office to sign off on a simple brochure because nothing about this Act is simple.

Prosecutions: On average, there has been less than one prosecution a year in the South West land division under the old Act which seems about right as the State was busy encouraging land clearing and dam building, but we still managed to identify and protect key heritage sites like Wave Rock and Yealering Lakes. Why is the new Act so intrusive?

Miners versus Farmers: There seems to be a perception that farmers are like miners and apply highly destructive activities. Outside of land clearing which has come to an end and blowing the odd bedrock out of the bottom of a dam, our activities can't be compared to the miners. Hence using a mining approach for heritage protection on farmland was always going to be problematic.

Sheds around homesteads: Not sure why we ever need an on-the-ground heritage survey when building a new shed around the homestead. This ground is already highly disturbed why not use technology and allow photo, video and satellite surveys to confirm the site is not a risk to heritage.

Bell the Cat: Let's bell the cat that this legislation is ripe for abuse just as the exploration and mining sector has found with the old Heritage and Native Title Acts. Both gifts that keep giving, developing a hundred million dollar a year Aboriginal industry which has done little to close the gap. I bet the government would put in place much tighter criteria if it was funding the heritage surveys and compensating private land holders.

Cash for Destruction: The funding formula in the mining sector is well established, 1%-7% of exploration expenditure and 1%-3% of royalties and the heritage can then be blown to kingdom come. It's only a matter of time before a formula emerges in the agricultural sector. My guess is it will be payment for site monitoring based on a percentage of the value of the shed, dam, house etc if it involves heritage site impact.

Costs: The mining industry is expected to pay for 10 or more knowledge holders and apprentice knowledge holders to go on a survey, but the Department expects the farming community to have such good relations with their LACHS that this will only see one or two come for a look see. I think this is wishful thinking as it will be hard for the LACHS to say no to filling the car. I know I used to run surveys. Why not cap it at two elders? Rough rule of thumb, two x \$1200 + km + meals, legals and admin = a basic survey at \$5000. If it then needs a management plan double it to \$10,000 and if it's complex or disputed double it again.

Sites: There are 78 high value protected sites with the highest level of threshold, plus 40,000 sites that sit on the Department's system and an unknown number of secret sites. I'm opening the book on how many sites there will be by 2030 once the 40 new LACHS get up and running. When do a few rock flakes stop being heritage?

Appeal: There is no appeal mechanism to the Government's appointed Heritage Council, a body stacked with those sympathetic to the indigenous cause. The opposition should be running with a policy to abolish the Council and bring it in house to the Department, plus create an appeals process through to the State Administrative Tribunal, giving us some hope of a fair process.

Legal Certificate: If we get our farm surveyed by knowledge holders, we will get a certificate of clearance, but it only applies for those infrastructure activities surveyed for a specific site for a limited time. The certificate does not last forever because heritage can change over time.

Consultation: Consultation time frames need to be shortened to 90 days. We need to move to automatic approvals if the LACHS don't respond, the world of business can't work to indigenous time or the negotiation weapon of endless delays.

Country Borders: In one session the Department tells us it will make the call on which mob represents which country, and in another it said it would be the new Heritage Council, and another will leave the local elders to sort it out. Either way good luck with finalising that map in the near term and bad luck if your farm is in disputed territory.

One for the Bush Lawyers: What happens when the local LACHS or the Department goes, yeah nah – you should have not built that new fence without a full survey. Do you just say – nah yeah go away I was following the minister's advice as it's 'like for like'. What is the legal defence? An exempt activity by definition does not require a DDA, and nor does it have the corresponding defence as per section 103 of the Act. We seriously need clarity on exempt activities.

Secret Sites: Hard to do a DDA if sites are not on the map. Not



sure why the Department keeps telling us to check if some of the 40,000 registered sites across the State are hidden from public view. The Department's, solution is to call them with the exact build site location details, and they will check for you, but then that would be revealing a secret heritage site if they confirm you are encroaching on heritage ground. Forget the map you have to call the Department and get any advice in writing.

Ignore it: My guess is most farmers will ignore the legislation as they grasp onto the simple idea that they can carry on 'like for like' just like they did last year. But be careful, once those LACHS get up and running they will need a million dollars a year to fund the office, which is a big incentive to scare farmers into running surveys. Remember they have access to satellite maps and can prosecute years after you ran around with the dozer thinking the Premier had given you a 6 month reprieve.

1100m²: Why is a rich western suburbs 1099m² block with water views exempt, while a battler's 1101m² block in Wickiepin or Wagin not, as it's more than 1100m². If heritage is important no block of land should escape the government's new laws. Why aren't the indigenous groups pointing this out, it will open up a bonanza of opportunities to them and a world of political pain for the government?

First and Final Survey: The way forward is to do full farm surveys and identify and protect what's heritage on farm and hopefully leave the rest of the farm heritage free forever. I can see a \$/ha rate to buy long term certainty, but at what price?

Property Rights: Read this 'The Attack on Property Rights Upholding the Australian Constitution': The Samuel Griffith Society (2010). *"The increasing use of heritage listing regulations in Australia provides a more gradual example of the long-term erosion of private property rights." ...the legal and economic costs of heritage preservation are disproportionately borne by private property owners to the extent that their property rights are eroded. This cost burden on private owners is economically unreasonable and a rebalancing of the costs of heritage conservation is desirable."*

Compensation: If a site for a new dam is likely to impact heritage and the dam can't be built then the second-best site is the only option. This has a material impact on the farm. Who should wear this cost, the property owner or the State? If the state had to write a cheque to cover the lost economic opportunity of the 40,000 sites on the current register and the next 40,000 that are no doubt coming, then it might put a bit of economic common sense into the legislation.

Liberals and The Nationals WA: I wonder where the WA Nationals priorities are when its voice on the new heritage Bill was silent for so long, but it had time to rush out and voice its support for the Voice referendum. At least farmers got to make their voice heard against the Heritage Act through the efforts of Liberal Mining and Pastoral MP Neil Thompson and his 30,000 strong petition. Keep an eye on him, Ag Scientist, Economist, ex chief of staff in the Barnett government, senior bureaucrat Dept of Planning and Aboriginal Affairs, he knows government inside and out. When he speaks on Heritage he is across the detail, keep an eye on his Facebook page.

Legal Advice: Ignore the Premier's claim of a soft start, no Premier is the US President and can give you a pardon. The Department might not prosecute in the first 6 months, but it will still have 6 years to come after you. The penalties are brutal and 'like for like' is a legal minefield. Get legal advice before digging in, talk to Phil or Matilda at Bailiwick Legal on 9321 5451.

THE WESTERN AUSTRALIAN FARMERS FEDERATION (INC)

DAIRY SECTION – ELECTION

WAFarmers hereby notifies its members of the nominations received for the WAFarmers Dairy Conference 20 July 2023.

Nominations – election 2023 (as at close of nominations 21/06/23)

President: NOAKES, Ian, Forest Grove

Vice President: No nomination received

Note: Where no nomination has been received for WAFarmers Dairy Section Vice President, nominations may be taken from the floor at the Annual Conference if agreed to by the Dairy Section Council.