



A Duty of Care for the Protection of Biodiversity on Land

Consultancy
Report

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Report to the
Productivity Commission

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Preface

In 1996, the State of the Environment Advisory Council described biodiversity loss as perhaps the most serious environmental problem facing Australia. The Commonwealth Government has introduced several strategies to address this issue, such as the National Strategy for the Conservation of Biodiversity and the National Strategy for Ecologically Sustainable Development. The success of these strategies depends to a large extent on conservation by the private sector, which manages more than 60 per cent of land in Australia.

The recognition and application of a ‘duty of care’ to protect the environment may be one means to ensure adequate biodiversity conservation. In 1998, the Industry Commission’s inquiry into Ecologically Sustainable Land Management recommended that a statutory duty of care to the environment be introduced. Under such a duty, resource users would be required to take all reasonable and practical steps to prevent environmental harm arising from their actions.

To date, there has been some confusion as to the meaning and status of a duty of care to the environment in Australia. To help clarify the issues, the Commission contracted Dr Gerry Bates of the Australian Center for Environmental Law to prepare this report, which explores the concept of such a duty in relation to biodiversity. The report explains when a duty of care may exist, the obligations it imposes and the implications of introducing a duty of care in statute.

This consultancy report forms part of a stream of work being undertaken by the Commission in relation to private incentives for the conservation of biodiversity. Comments on the report are welcome and should be directed to the Commission’s Economics and Environmental Studies Branch.

Key points

- The overarching policy framework for resource use and management in Australia is Ecologically Sustainable Development (ESD). ESD requires decision-makers to take into account economic development, the environment and social factors in their decisions.
- Australian legislation has tended to incorporate ESD as an input to decision-making, rather than as an outcome. In addition, there is a lack of guidelines on how to weight the components of ESD. Hence the implementation of ESD in Australia may not ensure adequate biodiversity protection.
- There is therefore merit in considering complementary approaches to ensuring adequate protection. In its 1998 inquiry into Ecologically Sustainable Land Management, for example, the Industry Commission proposed the introduction of a statutory duty of care. However, questions remain about how such a duty would work in practice.
- A duty of care may exist in common law and statute law. It is only harm to personal interests that are actionable at common law: common law does not recognise that a duty of care might be owed to the environment *per se*. Hence the common law can only protect the environment indirectly through legal liability for impacts on persons and property arising out of activities that harm it.
- The common law duty of care is continuing to evolve in Australian courts. Currently, there is considerable uncertainty surrounding its extent and application in different circumstances. In many cases it is not possible to say whether a duty exists until a judicial pronouncement of the highest authority clarifies the issue.
- A statutory duty of care can potentially be more precise about when and how a duty will arise, provided it is clearly defined. Consistent with the common law, statutory duties of care tend to be owed to individuals. Individuals may be obliged to refrain from damaging the environment if such damage results in harm to others. Individuals also can be required to enhance the quality of the environment, although this approach is less common.
- By defining the duty as one owed to individuals, the focus is on the financial penalties of breaching the duty, rather than encouraging individuals to consider their impacts on the environment.

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- Occasionally statutory duties of care may be owed to the environment itself. This approach can encourage individuals to focus on the environment specifically. However, such duties may prove difficult to enforce and may not provide much additional protection for biodiversity where direct legislation for environmental protection exists.
 - Nevertheless, they can fill gaps in existing legislation where no specific duties are imposed. They also provide a means to articulate required environmental standards and positive measures for environmental management can be stipulated. The test for compliance with the duty of care should be best practice.
 - When backed by explicit guidelines, the educational effect of a duty of care can be a significant benefit for guiding individuals in sustainable resource use.
 - Recognition or imposition of a duty of care has implications for who bears conservation costs. Federal and most state law provides compensation rights for removal of property rights which may result from imposition of new duties. There may be a need to phase in standards of best practice, and/or to assist with the costs of doing so.
 - Introducing a statutory duty of care could bring considerable benefits in protecting biodiversity by providing guidance to resource users on what practices are acceptable. However, a statutory duty of care is unlikely to be a panacea. It would need to be supported by complementary approaches, including encouragement of voluntary action, education and financial incentives.

1 Introduction

This report considers the appropriateness and potential effectiveness of a ‘duty of care’ in legislation as a policy tool for the conservation of biological diversity (biodiversity) on land in Australia. The aims of this report are to:

- review recommendations for the introduction of a duty of care to protect the environment;
- indicate the strengths and weaknesses of existing legislative approaches to protect biodiversity;
- explain the concept of a duty of care in existing law;
- discuss the application of the concept of a duty of care in common law and legislation; and
- discuss the strengths and weaknesses of a duty of care as a possible tool for biodiversity conservation.

1.1 Structure of this report

Sections 1.2 and 1.3 outline calls for a duty of care for environmental protection and the adequacy of current legal approaches to biodiversity protection. Chapter 2 discusses a duty of care when it occurs in common law and the key issues in determining its existence. Chapter 3 considers a duty of care when it occurs in statute, and discusses the merits of having the duty of care owed to individuals or to the environment itself. Chapter 3 also discusses means to define duties of care and the implications of a duty for the costs of biodiversity protection.

1.2 Proposals for introducing a duty of care into environmental legislation

The concept that a general duty of care should be made a cornerstone of statutory responsibilities for the environment and natural resource management has been propounded most notably by the former Industry Commission (replaced by the Productivity Commission) in its report *A Full Repairing Lease: Inquiry into*

Ecologically Sustainable Land Management.¹ The Commission recommended the introduction of such a duty to counteract the prevailing tendency of legislation to concentrate on ‘command and control’ regulation rather than prescribing broad outcomes and conferring discretionary powers on administering authorities to determine how to achieve those outcomes. According to the Commission, the introduction of a duty of care would require that individuals who could influence a risk of harm to the environment take ‘reasonable and practical’ steps to prevent such harm. Voluntary standards and mandatory standards (although only where necessary) would support the duty as far as possible. This would place greater reliance on self-regulation to demonstrate compliance with the duty, with voluntary standards set by reference to codes of practice and environmental management systems.

Response to the recommendation for legislating an all-encompassing duty of care has been mixed. In December 1999, the Commonwealth Department of Agriculture, Fisheries and Forestry – Australia (AFFA) noted that:

... while the statutory duty of care may not be practical, a broader concept of duty of care should be embraced by all members of society.²

On the other hand, some agencies have followed the Industry Commission’s lead in calling for the duty of care to be made more explicit in law. The Sustainable Land and Water Resource Management Committee, for example, recommended that a statutory duty of care should apply to harm that may be caused, both harm to those who are living and harm to those yet to be born.³ This reflects a principle of sustainable development known as intergenerational equity. The committee proposed that resource users, under such a duty, would be responsible for making good any damage (on- or off-site) caused by their use of practices inconsistent with the duty.

State level authorities have also called for a more enforceable and explicit statutory duty of care. The Victorian State Groundwater Council, for example, proposed

¹ Industry Commission 1998, *A Full Repairing Lease: Inquiry into Ecologically Sustainable Land Management*, Report no. 60, AGPS, Canberra.

² Department of Agriculture, Fisheries and Forestry – Australia (AFFA) 1999, *Managing Natural Resources in Rural Australia for a Sustainable Future: A Discussion Paper for Developing a National Policy*, report by the National Natural Resource Management Task Force, Canberra, p. 553.

³ Sustainable Land and Water Resource Management Committee 1999, *Discussion Paper: Principles for Shared Investment to Achieve Sustainable Natural Resource Management Practices*, Canberra.

imposing an explicit duty of care on resource users to not damage the natural resource base.⁴

The most considered academic analysis of the concept of duty of care has been that by Alex Gardner, a senior lecturer at the School of Law of the University of Western Australia.⁵ Gardner's main concerns have centred on the enforcement of the concept and its relationship to ecologically sustainable development (ESD). Gardner suggests that the proposed duty of care should be subject to the objectives of ESD, which could be expressed as the objects of the legislation. The duty to take reasonable and practicable measures could then be fulfilled only if the principles of ESD were also met.

Gardner advocates an approach to regulatory instruments similar to that recommended by the Industry Commission — that is, performance based planning for natural resources management (rather than prescription), together with the introduction of a wide range of management tools from which managers could pick the most appropriate means for achieving the objectives of the legislation. This approach has been strongly supported.⁶

Whether the introduction of a general duty of care would add anything to existing legislation depends on whether existing legislation is effective in protecting biodiversity. A lack of effectiveness could give some impetus to proposals to legislate a duty of care as an effective alternative or useful adjunct to existing approaches. The next section considers the adequacy of current legislative approaches to biodiversity conservation.

⁴ Victorian State Groundwater Council 1997, *Groundwater: Groundwater Management Structure and Cost Sharing Arrangements*, Victoria, April.

⁵ Gardner, A. 1998, 'The duty of care for sustainable land management', *Australasian Journal of Natural Resources Law and Policy*, vol. 5, no. 1, pp. 29–63; Gardner, A. 1999, 'The administrative framework of land and water management in Australia', *Environmental and Planning Law Journal*, vol. 16, no. 3, pp. 212–56.

⁶ See AFFA 1999, op. cit. Young, M., Gunningham, N., Elix, J., Lambert, J., Howard, B., Grabosky, P. and McCrone, E. 1996, *Reimbursing the Future: An Evaluation of Motivational, Voluntary, Price-based, Property Right and Regulatory Incentives for the Conservation of Biodiversity*, Report to the Biodiversity Unit of the Department of the Environment, Sport and Territories, Biodiversity Series Paper no. 9, Canberra; Gunningham, N. and Grabosky, P. 1998, *Smart Regulation: Designing Environmental Policy*, Oxford University Press, Oxford, ch. 5.

1.3 Adequacy of current legal approaches to the protection of biodiversity

To ascertain whether the introduction of a duty of care may improve the effectiveness of legal protection of biodiversity, a study of more than 130 pieces of legislation was undertaken. All legislation that could be categorised as having been enacted specifically to protect biodiversity was included.⁷ Also studied was a range of legislation under which actions could be taken that may have an impact on biodiversity. This included environmental planning, transport, energy, mining, water, forests and fire services legislation.

A study was also made of published critiques of existing law. The purpose of this survey was to draw tentative conclusions about the legal structure, the breadth, and the potential and actual effectiveness of existing law. If this survey suggested that existing legislation was not effective, or likely to be effective, in protecting biodiversity, then the possibility of introducing other instruments, such as the duty of care, would take on greater significance. The following is a summary of conclusions drawn from this survey.

The context for biodiversity protection policy

According to Young et al. (1996)⁸, biodiversity has several features that distinguish it from other environmental issues, and which must be taken into account in policy design. These include that:

- biodiversity loss is irreversible;
- many species — especially the invertebrates, microbes and viruses — have yet to be discovered;
- ecosystem diversity exhibits threshold effects;
- many biodiversity problems cannot be solved by merely proscribing certain behaviour;
- much biodiversity has no immediate economic value, giving rise to substantial tensions between public and private interests; and
- the causes of genetic, species and ecosystem losses are extremely diffuse in nature, and involve many different sectors and forms of economic activity.

⁷ This encompassed national parks and wildlife and threatened species legislation principally, but also included native vegetation clearance controls and heritage legislation generally.

⁸ Young et al. 1996, op. cit.

These characteristics serve to emphasise the limitations of regulation as a stand-alone approach to biodiversity conservation. In other words, the introduction of a duty of care into legislation would not provide for the complete protection of biodiversity. It would need to be supported by complementary approaches, not all of which are necessarily regulatory in origin.

Despite the wide range of instruments available to policymakers to protect biodiversity, most governments have used only a limited number of such instruments in most circumstances. Those principally used have been subsidies and piecemeal regulation prohibiting particular acts.⁹ Subsidies have often proved environmentally counterproductive, while regulation commonly suffers from serious design faults.¹⁰ This paper does not critique existing policy approaches and non-regulatory responses to biodiversity management. However, the findings of Gunningham and Grabosky¹¹ suggest that current and recent policies have contributed to regulatory failure. For example, perverse incentives, that is incentives usually developed for entirely different objectives that have secondary or unintended effects, have encouraged unsuitable practices such as land clearance. Tax rebates for land clearance and the conditions attached to land grants and leases that are designed to encourage land clearance for development, for example, have often had this effect. Some perverse incentives remain.

An example of legislation often criticised for its poor regulatory design is that related to endangered species protection. Such legislation is used by most States and the Commonwealth. This legislation commonly prohibits the taking of protected fauna without a licence. It has been criticised because it concentrates on only one threat to biodiversity and because it deals with the destruction of only known, listed species, rather than addressing the cause of the problem — namely, ecosystem and habitat destruction. These limitations have been well documented¹² and could be mitigated by improvements to the design of this type of legislation.

⁹ Species-specific measures (mostly the prohibition of or limitation on taking a species) have dominated mostly, but a new type of instrument has gradually merged: the threatening process concept. See de Klemm, C. 1997, 'The regulation and management of destructive processes', *Environmental Law and Policy*, vol. 27, no. 4, pp. 350–54.

¹⁰ See Gunningham and Grabosky 1998, op. cit., ch. 5.

¹¹ See Gunningham and Grabosky 1998, op. cit., ch. 5.

¹² See Dixon, N. 1994, 'Protection of endangered species — how will Australia cope?', *Environmental and Planning Law Journal*, vol. 11, pp. 6–30; Bradsen, J. 1992, 'Biodiversity legislation: species, vegetation, habitat', *Environmental and Planning Law Journal*, vol. 9, pp. 175–80; Smith, J. 1997, 'Skinning cats, putting tigers in tanks and bringing up baby: a critique of the Threatened Species Conservation Act 1995 (NSW)', *Environmental and Planning Law Journal*, vol. 14, pp. 17–37; Kelly, A. 1996, 'New mandates for protecting threatened species in New South Wales', *Local Government Law Journal*, vol. 2, no. 2, pp. 78–94; Mahony, S. 1997, 'Efficacy of the "Threatening Processes" provisions in the

One approach that could improve the operation of endangered 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.¹³ This would have three principal advantages.

- educating resource users about their responsibilities under the law would be easier;
- by protecting even unknown species, the legislation would encompass the precautionary principle; and
- justifying and implementing a duty of care would be easier.

The obstacles to effective policy design and the shortcomings of existing regulatory systems for biodiversity conservation¹⁴ are often due to a divergence between the interests of landholders and the general public. Insufficient incentives may exist for landholders to make the sacrifices that the appropriate level of environmental stewardship may require of them. Regulators may be tempted to resort to the coercion of landholders. However, this is likely to be a blunt and inefficient instrument because monitoring may be extremely difficult and expensive, and sanctions may lack political acceptability. Moreover, when positive measures to reverse degradation are needed in conjunction with the development of an ethic of environmental stewardship, command and control regulation has little to contribute.

Even where command and control is practicable, such regulation is not necessarily desirable. Such measures are commonly criticised as being inefficient,

Threatened Species Conservation Act 1995 (NSW): bush-rock removal and the endangered broad-headed snake', *Environmental and Planning Law Journal*, vol. 14, no. 1, pp 3–16; Environmental Defenders Office (NSW) 1997, *Submission to Joint Select Committee on the Threatened Species Conservation Act 1995*, Sydney, August; Parliament of New South Wales 1997, *Report of the Joint Select Committee (JSC) upon the Threatened Species Conservation Act 1995*, Sydney, December.

¹³ de Klemm, C. and Shine, C. 1993, *Biological Diversity Conservation and the Law: Legal Mechanisms for Conserving Species and Ecosystems*, World Conservation Union (IUCN), Gland, Switzerland, p. 84.

¹⁴ Gunningham, N. and Young, M. 1997, 'Towards optimal environmental policy', *Ecology Law Quarterly*, vol. 24, pp. 243–98; Young et al. 1996, op. cit.; Slee, D. 1998, *Remnant Native Vegetation — Perceptions and Policy — A Review of Legislation and Incentive Programs*, National Research and Development Program on Rehabilitation, Management and Conservation of Remnant Vegetation, Research Report 2/98, Environment Australia, Canberra; Environment Australia 1998, *Australia's National Report to the Fourth Conference of the Parties to the Convention on Biological Diversity* Canberra; ANZECC Working Group on Nature Conservation on Private Lands 1996, *Nature Conservation on Private Land: Commonwealth, State and Territory Legislation and Programs*, Canberra; Environmental Defenders Office (NSW) 1997, *Submission to Joint Select Committee on the Threatened Species Conservation Act 1995*, Sydney, August.

unnecessarily intrusive and unduly expensive to administer. Some regulations may inhibit innovation and discourage people from searching for new and more efficient ways of using a resource.

On the other hand, some forms of command and control regulation may serve as an essential safety net, providing a backdrop of minimum legal biodiversity protection standards without which other, less coercive strategies cannot function successfully.

The more flexibility, variety and discretion 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 may potentially fulfil this role.

Existing legislative structures

Legislation throughout Australia may be categorised as:

- that which is designed specifically to protect biodiversity — for example, national parks and wildlife and threatened species legislation;
- that which, although not solely designed to protect biodiversity, has significant application to biodiversity protection — for example, environmental planning legislation and legislation regulating clearance of native vegetation;
- that which is not designed to protect biodiversity, but which in application may adversely affect biodiversity. This category may:
 - contain provisions relating to biodiversity protection or ESD — for example, water, energy or rural fires legislation; or
 - contain no provision for biodiversity protection — for example, roads or noxious weeds¹⁵ legislation.

Biodiversity protection throughout Australia is affected by, and relies on, the discretionary exercise of power by virtually every statutory or government authority. Responsibility for biodiversity protection is legally divided among, or conferred on, many of these authorities, creating a complex regulatory web that is uncertain in its application and inefficient in its approach.

Legislative functions appear to have been conferred on government agencies in an *ad hoc* manner without any clear strategic direction for promoting biodiversity

¹⁵ In considering control methods, for example, there may be no specific requirements to have regard to effects on non-target species.

conservation. Road authorities, for example, are empowered by statute to exercise powers in road reserves. These include:

- the destruction of trees and vegetation;¹⁶
- the planting of vegetation;¹⁷
- the removal of timber and minerals;¹⁸
- the destruction of plant and animal pests;¹⁹
- the provision of fencing, gates and grids;²⁰
- the diversion and construction of watercourses;²¹
- the subdivision, rezoning or development of land or road works or management changes that may have significant adverse impacts on roads;²²
- the use, cultivation and grazing of roads;²³
- the impounding of cattle;²⁴ and/or
- the taking of action against persons removing materials, depositing rubbish or interfering with watercourses that affect roads.²⁵

Statutory authorities such as energy, water supply and sewerage and drainage authorities are also granted general but wide-ranging powers:

... to do all things that are necessary or convenient to be done for or in connection with, or as incidental to, the performance of [their] functions.²⁶

¹⁶ *Highways Act 1926* (SA) s.26d; *Local Government Act 1960* (WA) s.345; *Transport Infrastructure Act 1994* (Qld), ss.20, 45, 46; *Local Government Act 1934* (SA), ss.360, 361; *Land Act 1958* (Vic) s.271; *Transport Act 1983*, (Vic), sch. 4, cl.3; *Roads Act 1993* (NSW), s.88.

¹⁷ *Highways Act 1926* (SA), s.26(b); *Transport Infrastructure Act 1994* (Qld), ss.20, 45, 46; *Land Act 1958* (Vic) s.350; *Forests Act 1958* (Vic) s.18.

¹⁸ *Local Government Act 1934* (SA), s.374; *Forests Act 1958* (Vic) s.77.

¹⁹ *Local Government Act 1934* (SA), s.345; *Local Government Act 1960* (WA) ss.340, 342.

²⁰ *Local Government Act 1993* (Qld), ss.497(4), 515; *Land Act 1958* (Vic), s.265; *Local Government Act 1934* (SA), s.375; *Roads Act 1993* (NSW), s.96.

²¹ *Transport Infrastructure Act 1994* (Qld), s.35.

²² *Transport Infrastructure Act 1994* (Qld), ss.38, 40.

²³ *Land Act 1958* (Vic), ss.214, 401, 402, 405; *Crown Lands Act 1989* (NSW), s.72.

²⁴ *Local Government Act 1960* (WA), ss.447, 448.

²⁵ *Transport Infrastructure Act 1994* (Qld), s.43.

²⁶ For example, *Water Act 1989* (Vic), s.123.

The exercise of any of these functions could have an impact on biodiversity. Thus, a wide range of lawful (as well as unlawful) activities may have an adverse impact on biodiversity.

Further, except for legislation that is specifically directed to protect biodiversity, the statutory authorities undertaking such activities are usually not required to consider the effects on biodiversity or, at most, are generally required to only ‘have regard’ to environmental impacts or to the principles of ESD, of which protection of biodiversity is only one. Most of this legislation also fails to specify any criteria to guide consideration of environmental impacts.

Even legislation enacted specifically to protect biodiversity enables biodiversity values to be traded off against economic and social issues, often with no guidelines for approaching this difficult task. Most legislation is also still heavily weighted towards regulation, although some evidence of other approaches (particularly the encouragement of voluntary action underpinned by financial incentives) is beginning to appear in some legislation.

Implementing ESD does not necessarily protect biodiversity

ESD is increasingly one of the primary objects of legislation or statutory authorities that operate under the legislation.²⁷ Importantly, not just environment and resource based legislation contains such statements, but also legislation that is not environmental in focus, yet empowers decisions that could adversely affect environmental values.²⁸

In this legislation, ESD is often also expressed as a principle that should be considered, or to which regard should be had, in decision making.²⁹ Such objectives or instructions can be found, for example, in legislation setting out the powers and duties of environment protection agencies,³⁰ and energy, water and fire

²⁷ See, for example, *Environmental Protection Act 1993* (Qld), s.3, sch. 4 (standard criteria); *Environmental Management and Pollution Control Act 1994* (Tas), s.8 and sch. 1; *Protection of the Environment Operations Act 1991* (NSW), s.3(a); *Contaminated Land Management Act 1997* (NSW), s.3(2)(d); *Environment Protection Act 1993* (SA), s.10; *Environment Protection Act 1997* (ACT), s.3(1)(g),(2).

²⁸ See, for example, *Rural Fires Act 1997* (NSW), ss.3, 9, 48, 51.

²⁹ See, for example, *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth), s.136(2)(a).

³⁰ See, for example, *Protection of the Environment Administration Act 1991* (NSW), s.6 (objectives of the Environmental Protection Authority).

authorities.³¹ Sometimes the precautionary principle — one of the principles of ESD — is also singled out as a principle requiring particular regard.³²

The importance of expressing objectives in legislation is that State interpretation acts commonly state that the objectives of an act should be promoted in decision making.³³ This means, if particular decision making is questioned, that courts may determine the legality of specific applications of executive authority by reference to the expressed or even implied objects of the legislation.³⁴

It is noted in *Australia: State of the Environment Report 1996* 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.³⁵

Legislative definitions of ESD in Australia also seem to make this same assumption. However, Bates and Lipman³⁶ indicate that this assumption may be flawed, suggesting that the implementation of ESD in Australia has been characterised by several weaknesses that may result in inadequate biodiversity protection, including:

- lack of legislative guidelines for considering competing values; and
- incorporation of ESD as an *input* to decision-making, rather than as an *outcome*.

The absence of legislative guidelines on how to allocate weight or priorities to the often competing components of ESD presents difficulties in ensuring adequate protection of biodiversity. Under current definitions of ESD — which in all States are generally a variation on that contained in the 1992 National Strategy for Ecologically Sustainable Development and the 1992 Intergovernmental Agreement on the Environment — biodiversity protection is expressed as a ‘fundamental consideration’ in decision making. However, it is only one of a number of principles considered relevant for the implementation of ESD; in other words, the definition of ESD does not make biodiversity conservation a necessary component of ESD.

³¹ See, for example, *Rural Fires Act 1997* (NSW), ss.3, 9, 48, 51.

³² See, for example, *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth), s.391.

³³ See, for example, *Interpretation Act 1987* (NSW), s.33.

³⁴ See for example, *Woollahra MC v Minister for Environment* (1993) 23 NSWLR 710; *Packham v Minister for Environment* (1993) 80 LGERA 205.

³⁵ State of the Environment Advisory Council (SEAC) 1996, *Australia: State of the Environment 1996*, CSIRO Publishing, Melbourne, pp. 4–40.

³⁶ See Bates, G. and Lipman, Z. 1998, *Corporate Liability for Pollution*, LBC Information Services, Sydney, pp. 30–50.

Importantly, because biodiversity conservation, as a principle of ESD, has to be only ‘taken into account’ in decision making, it may be lawfully regarded as subservient to other considerations (such as economic and social considerations) in any particular proposal or activity. Section 136 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) (the EPBC Act), for example, instructs the Minister, when deciding whether to approve an action, to consider economic and social matters and to ‘take into account’ the principles of ESD.

The objectives of legislation, objects of statutory authorities implementing the legislation, and criteria for decision making set out in legislation are likely to be numerous. ESD is only one factor or consideration to be taken into account in decision making.

Where legislation mandates several factors for consideration without indicating the priority or weight to be accorded to each, the relevance of each factor is a question for the decision maker to determine.³⁷ If legislation accords the protection of biodiversity at most a weighting equal to that of other factors to be considered, then that due weight may legitimately be determined to be nil. Only if this weighting of relevant factors is not reasonably open to a decision maker on the evidence could the courts regard such a decision as unlawful.³⁸ In other words, within the boundaries of their legal authority, decision makers are able to lawfully make decisions that significantly and adversely affect biodiversity.

It is difficult to resist the criticism that current drafting approaches have missed the point that ESD is not a factor to be balanced against other considerations but rather is the balance between development and environmental imperatives. Definitions of ESD point out that it:

... requires the effective integration of economic and environmental considerations in decision making processes.³⁹

ESD is the objective of the management regime created by legislation, not a factor that can be further balanced against other influences. The balancing process should be undertaken to reach or achieve ESD, not to assess the relative priority of ESD to other factors. ESD should stand alone as an objective of legislation and decision makers should be instructed to do more than simply ‘have regard to’ it.

³⁷ See *Randwick MC v Manousaki* (1988) 66 LGRA 330; *Australian Postal Corporation v Botany MC* (1989) 69 LGRA 86; *Minister for Aboriginal Affairs v Peko Wallsend Pty Ltd* (1986) 162 CLR 24 at 41.

³⁸ See *Minister for Aboriginal Affairs v Peko Wallsend Pty Ltd* (1986) 162 CLR 24.

³⁹ *Protection of the Environment Administration Act 1991* (NSW), s.6(2).

However, biodiversity will not always be effectively protected even if the legal application of the concept of ESD is reconsidered. ESD introduces the notion of *integrating* economic and environmental factors, although arguably this will become a *balancing* exercise in decision making whereby the fulfilment of both objectives cannot be maximised; in other words, trade-offs are likely 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 so may involve trading off some elements that make up these values. Application of ESD, therefore, is about pursuing *optimal* protection of biodiversity rather than *maximum* protection.

In a western democratic capitalist system, it is also arguable that political values (as evidenced by the legislation referred to in this section) are already weighted towards economic and social issues and, although environmental values are important, that development and growth are assumed to be allowed to proceed unless there are clearly proven reasons for limiting them. Legislation that includes biodiversity protection or environmental value 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 being optimised.

By comparison, one may assume that legislation enacted to protect biodiversity specifically would seek to ensure at least some level of biodiversity protection; however, this is not the case. The EPBC Act, for example, requires the Minister for the Environment and Heritage to consider economic and social matters even though the Minister is also instructed not to act inconsistently with Australia's obligations under various international treaties, such as the Biodiversity Convention.⁴⁰ In New South Wales, the *Threatened Species Conservation Act 1995* also requires decision makers to consider the 'likely social and economic consequences' of making certain decisions in respect of critical habitat and recovery plans.⁴¹ Similar instructions are given to decision-makers under the *Flora and Fauna Guarantee Act 1988* (Vic).⁴² Only rarely are decision makers required to have regard to only environmental considerations when making decisions.⁴³

⁴⁰ See ss.137–140.

⁴¹ See ss.40, 44, 57 and 65.

⁴² See ss.19, 26 and 31.

⁴³ See *Endangered Species Protection Act 1992* (Cwlth) s.27 and *World Heritage Properties Conservation Act 1983* (Cwlth) s.13. Both these provisions have been repealed by the *Environment Protection and Biodiversity Conservation Act 1999*. See also *Coastal Waters Alliance of Western Australia Inc v Environmental Protection Authority* (1996) 90 LGERA 136 (in which the Environmental Protection Authority is restricted to consideration of environmental factors, and not allowed to account for economic and political considerations).

Legislation that is not directed towards biodiversity protection fails even to indicate any particular criteria or means by which decision making may promote ESD (and particularly biodiversity conservation), despite the statutory instructions to ‘have regard to’ ESD.

This suggests that biodiversity protection may not be given sufficient weight in decision making for ESD, or while biodiversity-focused legislation stresses the economic and social consequences of taking action. If biodiversity protection is at least, as the Intergovernmental Agreement on the Environment declares, a ‘fundamental consideration’ of decision making, then more guidance is needed in the course of decision making that may adversely affect biodiversity. This guidance could take the form of: criteria mandated by statute that govern decision making (such as a duty of care coupled with guidelines for implementation); requirements for consultation with (and the concurrence of) statutory authorities responsible for biodiversity protection; and priority legislative weighting to biodiversity considerations over other factors.

There may be merit, therefore, in considering complementary approaches to biodiversity protection, and the introduction of a general duty of care is arguably the most far reaching and potentially effective of these options.

2 The concept of the duty of care

The duty of care is a concept that developed as part of the common law of the United Kingdom. It became part of the common law of Australia on the reception of British law into the former colonies early in the nineteenth century. The concept has continued to evolve in the Australian courts. However, continuing uncertainty surrounding the extent and application of the duty in different circumstances makes this a fertile area for contentious litigation. The concept has been translated into legislation principally to clarify the law regarding liability for personal injuries, most notably in the area of occupational health and safety.

Australian courts, like British courts, are heavily influenced by the common law in interpreting statutes. Unless a statute clearly, or by necessary implication, changes the meaning of words or concepts as they would be understood under common law, courts continue to apply common law principles in interpreting statutes. When contemplating the possible introduction of such a duty into legislation, it is therefore important to understand the concept of the duty of care as it has developed at common law. It is also important to appreciate that the common law duty of care has already been applied in the courts to injuries or losses sustained from activities that have caused harm to the environment.

In this chapter, the meaning of a common law duty of care will be considered, together with the key determinants of its existence.

2.1 The common law duty of care

The concept that one person owes a duty of care not to injure the person or property of another is well known in Australian law. The common law actions in trespass, nuisance and negligence are, by implication or explicitly, founded on such a duty. However, the common law does not recognise, and never has recognised, that a duty of care may be owed to the environment *per se*. The common law action in nuisance may compensate a landholder for damage to the environment, but because the common law views this as an infringement of the landholder's property rights, not because it perceives a breach of a duty to protect the environment.

Action in negligence has defined and continually redefined the meaning and legal limits of the duty of care. Indeed, the law of negligence is built upon deciding who owes whom a duty of care and in what circumstances.

Negligence

The law of negligence stipulates certain standards of conduct to which people ought to conform in their relationships to one another. These standards may govern potential impacts on the person, property or economic wellbeing of another. Although such impacts may arise out of conduct that adversely affects the environment — for example, pollution of a watercourse⁴⁴ — it is the harm to personal interests that is actionable under common law, not the harm to the environment *per se*. The action in negligence may provide a remedy where personal harm has occurred as a result of a negligent rather than intentional act.

Liability in negligence depends on whether:

- the respondent owes a duty of care to the person affected;
- a reasonable standard of care has been employed in carrying out or omitting to carry out the activity in question; and
- the damage caused was reasonably foreseeable as a result of those activities or omissions.

The basis of the tort of negligence is that all persons owe a duty of care to avoid harm to others who may reasonably be foreseen as being likely to be affected if activities are carried out (or not carried out) negligently. These activities may be authorised or required by statute.

The standard of care expected is that which is reasonable in the circumstances. This means that the more hazardous an undertaking, the higher is the standard of care that may be required. When ultra hazardous activities are carried out, the standard of care required may amount to almost a guarantee that no harm will result. This effectively means that the standard of care cannot have been met if harm does occur.⁴⁵

⁴⁴ See *Scott-Whitehead v National Coal Board* (1987) 53 P&CR 263; *Puntoriero v Water Administration Ministerial Corporation* (1999) 104 LGERA 419 (regarding the failure of a water supply authority to warn of chemical additives introduced to combat blue-green algal contamination).

⁴⁵ See *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42.

Failure to take action — for example, failure to warn of environmental dangers such as the risk of contamination of a water supply⁴⁶ or residential land,⁴⁷ or failure of a statutory authority to supply information required for planning purposes⁴⁸ — may also ground liability in negligence if personal harm results from such failure.

In assessing whether the requisite standard of care has been met, evidence of industry practice will be relevant but not conclusive. The courts will not effectively delegate the task of deciding what is a reasonable standard of care to industry or professional groups.⁴⁹ The general practice may even be shown to be negligent — for example, where industry practice does not keep abreast of increased awareness of dangers and the introduction of new technology which might lessen the risks.⁵⁰

In determining whether the harm occasioned by an act was foreseeable, if the harm suffered is of a type or class of harm that is reasonably foreseeable, then it does not matter that the harm that eventuates, or the circumstances leading to the harm, was not foreseeable.⁵¹ If, for example, bodily harm of some kind was foreseeable as a possible consequence of a breach of duty, then the defendant will be liable for the bodily harm that ensues, no matter how unusual that harm might be, so long as that *kind* of harm was foreseeable.⁵² However, if, for example, damage by fouling from an act of pollution is foreseeable, but not damage by fire when the pollutant ignites,

⁴⁶ See *Scott-Whitehead v National Coal Board* (1987) 53 P&CR 263; *Puntoriero v Water Administration Ministerial Corporation* (1999) 104 LGERA 419 (regarding the failure of a water supply authority to warn of chemical additives introduced to combat blue-green algal contamination).

⁴⁷ See *Alec Finlayson Pty Ltd v Armidale City Council* (1994) 84 LGERA 225; *Armidale CC v Alec Finlayson Pty Ltd* (1999) 104 LGERA 9 (regarding the failure of a local authority to consider economic risks consequent upon approving residential development on contaminated land).

⁴⁸ See *L Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225.

⁴⁹ See *F v R* (1983) 33 SASR 189 per King CJ at 194. See also *Thompson v Johnson & Johnson Pty Ltd* (1991) 2 VR 449, 494; *Young v Northern Territory* (1992) 107 FLR 264, 271.

⁵⁰ See *Thompson v Smiths Shiprepairers (North Shields) Ltd* (1984) 1 All ER 881 (employers failing to provide employees with adequate protection against noise).

⁵¹ See *Chapman v Hearse* (1961) 106 CLR 112; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383.

⁵² Determining the kind of harm that is foreseeable is not always an easy task. For example, in *Tremain v Pike* (1969) 3 All ER 1303, a farmhand contracted a rare disease through coming into contact with rat's urine. The court held that other types of complication might be foreseen as a result of contact with rats, but that this injury was not of a kind that could be foreseen. On the other hand, in *Bradford v Robinson Rentals* (1967) 1 All ER 267, an employee who suffered frostbite was able to recover costs because foreseeable injuries were said to encompass cold and chilblains.

then the resulting harm as a result of fire would not be actionable.⁵³ A duty of care does not apply to harm that is not of a type or kind that is reasonably foreseeable.

Legal liability in negligence for impacts on persons and property may arise out of activities that harm the environment, even though the law does not recognise harm to the environment *per se*. Loss or damage from negligent acts or omissions that cause environmental harm would generally be expected to take the form of financial loss or personal injury. An example of the former is *Puntoriero v Water Administration Ministerial Corporation* (1999) 104 LGERA 419. Potato farmers successfully sued for their financial loss when their crops were destroyed by the deliberate addition of chemicals to water to tackle the infestation of the waterway by blue-green algae. The respondents had statutory authority to take such action, but not the authority to carry it out negligently.

An example of personal injury arising from environmental pollution is *Ryan v Great Lakes Council* (1999) 102 LGERA 123. Ryan's case illustrates the difficulties inherent in determining whether a common law duty of care arises out of the conferment of statutory responsibilities and, if so, the applicable standards for meeting that duty and whether those standards have been met.

Following a surge of reported cases of the Hepatitis A virus in New South Wales in 1997, subsequent investigation by a New South Wales Government Task Force attributed 444 of these cases to the consumption of oysters grown in Wallis Lake on the northern coast. One of the virus sufferers, Mr Ryan, brought a legal action in the Federal Court on behalf of himself and nearly 200 other persons who had consumed contaminated oysters. The respondents to this action were the local Great Lakes Council, the State of New South Wales and the growers and distributors of the oysters.

It was established in evidence that oysters grown in the lake had the capacity to collect and concentrate viruses, including Hepatitis A. These viruses were present in sewage effluent emitted from several points around the lake. Although the exact source of the contamination could not be precisely identified, contamination of the oysters had been caused by pollution from these point sources. The depuration system required by the State regulator (the Health Department) was one method used to reduce the presence of human viruses in oysters, but it would not remove them completely. This underlined the necessity for an effective water quality management and monitoring program.

The council was aware of deficiencies in the sewerage systems of areas surrounding the lake and its catchment. Council officers were particularly aware of the health

⁵³ See *The Wagon Mound* (No. 1) (1961) AC 388; *Wagon Mound* (No. 2) (1967) 1 AC 617.

significance of septic tank pollution, and of the potential for the spread of disease. They were also aware that lack of proper management and maintenance of septic tank systems was resulting in pollution. However, council officers had given up investigating complaints of septic tank pollution because they lacked support and direction from the Council. By the time of the outbreak of Hepatitis A virus, the council had resolved that issues of effluent treatment and disposal should be addressed, but no concrete action had been taken.

The judge, Wilcox J, concluded that all the respondents were aware, or ought to have been aware, of the risks to oyster consumers of faecal contamination of the lake, and that all had been negligent in various ways. Mr Ryan was awarded \$30 000 in compensation plus legal costs. All other parties represented by Mr Ryan were, subject to proof of damage, also entitled to compensation.

Appeals by the State of New South Wales and the oyster growers and harvesters against these findings were dismissed. However, an appeal by the council was successful. A majority of the Full Court⁵⁴ concluded that it was foreseeable that lack of effective action on the part of the council might lead to contamination of the water and a danger to consumers of oysters, but that this did not establish that council was under an actionable duty to take such action. To impose a duty of care on the council would be to expose it to potentially unlimited liability on behalf of an indeterminate class of persons (the public generally) because it had no control over the number of oysters grown and sold. The court held that a duty to take affirmative action in these circumstances should not be imposed on a statutory authority in favour of the public because this would be neither fair, nor just nor reasonable. As Lindgren J explained:

... it would not be an incremental development but a major change of direction in the law if we were to hold that the council owed an actionable duty of care to the oyster consuming public in the circumstances of this case ... [I]n my view it is for the High Court, not this Court, to take the step of recognising a liability in these circumstances.⁵⁵

The court concluded that even if the council owed a duty of care to the consumers of oysters, failure to take all steps that were reasonably open to the council to minimise faecal contamination of the lake had not been shown to have caused the respondent's illness. By contrast, the statutory powers vested in the State, specifically with respect to the cultivation of oysters and public health, were clearly for the protection of members of the public who may be consumers of oysters.⁵⁶

⁵⁴ See *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 109 LGERA 1.

⁵⁵ *Ibid.* at 110.

⁵⁶ Responses by the New South Wales Government following this outbreak included the passage of the *Local Government (Approvals) Amendment Regulation 1998*, under which performance

The failure to carry out those duties properly could foreseeably have caused the injuries that had occurred.

What is clear in determining the liability of public authorities for negligence is as Kiefel J noted:

... the principal focus must be upon the statutes which confer power on those entities to determine what they were directed to and the objects sought to be achieved or the protection afforded by them; and consider what measure of control was given to them to effect those purposes.⁵⁷

Any proposal for conferring on authorities a general duty of care for the protection of biodiversity would need to bear in mind these comments of Kiefel J.

Weakness with the common law duty of care

As the cases demonstrate, determining whether a duty of care for the environment exists is not straightforward. There is no particular agreement among judges or academic writers about how to determine this duty. The circumstances in which the courts find that duties of care exist are constantly evolving; in many cases, it would not be possible to say with certainty whether a duty exists until a judicial pronouncement of the highest authority clarifies the issue. Even then, members of the highest judicial authority, the High Court of Australia, have different opinions about how to determine duty of care.

The action in negligence is a common law action, not a product of statute. A duty of care incorporated in a statute can be more precise about the circumstances in which the duty will arise. However, because courts are heavily influenced by the common law, any introduction of a duty of care into a statute will need to define (as clearly as possible) the circumstances in which it is intended to arise, how it may be broken, what defences are possible, and what remedies may be available.

In interpreting the appropriate standard of care required of public statutory authorities, the courts also look at the powers and tools conferred on the authorities by legislation. Lack of clear definition may result in judicial interpretation along the lines of current common law thinking. Breach of a statutory duty of care may also lead to breach of the statute, and therefore to enforcement action, so people also

standards for sewage management are specified and approval is required for the operation as well as the installation of sewage systems. See also New South Wales Department of Local Government 1998, *Environment and Health Protection Guidelines: On-Site Sewage Management for Single Households*, Sydney; and New South Wales Department of Local Government Circulars 98/28 and 98/60, Sydney.

⁵⁷ Op. cit. at 151.

need to know where they stand when taking action that may have an adverse impact on biodiversity.

2.2 Effect of statutes on common law duties of care

Statutes have the ability to override the common law. However, unless there is an unavoidable conflict between a statutory provision and a principle of common law, courts will interpret a statute as not affecting the common law. This is not often an issue in environmental legislation because environmental statutes, as well as introducing specific statutory obligations or restrictions in relation to activities that may adversely affect the environment, also generally make it clear that the operation of the statute is not to affect common law actions. This is because personal action by those adversely affected by environmental damage is seen as complementary to the statutory scheme, and thus there is no reason to limit common law rights of action.

Sometimes legislation may provide that compliance with the legislation does not necessarily indicate that a common law duty of care has been satisfied.⁵⁸ Sometimes, too, a statute may add its own form of action for damages,⁵⁹ which makes it easier for persons who suffer harm from a breach of a statute to seek remedies under the statutory scheme rather than relying on an action at common law to recover compensation. Even then, the action at common law is rarely removed.

In terms of environmental damage, the obvious disadvantage of relying on common law actions (nuisance or negligence) to protect biodiversity is that private litigants are not usually motivated to take action unless their property values have been affected. Pollution moving through a water body, for example, may adversely affect the biodiversity of the waterway but have little effect (or, at most, a transient effect) on property values. However, where restoration of, or repair to, the environment is required, common law action can be useful.

⁵⁸ See *Environmental Management and Pollution Control Act 1994* (Tas) s.10; *Environment Protection Act 1993* (SA), s.8; *Environment Protection Act* (ACT), s.9(2). See also *Environmental Protection Act 1994* (Qld), s.21(2); *Protection of the Environment Operations Act 1997* (NSW) s.322; *Environment Protection Act 1970* (Vic) s.65.

⁵⁹ See, for example, *Protection of the Environment Operations Act 1997* (NSW), s.246(1) and 247(1).

Exclusion clauses

Traditionally, acts of negligence have not been easily excused by statute. Persons and public authorities are not immune from actions in negligence simply because they purport to exercise public statutory functions.⁶⁰ However, with the imposition of greater statutory responsibilities on the providers of public services and on the managers of public resources for community good, Parliaments have shown greater willingness to exempt statutory authorities from the consequences of their own actions, generally so long as the activities criticised were undertaken in good faith in the pursuit of their statutory responsibilities.⁶¹

The courts' attitude to such exemption clauses is to treat them strictly. In *Puntoriero v Water Administration Ministerial Corporation* (1999) 104 LGERA 419, for example, such an exemption clause was held not to excuse the negligence of the respondent in adding chemicals to water without warning the plaintiffs. Section 19 of the *Water Administration Act 1986* (NSW) exempted the corporation from any action for loss or damage 'suffered as consequence of the exercise of a function' of the corporation. A majority of the High Court held that this exemption clause did not operate to excuse all positive acts of the corporation, only those that in the exercise of the corporation's functions would necessarily involve interferences with persons or their property. The supply of water was not such a function; it was more of a contractual arrangement between the parties. The imposition of criminal penalties for any unauthorised taking of water also supported the view that the clause should be strictly construed. In any case, the harm had arisen from a failure to warn the plaintiffs of a danger about which the corporation knew, or ought to have known. Although the law is not entirely clear on this point, it is arguable that the failure to warn constituted a separate tortious omission, rather than being bound up with the exercise of functions to which the exclusion clause could have applied.⁶²

⁶⁰ See *Armidale CC v Alec Finlayson Pty Ltd* (1999) 104 LGERA 9.

⁶¹ See, for example, *Environmental Planning and Assessment Act 1979* (NSW), s.145B; and *Water Administration Act 1986* (NSW), s.19.

⁶² See *Masterwood Pty Ltd v Far North Queensland Electricity Board* (1997) 97 LGERA 216 (failure to warn of the presence of electricity cables, which constituted a later and separate omission that was not protected by a statutory exclusion clause).

3 Statutory duties of care

A feature of the duty of care under common law is that, irrespective of the form in which it appears, it is owed to individuals, not to the environment or any particular facet of it. Legislation that has introduced a statutory duty of care has done so 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 that duty holders directly help develop.

Gardner⁶³ has commented that experience in enforcing such a duty in occupational health and safety legislation suggests it may be difficult to enforce a broad based environmental obligation where individuals are clearly not the object of protection. If it is determined that it is appropriate to develop a statutory duty of care for the environment, then from a legal perspective this could be addressed in two ways:

- to make the duty of care owed to individuals (section 3.1); or
- to make the duty of care owed to the environment (section 3.2).

3.1 Duty of care owed to individuals

Section 20 of the *Catchment and Land Protection Act 1994* (Vic) illustrates a duty of care that is owed to individuals (for example, other resource users or landholders). It states that, in relation to their land, 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;
- protect water resources;
- eradicate regionally prohibited weeds;

⁶³ Gardner, 1998, op. cit., fn 5.

-
- prevent the growth and spread of regionally controlled weeds; and
 - prevent the spread of, and as far as possible eradicate, established pest animals.

Such duties may be transferred to other occupiers or lessees.⁶⁴ The duty is directly enforceable as a breach of the legislation by civil action, criminal prosecution or the issue of administrative orders for compliance.⁶⁵ The interesting point about the nature of this duty of Section 20 of the Act is that it introduces a duty on individuals to undertake positive management (enhancement) of their property, not merely a duty to avoid actions that could cause harm. This is unusual because traditionally the law does not tell people how to manage their property (see section 3.4).

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*.

3.2 Duty of care owed to the environment

Pollution control legislation has introduced a general duty of care owed to the environment, rather than to individuals. Although the means of compliance may be stipulated by other instruments, such as licence conditions, management plans or codes of practice, the duty is to avoid harm rather than to act to comply with the duty. In Queensland, South Australia and the Australian Capital Territory, a person must not undertake an activity that pollutes or may pollute the environment unless that person takes all reasonable and practicable measures to prevent or minimise environmental harm.⁶⁶ In determining whether a person has complied with this duty, or what action needs to be taken to comply, regard must be given to the nature of the pollution, the sensitivity of the receiving environment, financial implications, the state of technical knowledge and the likelihood of the proposed measures succeeding.⁶⁷

⁶⁴ See s.22.

⁶⁵ See Part 4, Division 3; Parts 5, 6, and 9.

⁶⁶ See *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). Although not specified as such in the *Environmental Offences and Penalties Act 1989* (NSW), the interpretation of the Act by the Land and Environment Court in *EPA v Ampol Ltd* (1994) 82 LGERA 247 appears to impose a similar duty to avoid or minimise environmental harm. This was gleaned from the intent and purpose of the legislation.

⁶⁷ See as per footnote 73, the Queensland Act, s.36(2), the South Australian Act, s.25(2), and the Australian Capital Territory Act, s.22.(2). The Australian Capital Territory legislation provides that regard shall first be had, and greater weight shall be given, to the risk of the harm involved in conducting the activity.

Failure to comply with the general environmental duty does not, alone, give rise to civil or criminal liability,⁶⁸ 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.⁶⁹ 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 practice⁷⁰ or in some other way.⁷¹ In Queensland, for example, 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 establish liability for causing unlawful environmental harm.

Whether the existence of such a general duty adds anything to what is otherwise contained in the legislation is debatable. It is a general offence to cause pollution so the existence of a general duty to avoid causing pollution would seem to add nothing to the offence provision. Equally, where regulatory authorities and others can use civil action to apprehend those who breach legislation, the existence of a general duty of care would appear to add nothing to the powers already conferred.

On the other hand, the legislation states that compliance with a duty of care shall be a defence against proceedings alleging a breach of the legislation. In other words, compliance with the duty provides an active standard by which to measure the extent of legal obligations under the legislation. The existence of a general duty therefore seems to provide more assistance in measuring a defence to a charge of causing environmental harm than in determining the extent of positive obligations to avoid environmental harm.

The advantage of using compliance with the environmental duty as a defence 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

⁶⁸ The South Australian Act, s.25(4); the Australian Capital Territory Act, s.22(3). The Queensland 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.

⁶⁹ See as per footnote 73, the South Australian Act, s.25(4).

⁷⁰ See as per footnote 73, the Queensland Act, s.219 and the Australian Capital Territory Act, s.33.

⁷¹ See as per footnote 73, the Queensland Act, s.119(2)(b).

subordinate instruments such as regulations, plans of management, and planning instruments.

Another advantage of introducing a general duty of care is that its existence may help to fill gaps in legislation where no specific duties are imposed but substantial harm to the environment is threatened. It is common, for example, for legislation to provide that cultural heritage will be protected if it is registered or listed in some way. Prior to listing, there may be no duties with respect to heritage, except perhaps the duty to report its existence. Although heritage may not be officially recognised until it is listed, a general duty of care (coupled with guidelines for compliance) would help warn, educate and instruct landholders and resource users about the need for care in conducting their activities.

On the other hand, where legislation confers blanket protection, from a regulatory point of view there may be less need to include a general duty of care. It is common for legislation to give blanket protection to native wildlife and threatened species, for example, although licences can be obtained to undertake activities that may cause harm to such wildlife. From a management perspective, however, blanket protection usually means a ‘negative’ duty to avoid harm — similar to the general duty in pollution control — rather than a positive obligation to manage resources. A duty 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.

The educational effect of including a duty of care, backed by the subsequent publication of guidelines for compliance, is an advantage that should not be underestimated.

3.3 Duty to comply with the law

There is already a general environmental duty in all statutes — that is, the duty to comply with the environmental restrictions or controls imposed by the legislation. Everyone is under such a duty, the terms of which are clearly spelt out in the legislation. (Breach of the legislation may result in administrative, civil and/or criminal action). The effectiveness of this duty depends on the law, and on whether breaches are regularly detected and enforced.

Protection of biodiversity is usually introduced into a statute through provisions detailing specific offences. The Commonwealth EPBC Act 1999 provides a classic

example. That statute contains no general duty to protect or to not harm biodiversity; however, it is an offence to take action that results in a significant impact on world heritage values,⁷² the ecological character of a declared RAMSAR wetland,⁷³ threatened species or ecological communities,⁷⁴ or migratory species.⁷⁵ 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 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.⁷⁶

The disadvantage of these provisions is that the term ‘action’⁷⁷ 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.

This method of defining duties of care by referring to the prohibition of certain activities is common in environmental law. Blanket prohibitions, coupled with powers to do that which is prohibited if a licence is obtained from a government regulator, are common in virtually all environmental and natural resources legislation. Sometimes, blanket prohibitions are imposed without licensing provisions, but this is rare. Even threatened species can be taken with a licence.

3.4 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

⁷² See s.15A.

⁷³ See s.17B.

⁷⁴ See s.18A.

⁷⁵ See s.20A.

⁷⁶ See s.196–96E.

⁷⁷ See ss. 523–524B.

breach of the duty.⁷⁸ 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. In pollution control legislation, for example, the conditions of licensing and pollution reduction and waste minimisation programs indicate to licensed premises how to meet the general duty of care. However, for non-licensed polluters, the only real guideline is often the statutory instruction not to cause environmental harm (although some environment protection authorities have developed industry guidelines).

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 may need to be further defined in relation to activities such as land clearance or agricultural practices.

Best practice may be effectively described as management of an activity that achieves ongoing minimisation of environmental harm through cost-effective measures (assessed against measures used nationally and internationally for managing that activity).⁷⁹ In other words, it is about balancing the cost of achieving desirable environmental quality standards and the risk of environmental harm arising from the activities under consideration. Persons subject to a duty of care would be expected to meet best practice standards as defined by codes of practice or other instruments. As in pollution control, regulatory authorities should be given discretion to apply such standards gradually in pursuing best practice environmental outcomes.

In some cases, it may be considered acceptable to set a duty of care that is lower than current best practice standards. Such a duty, of course, is unlikely to result in improved environmental outcomes unless the acceptance of the lower standard is a temporary step in the transition to a higher standard. However, 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 quality. 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.

⁷⁸ 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.

⁷⁹ Environmental Protection Act 1993 (Qld), s. 18 and sch. 4 ('standard criteria'); Tas, s. 4.

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.

In 1995 the Council of Australian Governments endorsed principles and guidelines for the development of national standards and regulations. These principles and guidelines, which have relevance to the design of new biodiversity protection measures, stipulate that:

- an assessment of a proposed standard requires an adequate evaluation of its economic and social costs and benefits. Such an evaluation is best conducted prior to the design and implementation of the standard;
- mandated standards are most likely to be efficient where the management of the environmental risks does not vary greatly. If risks do vary significantly, then the hazard is best tackled by a code of practice;
- there needs to be a direct link between the achievement of the standard and a reduction in the risk of environmental damage;
- as far as practicable, mandated standards should be expressed in terms of broad outcomes, rather than as processes, outputs or technical requirements; and
- measurable and audited standards are more easily enforced, and those that cannot be enforced discredit the regime.

These guidelines reinforce the suggestion that 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 discretionary application of standards, can only discredit them. Best practice, once determined, may be periodically reviewed; however its application should be non-negotiable. The 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 licences, management plans and administrative orders — which lay down prescriptive requirements for management.

Positive obligations of management have often not been expressed in legislation, probably as a result of the traditional inability of the law to enforce such obligations. The courts declare what is the law and enforce breaches that are brought before them, but they do not directly supervise the carrying out of substantive orders or legal obligations. Another reason is that landholders traditionally do not like to be told what to do with their own property. The social and political influences long associated with the ownership of land also help explain the traditional reluctance to impose positive obligations of management on landholders, whether by legislation or executive decree. Clearing controls for native vegetation, for example, focus on restricting inappropriate use rather than promoting appropriate management, and thus:

... [to] this extent, it is ill-adapted to providing the two-pronged strategy of retention and management needed to address the issue of biodiversity protection ...⁸⁰

Farrier, in particular, has argued that those who are forcibly constrained from clearing land are unlikely to be enthusiastic land managers and, thus, regulation must be combined with adequate financial instruments. However, he also notes that:

... these should take the form of forward looking payments for management rather than backward looking compensation.⁸¹

[T]he priorities of these initiatives need to be adjusted to ensure that greater emphasis is placed on the retention of existing native vegetation rather than replanting, and that restructuring in local communities is not based exclusively on short term productivity concerns, but also takes into account the much longer term economic interest that the community has in conserving biodiversity.⁸²

Similarly, it has been argued that:

... without management, the vegetation will ultimately disappear as surely as if it had been cleared in the first place. Controlling clearing ... has to be seen as only the first step in what must become an ongoing process of native vegetation management.⁸³

⁸⁰ Farrier, D. 1995, 'Policy instruments for conserving biodiversity on private land', in Bradstock, J. (ed.) 1995, *Conserving Biodiversity: Threats and Solutions*, Surrey Beatty and Sons, Chipping Norton. See also Farrier, D. 1995, 'Conserving biodiversity on private land', *Harvard Environmental Law Review*, vol. 19, no. 2, pp. 304–405.

⁸¹ Farrier 1995, *Environmental Law Review*, op. cit.

⁸² Ibid.

⁸³ Harris, C. 1996, 'Native vegetation clearance controls — the South Australian experience', in Dendy, T. and Murray, J. 1996, *Proceedings of the Seminar From Conflict to Conservation, Native Vegetation Management in Australia: A Focus on the South Australian Program and Other Australian Initiatives, Past, Present and Future*, 21 November 1995, Adelaide, South Australian Department of Environment and Natural Resources.

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 that legislation cannot lay down positive obligations of management as well as duties to avoid harm. The precise nature of fulfilling 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.

3.5 Duty of care and cost sharing

The imposition of a duty of care for the protection of biodiversity will have cost implications. There will be argument as to how those costs should be borne and by whom.

Binning and Young⁸⁴ have suggested that consistency with national competition and trade policies requires 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.⁸⁵ 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 Young⁸⁶ have suggested that cost sharing is only justifiable for actions that go beyond the duty of care. The community may, for example, demand higher environmental quality than is legally required under a duty of care. In such a case, Binning and Young have argued that there may reason for ongoing sharing of

⁸⁴ Binning, C. and Young, M. 1997, *Motivating People: Using Management Agreements to Conserve Remnant Vegetation*, Report prepared for the National Research and Development Program on Rehabilitation, Management and Conservation of Remnant Vegetation, Research Report 1, Canberra, p. 15.

⁸⁵ Ibid.; Hajkowicz, S. and Young, M. 2000, *An Economic Analysis of Cost Sharing Assessment for Dryland Salinity Management: A Case Study of the Lower Eyre Peninsula in South Australia*, Report to the South Australian Department of Primary Industry and Resources, CSIRO Land and Water, South Australia; Victorian State Groundwater Council 1997, *Groundwater: Groundwater Management Structure and Cost Sharing Arrangements*, April; AACM 1995, *Cost Sharing for On-ground Works: Discussion Paper*, Report prepared for the Murray-Darling Basin Commission, South Australia; Crosthwaite, J. 1997, *Native grassland: at what cost?*, Paper presented to the 41st Annual Conference of the Australian Agriculture and Resource Economics Society, Gold Coast, 22–24 January; Crosthwaite, J. 1998, *Cost Sharing Approaches for Native Vegetation Management in the Goulburn Broken Catchment*, Background report, Melbourne.

⁸⁶ Hajkowicz and Young 2000, op. cit., p. 3.

costs between resource users and the government on the grounds of equity. This is because the maintenance of environmental quality beyond the duty of care represents a community service provided by the landholder. 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 the statutory scheme may be compromised if standards for fulfilment of the duty fall below best practice.

Compliance with best practice standards may be an onerous burden, particularly on those not used to such compliance regimes. The answer may be to phase in standards for best practice and/or to assist with the costs of doing so, on grounds of equity, necessity, efficiency or other good reasons. Where 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.

In its submission to the Industry Commission inquiry into ecologically sustainable land management⁸⁷ for example, Environment Australia noted that it may be inappropriate to require land managers to comply with the duty without technical and/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.

On the other hand, the AACM has argued that resource users may need to shoulder at least some of the cost incurred in tightening the duty of care in resource use:

These [historical] policy failures lead to a moral argument for government to share the cost of on-ground works for remedial actions. However, it should also be remembered that land and water resource users of the time also benefited from these policies. Because of this and their continuing relationship with land and water resources, land holders and water users also have a moral responsibility to share the costs of on-ground works to correct outcomes of policy failures.⁸⁸

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 Young⁸⁹ 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

⁸⁷ Industry Commission 1998, op. cit., Sub. 229, p. 5.

⁸⁸ AACM 1995, op. cit., p. 10, Annex 1.

⁸⁹ Binning and Young 1997, op. cit.

burden for environmental protection than that borne by other resource users. In such cases, Binning and Young have argued that government should provide funding to promote equity and to ensure that socially beneficial actions occur.

However, while arguments for compensation to encourage changes in resource use practices 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. Similarly, 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.⁹⁰

Young et al.⁹¹ have noted that federal and most state law provides, on equity grounds and to encourage efficient investment, a right to compensation for the removal of a recognised property right.⁹² However, where compensation is necessary, Young et al. have argued that it should be offered only for a transitional period, as an equitable means of bringing about a rapid and irreversible transition to a new standard. Administrative costs may also be lower if the initial policy change is accompanied by a plan to reduce the proportion of compensation payable by, say, 20 per cent per year.

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 a Native Vegetation Authority to make decisions on applications to clear. Initially, all those who were refused consent to clear were entitled to compensation in return for acceptance of a Heritage Agreement. However, this entitlement was replaced in 1991 with an arrangement whereby incremental costs would be compensated only

⁹⁰ Ibid. See also Craik, W. 1996, 'A farming perspective', in Land and Water Resources Research and Development Corporation (LWRRDC) 1996, *Sustainable Management of Natural Resources: Who Benefits and Who Should Pay*, Canberra, pp. 38–43; AACM 1995, op. cit.; Sperling, K. 1997, 'Going down the takings path: private property rights and public interest in land use decision making', *Environmental and Planning Law Journal*, vol. 14, no. 6, pp. 427–36.

⁹¹ Young, M. et al. 1996, op. cit.

⁹² A specific clause in the Constitution prohibits the removal of property without just compensation, but this right is not guaranteed by any State Constitution.

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.

As a result of these arrangements, broadacre clearance has effectively ceased and more than 600 000 hectares of land are now conserved under Heritage Agreements in South Australia. The Australian and New Zealand Environment and Conservation Council (ANZECC) Working Group on Nature Conservation on Private Lands concluded that the South Australian legislation had been effective in changing broadacre clearance, but that management of the conserved areas and linking remnants now needs to be emphasised.⁹³ The Act is thought to need to be made more relevant to landholders to retain their commitment to better manage vegetation. This reinforces the need for information and support for private landholders' initiatives.

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 additional advantage of providing a financially attractive and positive element to the regulatory environment.

If government financial support is to be offered, it is preferable in the form of direct grants or tax rebates rather than as tax concessions or exemptions, because the level of revenue forgone would then be more readily identifiable. This approach would improve both the transparency and accountability of the support.⁹⁴

Some of these voluntary initiatives are already in existence but often are under-developed and/or under resourced. Section 69 of the *National Parks and Wildlife Act 1974* (NSW), for example, provides for voluntary conservation agreements between landholders and the Minister administering the Act (for example, to protect natural or scientific values). Lack of resources, however, has resulted in a failure to develop this mechanism fully.⁹⁵ Similarly, there is provision for the designation of wildlife refuges under voluntary agreements, but again funding has been limited.⁹⁶

⁹³ ANZECC Working Group 1996, p. 28.

⁹⁴ Industry Commission 1998, op. cit.

⁹⁵ ANZECC Working Group 1996, op. cit.

⁹⁶ ANZECC Working Group 1996, op. cit.

3.6 Is there merit in introducing a general duty of care into legislation to protect biodiversity?

Consistent with the arguments expressed in the Industry Commission's report *A Full Repairing Lease*, there is considerable benefit in including in legislation, a general duty provision imposing a 'duty of care' to the environment on managers and owners of natural resources and any others whose actions could significantly affect biodiversity.

The introduction of a statutory general duty of care — which would extend to not only private landholders and resource users but also public sector managers — would require all reasonable and practical steps to be taken in decision making and in the conduct of activities, to prevent harm to biodiversity. Voluntary standards and codes of practice would be a practical means of fulfilling the duty. The duty of care would require natural resource managers to meet the costs of managing or protecting the environment or conserving biodiversity where it is reasonable and practical to do so. Reasonableness is an objective test⁹⁷ that is well known to the law through application of the torts of nuisance and negligence.

The duty of care (in conjunction with voluntary codes of practice) is also 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.

As already stressed, however, the duty of care is not a lone solution to the disadvantages of current legislative approaches to biodiversity protection. It will need to be complemented by other initiatives, particularly those encouraging voluntary action and encompassing educational and financial incentives.

⁹⁷ The court will concentrate on what persons would be reasonably expected to do in similar circumstances. Although the situation or particular circumstances of a person may be relevant to determining what might be expected, this test is not a subjective one. It would be based on an interpretation of the reasonable expectations of the statutory scheme.