



WAFARMERS
Shaping the Future of Agriculture

Hon Toni Buti BPE DipEd MIR LLB DPhil
Minister for Aboriginal Affairs

7 July 2023

Minister

Aboriginal Heritage

Thank you for your reply to my letter dated 9 June 2023 addressing questions I had posed on cultural heritage.

Unfortunately, your reply fails to adequately provide the much needed clarity that the agriculture industry is seeking as a raft of questions and ambiguities within the legislation remain.

Questions, which WAFarmers believes need to be immediately and actively addressed to give the agriculture industry greater certainty are:

Like for Like: In your reply you state:

the Act includes significant exemptions for those in the agricultural industry.

This includes the exemption of like-for-like or less activities that allow farmers on established farms to continue their work...

Whether a survey is required would depend on a range of circumstances including whether the proposed activity falls within the parameters of a like-for-like activity and is therefore exempt and whether the area has previously been subject to a survey that identifies that no ACH is present.

You refer to Items 6 and 8 of Schedule 1 of the Regulations to support the above propositions.

These items do not use the term “like-for-like”, nor will you find that term anywhere in the Act or Regulations.

Further, your explanation (and we note that the Department has also spruiked this notion) does not take into account Item 35 of Schedule 1 (subdivision 3 – General Tier 2 activities, Division 1) of the Regulations.

In essence, Item 35 provides that a “like for like” activity is a Tier 2 activity, and as such will require the requisite level of due diligence and a permit.

As a matter of statutory interpretation, given Regulation 40, the interpretative rule that the “specific over-rides the general”, and where Tier 1, Tier 2 and Tier 3 activities are separated from and not subject to any exemption, then surely Item 35 is the catch-all, and any “like for like” activity, not just on farms, but anywhere, falls as a Tier 2 activity.

The above is just one example of how flawed this legislation is.

At its best, there is ambiguity between Items 8 and 35 which the courts will be tasked to resolve.

Worst case of course is that all farming activities are Tier 2 activities.

Your reliance on any notion of “like-for-like” as a panacea for farmers to keep on doing what they have always done, is not just misconceived, it could lead to farmers being found guilty of damaging cultural heritage when they thought they were undertaking normal, like for like, farming activities.

Reliance on Item 6 of Schedule 1 is also fraught with ambiguity.

Where infrastructure was put in decades ago, by someone who is now deceased, how is a person meant to determine what area was “disturbed during the construction” of that infrastructure? No doubt, where this Item is enforced, it will fall upon the person undertaking the activity to prove that they have not disturbed more ground, an impossible task in the above circumstances.

To assist the agricultural industry, and remove any of the above ambiguities, there needs to be specific regulations that enshrine your supposed “like-for-like” activities as specific exempt activities for agriculture.

Where you say that such “like-for-like” are exempt activities, then the Act and Regulations should explicitly and expressly say this.

Further, these exemptions should not be couched in the ambiguous legal terms of “no greater in surface height than existing land use and no greater in depth than 10m below ground level” why not simply clearly state that there is an exemption for ‘all farming activities 10m above and 10m below ground’ this would take away the confusion around the “like-for-like” exemption.

Cost: The extension of aboriginal cultural heritage to “intangibles” and the locking away of landscapes and river systems as “heritage sites”, means that “heritage” may be newly “formed” over freehold land and in places where landowners have not seen an indigenous person engaging in cultural activities for many generations.

This power is rife for abuse, as we have seen in the mining and pastoral estate where simple ground surveys are regularly costing between \$10,000 and \$50,000.

See “*Rorting, overcharging, duplication and delays are rife in the Aboriginal heritage approval process that is costing an estimated \$100 million a year,*” The West Australian on November 27, 2014.

What controls has the government put in place to prevent the abuse of process when heritage can be anything, anywhere and change anytime creating an endless demand for surveys?

Review: A decision to assign heritage status under the State Heritage Act (old buildings etc) is subject to review to the State Administrative Tribunal.

Why is there no appeal process to the SAT.

The State and ILUA's: Many south west farmers have river systems running through their freehold land.

Most if not all these systems are now shown as heritage sites and have been included in ILUA's between the relevant native title group and the State.

Farmers who own such land will not only have to treat (and pay) their local LACHS for a due diligence process and permit application, but will also potentially run into problems with the South West Native Title Settlement that could impose additional restrictions on land use or costs.

Has the State made it clear to land holders that could be impacted that additional restrictions could be imposed in the future?

Pathway to Certainty: Farmers and bankers require certainty over property rights, why are these surveys only good for one time, why has the State not included a clear provision for property wide surveys that can confirm and define heritage once and for all? A State mandated process with fixed costs would allow councils and main roads to undertake road maintenance without endless surveys, would save ratepayers money and would give farmers certainty? Why isn't a pathway to certainty part of the Act when it would be in the interests of all parties to do so?

LACHS Borders; So many countries in the world, present and historically, have endured disputes over where their border should be.

Ukraine and Russia are but the latest.

How is the Council to deal with this? What effect will this uncertainty and likely dispute between indigenous groups have on the timing of heritage surveys? We only need to look at the debacle that resulted under the Native Title legislation where different “groups” laid claim to the same land and the long legal disputes to understand this is a major problem that needs addressing.

Will the government set a timeline and take ultimate responsibility for drawing lines on maps?

Application Tracking: The Department of Mines runs an online clock watch tracking program that allows proponents to track their approvals through the system.

This ensures that applications do not sit on desks at the bottom of the pile for weeks and months, get lost in the system, or certain proponents being treated differently to others.

Such a system is needed for the cultural heritage process, in fact a one stop online shop application site that funnels all applications through the department leaving the responsibility of the department to contact LACHS and manage approvals needs to be developed.

This will minimise the chances of the LACHS building an industry out of approvals and put KPIs into the system for the Auditor General to monitor.

Is such a system part of the \$85m funding application? If not, can this be given serious consideration by government?

MAP: If some registered sites are not publicly available and proponents rely on it, are they not risking disturbing heritage sites.

If so, then simply checking online is never enough, the department will always need to be consulted? Why is this not made clear, and why can't an online application process be established.

1100m²: What possible rationale is there for this measure? If the policy reasoning is that the metropolitan freehold suburban block is not to be subject to this law, why has this exclusion not been extended to all freehold land? Why would a multi-million dollar river front block in Mosman Park of 1099m² be excluded while a 1101m² in Merredin be caught up in cultural heritage? If it is as important as the Government

wants us to believe, then no land should be exempt.

Property Rights: The increasing use of heritage laws in Australia provides a more gradual example of the long-term erosion of private property (freehold) rights, with the legal and economic costs of heritage preservation being 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 needs to be shared with the community through paying compensation for any losses experienced.

Can the government justify why these costs are being born by private property owners?

Certainty: The State should strive to secure certainty for freehold landowners and commit to undertaking a survey to establish specific cultural heritage sites that have special significance to the indigenous inhabitants of this State.

That process would naturally involve liaison with indigenous groups and peoples, who would assist with the identification and reasoning of why a particular “area” has special significance.

The State should move to capture this knowledge while the knowledge holders are with us, at the State's expense.

Why is the government not doing this if cultural heritage is so important? A fully funded survey across the 18m hectares of the south west freehold farm titles completed by 2030 with the aim of mapping, capturing and finalising heritage sites and their stories would be a worthy investment of State resources.

Will such a policy be considered by the government?

I urge you Minister, and the government, to sit and listen to the concerns raised by agriculture and to do more than go through a process of consulting around the implementation of these laws.

What's needed is fundamental changes that takes the costs and risks away from freehold property owners while capturing true aboriginal heritage sites without turning this into an industry that will benefit a few at the expense of the community.

John Hassell
WAFarmers President



WAFARMERS

PUBLIC MEETING

LET FARMERS KEEP FARMING

Live Export Aboriginal Cultural Heritage

Monday 24 July 2023

2.00pm - 5.30pm

Katanning Leisure Centre (Ram Pavilion)
4 Pemble Street, Katanning

WAFarmers is calling a public meeting for farmers and supply chain participants to let their views be heard by Members of Parliament on live exports and Aboriginal cultural heritage.

Attendees include Hon David Littleproud MP, Hon Neil Thomson MLC, Mark Harvey-Sutton CEO Australian Livestock Exporters' Council, David Jochinke, VP National Farmers' Federation.

Other Federal and State MPs and industry groups will be in attendance.



To register, scan QR code or go to
<https://www.eventbrite.com.au/e/let-farmers-keep-farming-public-meeting-tickets-671301229047>

For more info email reception@wafarmers.org.au or call (08) 9486 2100