



*Tasmanian Farmers & Graziers Association*

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A Member Of The  
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**Scott Gadd**  
**Chairman**  
**Tasmanian Aboriginal Heritage Legislation Project Steering Committee**  
**GPO Box 771**  
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January 2, 2007

Dear Mr Gadd

**New Tasmanian Aboriginal Heritage Legislation *Consultation Package*,  
November 2006**

Thank you for the opportunity to comment on the Information Sheets released in the Consultation Package on this important subject, on 9 November 2006.

As per discussions with your office, thank you for the extension of time to allow for full consideration of the Consultation Package in respect of the New Tasmanian Aboriginal Heritage Legislation.

**Background**

The Tasmanian Farmers and Graziers Association (TFGA) is the State's peak representative body for farmers. Membership totals some 5,000 enterprises covering the wool, meat, dairy, vegetables and cereals and seed production industries. Members are also involved in a range of other agricultural activities, including poppies, berries and pyrethrum, and private forest management and wood production in both native forests and plantations.

Most Tasmanian farmers have a sense of "stewardship" with regard to how they manage their land, first and foremost because it is in their own best interests. Agricultural productivity relies on natural resources and it's the goal of just about every farmer to pass on his land in better condition than he received it.



On the other hand farmers must be able to manage their land to best commercial effect in a changing and very competitive world if they are to remain in business.

### **Aboriginal Heritage Legislation**

Tasmania's Aboriginal heritage is naturally important for Tasmania's Aboriginal community. It is also important for Tasmanians more widely as part our heritage generally.

Important aspects of that heritage are exposed to damage and loss every day, often quite accidentally as a result of the land use activities of a modern society going about its business. Farming activities are no different to other land based activities in that regard.

In the circumstances it is important to have clear rules setting out what is and what is not acceptable in terms of land use impacts on aboriginal heritage. But it is also important that these rules be straightforward and fair, and formulated in a way which allows land owners to manage farm enterprises with a minimum of constraint and a maximum of certainty.

Effective legislation is a prerequisite for such rules, and the TFGA commends this review of Aboriginal Heritage Legislation to that end.

### **Comment on Consultation Package**

The following comment has been prepared on the basis of the released *Consultation Package* and following discussion with Mr Brett Noble and Ms Vicki Wills of your agency.

We understand that you are happy to accept supplementary comment in weeks to come, should this be offered, and that there will be a further formal round of public consultation towards the middle of 2007 when draft legislation has been prepared. Our objective here has therefore been to flag key issues rather than suggest detailed wording options.

#### **1. Definitions**

***There need to be very clear definitions of exactly what comprises "Aboriginal heritage" and what type and level of land use activity will lead to unacceptable "disturbance" or "damage" in that connection.***

It is important that definitions be objective, expressed in non-specialist terms, and presented in a way that will allow them to be reasonably applicable by a large majority of land owners. The last thing we need is a situation where specialists are required for all decisions, or where



there is so much opinion involved in decision making that no two people define the same thing in the same way.

Particularly important will be definition of heritage relating to “place” as distinct from actual artifacts and sites (ie things like middens and quarries). It will be more difficult to provide objective definitions for “place” based heritage but such definitions are necessary nonetheless if land owners are to be given the certainty they must have to manage land effectively.

Very important is definition of what constitutes unacceptable disturbance or damage, which the legislation will clearly be focusing on as the “undesirable” impact of land use with regard to heritage. Land owners need rules in this regard which allow them to manage land effectively and which they can apply for themselves rather than constantly having to call on specialists.

## **2. The concept of “relative significance”**

***It is important to have some separation of the elements of “Aboriginal heritage” into different categories on the basis of “relative significance”. To regard everything as equally important, when clearly some artifacts, for example, are less so than others, is unlikely to encourage land owners to develop a respect for Aboriginal heritage as a whole.***

Levels of significance can be on the basis of the intrinsic character of heritage elements themselves. Alternatively it can be expressed in terms of the allowable degree of disturbance arising from land use activity.

## **3. Access to heritage sites on private land**

***It is important for the legislation to avoid any suggestion that the presence of recorded Aboriginal heritage on private land gives members of the public, including members of the Aboriginal community, any right of access to those.***

The legislation needs to state very clearly that the laws of trespass apply regardless of whether or not individual properties contain elements of aboriginal heritage.

## **4. Encouragement of land owners to make decisions**

***It is important that the legislation be designed in a way which will allow land owners to make a majority of necessary decisions for***

***themselves and, so long as they do so in good faith, to be given the benefit of the doubt in the event they make a mistake.***

One of the most effective ways of generating respect for Aboriginal heritage among land owners, will be to minimize the red tape associated with related regulations. The single most effective way of doing this will be to devolve as much responsibility as possible to land owners in delivery of the regulations.

Devolving responsibility will call for:

- legislation that can be easily understood by land owners;
- appropriate field interpretation tools for land owners;
- timely assistance at no cost where necessary;

It is very important that where land owners have genuinely applied definitions and guidelines, but have nonetheless made a mistake, they should be given the benefit of the doubt by regulators.

#### **5. Adequate support resources**

***It is critically important that Government adequately resources the agency responsible for implementing the legislation, particularly with regard to provision of effective advisory services.***

Government must commit to providing sufficient resources to allow for timely and unambiguous responses to land owner requests for assistance. If good support is not forthcoming land owners may well become frustrated, and frustrated land owners may not be inclined to respect the values that the legislation seeks to protect.

#### **6. Minimum compliance costs**

***It is important that the legislation does not add to land management costs for farmers.***

The farm sector in Tasmania operates in very competitive markets and it should not be assumed that additional costs can be passed on to customers. If farmers find themselves saddled with additional land management costs as a result of this legislation they may well look to short cut regulations as a result.

#### **7. Natural justice mechanisms**

***It is very important that there be effective avenues of appeal open to land owners who wish to query decisions by regulators, and these avenues need to be low cost and prompt in terms of outcomes.***



There must be provision in the legislation for a low cost appeals mechanism for land owners. At the end of the day the court system provides one avenue for appeals but this is expensive and can be slow. Far more effective will be an independent arbitrator that land owners can go to if they believe they have been unfairly treated.

Parallel legislation in the form of the Forest Practices Act, has a Tribunal to perform this function. At the very least a similar entity is essential in relation to this legislation.

## **8. Compensation provisions**

***There must be provision for compensation to land owners if they are prevented from using their land by virtue of this legislation, beyond a reasonable “duty of care” level.***

The following are three important points in this regard.

- There needs to be a clear statement of who will determine what constitutes a reasonable “duty of care” level, and what the basis for this determination will be.
- There needs to be explicit and strongly worded commitment to the concept that where the community wants land owners to “manage” land for heritage outcomes, it will pay them a fair price to do so.
- The legislation needs to set out the process of how land owners will receive commercially full and fair compensation.

## **9. Role and responsibilities of Aboriginal Representative Body**

***It is very important that the proposed Aboriginal Representative Body have a clearly defined role and that it have the status of an advisory body to Government in relation to Aboriginal heritage protection.***

There needs to be a very clear linkage between authority and accountability in the regulating agency. There is no doubt that an Aboriginal Representative Body will be important to delivery of the legislation, but it cannot be other than an advisory body to Government if it is not accountable to more than the Aboriginal community.

The TFGA believes that the legislation needs to make it very clear that it is the Minister who is responsible for implementation of the legislation, and that while the Aboriginal Representative Body should have the right to be heard by the Minister, it cannot be allowed to dictate the Minister’s final decision.



## **10. Penalty provisions**

***It is very important, if the legislation is to achieve its final purpose, that penalty provisions are not excessive.***

Most of the values that the legislation seeks to protect are not naturally robust. It is also going to be difficult in most cases to attribute damage or destruction unambiguously to specific individuals.

In the circumstances realistic protection of Aboriginal heritage will only occur with the active goodwill of land owners. The threat of strict liability and massively heavy fines may work where land owners are large companies, but are more likely to encourage removal of the evidence and circumvention of the law where this is not the case.

## **Conclusion**

The TFGA believes that Aboriginal heritage in Tasmania deserves respect and that land owners should be encouraged to conserve elements of that heritage where it occurs on their land.

However, many of the values at issue are not robust and can be easily damaged or destroyed, which means that without the active goodwill of land owners they may well not survive – regardless of legislation. Massive penalties will not change this reality.

The points made in this submission have been framed with this over-riding consideration in mind, and are commended to Government to that end.

Should the steering committee require any clarification of any points raised in the TFGA submission please contact me to discuss further.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Roger Swain', is positioned below the text 'Yours sincerely'.

**Roger Swain**  
**President**