

## Protecting biodiversity: property rights and the duty of care

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### Abstract

This paper explores how traditional rights of property have influenced the development of policy and legislative responses to biodiversity protection. Current law is hamstrung by a lack of clear commitment and vision to implementing and enforcing appropriate standards of protection. The introduction of a statutory duty of care to protect biodiversity would herald in much needed positive obligations of management on both private and public land managers.

### Keywords

biodiversity conservation, duty of care, property rights

### The influence of the common law on the development of environmental policy

In Australia, as throughout the rest of the world, the development of the law is inevitably shaped by the system of government adopted by the nation. Our Western style of government — parliamentary democracy — was inherited from our British forebears, and consequently our legal system reflects our desire to protect the social values associated with this form of government.

The origins of British law, and therefore Australian law, can be traced as far back as the Norman invasion of England in the middle of the 11th century; some concepts of public ownership of natural resources even borrow from Roman law. The dominant source of wealth and power in our society has always been ownership of land, so it is no surprise to find that our law has been built upon the foundation of protection of private property. For centuries the acquisition of land has been relied upon not only as a form of economic and political protection for the landowner's family, but as a means of developing, shaping and sometimes protecting the local environment: 'For environment a traditional lawyer reads property. Establish ownership or possession and the armoury of the English legal cupboard is yours to command' (Scarman 1974)

Within the boundaries of his or her own property, the landowner was free to exploit natural resources, including biodiversity, even to the point of extinction. The common law has no concept of sustainable resource management. It assumes that if land and natural resources have economic value that landowners will want to protect and manage those resources for economic gain. It does not distinguish between short-term and long-term values.

The only restriction on the right of landowners to do as they liked on their own land was the presence of neighbouring landowners, who had similar rights to use and enjoy their property without unreasonable interference from their neighbours. If one landowner polluted a neighbour's property, for example, the law would assist the aggrieved landowner to recover compensation from the transgressor.<sup>1</sup>

Outside the boundaries of private property, the common law adopted a 'free for all' approach to natural resources. Assets such as fisheries and wild animals<sup>2</sup> were regarded as public property, available to whoever could get to them first. Since no-one, under this system of law, had any responsibility to manage biological resources, governments of course had to step in and enact legislation to control unsustainable utilisation of wildlife. As Brennan J remarked

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<sup>1</sup> See for example *Lawrence v Kempsey Shire Council* (1995) 87 LGERA 49

<sup>2</sup> *A-G (British Columbia) v A-G (Canada)* [1914] AC 153; *Ball v Consolidated Rutile Ltd* [1991] 1 Qd R 524.

in *Harper v Minister for Sea Fisheries* (1989) 169 CLR 314, 329, ‘the public right of fishing in tidal waters is not limited by the need to preserve the capacity of a fishery to sustain itself. The management of a fishery to prevent its depletion by the public must be provided for, if at all, by statute’.

### **The legislative approach to biodiversity conservation**

Government has progressively moved to wrest management of natural resources away from private control and unlimited public access. It is common now for water, fish and biodiversity<sup>3</sup> to be vested in and controlled by the Crown. Legislation then creates government authorities charged with the task of managing these resources, and implementing and enforcing the statutory scheme. Environmental restrictions imposed by legislation, of course, cut across common law rights; but centuries of legal and cultural tradition that support the pre-eminence of the rights of private landowners cannot be easily overcome; and such rights still have a considerable influence on the development of environmental policy and therefore of environmental law. The governmental approach to environmental management and protection has had to be applied in the context of a social system, supported by the common law, that hitherto placed few restrictions on the exploitation of natural resources by private landowners.

Naturally there were bound to be tensions between the previously unregulated private interests and the government regulators, tensions that often manifested themselves in demands for no regulation, deregulation or compensation; for some interesting examples see Bonyhady (1992). While some intrusions into private rights have been successfully made to protect public interests, most notably in the area of land use or environmental planning, it remains true that the most significant environmental problems facing Australia today have also proved to be the hardest for governments to tackle because they force regulators to confront the traditional rights of private landowners. Town and country or urban planning succeeded because it addressed significant social rather than environmental problems; reforms reflecting increased environmental concerns were grafted on later. Attempts to curb degradation and destruction of natural resources on private land, however — for example clearance of native vegetation and forests, land degradation, salinity, and loss of biodiversity in general — have historically proved difficult to introduce, and have been inadequate in their coverage, implementation and enforcement. Water and fisheries reforms have also had to grapple with the difficulties inherent in modifying or removing common law rights and statutory entitlements that, over the years, had come to be regarded as *de facto* property rights. See, for example, Bond and Farrier (1996).

From the perspective of evaluating legal mechanisms for biodiversity conservation in Australia, legislation may be divided broadly into three categories:

- 1 legislation that is designed specifically to protect biodiversity (for example, threatened species legislation)
- 2 legislation that, although not designed solely to protect biodiversity, has significant application to biodiversity protection (for example, that applying to development and clearance of native vegetation)
- 3 legislation that is not designed to protect biodiversity, but the application of which may adversely affect biodiversity. This category may contain some provisions relating to biodiversity protection (for example energy and fire legislation), although most will contain no provisions for biodiversity protection.

The significance of such categorisation is to confirm that biodiversity protection is affected by, and in fact relies upon, the discretionary exercise of power by virtually every statutory or government authority in Australia, under a wide range of legislation; and that responsibility for biodiversity protection is legally divided among, or conferred upon, many of these authorities, creating a complex regulatory web that is uncertain in its application, inefficient in its approach, and ineffectual in adequately protecting biodiversity. Neither the legislation nor apparently government policy displays any coordinated or ‘whole of government’ approach to biodiversity

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<sup>3</sup> See for example Fisheries Act 1995 (Vic) s 10; Water Management Act 2000 (NSW) s 392; Nature Conservation Act 1992 (Qld) ss 83, 84.

protection. Legislative functions appear to have been conferred upon government agencies in an ad hoc manner without any clear strategic direction for promoting biodiversity conservation.

Some of the most important powers granted to regulators to protect biodiversity include:

- native vegetation clearance controls
- state environmental planning policies
- planning controls for development that require an assessment of the environmental impacts of development, and requirements for consultation with, or concurrence of, government agencies responsible for biodiversity protection
- wildlife and threatened species legislation
- the negotiation of property agreements with private landowners
- imposition of land management practices on private landowners by public authorities, particularly aimed at arresting and repairing land degradation
- restrictions on water use and extraction.

It is not the function of this paper to attempt to list all the statutory powers whose exercise may impact, either adversely or favourably, upon biodiversity. The list would run into thousands, and perhaps tens of thousands. It is obvious, however, that the exercise of a wide range of lawful activities, as well as unlawful ones, may impact adversely on biodiversity; and that, except for legislation that is specifically directed to the protection of biodiversity, the statutory authority to undertake such activities usually requires either no consideration of effects upon biodiversity, or at the most requires decision-makers only to 'have regard' generally to environmental impacts or principles of ecologically sustainable development, of which protection of biodiversity is one. Most of this legislation fails to specify any criteria by which such considerations should be guided; and also fails to specify criteria for evaluating effectiveness.

In reality, therefore, it is not so much the absence of legislation that determines impacts on biodiversity, as the application of legislation without regard for, or in ignorance or disregard of, its potential to adversely affect biodiversity; and absence of definite criteria for the assessment, management, monitoring and evaluation of impacts on biodiversity. There is plenty of legislation that can be used to influence beneficial outcomes, and legislative powers can be exercised in a way that will minimise rather than exacerbate impacts on biodiversity. But legislative directions to decision-makers generally fall short of prescribing approaches that actually direct a precautionary approach to decision-making, preferring instead merely to require that decision-makers 'take account of' biodiversity as one of a range of relevant considerations. One of the most common instructions is to have regard to principles of ecologically sustainable development.

### **Biodiversity conservation as a fundamental concept in sustainable development**

Ecologically sustainable development (ESD) has become the most important legislated criteria for environmental management. Statutory requirements to 'have regard to' or to 'take account of' ESD when making decisions appear not just in environmental legislation, but perhaps more importantly in legislation conferring discretionary powers upon a wide range of government agencies to take or approve activities that might impact adversely upon the environment and biodiversity.

Although legal definitions of the concept of ESD differ between Federal and State legislation, most are fundamentally based upon the definition of ecologically sustainable development agreed to by the Commonwealth, states and local government and embodied in the *National Strategy on Ecologically Sustainable Development 1992* and the *Inter-Governmental Agreement on the Environment 1992*. This definition states, in summary:

Ecologically sustainable development requires the effective integration of economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs ... the precautionary principle; intergenerational equity; conservation of biological

diversity and ecological integrity; and improved valuation, pricing and incentive mechanisms.

The definition of ESD introduces the notion of *integrating* economic and environmental factors. For example, section 3A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) emphasises that ‘decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations’. In decision-making this is likely to become a *balancing* exercise where, as inevitably happens, the fulfilment of all objectives cannot be maximised. In other words, there are bound to be trade-offs between the often competing components of ESD. ESD attempts to maximise the combined total of economic, social and environmental values of resource use, but to do this some of the elements that make up these values may have to be traded against one other. The application of ESD may therefore be said to pursue *optimum* protection of environmental values rather than *maximum* protection.

In our Western democratic, capitalist system of government, it is also arguable that political values are already weighted towards economic and social issues; and although environmental values are important, the prevailing assumption is that development and growth should be allowed to proceed unless there are clearly proven reasons for limiting it. Legislation that includes environmental values generally as equally relevant considerations in decision-making may fail to acknowledge the potentially inherent bias in institutional decision-making towards economic and social values. If such a bias exists, then arguably biodiversity protection is not even being optimised, let alone maximised.

In the definition of ESD adopted in Australia, conservation of biological diversity is expressed as a ‘fundamental consideration’ in decision-making. Whether this means that it should be given maximum rather than optimum protection, or priority against other factors that influence decision-making, is unclear. There is no explanation — in the definition of ESD, in legislation, or other policy documents — about how the ‘fundamental’ nature of biodiversity considerations is to be progressed in decision-making, or what weight these considerations should be given; for example, whether biodiversity conservation should somehow be given priority over other principles of ESD or over other inputs into decision-making, such as economic factors. In *Australia: State of the Environment Report 1996* it was remarked that ‘the relationships between ESD and the protection of biodiversity are not well understood and it is widely assumed that, once a human activity appears sustainable, biodiversity will be protected’ (Commonwealth of Australia 1996, p. 4-40). If biodiversity were adequately protected, then would the activity by definition be sustainable?

The legal definition of ecologically sustainable development is also problematic because:

- it tends to treat sustainability as part of a procedure for decision-making, rather than as a focus or an outcome of it
- there tends to be little accountability for pursuing or achieving sustainable outcomes
- there are few requirements in legislation for actually monitoring the sustainability of outcomes.

His Honour Justice Paul Stein has said that:

‘the inclusion of the principles in Australian legislation has been largely confined to objectives of statutes or agencies without any real guidance to decision-makers as to whether and how to apply the core principles or what weight to give them. Moreover, some of the principles contain vague statements, some might call them aspirations, as well as ambiguities, inconsistencies and uncertainties. Difficulties of interpretation and application are manifest. There is even discussion on whether the principles are merely guiding or whether they are also operational. In these circumstances, who can blame the courts for proceeding, like the precautionary principle, with a degree of caution?’ (Stein 2000)

It is difficult to resist the criticism of current drafting approaches that, by including ESD as one of a number of objectives of the legislation, or as one of a number of factors to which regard

should be had by decision-makers, regulators have missed the point that ESD is not a factor to be balanced against other considerations; ESD should be the objective of the management regime created by the legislation, and it should therefore stand alone as *the* object of the legislation.

### **Problems with current approaches for biodiversity conservation on private land**

Although it would be impossible in this paper to attempt to analyse the implementation of all legislation that allows regulators to restrict land management practices that might have an adverse impact on biodiversity, or to command management approaches, the following general comments can be made.

First, there is broad agreement that effective biodiversity conservation on private land requires a mix of both regulatory and incentive mechanisms (Young et al. 1996). Legislation in general empowers regulators to pursue both options; but providing the appropriate tools, of course, does not necessarily guarantee that they will be used. Regulators, as much as anyone else, are still influenced by the traditional rights of private landowners when it comes to placing restrictions on what landowners can do on their own property. Witness the farcical introduction of clearance controls in Queensland, for example, where the government was threatening not to implement its own legislation unless the Commonwealth came to the party to guarantee compensation to landowners for lost opportunity. In New South Wales the flurry of prosecutions for breaches of clearance controls (under the now-repealed State Environmental Planning Policy 46) seem to have dried up completely since the introduction of the *Native Vegetation Conservation Act 1997*. There is no evidence that landowners are suddenly complying with clearance restrictions. And despite the wide range of instruments now available to policy-makers to protect biodiversity, most governments have used only a limited range. These are usually piecemeal regulations prohibiting particular acts, and subsidies of various kinds. Gunningham and Grabosky (1998) suggested that subsidies have often proved environmentally counterproductive, while regulation commonly suffers from serious design faults, with the result that current and recent policies actually contribute to regulatory failure.

An example of legislation often criticised for its poor regulatory design is that related to threatened species, because it tends to deal with the destruction of only known, listed species, rather than addressing the cause of the problem, which is ecosystem and habitat destruction (Bradsen 1992, Dixon 1994, Kelly 1996, EDO 1997, JSCTSA 1997, Mahony 1997, Smith 1997). State and Commonwealth legislation governing threatened species exhibits other common limitations; for example, the huge inputs of human and financial resources that will be required to prepare and implement recovery plans, protect critical habitat, and deal with threatening processes,<sup>4</sup> and the susceptibility of positive action in any case to political veto.<sup>5</sup> One approach that could improve the operation of threatened species legislation is to list all species that are *not* protected, rather than to provide a lengthy list of species that are subject to the legislation (de Klemm and Shine 1993). This would have three principal advantages, as follows:

- 1 Educating resource users about their responsibilities under the law would be easier. Second, by protecting even unknown species, the legislation would encompass the precautionary principle. Third, justifying and implementing a duty of care would be easier.
- 2 Another problem is that legislation displays the same reluctance as the common law to actually require landowners to manage their land in any particular manner. Legislation allows *restrictions* to be placed on landowners — for example, with respect to polluting

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<sup>4</sup> The NSW EPA (2000, page 247) reported that, of the total number of recovery plans required for listed species, 680, only 3 had currently been approved, with a further 162 under development

<sup>5</sup> Because the appropriate minister usually has to sign off on the relevant listings or plans; see for example Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 269A, 270A; Flora and Fauna Guarantee Act 1988 (Vic) s 16

activities, removal of native vegetation, and capture of wildlife — but it rarely allows regulators to command how the land will be managed. When positive measures to reverse degradation are needed in conjunction with the development of an ethic of environmental stewardship, command and control regulation is out of its depth. The use of land is controlled through environmental planning legislation, but use is not the same as management.

Voluntary agreements for positive management are the preferred option, not regulation; and to encourage landowners to enter into such agreements, financial incentives are dangled as the carrot. In other words, public funds are offered to private landowners to manage their land in a more sustainable manner. Landowners of course would argue that if they are to forgo development of their property to protect public assets, then the use of public funds is quite appropriate. This argument of course relies on the assumption, fuelled by centuries of social tradition, that private landowners have no public duties to manage their land for longer-term values; no obligations of guardianship, if you like.

Voluntary land management agreements have proved popular with regulators, partly because they remove the necessity to confront deeply held beliefs and values about the sanctity of private property. Legislation also enables these agreements to bind future owners of the land,<sup>6</sup> thus contributing to a sense at least of guardianship of the natural resources of the property. The financial incentives effectively offer some compensation to the landowner, whereas regulation has been phasing out compensation as a realistic balance to the imposition of restrictions on land management.

- 3 Regulation is often a blunt tool. Picking one's way through the tortuous definitions, exceptions and exemptions of the NSW *Native Vegetation Management Act 1997*, for example, should convince anyone that if there is a better approach to regulation then it should be grasped with both hands. Even where regulation looks on paper as if it should be effective, however, monitoring may be extremely difficult and expensive, and sanctions, as indicated, may lack political acceptability. This is not to say that there is no place for regulation in the management of biodiversity; indeed, regulation must continue as an essential underpinning of any strategies for biodiversity conservation. Regulation can provide an essential safety net, a backdrop of minimum legal biodiversity protection standards without which other, less coercive strategies, cannot function successfully. The more that flexibility, variety and discretion is introduced into legislative design, the more that strong and effective regulation may be needed to discourage a lack of care or deliberate evasion of responsibilities, and to keep strategies on track. The 'duty of care' has the potential to fulfil this role.

### The duty of care

The concept that a person should owe a duty of care to others is well known in law, particularly through the common law action in negligence. Legislation has also borrowed from this concept, but largely to protect individuals. A well-known example is occupational health and safety legislation, where a general duty to do what is reasonably practical to achieve the objects of the legislation is supported and clarified by codes of practice and other voluntary mechanisms.

Gardner (1998) has commented that experience in enforcing such a duty in occupational health and safety legislation suggests that it may be difficult to enforce a broad-based environmental obligation if individuals are clearly not the object of protection. Environmental obligations in fact are rarely owed to individuals. In this regard, section 20 of the *Catchment and Land Protection Act 1994* (Vic.) is quite unusual, requiring that landholders must take all reasonable steps to:

- avoid causing or contributing to land degradation that causes or may cause damage to the land of another landholder
- conserve soil

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<sup>6</sup> See for example Conservation, Forests and Lands Act 1987 (Vic) s 72

- protect water resources
- eradicate regionally prohibited weeds
- prevent the growth and spread of regionally controlled weeds
- prevent the spread of, and as far as possible eradicate, established pest animals.

The duty is directly enforceable as a breach of the legislation by civil action, criminal prosecution or the issue of administrative orders for compliance.<sup>7</sup>

The other interesting point about these duties is that to fulfil them requires positive management on the part of the landowner, not merely the avoidance of actions that could cause harm. On the other hand, a disadvantage with defining the duty as one owed to individuals is that it focuses on the potential financial, rather than environmental, impacts of the breach and thus does little to foster the concept that a duty may be owed to the environment *per se*.

Pollution control legislation, by contrast, has introduced a general duty of care owed to the environment, rather than to individuals, although this is framed in negative terms rather than in positive obligations of management. In this legislation, the means of compliance may be stipulated by instruments, such as licence conditions, management plans or codes of practice, but the duty is to avoid or at least minimise harm, or to minimise discharges where harm is not a stipulated element of the offence, rather than to act to comply with the duty.<sup>8</sup> Failure to comply with the general environmental duty does not, by itself, give rise to civil or criminal liability,<sup>9</sup> but compliance may be enforced via the issue of an environment protection or clean-up order, or via an application to a court or tribunal for a civil or criminal remedy to restrain breaches (or anticipated breaches) of the legislation. A defence to a charge of unlawfully causing environmental harm may be that the defendant complied with the general environmental duty by observing a relevant code of practice or in some other way.<sup>10</sup> For example, in Queensland, complying with the Environmental Code of Practice for Agriculture enables agricultural producers to demonstrate compliance with the general environmental duty. The court may treat failure to comply with this code as evidence of a failure to comply with the duty, which may help to establish liability for causing unlawful environmental harm.

The advantage of using compliance with the environmental duty as a defence to a charge of unlawful environmental harm is that positive measures for management or protection of the environment can be stipulated in other instruments under the authority of the legislation. This fosters a performance or outcomes-based approach to environmental management and protection rather than a purely regulatory one. Instruments such as codes of practice and guidelines can effectively undertake the dual roles of indicating how to fulfil the duty and how to comply with legal standards imposed by the legislation or by subordinate instruments such as regulations, plans of management and planning instruments.

### **A statutory duty of care for biodiversity conservation**

A statutory duty (see Bates 2001) on landholders and resource users to prevent any loss of biodiversity, where it is reasonable and practical to do so, would introduce positive obligations of management that would complement the blanket yet negative protection of biodiversity that is conferred under existing legislation. The extent of the positive obligations of management and protection would be set out in a code of practice for the particular locality.

#### *Duty not to harm biodiversity*

Biodiversity conservation is usually introduced into legislation through provisions detailing specific offences. The Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* provides a classic example. That statute contains no general duty to protect or to not

<sup>7</sup> See Part 4, Division 3; Parts 5, 6, and 9.

<sup>8</sup> Environmental Protection Act 1994 (Qld), s.36; Environment Protection Act 1993 (SA), s.25; Environment Protection Act 1997 (ACT) s.22; Environmental Protection Act 1986 (WA), s.51(b).

<sup>9</sup> South Australia, s.25(4); ACT, s.22(3). The Qld Act s.21(3) refers only to civil liability but arguably a similar position with regard to criminal liability may be inferred from the scheme of the legislation.

<sup>10</sup> Queensland s.219 and the ACT s.33.

harm biodiversity; however, it is an offence to take action that results in a significant impact on world heritage values,<sup>11</sup> the ecological character of a declared Ramsar wetland,<sup>12</sup> threatened species or ecological communities,<sup>13</sup> or migratory species.<sup>14</sup> In a sense, these offences incorporate a general duty to avoid causing such effects. These offences are also general in the sense that the Act does not specify the means of causing such harm. This statute also describes specific offences by reference to more particular acts — such as killing, injuring, taking, keeping or trading threatened species.<sup>15</sup>

The disadvantage of these provisions is that the term ‘action’<sup>16</sup> and the specific offences are defined in terms of positive activity, not a failure to act. In other words, failing to act to protect or manage threatened species or the other specified environmental values does not appear to be an offence under this Act. If extending legal controls to the failure to take action was appropriate, then a duty of care to protect biodiversity (cast in terms of positive obligations of management) could cure this defect.

### *Defining standards of care: best practice*

The introduction of a duty of care assumes that standards will be set for fulfilment of the duty. Otherwise, persons under such a duty, and potentially liable for breach of the duty, would not know with any certainty how to comply with it. The judiciary is likely to perceive the absence of appropriate standards as a reason for denial of breach of the duty.<sup>17</sup> The duty therefore needs to be complemented by other instruments, such as codes of practice and guidelines, that indicate how the duty may be fulfilled.

Standards of care define the boundaries of what is reasonable and practical under the statutory scheme. Standards should be expected to reflect best practice for a particular industry or activity. Best practice has been well documented for some industry practices — pollution control, for example — but will need to be further defined in relation to activities such as land clearance or agricultural practices.

As with pollution control, regulatory authorities should be given discretion to apply such standards gradually in pursuing best practice environmental outcomes. Reduced standards may, therefore, have to be accepted as a temporary transition to higher best practice standards. The danger with this, of course, is that the introduction of a duty of care that sets a lower standard than that already being achieved by some individuals could reduce the incentive for those resource users to continue to demonstrate high standards of environmental management. On the other hand, a standard of care that is unrealistic in terms of practical compliance could also seriously compromise the objects of the statutory scheme and bring it into disrepute. For these reasons, best practice should be the benchmark for compliance with the duty of care, coupled with discretionary powers to allow or require the graduated adoption of standards as necessary.

Naturally, the introduction of best practice through a duty of care will have economic and social repercussions. The correct time to consider the potential economic and social effects of biodiversity protection is when devising best-practice standards. Once standards are in place, they should be applied without further balancing of the issues. ‘Watering down’ the standards, or allowing the discretionary application of standards, can only discredit them. This would suggest to the stakeholders that the implementation of the standards, rather than the means of implementation, was negotiable, and this would quickly lead to breakdown. Best practice, once determined, may be periodically reviewed, but its application should be non-negotiable. The

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11 s 15A

12 s 17B

13 s 18A

14 s 20A

15 s.196–96E.

16 ss. 523–524B.

17 For example, administrative orders that fail to specify appropriate ways of complying with the order may be declared invalid by the courts; see *Environment Protection Authority v Simsmetal* (1990) 70 LGRA 312; *Re Lawrence*; *ex parte Goldbar Holdings Pty Ltd* (1994) 84 LGERA 113; *Humes v Launceston City Council* (unreported) Resource Management and Planning Appeal Tribunal (Tas) No. 3166/96.

most efficient way in which to implement the standard and thus meet the duty of care may be negotiable, but the standard needs to be rigorously applied if it is to be workable and respected.

### *Positive duties of management*

Best-practice standards for compliance with the duty of care would not just encompass negative duties to avoid harm to biodiversity, but also extend to positive requirements to manage land to protect biodiversity. As already noted, the law is not familiar with stipulating positive requirements for land management in legislation, although regulatory authorities may issue statutory instruments under the legislation, such as the land management notices under s 38 of the *Catchment and Land Protection Act 1994* (Vic.) that may lay down prescriptive requirements for management.

Clearance controls for native vegetation, for example, focus on restricting inappropriate use and fighting off claims for compensation, rather than promoting appropriate management through forward-looking economic incentives (Farrier 1995a,b). Landowners who are forcibly constrained from clearing land are unlikely to become enthusiastic land managers.

With the advent of modern regulatory institutions, the tasks of not only determining environmental obligations but also enforcing compliance have been entrusted to the authorised officers of public authorities. Often, extensive rights of civil enforcement are also vested in the general public. There is no inherent reason why legislation cannot lay down positive obligations of management as well as duties to avoid harm. The precise nature of the fulfilment of the obligation could be determined through consultation and negotiation between the regulator and the landholder, based on best-practice standards as available or as drawn up for the particular circumstances.

### *Allocating the costs of biodiversity protection*

The imposition of a positive duty of care for the protection of biodiversity will, of course, have cost implications for landowners.

Binning and Young (1997) have suggested that, costs associated with fulfilling such a duty of care should be regarded as normal costs of production. Consequently, they and others argue that governments should not provide financial assistance to resource users to meet that duty (AACM 1995, Binning and Young 1997, Crosthwaite 1997 and 1998, Hajkowicz and Young 2000, VSGC 1997). Instead, the role of government in biodiversity conservation should be to provide support mechanisms, such as setting best practice standards for compliance with the duty of care and providing guidance on how to comply.

Hajkowicz and Young (2000, p.3) have suggested that cost sharing is justifiable only for actions that go beyond the duty of care, which raises questions of equity. The community may, for example, demand higher standards than are legally required under a duty of care. The maintenance of environmental quality beyond the duty of care represents a community service provided by the landowner for which compensation should be payable. However, if the duty is set at best practice levels, then there would be few occasions when the duty is surpassed.

An alternative to providing ongoing sharing of costs may be to adjust what is considered 'reasonable and practical' under the duty of care required of resource users. The difficulty with this approach is that, as indicated, the statutory scheme may be compromised if standards for the fulfilment of the duty fall below best practice.

It has to be recognised, however, that compliance with best-practice standards may be an onerous burden, particularly for those not used to such compliance regimes. The answer may be to phase in standards for best practice, or to assist with the costs of compliance, or both of these, on the grounds of equity, necessity, efficiency or for other good reason. In its submission to the Industry Commission Inquiry into Ecologically Sustainable Land Management,<sup>18</sup> for example, Environment Australia noted that it may be inappropriate to require land managers to comply with the duty without technical or financial assistance, when the aim is to correct environmental damage resulting from actions that occurred prior to the introduction of the duty of care. Where

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<sup>18</sup> Industry Commission 1998, Sub. 229, p. 5.

the ground rules are changing, there is nothing inherently wrong with sharing with the community the costs of moving to new standards. Without such concessions, attaining better standards of practice may not be achievable.

The effect of these various limitations is that there may still be cases, despite the existence of a duty of care, where government may need to consider cost-sharing to ensure adequate conservation of biodiversity. Binning and Young (1997) have argued that it would be inequitable for resource users responsible for areas of unique conservation value (such as small representative ecosystem areas) to bear a heavier burden for environmental protection than that borne by other resource users. In such cases, government should provide funding to promote equity and to ensure that socially beneficial actions occur.

However, while arguments for compensation to encourage changes in land management may exist, such payments are unlikely to be an efficient use of government funding in the long term. Payments may be most efficiently used only in the short term and where a permanent change in resource use practices is adopted. Thus, where compensation is necessary, it may be argued that it should be offered only for a transitional period as an equitable means of bringing about a rapid and irreversible transition from unacceptable to preferred management practices. Binning and Young have suggested that land management activities should be incorporated into a landholder's duty of care through a once-off transition payment tied to a permanent change in property rights (AACM 1995, Craik 1996, Binning and Young 1997, Sperling 1997).

A significant example of cost-sharing for biodiversity conservation occurred in South Australia in the 1980s. The South Australian native vegetation program, set out in the *Native Vegetation Act 1985* (repealed in 1991) made a considerable contribution to biodiversity conservation. This legislative program (in conjunction with heritage agreements) prohibited clearance without consent and established an authority to make decisions on applications to clear. Initially, all those who were refused consent to clear were entitled to compensation in return for accepting Heritage Agreement. However, this entitlement was replaced in 1991 with an arrangement whereby incremental costs would be compensated only where they were judged to be above those expected of all South Australian farmers. The opportunity for compensation was removed because the implied property right had changed.

Transitional compensation schemes of this type would seem to be a legitimate way in which to ease the short-term financial burden of regulation, to hasten the process of structural adjustment, to satisfy equity considerations and to achieve short-term political acceptance. They have the added advantage of providing a financially attractive and positive element to the regulatory environment.

## Conclusion

As a legislative tool that would have educational as well as regulatory impact, the duty of care should be considered as the basis of legislation for biodiversity conservation. Restrictions on land managers that concentrate only upon negative requirements to avoid harm, rather than positive obligations of resource management, may be understandable, given the strong influence of the common law in defining private rights of property, but they are likely to prove ineffective in protecting biodiversity in the longer term. The exclusive right to manage one's property has to be at least complemented with the acceptance of responsibility for wise management of biodiversity through an ethic of guardianship for natural resources. The duty of care represents a strong, yet essentially non-invasive, legal statement of that responsibility.

The duty of care (in conjunction with voluntary codes of practice) is more flexible and less prescriptive than many alternative approaches, and would promote a wide range of 'no regrets' measures (those measures that are low cost or reduce costs by increasing productivity) to protect the environment. The task now required is to give further consideration to how the duty would be implemented in practice through appropriate codes or guidelines. Standards for the retention (not clearance) of native vegetation, the application of fertilisers, and the use of pesticides, for example, come immediately to mind as land management practices for which standards already exist or can be prepared.

The duty of care is clearly not an all-encompassing, one-off solution to the disadvantages of current legislative approaches to biodiversity protection. It will also need to be complemented by other initiatives, particularly those encouraging voluntary action and encompassing educational and financial incentives. It would, however, seem to be an appropriate part of an optimum regulatory mix for the future protection of biodiversity.

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