THE MULTIPLE MEANINGS AND PRACTICAL PROBLEMS WITH MAKING A DUTY OF CARE WORK FOR STEWARDSHIP IN AGRICULTURE

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The common law concept of a duty of care is being extended into agriculture in some jurisdictions. However, the expression 'duty of care' hides a diversity of competing connotations. This article explains the context within which this environmental duty of care has evolved and outlines some conflicts the principle is intended to resolve and competing expectations this elicits. Statutory versions of the duty of care from natural resources and environment protection legislation are discussed, along with a consideration of the principle's operation in tort to set bounds to legal responsibilities and norms of behaviour. The article concludes that like other attempts to import useful policy concepts into legal relationships, false starts are inevitable before the promise of a duty of care approach becomes a reality.

I INTRODUCTION

Duty of care is a legal term with a long history in the common law, notably within the tort of negligence. It has proven to be functionally useful in applying community norms of responsibility to assist in flexibly resolving complex disputes between neighbours. Environmental regulation of farming is criticised for being inefficient, cumbersome and out of tune with community norms.[2] A duty of care

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[2] Paul Martin et al, *Developing a Good Regulatory Practice Model for Environmental*

has therefore been suggested as a way of helping to define what reasonable behaviour is for a farmer, allowing both accountability and flexibility in response to particular situations.[3] This has led to policy proposals that a duty of care should be incorporated into natural resource management legislation[4] which have been subsequently enacted in several states. It is, however, difficult to clarify what a duty of care means in practical terms for farmers, because of the absence of well-developed community norms about responsibility to the environment.[5] Duty proponents, like the rest of the community, do not have a shared understanding about the content of a duty of care nor about the type of outcomes it is intended to deliver in practice.[6] We discuss the range of competing interpretations later in this article.

The value of the duty of care as a legally enforceable social construct is demonstrated by its application in civil liability, and in the general statutory duties of company directors.[7] In both instances this success has been the culmination of a

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Regulations Impacting on Farmers (Australian Farm Institute, 2007)

3 Industry Commission, *A Full Repairing Lease. Inquiry into Ecologically Sustainable Land Management* (1998). Graham R Marshall, 'Economics of Cost Sharing for Agri-Environmental Conservation' (Paper presented at the 42nd Annual Conference of the Australian Agricultural and Resource Economics Society, 1998). Standing Committee on Agriculture and Resource Management, House of Representatives, *A discussion paper on principles for shared investment to achieve sustainable natural resource management practices* (1998). Australian and New Zealand Environment and Conservation Council, *National Framework for the Management and Monitoring of Australia's Native Vegetation* (Australian Government Department of Environment and Heritage, 2000). House of Representatives Standing Committee on Environment and Heritage, *Coordinating Catchment Management. Report of the inquiry into catchment management.* G Bates, *A Duty of Care for the Protection of Biodiversity on Land* (Productivity Commission 2001). M Young, T Shi and J Crosthwaite, *Duty of care: An instrument for increasing the effectiveness of catchment management* (Department of Sustainability and Environment 2003). Steve Hatfield Dodds, *The catchment care principle: a practical approach to achieving equity, ecosystem integrity and sustainable resource use* (CSIRO 2004). Phil Hone and Iain Fraser, *Extending the Duty of Care: Resource Management and Liability* (SWP 2004/06, Deakin University 2004).

4 Industry Commission, *A Full Repairing Lease. Inquiry into Ecologically Sustainable Land Management* (1998). House of Representatives Standing Committee on Environment and Heritage, *Public Good Conservation: Our challenge for the 21st Century. Interim report of the inquiry into effects upon landholders and farmers of public good conservation measures imposed by Australian Governments* A Gardner, 'The Duty of Care for Sustainable Land Management' (1998) 5(1) *The Australasian Journal of Natural Resources Law and Policy.* Queensland Government, *Delbessie Agreement: State Rural Leasehold Land Strategy* (December 2007). G Bates, above n 3.

5 Department of Sustainability and Environment (Victoria), *Land and Biodiversity at a Time of Climate Change Green Paper* (Government of Victoria, Australia, 2008) See p 61 on community expectations and the responsibilities of land managers.

6 This paper draws upon detailed evaluation of the various legislation, reports and studied cited, and 28 interviews with key farming, legal, government and environmental experts across the eastern part of Australia that were conducted between November and September 2008. Interviews took between 40 and 90 minutes.

7 For statutory duties of company directors see *Corporations Act 2001* (Cth). Sections 180 to 184 deal with general duties These are; the duty to act with care and diligence, to act in good faith and for a proper purpose, not to improperly use position and not to improperly use

long period of common law development. A statutory duty of care for natural resource management in farming does not enjoy a long history of refinement in the common law. The duty of care in common law has developed as a sophisticated process rather than as a code, primarily used for resolving disputes between citizens for damage to private interests. In its new sustainability application the principal use for a statutory duty of care is in setting boundaries of responsibility between citizens and the State, and while there are some indications of expected content there is no clarity about the reasoning process to be applied. In the absence of well-developed precedent, the legal interpretation of the new meanings of duty of care is likely to require reference to foundational principles from the common law.[8]

This article reviews issues concerned with boundaries of responsibility for natural resource management by farmers, where such a duty of care might be tested. We consider initially the variety of expectations and interpretations of a duty of care from the policy arena, which have led to its adoption into law. We then consider how the duty of care has been enacted as law in some jurisdictions. Based on this, we consider how these intentions might be tested in the courts, and the implications of the courts likely reliance on common law to develop a new meaning of duty in the pursuit of sustainability.

This highlights some potential obstacles to the practical implementation of a duty of care as the legal basis for sustainable natural resource management by farmers. It is hoped that such a review will provide an impetus to develop a more refined understanding of what a duty of care might mean in practice and thereby assist with its efficient application to control harms as well as supporting freedom to farm where the community expectation of a duty of care is met.[9]

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information.

8 The challenges of incorporating broad policy principles into legislation which impacts upon the free exercise of private property rights are well illustrated by the early attempts of Australian courts to apply the well-understood concept of 'competition'. In the first case to test this principle in court, *Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd* (1975) 24 FLR 286, Joske J adopted a definition of competition that was seen as unusually narrow given the common understanding in economic expert circles of the meaning of this term. The *Trade Practices Act 1974* (Cth) was subsequently amended and a more detailed and specific definition of competition was inserted, which directed the courts to specific tests to define the newly created duty not to cause harm to competition. The difficulties arose notwithstanding a plethora of technical and general guidelines, including overseas cases, that were considered by commentators to provide a clear meaning to the policy term. A similar type of process occurred with the precautionary principle, which shares a number of characteristics with duty of care.

9 Daniel H Kim, 'From Individual to Shared Mental Models' (1994) 5(3) *The Systems Thinker;* Aalders, Marius, 'Drivers and Drawbacks: Regulation and Environmental Risk Management Systems' (2002) 10 *London School of Economics and Political Science;* Sue Kilpatrick et al, *Effective farmer groups for defining best practices for sustainable agriculture* (Research and Learning in Regional Australia, University of Tasmania & Department of Primary Industries, Water and Environment, Tasmania, 2003); Michele Marra, David J Pannell and Amir Abadi Ghadim, *The Economics of Risk, Uncertainty and*

II COMPETING EXPECTATIONS AND MEANINGS

The unique role of the duty of care in law is to provide a mechanism to give legal effect to unstated expectations about how an individual ought to act, where their action might impact on others. It defines a limit to the freedom of the individual that is based on community norms. It does so by applying a careful process of logic to define what the citizen ought to have done, after the fact. From this citizens can infer their own code of behaviour for future actions.

This implies some level of consensus that can be identified by a court about the boundaries of responsibility between the individual and broader community. In the civil and corporate uses of duty of care it would seem that there is an understanding that harm to another can lead to personal liability, and about what actions might be considered reasonable. The consensus has evolved partly as a result of the liability potential created by the legal duty, and the relationship between consensus and a legally enforceable duty is circular. It is not clear that there is such a consensus in the community about what harm to the environment is actionable based on a duty of care. The greatest social value from introducing a legal duty of care for the environment may not be in its capacity to resolve disputes today, but in its potential to drive the emergence of such a consensus over time through litigated disputes.[10] However, this is a different line of argument from those that have been used to date to support environmental duties of care.

Expectations of reasonable natural resource management by farmers may come from formal or informal sources. Formal expectations are documented in domestic laws and administrative instruments, which may reflect international agreements and treaties. Examples of formal instruments with expectations about farmers' natural resource management are: the *Native Vegetation Act 2003* (NSW), *Property Vegetation Plans* (NSW) and the *RAMSAR Convention*.[11]

Social expectations are defined by both formal and informal means, and the expectations may not necessarily be consistent.[12] They can be expectations of

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Learning in the Adoption of New Agricultural Technologies: Where Are We on the Learning Curve? (SEA Working Paper 01/10/2003), James Meadowcroft et al, 'Deliberative Democracy' in *Environmental Governance Reconsidered. Challenges, Choices, and Opportunities* (2004) 183; Peter M Senge and Danah Zohar, 'Emerging Theories about Deep Collective Learning' (Paper presented at the 22nd International Conference of the System Dynamics Society, Oxford, England, July 25-29 2004).

10 For analysis of the social function of law in the harnessing of conflict for the purposes of norm formation and social cohesion see Niklas Luhmann, *Social Systems* (1984).

11 The *Ramsar Convention on Wetlands of International Importance especially as Waterfowl habitat*, done at Ramsar, Iran on 2 February 1971. The English text of the convention is set out in Australian Treaty Series 1975 No. 48. The convention is adopted into Australian law by the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

12 M Bovins, *The Quest for Responsibility. Accountability and Citizenship in Complex Organisations* (1998). To bear responsibility and to take action on it happens 'in the realisation that you will at some point have to answer for your action or inaction; whether to a formal institution, such as a tribunal or commission of inquiry; to an informal, but no less

virtuous behaviour (achievement of which deserves to be rewarded, perhaps by improved access to resources), or they can represent expectations of minimal accountability (non-achievement of which may justify punishment, perhaps by denial of access). Accountability reflects a minimum required level of behaviour, and virtue is a desirable standard of ethical performance.[13] This prompts the question whether a legal duty of care is intended to enforce accountability or results from a desire to reward virtue. Both conceptualisations are present in advocacy of a farmer's legal duty of care for the environment.

To illustrate, in irrigation farming competing informal expectations can be seen in community debates about: the volume and timing of water allocation, impacts of irrigation on the environment and the security of access to water by farmers and water for the environment. Such expectations reflect evolving social concerns about sustainability and the complex links that exist between water in its various uses, and community wellbeing.[14] These informal expectations go beyond formal accountability. It is in clarifying this region between what is stated as mandatory under statute, and what is expected of farmers by the community but unstated, that the concept of duty of care is anticipated to be most useful. However as expectations are not homogenous, and span the range from virtue to accountability, it is difficult to identify where these boundaries lie today.

It is relatively easy for everyone to agree that some boundaries should be in place, reflecting a distinction between behaviour that is 'accountable' and behaviour that is 'virtuous'. Moving from the abstract to the specific requires clear principles for doing so and to date these are not in evidence.

III Debate surrounding Boundaries of Responsibility and Farming

There are typically three areas of dispute around natural resource management by farmers: the rights and responsibilities of secure access to natural resources, the appropriate principles and standards for regulating agriculture, and the apportionment of cost and benefit between farmers and society. These three areas provide some illustrations of the challenges.

A *Conflict about Responsibilities*

concrete, forum such as your circle of friends, your parents of your children; or to a more metaphysical type of forum such as God or human kind' see page 28. These expectations create a boundary of responsibility for performance that may not always be clearly defined.

13 Bovins, above n 12.

14 A Cashman and L Lewis, 'Topping up or watering down? Sustainable development in the privatised UK water industry' (2007) 16 *Business Strategy and the Environment* 12.

Rights and responsibilities are inseparable components of property.[15] A holder of legal property rights to beneficial use and enjoyment of land is bounded by their responsibilities to neighbouring landholders (and through regulation to the broader community).[16] Australian society is increasingly concerned about farmers' natural resource management, reflected in media coverage of land degradation, water use issues, drought, and food production.[17] There is uncertainty about what duties a farmer has (or ought to have), reflecting both legal property rights and community perceptions of moral duties.[18] Political positions in the property rights and environmental responsibility debates can be characterised as supporting either un-attenuated freedom of use or greater restriction on use of resources. Non-attenuation is generally the position of farming interest groups, who see duty of care as providing greater freedom from government regulatory action that constrains farming. This position reflects a view that provided a farmer is satisfying a narrowly defined responsibility to the environment he or she ought to be free to operate unhindered and ought to be compensated if his or her operation is otherwise interfered with in the public interest. This narrow accountability approach is represented by groups such as the Australian Farm Institute, New South Wales Farmers Association and the National Farmers Federation.[19]

Greater attenuation of rights to access natural resources, based on expectations of virtue, underpins the advocacy of a legal duty of care by conservation groups, who see duty of care as a complement to regulation. Conservation interest groups argue that landholder responsibilities have been poorly defined.[20] These stakeholders often believe that farmers also have an obligation to go beyond compliance with regulation in their land management responsibility. In practice, conservation interests reflect a belief that responsibility encompasses 'the management of off-farm impacts such as salinity, soil erosion, pollution, and regional biodiversity

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15 R W G Bryant, *Land: Private Property and Public Control*, Environment Series (1973); H Demsetz, 'Towards a Theory of Property Rights' (1967) 57 *American Economic Review* 347; Charles K. Rowley and Charles Rowley, *Property Rights and the Limits of Democracy* (1993); John Brewer and Susan Staves, *Early Modern Conceptions of Property* (1995); Heritage House of Representatives Standing Committee on Environment, above n 4; Hone and Fraser, above n 3; Murray Raff, 'Toward an Ecologically Sustainable Property Concept' in Elizabeth Cooke (ed), *Modern Studies in Property Law* (2005).

16 Raff, above n 15. See para 2.44 in Heritage House of Representatives Standing Committee on Environment and, above n 4.

17 M Keogh, *Success requires innovation - on and off the farm* (2005).

18 Heritage House of Representatives Standing Committee on Environment and Heritage, above n 4.

19 National Farmers Federation (NFF), *Policy on Sustainable Production, Land and Native Vegetation* (2004); Jack A Sinden, *Who Pays To Protect Native Vegetation? - Costs To Farmers In Moree Plains Shire, New South Wales* (University of New England, 2002); NFF, *Community Attitudes to Farmers and Resource Security* (2003); Bryan Pape, 'Taking Farmers Property Rights Seriously and Just Compensation On Their Taking' (Paper presented at The Fourth Annual Global Conference, Environmental Taxation Issues, Experience and Potential, 2003); Andrew Macintosh and Richard Denniss, *Property Rights and the Environment - Should farmers have a right to compensation?* (The Australia Institute, 2004).

20 Australian Conservation Foundation, *Rights and Responsibilities in Land and Water Management* (2002).

decline' in addition to responsibility for impacts on the farm.[21] This version of a duty of care presupposes that many public interests which farmers believe ought to be funded by the public should be satisfied without compensation. This position is represented in the duty of care advocacy by groups such as the Australian Conservation Foundation, World Wildlife Fund, and the Inland Rivers Network.[22]

A lack of clarity and flexibility can inhibit innovative practice.[23] Duty of care has been promoted as a way to stimulate innovation by providing protection to farmers from detailed prescriptive regulations that limit land use options.[24] This potential to stimulate innovation in a way that helps meet public expectations has been highlighted,[25] suggesting that a legal duty may assist farmers to align their operations with regional natural resource management plans by using industry codes, best management practices and environmental management systems.

Whether replacing legislation that has the benefit of parliamentary oversight with codes, standards and systems that are not the subject of this form of scrutiny will ultimately result in greater simplicity and clarity is at this stage untested. One possibility is that the battle over requirements will simply move from Parliament into political backrooms, as competing environmental and farmer political interests struggle to become controllers of the interpretative guidelines and codes. Another is that these issues will be litigated through other avenues, notably administrative law, contract disputes or through enforcement processes.

B *Debate about Principles and Standards for Sustainable Agriculture*

Sustainability is primarily about the management of behaviour. Regulation is one tool of behaviour change.[26] Arguably a duty of care allows greater latitude for performance to be self-managed than traditional regulation because it allows greater freedom of action.[27] The potential to manage flexibly in response to local conditions is a valid argument to support duty of care[28] given the diversity of

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21 Ibid.

22 Warwick Moss, *Why The Property Rights Debate Is Holding Back Reforms- A Case For A Focus On Structural Adjustment* (WWF, 2002), The Wentworth Group of Concerned Scientists, *A New Model for Landscape Conservation in New South Wales* (2003) WWF, *Native Vegetation Regulation: Financial impact and policy issues* (WWF, 2005), Australian Conservation Foundation, above n 20.

23 Bates, above n 3.

24 Australian Farm Institute, *Statutory Theft* (2001).

25 Bates, above n 3; M Young, T Shi and J Crosthwaite, *Duty of care: An instrument for increasing the effectiveness of catchment management* (Department of Sustainability and Environment, 2003).

26 Evidence to Standing Committee on Natural Resource Management, NSW Legislative Assembly, Sydney, 21 February 2006, (Professor Paul Martin); House of Representatives Standing Committee on Environment and Heritage, above n 4.

27 John G Fleming, *The Law of Torts* (9th ed, 1998). See p 9.

28 Gardner, above n 4. See particularly p 30 and p 61.

farming and environmental situations in Australia. However putting detailed meat on the broad bones of this policy objective is likely to be difficult. Three possible approaches are discussed below.

Land management policy principles have been suggested as the way to convert broad aspirations into actionable legal duties (see Table 1). While laudable, it is difficult to see how very broad principles will result in the clarity of the responsibility of farmers that is sought by all along the farmer/conservationist spectrum of opinions.

Farming systems research can provide more detailed management guidelines; these include: 'critical success factors for multi-purpose farming systems' (see Box 1),[29] 'principles for rural land management,'[30] 'fundamental requirements for sustainable farming systems',[31] and the principles for ecologically sustainable farming systems in Australia.[32] These management principles may provide greater practical guidance, but they too are both general and contestable. It seems unlikely that any will conclusively satisfy the competing expectations of a practical meaning for a farmers' duty of care, though they may form useful components in future debates.

A third alternative (beyond broad policy statements and farm-systems principles) is to rely upon science for specific guidance about actions to be taken at a farm level. By way of illustration, the approach in NSW is one where science-based environmental standards underpin regulation of farming practice.[33] This regulatory framework follows the recommendations made by the Wentworth Group of Concerned Scientists.[34] These standards address water quality, salinity, biodiversity, and soil conservation. Under this model, regulatory property management plans become a form of contract between farmer and the State, and establish the boundaries of responsibility for performance and funding. They are expected to provide investment security, management flexibility, and financial support opportunity for land managers.[35]

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29 Neil Southorn, 'Challenges and opportunities for multi-purpose agriculture in Australian farming systems' (Paper presented at the AgroEnviron, University of Udine, Italy, 2004).

30 S McIntyre, 'The way forward, from principles to practice' in S McIntyre, JG McIvor and KM Heard (eds), *Managing and conserving grassy woodlands* (2002)

31 John B Passioura, 'Can we bring about a perennially peopled and productive countryside?' (1999) 45 *Agroforestry Systems.*

32 MC Watts, 'Getting on track? A discussion paper on Australia's progress towards ecologically sustainable management of our rural landscapes' (Australian Conservation Foundation, 2004).

33 There are three interrelated statutes that establish this science based framework for sustainable land management. These are the *Catchment Management Authorities Act 2003* (NSW), *Natural Resources Commission Act 2003* (NSW), and *Native Vegetation Act 2003* (NSW). These three need to be considered together for this purpose as they integrate to establish state wide standards and targets, establish statutory catchment plans and linking those to on ground performance via property vegetation planning.

34 The Wentworth Group of Concerned Scientists, *A New Model for Landscape Conservation in New South Wales* (2003).

35 Ibid. See p 9 about Property Management Plans.

Table 1: Policy principles for farmers' duty of care from government inquiry documents

Principles for land management, natural resources and environmental protection[36]	**Principles of public good conservation**[37]
(i) Land managers' duty of care for the environment established by statute, with associated rights and obligations. (ii) Identify and manage the risks of causing harm to the environment. (iii) Inform those directly at risk of foreseeable personal or financial harm. (iv) Inform the regulatory agency of the risk of foreseeable harm to the environment. (v) Consult with those at risk of foreseeable harm.	(i) Landholders' rights in respect of land use. (ii) Landholders' duty of care to manage land in ecologically sustainable manner, (iii) Policy focus on outcomes and context-specificity. (iv) Repairing past damage a shared responsibility. (v) All programmes must be based on latest and best scientific data

Such standards are more detailed than traditional regulations. The implementation of these detailed scientific standards has shown itself to demand a great deal of data and time. It has involved complexity for farmers and government and has reduced reliance on the farmers' judgement in the light of local conditions and operating needs.[38] These unintended costs are arguably due to an insufficiency of data and

36 Industry Commission, *A Full Repairing Lease. Inquiry into Ecologically Sustainable Land Management* (1998).

37 House of Representatives Standing Committee on Environment and Heritage, above n 4.

38 Government mandated legislation related to catchment management and its administration has the effect of crushing local initiative; see Anna Carr, *Grass Roots and Green Tape. Principles and Practices of Environmental Stewardship* (2002) 10. Uncertainty surrounding what a person may or may not do under public good conservation regulation reduces the confidence of landholders to invest in new forms of production and innovative technology (see p 66, House of Representatives Standing committee on Environment and Heritage, above n 4). There is a disconnect between government desire to sustain natural capital and rural social realities due to the economic constraints on farmers and the mixed policy signals that on one hand expose farmers to volatile international markets, while also demanding increasingly complex environmental protection measures See Matthew Tonts, 'Government Policy and Rural Sustainability' in Chris Cocklin and Jacqui Dibden (eds), *Sustainability and Change in Rural Australia* (2005). Much of the science that relates to such environmental protection remains uncertain at the local level. See p 72 of Paul Martin et al, *Developing a Good Regulatory Practice Model for Environmental Regulations Impacting on*

analytic processes, resulting in frustration among farmers as they are required to seek approvals for normal farming activity while processes are developed and data evaluated.[39] It would be hard to claim that harnessing science in this way has reduced the expectations gap between the farmer and environmentalist.

Box 1: A 'critical success' management approach to sustainable farming[40]

(i)	Know natural resource condition and limitations and the linkage of these to business success
(ii)	Natural resources are viewed and valued as business assets that can depreciate
(iii)	Inputs are matched to production potential
(iv)	High input production is planned for environmentally stable and resilient sites with the appropriate protection measures in place
(v)	Active participation in conservation as part of the business plan
(vi)	Seek environmental accreditation and partnerships for development of environmental services
(vii)	Environmental management is integrated into farm decision making and planning
(viii)	Support and participate in education
(ix)	Willingness to achieve change in organisational culture

Developing the practical meaning of a duty of care at a farm level is likely to involve a lengthy process of testing through administration, prosecutions or civil action. Science based standards of performance may eventually provide a robust link between principles and practice but this will be a lengthy and data hungry process. The mere creation of a statutory duty of care will not solve the fundamental problems that derive from a lack of consensus in society, and the limited capacity of science to resolve farming issues at an enterprise level. The law may reflect such tensions but it may be too much to expect that a legal formulation will efficiently resolve them.

C *Conflict over Cost Apportionment*

There is conflict over who should pay for public good conservation on private land. The costs of conservation include (for example) foregone production from setting aside land and water for the purpose of protecting or rehabilitating the environment.

Farmers (Australian Farm Institute, 2007).

39 Martin et al, ibid.

40 Neil Southorn, 'Challenges and opportunities for multi-purpose agriculture in Australian farming systems' (Paper presented at the AgroEnviron, University of Udine, Italy, 2004).

Farming interests argue that other than where the farmer is the harm-doer, imposed public good costs should be funded from the public purse.[41]

Conservation interests suggest applying the 'polluter pays' principle as part of the duty of care.[42] This viewpoint can include acceptance that land managers could be paid incentives for generating social value through environmental stewardship and production of public goods, while those generating social costs should be subject to penalty.[43] However, 'polluter pays' leaves two issues unresolved. The first is that many types of environmental harm are intrinsic to normal farming practices, particularly irrigation farming. These require the maintenance of land in an artificial state, the redirection of water and the application of other inputs, and the control of pest species (which may be native). The second is that society, through government, expects farmers to actively protect the environment by foregoing normal uses of their private property, which farmers would argue forces them to unreasonably bear the cost of the public good.[44] For example, the Australian and New Zealand Environment and Conservation Council proposed that a farmers' private responsibility for native vegetation management 'could reasonably be expected to include protection of endangered species and/or ecosystems, protection of vegetation on land at risk of land degradation, protection of riparian vegetation, protection of vegetation on lands of low agricultural capability and protection of vegetation on acid sulphate soils'.[45] Farmers dispute that such expectations reflect their obligations to society.

Consensus on a conceptual framework that distinguishes between 'polluter pays' and 'public benefit' within a farmers' duty of care does not reflect a consensus about what this means in practice. It is for such reasons that the duty of care is unlikely to be an efficient policy instrument for the public good provision of ecosystem services by farmers'.[46] This Productivity Commission evaluation limits the value of a duty to 'where actions by individual landholders have a direct, observable impact that is well understood by them and where there is broad

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41 Australian Farm Institute, *Statutory Theft* (2001). Evidence to Standing Committee on Natural Resource Management, NSW Legislative Assembly, Sydney, 21 February 2006 (Professor Paul Martin).

42 ACF, above n 20.

43 Watts, above n 32. ACF, ibid.

44 Evidence to Standing Committee on Environment and Heritage, Inquiry into Public Good Conservation, House of Representatives, Canberra, September 2000 (Wendy Craik). Evidence to Standing Committee on Environment and Heritage, Inquiry into Public Good Conservation, House of Representatives, Sydney, November 2000 (Mick Keogh). ACF, ibid. NFF, above n 19.

45 Australian and New Zealand Environment and Conservation Council, *National Framework for the Management and Monitoring of Australia's Native Vegetation* (Australian Government Department of Environment and Heritage, 2000)

46 Productivity Commission, *Impacts of native vegetation and biodiversity regulations* (29, 2004).

acceptance of the level of responsibility implied by the duty'.[47] The cost-allocation challenge requires a decision about who is to pay in the contested space between a narrow polluter pays definition of duty and a more expansive public stewardship responsibility. An accountability concept of duty of care would align with the farmer interest, and a virtue requirement would better suit conservationists. Saying that a duty of care applies does not per se resolve this conflict of expectations.

IV MULTIPLE MEANINGS OF A DUTY OF CARE

Even among those who consider a statutory duty of care to be desirable, there are many interpretations about what the duty of care is and what it can do. Twelve broad possibilities for what people mean when they talk of a duty of care can be distilled (see Table 2),[48] few of which reflect uses of duty in negligence, which we will discuss later. Many of the interpretations in table two are used in debate without the conflicts between them being highlighted, creating a false sense of coherence between competing interests in the advocacy of a farmers' duty of care. In using the term 'a duty of care', advocates may be expecting quite different outcomes from its specific application.

Table 2: Possibilities for a duty of care and natural resource management by farmers

Potential interpretations of duty of care	
Is it a flexible process for determining responsibility in a range of situations?	Or is it specific rules of practice that can be clearly stated?
Is it a method for handling disputes between individuals?	Or is it a method for determining compensation claims against the state for 'taking' of private resources?
Is its principal purpose to increase accountability for environmental and public good performance of private enterprise?	Or is it a means to safeguard resource use for private enterprise?
Does the term refer to a statutory duty of care, specified by Parliament?	Or does it mean a common law duty of care, developed by the judiciary?
Is it principally a tool used to frame political rhetoric?	Or is it a legally actionable concept with specific legal content
Is its purpose to define the collective duty of resource users generally across a generic range of circumstances?	Or is it intended to be a tool to evaluate individual performance in particular circumstances?

These different concepts reflect opposing hopes of interest groups in their advocacy of the duty of care, which include:

(i) Strengthening the property right and compensation claims of farmers;

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47 Productivity Commission, ibid. See page LVIII.

48 These 12 versions are distilled from the literature cited, and from the 28 interviews conducted.

(ii) Strengthening the public interest claim over farmers' management of natural resources;
(iii) Creation of new civil or government rights to intervene in the management of primary production;
(iv) Strengthening 'right to farm' claims;
(v) Shifting of the costs of public good conservation from the private to the public purse; or
(vi) Embedding of the costs of conservation as a cost of land tenure.

Not all these expectations can be met. The potential for conflict and uncertainty remains high. Further refinement through the Parliament or judicial review will take time, and may impose high transaction costs.[49] Native vegetation regulation demonstrates that on-the-ground implementation of politically negotiated solutions to conservation conflicts can impose operating complexity and lead to loss for farmers, even for individuals who are not guilty of substantive harm-doing.[50]

A *Statutory Versions of Duty of Care*

Table 3 shows where the duty of care has been incorporated into land management statute in Australia. These enactments are consistent with Parliamentary inquiry recommendations that draw on a common law duty of care without a detailed

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49 Steven M Maser and Douglas D Heckathorn, 'Bargaining and the Sources of Transaction Costs: The Case of Government Regulation' (1987) 3(1) *Journal of Law, Economics and Organisation* 69; BG Colby, 'Regulation, Imperfect Markets and Transaction Costs: The Elusive Quest for Efficiency in Water Allocation' in DW Bromley (ed), *The Handbook of Environmental Economics* (1995); Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy, and Practice* (1999); Andrew Dragun, 'Environmental Institutional Design: Can Property Rights Theory Help?' (Discussion Paper 251, Department of Economics, University of Queensland, 1999) Karen Palmer and Margaret Walls, *Extended Product Responsibility: An Economic Assessment of Alternative Policies* (Resources for the Future, 1999); Kevin Guerin, *Encouraging Quality Regulations, Theories and Tools* (26; New Zealand Treasury Working Paper 02/24, New Zealand Treasury, 2002), Martin et al, above n 2; Barak D Richman and Jeffrey T Macher, 'Transaction Cost Economics: An Assessment of Empirical Research in the Social Sciences' (Duke Law School, 2006).

50 Denys Slee and Associates, *'Remnant Native Vegetation, Perceptions and Policies: A Review of Legislation and Incentive Programs'* (2/98, Environment Australia: Biodiversity Group, 1998); Wentworth Group, above n 22; NSW Department of Infrastructure Planning and Natural Resources, *Draft Native Vegetation Regulation 2004. Regulatory Impact Statement* (Department of Infrastructure Planning and Natural Resources 2004); NFF, above n 19. Productivity Commission, *Impacts of native vegetation and biodiversity regulations* (29, 2004); WWF, *Native Vegetation Regulation: Financial impact and policy issues* (WWF, 2005); Auditor-General of New South Wales, *Performance Audit. Regulating the Clearing of Native Vegetation. Follow-up of 2002 Performance Audit* (The Audit Office of New South Wales, 2006); Alastair Davidson et al, *Native Vegetation: Public Conservation on Private Land, Cost of Foregone Rangelands Development in Southern and Western Queensland* (ABARE 2006); Martin et al, above n 2.

examination of its tort law function and meaning.[51] In particular, legislatures have been keen to avoid civil action over a breach of an environmental duty of care, eschewing the traditional private use of a duty of care in relations between citizens, developed and applied through the courts. The statutory versions of a duty of care instead focus on boundaries of responsibility between citizens and the state adjudicated through an administrative process. This is intended to place a duty of care as the centrepiece of a renewed ethical approach to natural resource management (a virtue conceptualisation).[52] Administrative notices and prosecution for non-compliance are the means to enforce this type of a duty.[53] These administrative implementation processes are reviewed in the next section.

The legislation identified in Table 3 demonstrates two ways of expressing the duty of care. The duty itself may be brief with the details being imported by reference to some non-statutory code, or alternately details may be expressed in the legislation itself. One implication of these alternatives is the extent to which the details of the law will be determined under parliamentary supervision, or by administrative decisions, or by judicial review. We shall return to this question.

An example of the brief statutory form is the general environmental duty in Queensland. This requires all reasonable and practical measures to minimise or prevent environmental harm.[54] A breach of this duty does not give rise to civil action but involves a regulatory compliance process.[55] The Act provides a short list of relevant factors to consider in working out what the duty means,[56] and refers to an industry code for detail.[57] A code has been prepared by the Queensland Farmers Federation to provide more detailed interpretation centred on six 'expected environmental outcomes'.[58] This code has not yet been tested by judicial review.

Table 3: Statutory duties of care for the environment in Australia

Legislation	**Source of the duty**
Environmental Protection Act 1994 (Qld)	Section 319 general environmental duty
Land Act 1994 (Qld)	Section 199 duty of care condition
Catchment and Land Protection Act 1994 (Vic)	Section 20 general duties of land owners
Environment Protection Act 1993 (SA)	Section 25 general

51 House of Representatives Standing Committee on Environment and Heritage, above n 4. See recommendation 5. Industry Commission, *A Full Repairing Lease. Inquiry into Ecologically Sustainable Land Management* (1998) See recommendations 8.1 and 8.2.

52 Gardner, above n 4. The new ethic is referred to on p 63.

53 Ibid.

54 *Environmental Protection Act 1994* (Qld) (*EP Act*). See s 319(1).

55 *EP Act.* See s 24(3).

56 *EP Act.* See s 319(2)

57 *EP Act.* See s 436(3).

58 Queensland Farmers Federation, *The Environmental Code of Practice for Agriculture* (1998).

	environmental duty
Natural Resources Management Act 2004 (SA)	Section 9 general statutory duties; s 133 specific duty to a watercourse
River Murray Act 2003 (SA)	Section 23 general duty of care
Pastoral Land Management and Conservation Act 1989 (SA)	Section 7 general duty of pastoral lessees
Environmental Management and Pollution Control Act 1994 (Tas)	Section 23 general environmental duty
Forest Practices Act 1985 (Tas)	Section 31(1) code of practice to provide reasonable protection to the environment

An illustrative example of the brief form of a duty of care is the *Land Act 1994* (Qld) (*L Act*) duty of care for the land as a lease, licence or permit condition for lessees of Crown land.[59] This legislation provides a general list of reasonable considerations for agricultural, grazing or pastoral managers.[60] Under the *L Act* a leaseholder who complies with a land management agreement is said to be satisfying his or her duty of care.[61] A brief expression of the duty also exists in Victoria where legislation provides a general statement about reasonable land management behaviour for land managers.[62] Failure to comply with this landholder duty in is not an offence but may attract a land management notice.[63] Lessees of pastoral lease land in South Australia are also subject to a brief specification of their duty of care.[64] The detailed meaning of this for land protection and management is referred to in a land management plan to be prepared by the lessee. Implying duty of care into land use agreements with the Crown gives rise to the potential that the content of this legal duty will be contested judicially in contract termination disputes.

In Tasmania, statute imposes a general environmental duty on all citizens to prevent or minimise environmental harm or environmental nuisance.[65] Following an approved code of practice is accepted as compliance with the general environmental

59 *Land Act 1994* (Qld) (*L Act*). See s 199(1) for the duty of care, with the list of reasonable factors at s 199(2).

60 *L Act.* See s 199(2).

61 Queensland Government, *Delbessie Agreement: State Rural Leasehold Land Strategy* (December 2007).

62 *Catchment and Land Protection Act 1994* (Vic). See s 20

63 Ibid. See s 37.

64 *Pastoral Land Management and Conservation Act 1989* (SA) See s 7.

65 *Environmental Management and Pollution Control Act 1994* (Tas) (*EMPC Act*). See s23A(1) and (2).

duty.[66] The *Forest Practices Act 1985* (Tas) creates a code of practice to provide for reasonable protection of the environment.[67] The Code establishes a landowner's duty of care for the conservation of natural and cultural values, including measures detailed in the code as necessary to protect soil and water values and the reservation of other significant natural and cultural values.[68] In all these instances the non-statutory code provides the interpretative substance of the duty, and as a result may be eventually tested politically or in court.

The alternative approach is to provide greater detail within the statutory instrument. Detailed expression of a duty is used in South Australia.[69] In determining what is reasonable the act lists eight factors to be considered along with the 24 points that make up the objects of the Act.[70] This provides greater legislative completeness, but necessarily uses generic words about reasonable behaviour. A breach of this duty does not make a person liable for civil or criminal action.[71] A general environmental duty also exists in South Australia to take all reasonable and practical measures to minimise or prevent environmental harm.[72] The measures required are listed briefly, but must also be considered in a way that is consistent with the complex objectives of the Act.[73] A breach of this duty does not give rise to civil liability.[74] South Australians are also under a general duty of care to take all reasonable measures to prevent or minimise any harm to the Murray River.[75] What this means is outlined in the act but once again this must be read along with the objectives of the act.[76] A breach of this duty does not give rise to civil liability.

Whether the duty is given brief or detailed treatment in the legislation the fundamental purpose is the same. Duty of care moves responsibility beyond what is written down, and into the sphere of unstated and often contested social expectations. Perhaps this is why the common law has evolved in the way it has, as a sophisticated reasoning process more so than a rule book. It is in the move from reliance on legal instruments to social judgements where the potential for greater use of self-regulation lies.[77] By taking an administrative pathway and excluding

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66 Ibid. See s23 (4).

67 *Forest Practices Act 1985* (Tas) See s31(1). It is uncertain whether the *Forest Practices Code* is an approved code under the regulations for the purposes of the *EMPC Act.*

68 Forest Practices Board, *Forest Practices Code* (2000) 52.

69 *Natural Resources Management Act 2004* (SA) (*NRM Act*). See s 9.

70 Ibid. See s 9(2) and s 7

71 Ibid. See s 9(4).

72 *Environment Protection Act 1993* (SA). See s 25.

73 Ibid. Section 25(2) provides the measures required. These must also be read with regard to the objectives of the act which must be furthered by those undertaking administration of the Act (see s 10(2)).

74 *Environment Protection Act 1993* (SA) s 25(4).

75 *River Murray Act 2003* (SA). See s 23.

76 Ibid. Subsections 23(2) and (3) outline the meaning of the duty, but s 8 specifically requires that all administration, operation and application of the act must be consistent with and further the objectives of the Act.

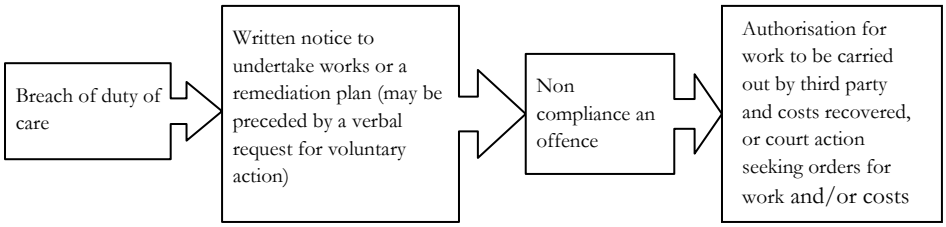
77 For example, see Queensland, *Parliamentary Debates*, Legislative Assembly, 9 September 1994, 9535-9538 (M J Robson, Minister for Environment and Heritage), particularly p 9537 where the Minister announces the duty of care as the essence of self regulation. Also see

civil action, the legislators have sought to exclude one of the mechanisms for forming social norms. That is through civil disputes between citizens resolved in the courts. By reducing the opportunity for disputes to be adjudicated by the courts, the potency of the duty of care as a mechanism for generating virtuous social norms for land management may be reduced.[78]

1 *Administrative Implementation of the Duty*

The preferred legislative approach to implementation of the duty of care is through administrative process. This usually involves issuing an order or notice for which non compliance is an offence. A third party may be authorised by further administrative action, then costs recovered or court orders issued as a final step in the general process (see Figure 1).

Figure 1: A generic compliance process for a statutory duty of care



This model (implemented in various ways in different states) broadly follows the enforcement strategy recommended by Gardner.[79] A key factor is enforcement by a local body (such as a catchment authority or natural resource management board) with the relevant knowledge and standards about natural resource management and environmental protection usually embodied in a catchment or regional plan. Different states have taken slightly different approaches. However in many instances the consequences of administrative process can be an order which involves additional costs, possible prosecution for non compliance, or loss of a leasehold interest.

By way of illustration, causing environmental harm is unlawful in Queensland under the *Environmental Protection Act 1994* but it is accepted that a defendant complied with the general duty if it is proven that an approved code of practice was

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Forest Practices Act 1985 (Tas). See sch 7 for the objective of the forest practices system to achieve sustainable management that is as far as possible self-funding with an emphasis on self regulation.

78 For an examination of the positive value of legal disputes as a mechanism for norm formation, see Niklas Luhmann, *Social Systems* (1984).

79 Gardner, above n 4.

followed.[80] For farming, this means compliance with the *Environmental Code of Practice*.[81] A breach of the Crown land lessee's duty of care in Queensland may result in the loss of access and use rights to the land, though failure to comply with a land management agreement only attracts a remedial action notice rather than loss of access and use.[82]

A land management notice issued under the *Catchment and Land Protection Act 1994* in Victoria may make prohibitions with respect to land use or management or specify actions to be taken. Failure to comply with the notice is an offence under s 41 of the Act. [83]

In South Australia, failure to resolve a breach of the duty under the *Natural Resource Management Act 2004* through negotiation and voluntary action may result in the issue of a notice to prepare an action plan to address the breach.[84] Failure to comply with a notice is an offence.[85] A breach of the duty may also be remedied through a protection or reparation order or authorisation.[86] Failure to comply with an order or authorisation triggers further regulatory action and may be the subject of a court order for non compliance.[87] Compliance with the duty of care under the *River Murray Act 2003* may be enforced by a protection or reparation order or reparation authorisation.[88] Failure to comply with these regulatory enforcement actions is an offence. Breach of the pastoral lessee's duty in South Australia is enforced by way of a notice to prepare a property plan addressing the degradation issues.[89] Failure to comply with the notice may result in a plan being prepared by the pastoral board.[90] Failure to prepare or implement a property plan is a breach of the conditions of a pastoral lease.[91] The general environmental duty in South Australia is enforced through an environmental protection order, clean up order or authorisation.[92] Failure to comply with these is an offence and may result in orders being issued by the court.[93]

In Tasmania, the code of practice and its duty (made under the *Forest Practices Act 1985*) is enforced initially by a request for voluntary action. Failure to undertake the requested action triggers a regulatory compliance process commencing with a

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80 *Environmental Protection Act 1994* (Qld). See s 423.

81 Queensland Farmers Federation, *Environmental Code of Practice for Agriculture* (1998).

82 *Land Act 1994* (Qld) See s 234(b).

83 *Catchment and Land Protection Act 1994* (Vic).

84 *NRM Act.* See s 122.

85 *NRM Act* s 123(12).

86 *NRM Act.* See s 193 for protection orders, s 195 for reparation orders, and s 197 for reparation authorisations.

87 *NRM Act.* See s 201 for court orders

88 *River Murray Act 2003* (SA). See s 24 for protection orders, s 26 for reparation orders and s 28 for reparation authorisations.

89 *Pastoral Land Management and Conservation Act 1989* (SA) (*PLMC Act*). See s 41(1).

90 Ibid. See s 41(5)

91 Ibid. s 41(10). The cancellation of a lease for breach of conditions occurs under s 37.

92 *Environment Protection Act 1993* (SA). See ss 93 and 94 for protection orders, s 99 for clean up orders, and s 100 for clean-up authorisations

93 Ibid. See s 104 for civil remedies

notice. Failure to comply with a notice is an offence.[94] A third party may then be authorised to carry out the works required by the notice and the cost of that can be recovered from the offending landholder.[95] We contend that this approach and the similar administrative enforcement actions outlined above offer the potential for litigation under administrative law, seeking review of administrative decisions about compliance; and in civil proceedings for recovery of farmers' compliance costs, contesting lease contract terminations, or challenging a non-statutory code used to interpret the meaning of a duty of care.

2 *An Opportunity for Judicial Review*

We anticipate that courts will be called upon to interpret the practical meaning of a statutory duty of care. This is because of the economic implications of its application and the range of possible interpretations of its meaning in practice. For example, whilst the general environmental duty in Queensland is implemented administratively, we anticipate that the legal validity of administrative interpretation and reliance on industry codes of practice will be contested. This seems particularly likely if breach of a statutory duty of care is used to terminate a lease agreement over Crown land. It also seems plausible to foresee a farmer seeking recovery of compliance costs from administrative enforcement when orders are issued requiring certain actions be undertaken. Such possibilities are for illustration. It is not our intention here to deal with the many ways through which administrative enforcement of a statutory duty of care might be judicially tested. Rather, we will illustrate the potential for an administratively applied legal duty of care to the environment to generate judicial intervention by reference to the precautionary principle. As with a duty of care, the legislative intent was to take a policy term with hidden competing meanings, and convert it into a statutory instrument for administrative application. As is likely with a duty of care, the consequence of this was to adjust private economic interests to the public environmental good.

Seven of the statutes shown in table three contain objects to achieve or promote ecologically sustainable development or sustainable management.[96] Ecologically sustainable development reflects the intent to meet present needs without compromising the ability of future generations to meet their needs.[97] It is a central element of decision making about natural resources,[98] with detailed meaning

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94 Ibid. A notice is issued under s 41(2) and non-compliance with the notice is an offence under s 41(5).

95 *NRM Act.* Authorisations are issued under s 41(6) and costs may be recovered under s 41(7).

96 See s 3 *Environmental Protection Act 1994* (Qld), s 4 *Land Act 1994* (Qld), s 10(1)(a) *Environment Protection Act 1993* (SA), s 7 *Natural Resources Management Act 2004* (SA), s 6(1)(d) *River Murray Act 2003* (SA), s 8 and sch 1 *Environmental Management and Pollution Control Act 1994* (Tas), sch 7 *Forest Practices Act 1985* (Tas).

97 See World Commission on Environment and Development, *Our Common Future* (1987) 44.

98 See para 57 of *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34 (6 February 2006).

interpreted by reference to a range of principles. The precautionary principle, inter-generational equity, conservation of biological diversity and ecological integrity and improved valuation, pricing and incentive mechanisms exist in statutory form.[99] Further principles of sustainable use, intra-generational equity and the integration of economic, environmental and social considerations in decision-making processes have all been subject to judicial review.[100]

Case law interpreting ecologically sustainable development and its principles has focused primarily on judicial review of planning decisions where broad policy pronouncements have undergone detailed interpretation and refinement.[101] Notwithstanding the apparent impediment of the *Wednesbury* decision,[102] Talbot J in *Nicholls v Director General of National Parks and Wildlife* (1994) proposed a wide scope for review of administrative implementation of sustainability principles on the basis that 'the statement of the precautionary principle, while it may be framed appropriately for the purpose of a political aspiration, its implementation as a legal standard could have the potential to create interminable forensic argument'.[103] This has occurred over the years since, culminating with Preston CJ providing a detailed explanation and the procedure for application of the precautionary principle in *Telstra v Hornsby Shire Council*.[104] Throughout that time, judicial reinterpretations of the precautionary principle have been applied to the granting of emissions permits,[105] property development approvals,[106] fisheries management,[107] and criminal liability for pollution,[108] among others.[109] It is our contention that the statutory duty of care may be similarly refined.

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99 For example, see s 6(2) *Protection of the Environment Administration Act 1991* (NSW).

100 See paras 109, 110, 111, 112 and 117 of *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133 (24 March 2006).

101 Notably in the Land and Environment Court of New South Wales, but also in other jurisdictions, initially with particular focus on the precautionary principle but recently inclusive of the broader meaning of ecologically sustainable development. See cases below.

102 *Associated Provincial Picture Houses v Wednesbury Corporation* (1948) 1 KB 223; here it was found that the role of a reviewing body in administrative review is simply to decide whether the decision was so unreasonable that no reasonable decision-maker could have made it. This would apparently limit the role that judicial administrative review would have in defining the content of a duty of care.

103 *Nicholls v Director General National Parks and Wildlife Service* (1994) 84 LGERA 397.

104 *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133 (24 March 2006) See paras 127 to 183.

105 *Greenpeace Australia Ltd v Redbank Power Co Pty Ltd* (1994) 86 LGERA 143

106 *Brooks Lark & Carrick v Clarence City Council* [1997] TASRMPAT 61 (2 April 1997) *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133 (24 March 2006).

107 *Bannister Quest Pty Ltd v Australian Fisheries Management Authority* [1997] FCA 819 (14 August 1997).

108 *Mclennan v Holden Ltd* [1999] SAERDC 83 No ERD-99-171 Judgement No OE83 (18 October 1999).

109 For more on approval of major projects including airport extensions, see *City of Botany Bay Council v Minister for Transport & Regional Development* [1999] FCA 1495 (4 November 1999). For major mining developments, see *CSR Ltd v Coffs Harbour City Council* (1995) NSWLEC 146 Also more recently in the Anvill Hill case *Gray v Minister for Planning* [2006] NSWLEC 720 (27 November 2006). There is now an extensive literature on the

The series of cases on the meaning of the precautionary principle and ecologically sustainable development illustrates that ousting the courts in favour of administrative rule is unlikely to be effective where those administrative decisions have significant economic and political impacts.[110] The environmental duty of care could impact significantly upon contracts and property interests, as well as upon resource stewardship obligations. The unresolved multiple meanings (highlighted earlier in this article) will be brought into sharp focus. When this occurs we contend that the most articulate precedent available to the courts will be the common law, and that attempts to reconcile the common law duty of care with the environmental duty of care will require significant judicial creativity.

In addition, while statutory duties of care exclude private rights of action, they do not exclude the use of arguments about breach of statutory duty as prima facie evidence of negligence in disputes. Under such circumstances evidence of how administrative bodies have applied the statutory duty, or how courts have interpreted that duty, may be part of a claim for civil remedy.

The essential characteristic (and appeal) of a common law duty of care approach is that it provides a mechanism to move responsibility beyond what is written down in legislation, into the field of unwritten social obligations. This role of interpreting community mores and giving them legal effect if Parliament has not embodied them in statute has always been the role of the court. For these reasons, we would expect that like the precautionary principle the administrative approach to an environmental duty of care will not emerge untouched by judicial review.

3 *The Nature of the Common Law Duty of Care*

Civil law is a private instrument which assists citizens to resolve disputes over their interests. This should be contrasted with a regulatory or administrative instrument through which government adjusts private interests or constrains private action. The common law duty of care does not purport to codify the types of conflict nor to specify the circumstances in which liability might arise. Detailed guidance is sparse, but the processes of judgement are sophisticated. Efficiencies from the common law process arise not from administration of instruments but from elegant

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judicial interpretation of this ostensibly administrative principle. For recent developments, see R J Whelan, C L Brown and David Farrier, 'The Precautionary Principle: What is it and how might it be applied', in Pat Hutchings, Daniel Lunney and Chris Dickman (eds), *Threatened Species Legislation: Is it just an act?* (2004). See also Jacqueline Peel, *The Precautionary Principle in Practice. Environmental Decision-making and Scientific Uncertainty* (2005).

110 For a detailed discussion of the early cases concerned with the precautionary principle, and the judicial treatment of similar sustainability enactments, see Paul Martin and Miriam Verbeek, *Cartography for Environmental Law. Finding new paths to effective resource use regulation* (2000) 76-88.

judicial interpretative processes within a basic logical structure. This structure relies not upon words, but upon a shared understanding based on long history. Judicial culture and knowledge and contests between citizens are important parts of this process.

Reasonable care is determined by consideration of what a reasonable person would be expected to do under similar circumstances.[111] The actions of the individual are tested against this standard to determine if there is a breach of duty. Many factors are relevant to the decision about the existence and breach of the duty of care. These include; the assessment of the probability that the risk resulted from the conduct, the seriousness of the harm that may result from the conduct, the cost of preventing the risks associated with the conduct, and the social utility of what the person is doing.[112] Common practice of an industry or profession is relevant and the more that common practice has been followed, the more likely there will be no breach of the duty found. The courts are familiar with applying these rules to established categories, though administrative agencies may find the sophisticated thinking which is involved daunting.

As a pattern of interpretation of the duty of care is distilled from the common law, over time through social communication and education communities internalise these norms, and behaviour is modified. While we can accept the argument that restricting disputes to an administrative arena may be more efficient in dealing with particular issues, the counter would be that the effectiveness of civil litigation to shape norms of accountability cannot be readily replaced by administrative actions, because of the absence of testing of the reasons for decisions through informed discussion and courtroom debate. Whether one approach is preferable is a judgement call based on values as well as facts.

V IMPLICATIONS OF A CIVIL DUTY CONCEPT

This paper has highlighted a concealed chasm between the expectations of different stakeholders over what a duty of care ought and will mean in practice. Duty of care involves an innovative combination of a common law concept, implemented through a variety of statutory approaches sometimes combined with scientific and management concepts which are intrinsically value-laden; applied administratively but with an impact on property interests with significant economic and environmental implications; the interpretation of which may be contested through contract, administrative and civil action as well as political processes. That we expect that this mix may pose challenges to the legal and political system ought not be surprising.

Some of the competing expectations (including those of legislatures) will not be met. The common law of negligence does not impose obligations to act reasonably in respect to all kinds of harm. For example, the common law usually imposes an

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111 For a more detailed discussion of breach of duty, see Francis Trindade Peter. Cane and Mark Lunney, *The Law of Torts in Australia* (2007) ch 8.

112 The leading Australian authority is *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

obligation to act reasonably to avoid inflicting physical harm or damage to property on another. It does not impose the same general duty in relation to what are known as 'purely economic' losses, and there are limits on when a duty to act, as opposed to imposing a duty when acting, will be imposed. The role of 'duty' in the common law sets limits for liability arising from careless behaviour, using public policy considerations to determine when, how and to whom a general duty ought apply. These restrictions on duty reflect policy decisions that certain kinds of harm, or harm caused in a certain way, or by certain kinds of people, should not trigger liability even if caused negligently.[113] Civil duty of care is a conceptual framework for identifying boundaries of liability, taking into account the compromises required in making people liable for the consequences of their careless behaviour whilst allowing individuals reasonable autonomy to act as they wish.

The common law duty of care protects a limited range of interests which are essentially private (eg health, property, money). It does not extend to what might be called 'public harms' unless such harms coincidentally correspond to private harms. How the courts might respond to this difference in fundamental conceptualisation of responsibility at law is unknown.

In addition, the primary function of the common law action in negligence is compensation; a monetary award of damages for negligence that has resulted in a certain kind of loss to the plaintiff. The right to sue is limited to the party who has suffered loss. The enquiry is generally limited to looking back in time and assessing whether the conduct of the defendant that caused the loss was careless. Once a court ruling has been made on whether conduct was careless or not, that ruling is a guide to how courts will evaluate future conduct. In this way the common law duty in the law of negligence is both backward and forward looking – backward to determine after the event whether the conduct was negligent, and forward by providing guidance for future conduct, but the latter relies on the former. The common law of negligence does not provide judgements about whether conduct about to be undertaken would be careless, but at the heart of many of the political expectations is the belief that this is the role of the common law duty. There is a significant gap between the role of the common law duty of care and what is expected in enacting it legislatively.

A third difference between the common law and some expectations of a statutory duty of care for the environment relates to the standards of conduct each wishes to encourage. The common law duty of care is a minimal standard. It determines what conduct triggers compensation. It promotes accountability and is not concerned

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113 There is academic controversy over the range and legitimacy of the limited or no duty situations For a sample of competing views see Jane Stapleton, 'Duty of Care Factors: a Selection from the Judicial Menus' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (1998); Allan Beever, *Rediscovering the Law of Negligence* (2007) Robert Stevens, *Torts and Rights* (2007).

with rewarding virtue. The common law has no interest in determining whether other conduct might have been better in promoting some desired end. Given that the statutory duties of care are usually phrased in terms of reasonableness, it might be thought that the same would apply to them but advocacy of statutory duties of care suggests that they will promote ethical land management. If promoting virtue in land management is its goal then the statutory duty of care is intended to be a very different beast from the common law duty of care in negligence.

VI CONCLUSION

Disputes about natural resource stewardship by farmers typically centre on three issues; definition of the boundaries of their responsibilities, appropriate principles to guide their behaviour once responsibility is identified and cost apportionment between society and farmers. Clearer boundaries of responsibility and norms for stewardship are desirable to help resolve these issues, and to allocate costs fairly. Competing interests often agree politically that the duty of care, derived from the common law, is a useful concept to simultaneously guarantee freedom of action by farmers and restrict harmful farming practices, protect access to resources and limit access to resources, protect the private business interests of farmers and guarantee social good environmental outcomes from farming. A statutory duty of care for the environment or natural resources now exists in nine instances in four Australian states. These statutory versions are worthy as general principles but do not provide sufficient clarity about what the obligations they create mean in practice. Ultimately this problem will have to resolved. Our expectation is that it will have to be resolved by the courts by the application of the common law principles which have proven so appealing in theory to so many interest groups. Some of the competing expectations that are masked by broad political appeal of the abstraction embodied in the ‘duty’ will not be met.

At common law the duty of care functions as a two stage process for resolving conflicts and setting flexible standards. The value of this process is as a boundary setting mechanism based upon examining contexts and relationships to decide whether one person is under an obligation to act reasonably to another to prevent certain potential harms. The boundary of responsibility for harm depends on whether the harms, harm causing practices or people involved are of a type that for policy reasons ought to be excluded from liability. The behavioural norm aspects of a duty, which define how one needs to act to satisfy the duty, arise once the general obligation to take reasonable care is established. The norms are established by patterns of judicial decision making over many particular claims of breach. Creating these patterns requires that the issues be contested before the courts. There are obstacles that the courts are likely to encounter in trying to develop the practical meaning for a statutory duty of care for the environment based on the common law. These include; the focus on physical harm to private interests, limits on liability for policy reasons that restrict the harms and causes that can lead to liability and the people that can be found to owe an obligation, a reliance on loss to

trigger the norm development process, and a focus on the minimal standard of accountability as reasonable care.

These are challenging concerns, particularly when consensus for a statutory duty of care has been hard won. Our intent with this paper is not to question the policy goals, nor to criticise the approach that has been adopted. Our intention is to highlight that to make statutory duties of care for the environment effective will require a great deal more interpretative support from the courts, and involve significant jurisprudential steps. We anticipate that clarification of the legal meaning of a duty of care will leave some of the competing hopes that led to the incorporation of this duty into law being frustrated. These are matters to which legal policy makers may need to give more attention.