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Submission to the Land & Biodiversity Green Paper

From

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Dear Sir/Madam

We welcome the opportunity to present our views on key policy areas for land and biodiversity in Victoria for the coming decades. This submission provides an outline of research currently being undertaken by Charles Sturt University, School of Environmental Sciences, exploring the potential role that a statutory duty of care for biodiversity could play in improving outcomes for biodiversity. The specific focus for this study is the agricultural landscape of south-eastern Australia, where remaining biodiversity is concentrated on privately owned land, and where few public land reserves exist. In this landscape, effective biodiversity conservation will, to a large degree, be dependent on the willing participation and active management of landholders.

It is our contention that existing measures directed at improving biodiversity conservation on private land have been important, but insufficient, and that an expanded array of policy instruments for promoting biodiversity conservation on private land is warranted. A statutory duty of care for biodiversity has been suggested as a potentially valuable instrument for encouraging responsible management of biodiversity to promote maintenance of ecological function in agricultural landscapes.

In the following pages we outline the reasons why we think that a statutory duty of care specifically for biodiversity would be a useful policy instrument for improving biodiversity outcomes, and as a model upon which a more general environmental duty of care could be based.

This submission specifically addresses the policy question:

*What are the roles and responsibilities of individuals, community, business and government and how can we maximise the effectiveness of our joint effort?*

## **Background**

The idea of an environmental duty of care has been topical for nearly twenty years, since Bradsen's (1988) first proposal as a measure to alleviate soil erosion in South Australia.

Subsequent reports recommended a statutory duty of care to the environment, including Binning & Young (1997) and the Industry Commission, in its inquiry into sustainable land management *A Full Repairing Lease* (1998). The latter report recommended three pillars for sustainable land use, one of which was a statutory duty of care to the environment. The other two pillars were improved conservation on private land, and the creation of new markets for natural resources.

## **Limitations of existing duty of care legislation**

At the time, a number of examples of statutory legislation with an environmental duty of care existed in various State legislation. Some examples include:

- *The Pastoral Land Management and Conservation Act 1989* (South Australia);
- *The Environment Protection Act 1993* (South Australia);
- *The Environment Protection Act 1993* (Queensland);
- *The Catchment and Land Protection Act 1994* (Victoria).

It is our contention that these examples provide key lessons, pointing to a need for a specific duty of care for biodiversity, and the reasons for this are presented below.

The *Pastoral Land Management and Conservation Act 1989* (South Australia) contained the environmental duty of care that Bradsen (1988) had called for. This duty was to avoid degradation of the land, where "land" included all natural resources including biodiversity, although at the time of drafting that term was not in common use. However, in the absence of guidelines or codes specifying rules by which the duty could be met, this duty remained ineffective. Morton, Stafford Smith, Pickup and others have subsequently pursued research aimed at providing more

tangible definitions of land degradation and sustainable pastoral grazing in semi-arid rangelands.

*The Environment Protection Act 1993 (South Australia)*

In this Act the environmental duty of care was directed at avoiding harm to the environment, where “environment” included biodiversity (organisms), ecosystems, land and water. The emphasis on the legislation was pollution mitigation, rather than biodiversity maintenance.

However, the *Environment Protection Act 1993* has been amended to take into account the duties embodied in more recent legislation in South Australia, the *River Murray Act 2003* and the *Adelaide Dolphin Sanctuary Act 2005*. In these recent examples the duty of care is owed to discrete geographical entities, namely the course of the River Murray and its natural resources, and in the latter, the area within the Sanctuary boundary and its dolphin population and natural habitat.

*The Environment Protection Act 1993 (Queensland)* contains the only example of a general duty of care to the environment that is supported by codes of practice, giving practical articulation of the duty of care. These codes have been based around specific production enterprises, including agriculture, horticulture, piggeries, cane growers and dairy farmers. The code of practice for agriculture states

*“...all reasonable and practical measures should be adopted, within the constraints of sustainable agriculture, to conserve representative native species and ecosystems.”*

The code also specifies in general terms, management practices that can potentially assist the maintenance of native biodiversity. It is our contention that this approach has not adequately addressed the needs of biodiversity. Firstly, by framing the codes of practice around production enterprises, the notion of biodiversity conservation is always going to be secondary and subordinate to the enterprise. That is, biodiversity conservation will always remain within the paradigm of production, regardless of the particular context and requirements for its maintenance. This is also reinforced by the conditional nature of the duty of care, i.e. to take “all reasonable and practical

measures.....within the constraints of sustainable agriculture.” Such a condition raises the possibility that where agriculture may be deemed to be constrained, the adoption of even basic measures to care for biodiversity may be abandoned. Because the market drivers for biodiversity are not strong, it is foreseeable that this situation may arise.

#### *The Catchment and Land Protection Act 1994 (Victoria)*

This legislation replaced the *Vermin and Noxious Weeds Act 1958* and the *Soil Conservation and Land Utilization Act 1958*. The general duty of care contained in the *CaLP Act* aims to avoid degradation of land, where “land” includes biodiversity, soil and water on land. Again, the term “biodiversity” was not commonly used in 1994, but its absence from the terminology of the *CaLP Act* in 2007, together with the legislative heritage of the *CaLP Act*, has resulted in the duty of care provisions not being applied to biodiversity matters.

Other limitations of the *CaLP Act* include:

- Its provision for the duty of care to be owed to neighbouring landholders, thereby place no responsibility on landholders to care for their own biodiversity (unless it results in foreseeable harm to a neighbour).
- The absence of codes of practice to give meaning to the duty of care.

### **Recent developments**

Since 1998, a broader suite of incentives to promote private land conservation has been developed, and the creation of new markets for biodiversity through ecosystem services has been made. Although extensive discussion of an environmental duty of care has also taken place (e.g. Gardner 1998; HRSCEH 2001; Crosthwaite 2001; Young *et al.* 2003) little progress towards development of a system that could operate at a regional scale has been made.

Bates (2001) considered the merits of a duty of care specifically for biodiversity, concluding that it could have many positive implications, while acknowledging difficulties with the application, and the unlikelihood that it would provide a comprehensive mechanism, alluding instead to the well accepted dogma that a portfolio of policy approaches will provide better outcomes than any single approach (Young *et*

*al.* 1996; Gunningham & Young 1997; Doremus 2003). More recently the South Australian government has called for a duty of care for biodiversity in its draft biodiversity strategy (SA Government 2006), despite its relatively lengthy experience with environmental duty of care provisions in legislation. From our interactions with a number of Victorian CMAs, duty of care is a vexing issue that requires address in the near future.

### **Suggestions**

It is our belief that biodiversity would be best served by having a statutory duty of care assigned specifically to it. Biodiversity conservation on private lands presents additional challenges to other natural resource management issues, not least because of biodiversity's weak position with respect to economic drivers. In suggesting this approach we acknowledge there are concerns about segregating biodiversity from other natural resource elements, but believe that a strong focus on it is warranted. We think that by addressing the need for a statutory duty of care for biodiversity specifically, not only will the profile of biodiversity be raised, but we envisage that the adaptation/integration of a duty of care to other natural resource elements would be a logical and more straightforward process. By focusing clearly on biodiversity, the weaknesses apparent in existing legislation containing an environmental duty of care could be addressed.

In summary, we think that existing environmental duty of care provisions are not adequately serving the needs of biodiversity in Australia. For this reason we think that a separate focus on developing a practical, duty of care framework, suitable for operation at a regional scale, is preferable in the short term. Charles Sturt University post-doctoral student Gillian Earl is exploring this topic under the supervision of Professor Allan Curtis (CSU), Dr Catherine Allan (CSU) and Dr Vivienne Turner (ARI). Ms Earl has developed a framework for a duty of care for biodiversity that is designed to operate at a sub-catchment scale, and over the next six months will be conducting case study research to test its utility in two Victorian CMAs.