



TASMANIAN FARMERS & GRAZIERS ASSOCIATION

Aboriginal Heritage Act Review

Dear DPIPWE Review Team,

TFGA Submission – Statutory Review of the Aboriginal Heritage Act 1975

The Tasmanian Farmers and Graziers Association (TFGA) is the leading representative body for Tasmanian primary producers. TFGA members are responsible for generating approximately 80% of the value created by the Tasmanian agricultural sector.

Agriculture is one of the key pillars of the economy and, with the current level of support from government, are well positioned to further capitalise on the stature of Tasmanian agriculture.

Farmers have a strong sense of stewardship regarding how they manage their land. Agriculture productivity relies on natural resources and it is the goal of farmers to pass on their land in better condition from when they received it. However, at the same time, if they are to remain in business farmers must be able to manage their land to the best effect in what is a constantly changing and very competitive commercial world.

The TFGA appreciates the opportunity to submit a submission regarding the Statutory Review of the Aboriginal Heritage Act 1975 and our response has been segmented as outlined in the Discussion Paper:

1. What is the Aboriginal Heritage Act 1975 trying to achieve?

How clear is the Act regarding what it is trying to achieve? Could this be improved, and if so, how?

TFGA believe the content of the Act is basic, needs updating grammatically, needs to be clearer in respect to its aspirations; to expand upon and clearly define all key interpretations of the Act, such as 'Aboriginal Heritage', as an example of this.

We believe there are some improvements that can be considered that will improve the way in which the Act balances its primary objective of protecting Aboriginal Heritage and the rights/needs of industry and the general public.

TFGA believe that the identification of reasonable time frames within which designated actions are to be performed, will provide a more reasonable balance to industry, to avoid any stifling of investment and to consider landowners right to farm. This could be aligned with s.58 of the historic Cultural Heritage Act.

2. What is the Aboriginal Heritage?

How well does the Act define Aboriginal Heritage? Could this be improved and why?

The Act does not define 'Aboriginal Heritage' at all and TFGA recommends this is defined in Interpretation and throughout the Act.

Does the definition of a 'relic' adequately capture all elements of Aboriginal Heritage that should be protected and managed?

The TFGA believes the Act captures the definition of a relic for 'tangible' Heritage but recommends that 'intangible' Heritage should be carefully reviewed and defined, in consultation with key stakeholders, including landowners.

The discussion paper identifies that in legislation in Victoria intangible Heritage is included and caters for "ceremony, stories, traditional skills and practices, language and dance" and the potential to include "spiritual essence of a place or broader landscape where Aboriginal people once lived, hunted and practiced culture".

TFGA recommends that these definitions be discussed with key stakeholders, including landowners, to clearly define the criteria for 'intangible' Heritage and to consider all implications involved, to ensure land is not being restricted unnecessarily and the 'Right to Farm' and Aboriginal Heritage is maintained and respected together.

Should use of the term 'relic' and the way Aboriginal Heritage is recognised and defined, be changed?

The TFGA do not hold a view either way about the term 'relic'. The way Aboriginal Heritage is recognised and defined has been commented on above. The TFGA recommends the notion of intangible Heritage would create considerable confusion, angst and would elevate sovereign risk for industry in an unacceptable manner and in a way where compliance would be next to impossible. This needs to be carefully considered and reviewed with appropriate stakeholders.

3. Ownership of Aboriginal Heritage

How clearly does the Act describe ownership of Aboriginal Heritage?

The Act does not define 'ownership' in complex terms if on Crown Land and is silent regarding 'ownership' on private land.

Other states have differing definitions of ownership, such as Victoria, that talk about ownership and custody; NSW seem to have many Acts relating to Heritage and land (not just Aboriginal) and are silent in one Act and very broadly using the terms ownership and custody; and Queensland talk more specifically about ownership, custodianship and possession.

The TFGA recommends that this may need to be addressed with key stakeholders, including landowners, whilst reviewing this Act but caution should be demonstrated due to the complexity of the topic.

Are provisions in the Act providing for ownership reasonable?

The TFGA recommends that the term of 'ownership' is reviewed and with extensive consultation with key stakeholders, including landowners. This term may need to be re-classified to be more inline with

Aboriginal terminology such as 'custodian'. This must be clearly defined in the new Act to minimise confusion and misinterpretation.

Who should own Aboriginal Heritage?

The TFGA recommends the terminology of 'ownership' should be reviewed considering other state's legislation as a point of reference. Victorian legislation talks freely about ownership and custody should be returned to the Aboriginal people; NSW are silent. Queensland legislation details that basic intent is Aboriginal cultural Heritage should be protected and in supporting intent that, as far as practicable, Aboriginal cultural Heritage should be owned and protected by Aboriginal people with traditional or familial links to cultural Heritage, if it is comprised of Aboriginal human remains, secret or sacred objects and Aboriginal cultural Heritage lawfully taken away from an area.

This will need to be defined to consider the different circumstances between the ownership of land, respecting Aboriginal Heritage and private landowners' ability to farm.

Is the concept of 'ownership' the right way to think about who is responsible for Aboriginal Heritage?

The TFGA suggests an extensive consultation should take place with key stakeholders, including landowners, to review this terminology and consider Aboriginal Heritage more, whilst considering each stakeholder's requirements and responsibilities. Relics should be conserved in a reasonable way, to preserve Aboriginal history and minimise damage to that relic.

As a general concept TFGA recommend that "the right to farm" approach needs to be applied to land purchased in good faith for productive pursuits, but we would concede that this should not preclude reasonable steps to protect Aboriginal Heritage.

Should the 'rules' in the Act apply to everyone to every situation?

The TFGA recommends that each individual key stakeholder's situation should be addressed separately and defined accordingly, being respectful of each differing circumstance. The main goal should be to protect Aboriginal relics in a reasonable way, with consideration of adopting a similar preservation procedure such as Europe to ensure certain relics are protected from erosion and Aboriginal Heritage and culture can be maintained when necessary.

Should land tenure on which Aboriginal Heritage exists make any difference to who owns/how the Heritage is managed?

As Above.

4. Making decisions about what happens to Aboriginal Heritage

Is the way the Act describes who makes decisions, and how decisions are made, adequate and reasonable and how can it be improved?

The TFGA recommends that decisions about the management, disturbance, acquisition etc. of Aboriginal Heritage must remain within the jurisdiction of the Minister and/or the Director of National Parks and Wildlife and any decision-making process must be mandatorily subject to undertaking consultation with affected stakeholders.

The TFGA recommends improving decision making about Aboriginal Heritage by amending the Act to ensure that all decisions are subject to open and transparent communication and meaningful consultation with affected stakeholders.

The TFGA recognises and respects the Aboriginal community and agree, along with the Aboriginal Heritage Council, that they are the decision makers about their heritage and culture, but also view the

need for more integration of all affected stakeholders to make the decisions together, in a respectful way.

Who should make decisions under the Act?

The TFGA believes that, as above, the consultation should be undertaken with all decisions being subject to open and transparent communication and meaningful consultation with affected stakeholders.

The final decision, as mentioned earlier in this submission, should sit with the Minister and/or the Director of National Parks and Wildlife

Are there circumstances where different people, or parties, should make decisions about how to manage Aboriginal Heritage? How should decisions be made?

The TFGA recommends that decisions made should sit with the Minister and/or the Director of National Parks and Wildlife only, after an extensive consultation process has been conducted with key stakeholders.

5. The Aboriginal Heritage Council – what it is and what it does?

How should members for the Aboriginal Heritage Council be chosen?

The TFGA do not hold a view about how members should be chosen to be a part of the Aboriginal Heritage Council.

Should the Act specify criteria for Council membership, and what criteria should apply?

Other than if deemed appropriate, to have a specific knowledge set to be effective in decision making.

How clearly does the Act describe the role of the function of the Aboriginal Heritage Council?

The TFGA believes the Act describes the role of the function of the Aboriginal Heritage Council reasonably well, but suggest more detail is added in relation to the process of stakeholder engagement with the Aboriginal Heritage Council and to outline clear timeframes of their interaction with the Minister/Director as detailed in the Act, Part II – The Aboriginal Heritage Council.

Is the role of the Aboriginal Heritage Council adequate and appropriate and could this be improved? If so, how?

As described in the Act, the TFGA deems the role of the Council adequate and appropriate but can't provide any further recommendations outside of the Act description.

6. Offences under the Act and penalties for doing the wrong thing

How well does the Act describe and manage offences?

TFGA believe the amendments to the Act in 2017 to be entirely appropriate and provides a sensible balance between penalties for those “doing the wrong thing” and those disturbing relics through inadvertence.

We note that no penalties have been imposed under the new provision in the Act and therefore it is not possible to determine what approach the courts might adopt and whether they will in fact apply higher penalties or not.

It is critical that there be provision in the legislation for a low-cost appeals mechanism for landowners. An independent arbitrator that landowners can go to if they believe they have been unfairly treated would be an effective option.

Are the penalties adequate

The TFGA believes the penalties are now adequate.

Could the offences and penalties provisions in the Act be improved, and if so, how?

After the 2017 amendments to the Act, the penalties now prescribed are among the highest of any other Aboriginal Heritage legislation in the country, therefore the TFGA believe improvements have already been made.

Are there circumstances where the rules of the Act should apply differently to different people?

The TFGA recommend that removal of a tangible relic on private land be considered and assessed on a case by case basis to determine if the relic is likely to be damaged or is hindering normal primary production activities for landowners, as two examples. This would prevent any damage to the relic and allow preservation as appropriate.

The TFGA believe there may be circumstances that will arise whereby the “rules” in the Act will require a different application and this could include the example provided in the discussion paper. It would also apply to the different approach to deliberate versus unintentional damage to Aboriginal Heritage.

7. When can Aboriginal Heritage be interfered with?

Are the defence provisions in the Act adequate and reasonable and could they be improved?

The TFGA is satisfied that the 2017 amendments to the interference of Aboriginal Heritage is adequate as the Guidelines seem to provide a realistic approach that provides an equitable balance between protecting Aboriginal Heritage and allowing for economic opportunities for landowners.

The TFGA believe improvements have already been made in the 2017 Act amendments however it is always beneficial to conduct periodic reviews to ensure all possible future improvements are captured and implemented.

Do the Guidelines provide adequate protection for Aboriginal Heritage and could the Guidelines be improved?

From what the TFGA understand about protecting Aboriginal Heritage and after reviewing the Guidelines we believe the Guidelines seem to provide adequate protection.

8. Enforcement of Legislation

How well does the Act protect and manage Tasmania’s Aboriginal Heritage and how can it be improved?

After reviewing this part of the Act, the Act appears to allow a wide range of people be an authorised person/warden, which could result in fraudulent activity by a person purporting to be ‘authorised’. The TFGA recommends this is reviewed.

Should the Act include stop-work provisions?

The TFGA believes “stop work notices” is a proposal that raises considerable concern. Whilst we recognise the need to be able to cease work where actual Aboriginal Heritage is in immediate danger of irreparable damage, without very carefully constructed checks and balances it would not be something TFGA could support due to causing considerable disruption to farmer’s businesses’ and livelihood.

As stated in the discussion paper, a stop work notice could potentially be in place for years which is completely unacceptable to landowners.

Should the Act include provision for infringement notices and on-the-spot fines?

TFGA believe the provision of infringement notices and on-the-spot fines may not be appropriate at this time, as the term for authorised officer/warden is too broad and allows for fraudulent activity by a person purporting to be 'authorised'.

Should offences in the Act be further scaled to distinguish between minor and non-minor offences?

The TFGA are not able to comment here due to not having enough information and knowledge on the pros and cons of this section. We don't know what could potentially be classed as a non-minor offence.

9. Other ways the Legislation protects Aboriginal Heritage.

How well does the Act protect and manage Tasmania's Aboriginal Heritage and could this be improved?

The TFGA believes this has been addressed earlier in this submission.

Are 'protected sites' a useful mechanism for protecting Aboriginal Heritage?

After TFGA reviewed the Act and Discussion Paper, we can see the merits of a protected site, but believe the Aboriginal community are best placed to answer this question more thoroughly.

If a landowner is prevented from using a portion of their land, beyond reasonable 'duty of care' level, as a result of this legislation, then provision of compensation is required. There are important considerations regarding this including:

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

Is the provision for making of Regulations useful?

The TFGA recommends a review is undertaken to evaluate how effective the Regulations were before they expired in 2000. We do note that from reading the Act, there may be a genuine need for Regulations as there are some noticeable gaps such as flora and fauna, bringing living things onto a protected site and conduct and ejection of persons from the site.

10. Other matters covered by Legislation

The discussion paper identifies a range of other matters that might be considered in a review of the Act:

- Broader societal education on Aboriginal Heritage;
- Lack of understanding by persons regarding planning activities that might impact on Aboriginal Heritage;
- Appeals against decisions;
- Need for clarity and certainty in the operation of the Act;
- Statutory processes and timeframes to deal with enquiries over permit requirements and decision-making timeframes;
- Integration with TFGA and its members.
- More transparency and access to a map of positive and negative surveys that have already been conducted within the State as there is a belief that negative survey results are not retained and there fore leads to doubling up of fees payable to have the survey conducted more than once in the same area.

- The TFGA also recommends a more transparent and direct approach be taken with external stakeholders regarding correspondence received. We did email to clarify a few points in preparation for this submission and received a vague response which only really required an answer of Yes or No with a brief description.

TFGA recommends that there should be a significantly enhanced focus on educative processes that will, over time, lead to an increased understanding of Aboriginal Heritage, its importance and the need for it to be protected through appropriate and largely agreed procedures.

TFGA would support the Aboriginal Heritage Council and all other internal stakeholders to assist in the education of our members if so requested.

TFGA believe with extensive consultation with all internal and external stakeholders, that this will lead to a more detailed understanding of Heritage issues and genuine mutuality between the Aboriginal and non-Aboriginal stakeholders.

We look forward to hearing the outcomes in due course.

Please contact the TFGA if you require any further information.

Yours sincerely,

Peter Skillern

Chief Executive Officer

20th September 2019

