



SUBMISSION

On

LEGISLATIVE PACKAGE

Relating to

REGULATION OF CLEARANCE AND CONVERSION

OF THREATENED NON FOREST

VEGETATION COMMUNITIES

By

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SUMMARY RESPONSE

Native vegetation conservation programs of the Government directly impact the property rights of private land owners in Tasmania, in some cases substantially.

The Threatened Non Forest Vegetation legislation which was tabled by the Government in November 2005 will exacerbate this already serious problem.

The position of the Tasmanian Farmers and Graziers Association (TFGA) with regard to the legislation is as follows.

- The legislation is part of a regulatory package, which must also contain regulations, policies and processes to deliver outcomes on the ground. We have yet to see what Government finally proposes in this regard. The legislation cannot be judged in isolation from the rest of the package.**
- The regulatory package, as we understand its intent at this stage, is seriously flawed with regard to clarity, practicality and natural justice, and is unacceptable in its present form.**
- Equally important is the wider conservation program for non forest vegetation within which the regulatory package will operate, in particular the provision for voluntary arrangements between Government and land owners.**
- Until we have a satisfactory commitment by Government to the ongoing existence, scope and continuity of funding for this voluntary program we will not accept the regulatory package.**
- Until the Government commits satisfactorily to an acceptable voluntary program of voluntary vegetation conservation, and provides acceptable regulations, policies and processes as part of the regulatory package, the TFGA will refuse to accept any legislation on this issue.**

This position is non negotiable.



TFGA PRINCIPLES RELATING TO NATURAL RESOURCE MANAGEMENT

Tasmanian farmers require secure access to their land and related resources to enable sustainable and profitable agriculture.

Accordingly the TFGA supports the following *principles* in relation to environmental management and NRM issues.

- Sustainable development principles reflect that economic, social and environmental concerns should all be taken into account. Therefore economic viability of farm enterprises must be a standard criterion along with environmental in any land use regulation or policy.
- Secure access to natural resources and flexible on-farm management approaches to environmental issues are vital for the economic viability of farming.
- Farmers must not bear the total costs of providing environmental services that are demanded by and mostly benefit the wider community. There must be public funding to support farmers who exceed their reasonable duty of care to supply 'public good' environmental outcomes.
- Government regulation for 'public good' environmental outcomes must provide farmers with structural adjustment for any reduction in the value of their land.
- Voluntary approaches that support farmers to manage environmental issues are more effective than regulation, i.e. carrots versus sticks.
- Government approval processes for on-farm development (land use proposals) should be as simple as possible. Farmers should not be expected to bear all the costs associated with preparing a proposal for approval.
- There must be clear and measurable objectives and consistent definitions of key terms across all relevant regulatory instruments.
- The best available science and information must be made available to support decision-making, and subsequent approval processes should include economic and social assessments, as well as environmental.
- Farmers should be recognised for the good work they do with regard to practical environmental management. The farm sector should be accorded the recognition it deserves as the single most important class of land tenure in the context of environmental management and NRM.



TFGA POSITION ON THREATENED NON FOREST VEGETATION

The TFGA has consistently held to the following position with regard to the issue of protecting threatened native non forest vegetation from clearance and conversion.

- The TFGA has never endorsed or been party to the NHT Bilateral Agreement or to the Tasmanian Community Forest Agreement.
- Local Government should not be involved in any system of regulation.
- If Government wants to constrain land owners, this should be through voluntary arrangements – ideally 100%.
- Regulation should be used to a minimum – ideally 0%.
- If regulation is used, land owners must be compensated fully and fairly.



BACKGROUND COMMENT

The Tasmanian Farmers and Graziers Association (TFGA) is the State's peak representative body for farmers. Membership totals some 4,500 enterprises covering the wool, dairy, meat, vegetables, poppies, cereals and seed production industries, in addition to commercial wood production and a range of minor products such as berries.

Many of the TFGA's members will be directly impacted by the Government moves to restrict their ability to manage land to best commercial effect. In particular this is the case in the Northern and Southern Midlands and the Highlands Municipalities, and, to a lesser extent, across the north of the State and on King and Flinders Islands. The impact will be substantial for some farm enterprises.

The outstanding example of this impact relates to the many enterprises looking to use irrigation to increase pasture growth and diversify into vegetable production, on properties that have hitherto concentrated on wool. To secure full benefits from this kind of development it cannot be half done. If a full 360 degree circle of irrigation cannot be secured for a pivot irrigation system, because the irrigator is prevented from clearing native vegetation on part of it, it represents a heavy commercial disincentive to invest. The massive fixed costs of the irrigation infrastructure are the same as those necessary for a full circle, but income is immediately reduced.

These developments are being driven by a need for enterprises to improve productivity if they are to remain competitive. In some cases we may well be talking about the wind up of enterprises, where a ban on vegetation clearing simply prevents sufficient improvement in productivity and diversification.

These are very serious issues for farmers and the TFGA's members have expressed their concerns in this regard directly to Government, and in the media, ever since the Bilateral Agreement between the Australian and Tasmanian Governments was signed in June 2003. They are seen as a direct attack by Government on the legitimate property rights of farmers, with absolutely no regard to the commercial and social consequences.

The seriousness of the matter is underlined by the fact that after two and a half years of work by Government since June 2003, there is still

- a serious lack of clarity with regard to fundamental definitions,
- a serious lack of detail regarding processes,



- patently inadequate resources in Government to deliver regulation effectively, efficiently and fairly, and
- an absence of mechanisms to ensure natural justice for land owners in the circumstances.

The TFGA recognises that Government has sought to develop voluntary vegetation conservation options as a preferred approach to regulation, and this is very much the preference of the TFGA and its members as well. However, there has been no satisfactory commitment to date by Government, to resourcing programs to this end. Until that commitment is forthcoming land owners and the TFGA will frankly see Government announcements to that end as so much hot air.

The TFGA is extremely concerned that any attempt to restrict vegetation clearing by legislation, in the absence of very clear and fair definitions and processes, and in the absence of fully resourced voluntary options, will do serious damage to the value of the farm industry. We also believe it is unlikely to deliver the protection of the natural values which is its ostensible objective.



PROTECTING VEGETATION ON PRIVATE LAND

The following are important issues in any analysis of how natural vegetation values can best be protected on private land. An analysis of this kind must underpin any effective Government program to that end.

The essential objective – to protect values not hectares.

The essential objective of any effective program to protect native non forest vegetation values must focus on the values themselves. A focus on hectares as distinct from values, will alienate land owners and, at the end of the day, will lead to poorer conservation outcomes.

Vegetation values will not be protected without the active cooperation of land owners.

Vegetation values will be lost if vegetation is not actively managed to protect them. Fire management is an obvious example. Weeds can also have a major impact, as is evidenced by the spread of gorse through native vegetation in parts of the midlands region. The impact of game can be equally serious, as is evidenced by the current situation on King Island, where massive numbers of wallabies have effectively wrecked the understorey in much of the native vegetation which is their habitat.

Active management of native vegetation on private land requires a commitment of interest, time and resources from land owners, and these are not going to be forthcoming if land owners are alienated by clumsy Government programs, including unfair regulations. Without the active cooperation of land owners, effective protection of vegetation values on private property is simply not going to happen.

It also goes without saying that if Government wants to secure the active cooperation of land owners, it needs to start with a sound understanding of what will motivate land owners to provide that cooperation.

The primary concern of commercial farmers is to maintain land management options in a competitive world.

Land owners who are commercial farmers have as their primary asset the land they own. Tasmanian farmers compete directly in international markets, whether the final customer is in Australia or overseas. If they are to compete successfully in those markets they must be in a situation to maximise their land management options with a view to getting the most from their land, through both increased production and increased diversification.



Where parts of a property are capable of producing improved pasture or crops but remain under native vegetation, land owners are foregoing an opportunity to improve productivity or product diversity. In such situations a ban on clearing imposes an opportunity cost on land owners. That cost is multiplied where the land in question is suitable for irrigation, as is increasingly the case in Tasmania with the sophisticated irrigation technology on the market today.

If Government wants to win the active cooperation of land owners in these circumstances it needs to respect these needs of land owners. It also needs to do this in a way which recognises that the specific needs of different land owners are likely to be different.

Where the community wants natural values protected, the community must be prepared to pay, or provide other benefits.

The most direct way that Government can meet the legitimate rights and needs of land owners as described above, is to purchase “biodiversity protection” from them as an agricultural product on a free market basis. Such purchase can be on a “one off” or a “periodic payment” basis. In other words Government needs to be prepared to pay land owners to maintain their land in a natural state, if it values that state. It also needs to be prepared to do that in a way that is satisfactory to land owners.

A fair price within such a market will no doubt vary between properties, because the acceptable price for individual land owners will reflect the value of the development opportunity they are foregoing. It will also no doubt depend on the cash flow and other financial needs of the enterprise at the time. In these respects there will be no difference between the provision of “biodiversity protection” and more traditional agricultural products, as production options, from a land owner point of view.

This is not a new concept. The purchase of “natural value protection” from farmers is current practice in both Europe and the United States.

It is important to note that in some cases land owners may not actually want cash from Governments. Of more value to them may be other land use approvals, or even simply freedom from red tape.

The concept of fair compensation, monetary or otherwise, by Government to land owners, where they are being asked to provide a public benefit from their land, is not new in Australia. In 2004, Australia’s Productivity Commission recognised the importance of fair compensation for land owners by Government, where Government wants natural values protected on private land. The Federal Treasurer subsequently endorsed the essential fairness of this approach from an



Australian Government point of view, as have former Federal Minister for Agriculture, Warren Truss, and the Prime Minister.

Voluntary arrangements between land owner and Government will deliver outcomes.

A move by Government to win the active cooperation of land owners with relevant incentive mechanisms will deliver outcomes for nature conservation on private land. We know this because programs such as Tasmania's Protected Areas on Private Land (PAPL) and the Private Forest Reserves Program (PFRP) have delivered outcomes over the past several years. In fact PAPL has delivered outcomes with negligible financial input by Government.

Legislation as currently proposed will not deliver the outcomes that Government is seeking.

It is highly unlikely that the proposed legislation will deliver any significant protection of vegetation values in the long term. In the first place the proposed legislation does not address the issue of values at all. In other words it does not make it a legal requirement that land owners actually manage threatened vegetation communities on their land. In many cases it would take no more than "benign neglect" on the part of a land owner for values to be totally lost. In fact a lack of management could well result in vegetation losing so much value that it no longer qualifies as "native vegetation". Ironically, under the proposed legislation, the land owner could then clear and convert it without breaching the law.

It is also the case that if land owners feel that they are being unfairly asked by Government to carry an unfair cost of biodiversity protection on their properties, they may well deliberately move to degrade values so that condition is reduced and the "problem goes away". The TFGA would not condone that course of action, but we would understand why it might occur if this legislation were to be put in place.



COMMENT ON PROPOSED LEGISLATION

The proposed legislation is part of what will inevitably be a larger regulatory package. Other parts of that package will be consequential regulations, policies and processes. Until all parts of the package have been presented by Government for scrutiny it is impossible to make sensible comment on the proposed legislation. The following comment relates to the package as a whole, including the legislation, but also relating to necessary – though unincorporated – subsidiary regulations, policies and processes.

General Comment

- ***Impracticality in delivery:*** An immediately obvious feature of the legislation as it stands is how difficult it will be to implement effectively, efficiently and fairly.

The legislation is impractical for two major reasons. The first of these is the number of concepts and terms which are fundamental to the intent of the legislation but which, as the legislation stands, cannot be defined in a way which is precise and objective. Examples of the problems which will arise from this are provided in the section “Definitions”, below. One example will suffice here.

The point of “condition” at which a piece of vegetation moves from simply being vegetation containing native species, to being “native vegetation” as such, is a critically important concept from the view point of the legislation. Having said that, it is also going to be one of the hardest to define objectively, and objective definition (ie different individuals come up with the same answer) is basic to fair and efficient delivery of the legislation in practice.

By comparison Tasmania’s Threatened Species legislation deals with entities (ie species) where objective definition is easy. There is no doubt at all that you are dealing with a plant or animal, for the purposes of that legislation. The first decision that regulators will have to make with regard to the proposed legislation, is whether in fact the piece of vegetation at issue is even to be regarded as “native vegetation”.

The second reason the legislation is impractical is the fact that the Forest Practices Authority, which is to have the task of delivering the legislation on the ground, simply does not have the resources in terms of skilled staff to implement it with any reasonable timeliness or accuracy. Nor is this simply a matter of additional staff. The skill sets needed differ where



farming is an issue, rather than forestry. Those resources will take time to develop, and it will be years before adequate resources are in place and operating smoothly. This represents an impossible situation for land owners if implementation of the legislation is to commence in a matter of months.

Objectively clear definitions and processes must be developed before sensible comment can be made on the legislation. There also needs to be a clear demonstration of fair, effective and efficient delivery mechanisms. The appropriate place for these issues to be dealt with may well be subordinate regulations, policies and processes, but if that is the intention of the Government it simply highlights the fact that this legislation cannot be commented on in isolation. We must see the package as a whole before we can make sensible comment on any part of it.

- ***A lack of fairness and natural justice for land owners.*** Even allowing for further work on objective definitions of the difficult concepts we are dealing with here, there will always be the possibility of mistakes and bias in the on ground implementation of this regulatory package.

There must be provision in the circumstances for an “umpire”. At the end of the day the courts could provide that function, but it would be completely unacceptable for land owners if they had to continually revert to the courts to secure fair play. Parallel legislation in the form of the Forest Practices Act, has a Tribunal to perform the “umpire” function. At the very least a similar entity is essential in relation to this legislation.

Nor does the existing Forest Practices Tribunal have any where near the necessary competencies to undertake the range of issues which will arise in relation to agriculture. A completely new set of skills need to be built in, and this may well call for a parallel structure (or more than one) to the Forest Practices Tribunal.

The legislation is seriously flawed in its lack of attention to the issue of an “umpire” with regard to administrative decision makers. The regulatory package must include provision for a tribunal structure of some kind to ensure fairness for land owners in a situation so open to personal opinion in its delivery on the ground, and to delays in that delivery.



Specific Comment

The following are a range of problems in the legislation as it stands. These have been grouped under five headings for convenience.

- **Definitions:** A number of concepts and terms need a lot more work before they can be regarded as being in any way adequately and objectively defined.
 - *At what level of “condition” is a piece of vegetation containing native species to be regarded as “native vegetation”?* A vegetation community can be conceptualised as an assemblage of plants made up of a characteristic combination of species, present in typical numbers. A fundamentally important question is how many of those “characteristic” species, and how many plants of each, need to be present, for vegetation to be regarded as “native vegetation”.

A further complication arises where vegetation is fragmented, or where it is clearly regeneration as distinct from being ecologically mature.

Straightforward and objective definition is often going to be very difficult in these circumstances. This needs to be recognised up front, with a clear explanation of how the problem will be resolved. This has not been done in the package to date.

- *What classification of native non forest vegetation is to be recognised as the “official” classification?* The concept of protecting threatened vegetation communities rests fundamentally on how vegetation is classified. The Government has proposed a definition of “threatened” which includes as a subset, “rare”. The number of “rare” vegetation types will depend directly on the number of vegetation types recognised (the more there are, by definition the more “rare” types there will be). Decisions on how many communities are recognised, is a fundamentally important issue here, but how this will be managed has not been spelt out.
- *What will be the basis for review of this classification, given that it will be very easy to increase the number of “rare” (ie one category of “threatened” status) communities simply by increasing the number of communities and thereby reducing the average extent of communities?* Botanical science is not static, and there will inevitably be pressure from botanists for any official classification



of vegetation communities to be reviewed and changed. In general this pressure is likely to be for more classes to be recognised rather than fewer. The process of review itself, needs to be regulated and there is no reference to this in the regulatory package as it is set out.

- *On what basis will the Minister responsible for putting specific communities on the list of Threatened Vegetation Communities, make that decision?* The analogous Threatened Species legislation includes an entire system of checks and balances to this end, while accepting the importance of scientific opinion in the process. No parallel has been suggested here. In the absence of a robust system of checks and balances the process is wide open to abuse.
- *What will be the process for effective and cost free confirmation on the ground, by land owners, of whether they have a threatened community or not?* Current vegetation maps are not perfect, and in any case mapping can never be perfect, given the problems of unambiguous identification of communities on the ground – let alone from aerial photographs. What that means is that some other means needs to be established, as part of any regulatory package or wider vegetation conservation program, to allow land owners to establish whether or not they have a threatened vegetation community on their land.
- *What will be the basis for deciding whether a particular activity constitutes “clearance and conversion”?* As with decisions relating to judgment of “condition” as a determinant of whether a piece of vegetation qualifies as “native vegetation”, this decision is likely to be highly problematic in some situations. The intent of the Government is clearly to only regard radical change as “clearance and conversion”, but there are likely to be a significant number of situations where the decision is not clear cut. Lack of provision for some kind of “umpire” structure is critically important as an “appeal” body in these situations.
- **Exemptions.** Exemptions are far too restrictively defined in the legislation. At the very least all routine farming activity must be regarded as an exemption, as is the case with clearance and conversion regulation in NSW. In NSW, “Routine Agricultural Management Activities” (RAMA), are exempt from the need for clearance and conversion approval. The



same should be the case in Tasmania. This is an issue where an appropriate Tribunal system is clearly essential.

- **Approvals.** The legislation is seriously lacking in this area. On the one hand, who will decide whether there will be “net conservation benefits” likely to accrue from clearance and conversion episodes, or not. This is a particularly important area in terms of the need for some kind of “umpire” in the process.

Equally important is the lack of any serious concern with the importance of the “clearance and conversion” episode for the commercial well being of the land owner. There must be consideration given to this very important issue.

- **Compensation.** The following are three important issues which require clarification in this connection.
 - *Who will determine what a fair “duty of care” level will be, and what will the basis for this determination?* The Forest Practices system does not provide a satisfactory basis by itself, as appears to be suggested in this legislation. There needs to be far more account taken of both farming as an activity and of non forest as the relevant vegetation type.
 - *The circumstances under which compensation will be paid are far too limited as the legislation stands.* There needs to be explicit and strongly worded acceptance of the concept that where the community wants land owners to use land to deliver “biodiversity” outcomes, it will pay them a fair price to do so.
 - *The process for determination of the quantum of compensation must be far more transparently specified as being based on a calculation of the full and commercial opportunity cost of the ban on clearance and conversion, to the land owner.* The legislation is wholly inadequate in relation to the issue of how compensation quantum will be calculated. Nor does it adequately set out what process will be established to ensure that land owners will receive commercially full and fair compensation.
- **Administration process.** The Forest Practices System has developed over twenty years to meet the particular needs of the forestry sector. It has gradually evolved to its present form over that time. The role it is being asked to perform here is quite different in many and important



ways. The Forest Practices Authority simply does not have the resources, processes or expertise in place to implement this new role with any effectiveness or efficiency.

A major consideration here is the cost of delivery of the system, and who will be expected to pick that cost up. It is not at all fair for farmers to pick up the cost of a system which will inevitably be slow and inefficient for a long time.



THE LEGISLATION CANNOT BE JUDGED IN ISOLATION

The legislation which is the immediate subject of this submission, is part of a wider regulatory package, which is itself part of an overarching non forest vegetation conservation program of the Government. The adequacy or otherwise of the legislation cannot be judged in isolation from either the other parts of the package or the rest of the program.

The Government has insisted, since the signing of its Bilateral Agreement with the Commonwealth in June 2003, that its preference is to secure voluntary agreements with land owners as a basis for protecting vegetation values. In mid 2004 some \$3.8 million was provided by the Commonwealth to the State, to fund exploration of ways in which such agreements might most creatively be developed. This program is currently under way, and the TFGA is actively involved in it. The TFGA is unaware of any commitment by either the State or Commonwealth to continuity of funding once this has been spent. Without such a commitment the position that voluntary arrangements will be preferred, cannot be regarded as credible.

In the absence of a commitment to full funding of an on going program to secure voluntary agreements with farmers, the TFGA must assume that once current funding has been spent there will be no more. We must also assume that when that happens farmers will face regulation alone. The serious flaws in the regulatory package loom even larger in the circumstances.

There is no way that the legislation can be judged in isolation from the consequential regulations, policies and processes which will have to be put in place to allow its delivery on the ground. To do other than reject the legislation entirely, until that detail is available, would be extremely foolish of the TFGA and of farmers. A “trust me” approach by the Government with regard to definitional issues, for example, simply will not work.

Most important from a Government point of view however, is the fact that if it persists with the legislation, without fixing the problems we have pointed out, it seriously risks losing the very values it is seeking to protect.



CONCLUSION AND RECOMMENDATION

The package of proposed legislation that has been released for comment by the Government is seriously flawed, and if the government persists with it as it is, will not meet its objective of protecting non forest vegetation values.

The flaws relate to major weaknesses with regard to clarity, practicality and natural justice. These weaknesses relate to the important issues of definitions, the processes by which these are determined and reviewed, exemptions, approvals, compensation and administrative processes.

None of these flaws can be addressed if the legislation is regarded in isolation from the rest of the eventual regulatory package, including regulations, policies and processes, because those instruments are where regulatory detail will inevitably reside.

Nor can the legislation, or indeed the regulatory package as a whole, be judged in isolation from the Government's wider program of vegetation conservation, central to which must be an on going focus on voluntary agreements as preferable to regulation – the Government's stated objective.

This submission has set out our arguments in support of the above.

The TFGA strongly urges the Government to set the legislation aside until the weaknesses we have identified are resolved. To persist with the legislation will alienate farmers, and jeopardise the very values it seeks to protect.