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The Unlimited 'Duty of Care'

Greater community focus on the management of Australia's farming land, and ever-increasing demands from conservationists to limit biodiversity changes caused by farm development means governments are under increasing pressure to legislatively enhance conservation requirements on private land. To do so makes sense for government, as these measures can be imposed with little or no public cost, and can be paraded to appease 'green' voters. There is, however, increasing evidence that these regulatory measures impose a direct cost on private landholders to achieve a public-good.

Defining where the normal duty of care associated with land ownership ends, and public-good conservation starts will be essential to ensuring that the costs and benefits of conservation on private land are borne by the appropriate parties.

The concept that management of private farmland should be regulated to bring about public-good conservation objectives, such as the preservation of biodiversity, raises some difficult issues for landholders and Governments alike.

For landholders, regulations designed to achieve conservation objectives almost always bring with them either direct cost, loss of land value, or loss of opportunity to profit. These regulations are justifiable when they codify the duty of care landholders are required to exercise. For example, regulations that restrict land management practices that will result in soil erosion are widely accepted. Soil erosion on one property will damage water quality downstream, and may result in stream siltation, or damage to adjoining land if the erosion travels beyond the border of the land. The result will be an adverse impact on neighbouring landholder; therefore government regulation is appropriate.

At the other extreme, restrictions on land use solely to preserve a species of animal, plant or insect can hardly be considered to fall within the normal duty of care requirement, as it is difficult to see what damage arises to other landholders as a result of that landuse.

For governments, a fine though as yet untested line exists between legislation codifying the normal duty of care, and legislation aimed at broader public-good conservation outcomes, that restricts or damages the rights of a landholder.

Landholders' 'Duty of Care'

While duty of care is frequently referred to in discussions on this topic, it seems that interpretation of the concept is somewhat subjective, and less well defined than it might be.

The general legal definition of duty of care is:[1]

> There is a duty to take care in most situations in which one can reasonably foresee that one's actions may cause physical damage to the person or property of others. The duty is owed to those people likely to be affected by the conduct in question.

Duty of care arises from the legal concept of nuisance, which is recognised as part of common law. Nuisance is defined as:

> ...a state of affairs, created adopted or continued by one person (otherwise than in the reasonable and convenient use by him of his own land) which, to a substantial degree, harms another person (an owner or occupier of land) in his enjoyment of his land.[2]

The legal definitions is qualified with the use of terms such as 'reasonable', and also with the need for there to be some proximity (in time and distance) between the person causing the harm, and the person whose enjoyment of land is suffering due to the nuisance.

'Harm' has to be reasonably direct and able to be substantiated, and does not include things such as interference with the enjoyment experienced by those viewing a particular landscape. Even damage in the form of personal discomfort caused by smells and noise is downgraded in comparison with injury to property.[3]

Under common law, the burden of proof rests with those alleging the nuisance. (unlike the situation that prevails under the precautionary principle in environmental policies). As a result, courts have dismissed cases where a nuisance action was based on alleged damage to biodiversity.[4]

1 Oxford Dictionary of Law, 4th ed. 1997

2 Hargrave vs Goldman (1963). Commonwealth Law Reports.

3 Farrier, D. The Environmental Law Handbook. 2nd Ed. 1995

4 Farrier, D ibid.

The conclusion is that, under common law, a landholders duty of care restricts that person from carrying out activities that may cause harm to another's land, but would not extend to restricting activities because they may impact on biodiversity on that land.

However, over the years legislation has moved the common law concept onwards to a point where " .. it is becoming increasingly common to consider that land ownership entails a responsibility to ensure that the land is conserved for future generations, not necessarily untouched but with a realisation of the importance of proper maintenance and good farming techniques."[5]

Even this level of responsibility on landholders does not extend to a requirement to only engage in activities that have nil or minimal impact on biodiversity. The above interpretation of duty of care recognises that even minimal management inputs will have some impact on the land, and there is a requirement on landholders not to degrade the land, even if such degradation has no impact on any other persons enjoyment of their land.

Legislating Conservation Objectives

However, land management legislation aimed at securing conservation objectives sets a different, and higher standard. In such legislation, the question of harm to another persons' enjoyment of their land is not the basis of rulemaking. Rather, the concept of harm to any species or habitat on that land is increasingly the principle issue.

For example, under the NSW Native Vegetation Conservation Act, an application to clear more than 50ha of land on the Tablelands must be accompanied by information which includes maps and aerial photographs plus:

- an Aboriginal site search report
- a flora survey report
- a fauna survey report
- a landscape survey report
- an archaeological survey report
- an economic survey report
- a social survey report.[6]

In addition, the landholder may be required to provide survey information relating to threatened species as defined under the NSW Threatened Species legislation.

Given the range of information required, and the fact that the consent procedures under the NSW Environmental Planning and Assessment Act are utilised, it is clear that the intention is not just to limit enjoyment of land such that nuisance to other landholders is avoided.

This is reinforced by responses that landholders have received to development applications. These applications have been rejected, even when evidence has been provided to confirm that the proposed development does not have any technical limitations, such as the potential to cause soil erosion or interfere with water-table levels.

In these cases, consent to develop the land has been refused due to the potential presence of habitat of a threatened species, or the presence of threatened native or migratory birds.

Rather than simply restricting landuse to ensure that other land is not damaged, this level of regulation could be considered, in itself, to be damaging the 'enjoyment' of private land ownership.

The Cost of Conservation on Private Land.

The catch-cry of the conservation movement, and of some environmental scientists has been either that farmers gain direct benefits from biodiversity conservation on their land, or that there is no cost to a farmer in 'locking' up a part of the land.

A brief examination of the purported benefits of biodiversity conservation for a private landholder shows that to a certain degree, the retention of native organisms assists some of the biological processes that result in nutrient cycling and soil formation. However, retention of an area of land in a relatively unimproved state means that less efficient species and biological processes are present, and the ultimate productivity of that land is limited.

The introduction of improved plant species, fertilisers and appropriate management has substantially improved the productivity of vast swathes of farming land in Australia, while retaining some of the elements of the original biodiversity. Such productivity improvement cannot occur without disturbing the original species present in the area.

Other benefits of biodiversity retention, such as the potential technological or medical advances that might be made as a result of investigating a newly-discovered species, or the cultural benefits to society in having unspoilt areas of bush to visit, are undisputedly public benefits, which are unable to be captured by an individual landholder.

Increasing evidence is now emerging that biodiversity conservation on private land (beyond that necessary to meet a duty of care) does in fact impose a direct cost on the individual landholder, and on landholders generally.

For example, a recent report on land valuations in NSW stated:

> The (NSW) Native Vegetation Act, 1997 is impacting on land values and the saleability of some properties in the wheat/sheep belt. Some purchasers/vendors who may potentially be significantly impacted by the legislation, either perceived or in reality, now may hold off making decisions until after the March 1999 State election.[7]

5 Kincaid. Op cit.

6 NSW Government. Guidelines and Application form for clearing vegetation under the Native Vegetation Conservation Act, 1997.

7 Herron Todd White. The Rural Review. Dec. 1998

More directly, in a major recent study a detailed analysis was conducted of eight farms in south-east Australia that had significant areas of native grasslands.[8] Four of the properties were in plains areas, and a range of conservation options were examined to determine their impact on farm business profitability.

Fencing out just 2.5% of the property for conservation resulted in losses of between $16 and $42 per hectare. Lighter stocking was also examined, but when compared with a traditional cropping/pasture sequence, the results were not favourable. Planting of areas to native species such as saltbush was also examined, but the results were marginal and very sensitive to a number of management variables.

The authors conclude "None of the actions which might maintain or improve conservation management …are unambiguously profitable. Conversely, cropping native grasslands is profitable on the two Victorian properties."

For the four properties in more hilly areas, the results were not dissimilar. In all cases, the conservation options examined resulted in significant reductions in whole-farm expected operating profit, in comparison with a range of land development options that were identified.

Again, the authors conclude " … if various development options are undertaken (on native grassland areas) .. all four farmers are in a much better position to pursue conservation management." This is simply a restatement of the well-understood axiom – It's hard to be green if you're in the red.

A similar result arose from research at Charles Sturt University that examined options to conserve remnant native vegetation.[9] The conclusion was that conservation practices may not be economically rational in the short, medium or long-term, as the direct and opportunity costs associated with the conservation practices clearly outweigh the benefits. The report concluded that "Any policy approach to achieve conservation objectives for remnant native vegetation clearly requires significant financial incentives for landholders to undertake conservation activities."

These results will not surprise farmers, and in fact reflect the best-case situation for native species, as most of the studies involved native grasslands. In the case where the dominant native plants are shrubs or trees (which are less suited to grazing) the difference between returns from developed and undeveloped land would be substantially greater.

The situation has been summarised by Farrier.[10] He concludes:

> Biodiversity conservation, particularly in relation to core areas, places much greater demands on landholders than land conservation, while at the same time offering little, if anything, in terms of immediate market rewards.

[10] Farrier, D. A role for Private Landowners in Conserving Biological Diversity. Univ. of Wollongong, 1996

Reconciling Private Cost and Public Benefit

Whilst conservationists appear happy to blithely ignore the moral dilemma that exists in conserving biodiversity on private land, this issue has been the subject of considerable discussion in academic circles.

Young states that the issue is one of "Government failure not market failure. Biodiversity protection and most land degradation problems are of a public good nature."[11] He continues "this requires (Governments) to ensure that the costs of biodiversity protection and controlling land degradation are shared appropriately between society, individual landholders and the local community."

This issue was the subject of a major report released in 1996.[12] It concluded that a range of different policy instruments is necessary to encourage biodiversity conservation on private land.

The report also emphasised that motivational incentives that work to involve local communities and industries in planning, decision-making and implementation of biodiversity protection are very important.

With regard to financial considerations, some of the recommendations made were as follows:

- The Australian community as a whole should take financial responsibility for protecting biodiversity when the costs of doing so cannot be recovered by the use of market mechanisms.
- The cost of controlling and preventing threatening processes should be borne primarily by those who cause these processes.
- All those who benefit from non-market dimensions of biodiversity conservation, either directly or indirectly, should contribute to the cost of its maintenance.
- Landholders who draw attention to the presence of an endangered species … should be eligible for compensation for commercial opportunities foregone.
- As most property ownership embodies a speculative dimension, compensation for the loss of a private land development option should be used only as a transitional measure.
- When compensation is paid, it should be associated with a clear change in property rights guaranteeing the conservation of biodiversity values in perpetuity.

These recommendations appear generally supportable from a farmer's perspective, although some question may arise about the recommendation concerning threatening processes.

[8] Crosthwaite & Malcolm. An economic analysis of native grassland on the Riverine Plain of south-eastern Australia. Univ. of Melbourne. Dec 1998

[9] Miles, Lockwood, Walpole and Buckley. Report 107 CSU. 1998

[11] Young, M. Opportunities for Australia to improve conservation of remnant vegetation and to alleviate land degradation. 1997. CSIRO paper 97/12

[12] Biodiversity Unit. Biodiversity Series, Paper No. 9. Jan 1996

In the absence of a set of clearly defined biodiversity objectives, the definition of a threatening process will be flexible. At one extreme, it could extend to any activity, even grazing by livestock.

If a threatening process is defined as one which breaches the normal duty of care required of an owner of land, then this recommendation could be supported by farmers, within the context of present knowledge.

The second-last recommendation is also very important. Much is made of the need to conserve biodiversity for future generations, on the basis of intergenerational equity.

Conversely, however, the generation managing the land at the time that biodiversity conservation requirements are imposed suffers an equity loss (as noted in the earlier comments about the impact of the NSW Native Vegetation Conservation Act).

Intergenerational equity demands that the generation managing land at the time of the policy transition should be compensated for the opportunities lost as a result.

The Political Dimension

Irrespective of sound and sensible committee recommendations, the harsh reality is that policy implementation has more to do with politics than logic.

And politics dictates that whilever so-called 'green votes' are considered important, Governments will continue to impose higher conservation requirements on private landholders, as long as there is no cost to Government.

There are plenty of examples of the enthusiasm of governments for no-cost environmental policies. For example, some years ago public processes were implemented to identify the policy changes necessary to achieve ecologically sustainable development (ESD).[13] The resultant report produced 512 recommendations for change, of which 31 would have imposed some cost on government. These were referred to Commonwealth interdepartmental working groups for consideration, and not surprising, reasons were found to oppose virtually all of them.

This comes as no surprise to a group of NSW landholders whose land was incorporated in the Willandra Lakes World Heritage area, fifteen years ago. Whilst the declaration was made with much fanfare, and management restrictions were immediately imposed, successive State and Commonwealth Governments did everything possible to avoid any financial settlement for the resulting damage to landholders. Only sustained action by them resulted in a financial settlement some fourteen years later.

A similar situation arose with the NSW Native Vegetation Act. While much was made of an allocation of $15 million to provide incentives for landholders, the fund remained untouched for a considerable period, as bureaucrats were unable to come up with guidelines for landholders wishing to access it. Only the proximity of a State election resulted in a flurry to allocate some of the money.

Put simply, the higher the standard of duty of care that governments can establish by legislation or regulation, the less expensive it will be for them to achieve biodiversity conservation.

Ratcheting up the duty of care to accommodate concepts such as biodiversity conservation on private land will always be much cheaper than actually having to pay for the public good that is desired.

In some ways, farmers seeking fair treatment for the legislative removal of some of their property rights face the same dilemma that aboriginal people faced in attempting to claim native title rights to land, and perhaps there are some pointers for farmers in the way that issue progressed.

Irrespective of many expressions of goodwill, native title policy implementation only occurred when it was forced on Government via High Court rulings. In particular, it was Section 51(31) of the constitution – the just-terms compensation for land acquisition provision – which was pivotal in bringing this about.

Once governments realised that they could be required by Courts to pay compensation for the removal of native title rights and interests in land, they had little choice but to implement policy settings that accommodated this fact.

In the same way, it seems inevitable that farmers will have to test this same constitutional provision, and the related State-based legislation, in order to establish a limit to duty of care. Beyond that limit, governments and the public at large will need to be forced to provide compensation if landholders rights are to be removed for public-good purposes.

The added benefit with this approach will be that a degree of rigour and responsibility will be forced on policymakers in relation to conservation on private land. Enthusiasm for enhancements to the duty of care may be somewhat tempered if they brought with them the requirement that Governments would also need to pay the cost of these for landholders.

COMMENTS CONTAINED IN THIS DOCUMENT ARE BASED ON INFORMATION AVAILABLE AT TIME OF PUBLICATION.

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[13] Young. Op. Cit.