Ecosystem Services and an Environmental Duty of Care

ACF Comment on the VCMC/DSE Discussion Paper:


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ACF welcomes the discussion on sustainable land stewardship opened by the VCMC and DSE, and welcomes the opportunity to be involved.

ACF is on record as advocating for a greater recognition of the moral, as well as legal, responsibilities of landholders with regard to environment protection – both on- and off-farm – commensurate with their rights to natural resource use. Increasingly our society appreciates that strongly entrenched private landholders’ rights have come at the expense of irreplaceable environmental values and the health of our landscapes.

We do recognise also that, in some circumstances, the public have at least a moral responsibility to ensure that individual landholders are financially assisted through the transition to new regulatory regimes that ensure better environmental protection in the public interest.

ACF recognises potential benefits as well as significant challenges to the statutory duty of care concept being used to improve the environment. The purpose of this comment is not to enter into a detailed legal analysis of the proposals for a statutory duty of care, but rather to outline in broad terms the potential benefits and challenges of such proposals.

A Statutory Duty of Care to the Environment

According to Young, et al., a duty of care to the environment would mean every landholder has a legal obligation to take ‘reasonable and practicable’ measures to avoid harm to the environment. This duty goes beyond the current common law, which only extends the obligation to take reasonable measures to avoid harm to other persons. The proposed general statutory duty of care could be seen as an extension of existing duty of care legislation such as the Soil Conservation and Land Care Act 1989 (SA) and the Environmental Protection Act 1994 (Qld).

Potential Benefits

ACF sees significant environmental benefits that could, in theory, result from the introduction of an environmental duty of care by statute over and above the existing common law duty of care, namely:

- The interests of landholders could be expanded to include a healthy natural environment on- and off-farm, and the rights of future generations, without necessarily incurring prohibitively high administrative costs.

- Potentially, property management could be more effectively tied to regional or catchment plans, targets and standards, although the environmental benefits of a statutory duty of care are therefore largely dependent on the standard of catchment management.

- A statutory duty of care could open up new avenues for enforcing principles of ecologically sustainable development, particularly vis-à-vis recalcitrant landowners.

- Landholders may perceive a statutory duty of care as inherently flexible and adaptable to their particular situation, and as such it may be more politically palatable than traditional

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regulatory tools. As far as the environment is concerned, however, flexibility is always a double-edged sword and we would strongly caution against this being the main reason for introducing a duty of care by statute.

The extent to which a statutory duty of care would yield environmental benefits depends greatly on the degree to which other reforms, including institutional and economic policy reforms, are undertaken commensurate with its introduction. ACF agrees with Young, et al. that a statutory duty of care to the environment is thus a complementary, rather than a stand-alone policy tool for improving environmental management.

Potential Challenges

ACF also perceives that there are several substantial challenges to the use of a statutory duty of care as a driver for significantly better environmental outcomes in Victoria:

- The scope of landholders' duties.

According to Young, et al. a duty of care to the environment would mean every landholder has a legal obligation to take ‘reasonable and practicable’ measures to avoid harm to the environment. This general principle does not establish specific measures that have to complied with. Landholders, as well as courts or administrative agencies entrusted with enforcement or adjudication, will therefore need specific guidance on how to determine whether a given practice or activity is reasonable.

Under the common law of negligence, the ‘reasonableness’ test entails balancing the risks and possible harm of an action against its potential benefits. This system is at least arguably appropriate for private disputes among individuals, since there are broadly accepted principles for assessing and comparing the financial or property interests that are typically at stake. However, the proper method for measuring the benefits for biodiversity (for example) and weighing those up against private pecuniary interests is much less clear. Assessing the ‘reasonableness’ of an action affecting the environment itself, as opposed to other private persons, therefore presents novel challenges.

We believe strongly that the precautionary principle and the concept of ecologically sustainable development would be an indispensable point of departure for any assessment of ‘reasonableness’ under a general duty of care to the environment.

- Enforcement

Establishing a suitable framework for ensuring compliance with the duty of care is of paramount importance.

If the duty is ‘self-executing’, or directly enforceable in courts of law by private individuals and/or governmental authorities, there are a host of potential difficulties. The time and expense of litigation and the possibility of costs awards would dissuade many potential private litigants, especially where there has been harm to the environment but not to any one specifically injured party. Assuming damage awards for harm to the environment would be directed to a state agency for remediation, the incentives for private enforcement could be negligible.

Proving the existence of harm to the environment and the unreasonableness of the defendant’s conduct could also prove cumbersome in judicial proceedings, particularly in situations involving complicated issues of causation or collective incremental contributions to environmental harm. We find it difficult to see how an individual defendant-focused negligence remedy will solve problems of collective action, such as those that relate to water extraction and river system health.
Finally, courts themselves may be reluctant to impose significant damages awards or meaningful injunctive relief where no direct injury to the plaintiff has been shown.

An alternative approach would be to establish a strong administrative framework for ensuring compliance, without sacrificing the possible contribution of individual private enforcement. One approach, advocated by Alex Gardner in his important article on the subject,\(^2\) would be for enforcement by administrative non-compliance notices. Under this scheme, a breach of the duty would not give rise to direct civil or criminal liability, but could lead to the issuance of an administrative notice of breach, the failure to comply with which could then lead to judicial enforcement. Alternatively, the general statutory duty could allow for the making of more specific subsidiary administrative regulations or plans, which would be directly enforceable. The challenge for these sorts of structure is to ensure sufficient resources and commitment are devoted to the task of monitoring compliance.

- **Codes of Practice.**

In proposals for a statutory duty of care, voluntary standards and best practice codes are often advanced as an important component. Typically, compliance with such a code of practice is envisioned as a defence against enforcement actions, or as *prima facie* evidence of compliance with the duty.

Allowing a defence based on voluntary codes could threaten to rob the statutory duty of care of its potential as an instrument for change, however. Voluntary codes are often drawn up by or with the strong input of those who must comply with them, rather than by a broad cross-section of stakeholders. As such, they may well reflect a particular industry perspective rather than the optimal balance to which the principles of ecologically sustainable development strive. This is not to say that such codes are not useful instruments, but giving them legal effect as a defence to enforcement action may vitiate the benefits of a general duty of care.

- **Weakening of specific statutory or regulatory duties.**

The general duty of care has often been advanced as an outcomes-based alternative to the perceived unreasonable levels of specific, prescriptive regulation currently applicable to land management. The danger is that the existence of a vague, general duty will be used as an argument to repeal existing specific regulations or resist new proposals. It is difficult to foresee any such move that ACF would not oppose.

ACF believes that a statutory duty of care is unlikely to generate the kind of significant shift in land and water use and management needed to arrest the momentum of environmental decline in Victoria’s rural landscapes. Building greater resilience into Victoria’s rural landscapes and stopping the ongoing decline in ecosystem health resulting from a suite of threatening processes – eg. salinity, climate change, habitat fragmentation, bio-invasions, etc. – demands a substantial increase in public and private investment, together with a new mixture of policy tools, of which a general duty of care can be only one part.

In particular, the general duty of care should not undermine vital prescriptive legislation in areas where core environmental interests should not be subject to a “reasonableness” standard. Clear statutory prohibitions on clearing old-growth forest and destruction of habitat of endangered species, for example, remain essential tools in protecting our common environmental heritage.

Ensuring the duty of care yields better environmental outcomes

ACF does not regard a statutory duty of care towards the environment as a panacea, but rather as a complementary measure to prescriptive legislation and regulations prohibiting certain environmentally deleterious activities.

If a statutory duty of care to the environment were to be created, ACF believes that it would need to:

• Give landholders, courts and enforcement agencies clear and detailed guidance on the specific content of the duty by specifying criteria to be used in determining the reasonableness of a given action and the existence of environmental harm. These criteria should not be based exclusively on existing practice, but rather on the principles of ecologically sustainable development and objective standards of ecological health and statutory NRM plans.

• Provide for a serious administrative framework for effective enforcement, based on the promulgation of binding subsidiary regulations or the issuance of notices of breach, together with sufficient resources for enforcement agencies.

• Provide for open standing to sue on behalf of the environment, either to enforce the duty directly or to enforce any subsidiary regulations. If the enforcement framework includes administrative notices of breach, members of the public should be able to request and, on application to a court, compel issuance of a notice on presentation of evidence indicating a possible breach.

• Enforcement proceedings should be public and transparent.

• Provide for effective penalties or damages awards for breaches, with recovered funds going to a designated state authority to be used for remediation or amelioration of environmental harm.

• Not replace existing common law causes of action.

• Grant jurisdiction over enforcement actions to specialist environmental courts (such as the New South Wales Land and Environment Court), where applicable.

• Not permit costs awards against public or private parties suing to enforce the act, in recognition of the fact that such suits is brought on behalf of the environment or the public interest generally, provided that the suit is well-founded.

• Not permit compliance with voluntary best practices codes to be a defence or prima facie evidence of compliance in an action for breach, although such compliance could be considered together with other evidence.

• Ensure that governments and statutory environmental and NRM bodies continuously upgrade the standard of information, tools available and access to resources to make the ‘practicable’ test is sufficiently high to drive landholders to actually improve the environment in their care.

• Ensure that it is not used to replace or resist the introduction of other environmental regulations.
Ecosystem Services

ACF believes that the principles for the public payment for conservation actions, sustainable land management practices and ecosystem services provided for by private landholders set out in Young, et al. are reasonable.

Victoria should also commit to the facilitation of large-scale private investment in more sustainable land uses and management actions that also provide a return on investment, such as commercial-environmental ventures. Victoria may choose to do this alone, or it may choose to advocate a policy package that mobilises private capital in the environmental interests of the public within the Council of Australian Governments to effect a national policy shift with benefits for the state.

The framework outlined in the Business Leaders’ Roundtable report Leveraging Private Investment – Repairing the Country (Allen Consulting Group, 2001), proposed the creation of new institutions linking capital markets to commercially driven investment projects through land users, businesses and natural resource managers to mobilise large amounts of private investment in commercial-environmental ventures. The report draws on existing policy tools with a good track record in sectors such as health, urban infrastructure, business innovation and education.

Sustainable investment opportunities include new crops and farming systems, land-use change, (e.g. sustainable agro-forestry, tourism), infrastructure to support new markets, and resource-efficient technologies. Investments may also include the provision of ecosystem services.

The Business Leaders’ Roundtable package includes:

- Improved access to private capital through tax-preferred investment vehicles (statutory investment companies);
- A Land Repair Fund to administer a range of programs and tax concessions;
- Accreditation for commercial-environmental ventures to ensure projects yield real public as well as private benefits, and are consistent with national and catchment-based policies and objectives;
- Taxation – an integrated package of offsets and concessions tailored to make environmental investments more attractive; and
- Seed funding for innovative profitable ventures that achieve significant environmental benefits.

Variations on this model that still yield good environmental outcome are possible, and ACF welcomes further discussion on the concept.