

# **Duty of care for biodiversity in regional catchment settings: a framework to guide policy implementation**

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## **Introduction**

Past policies and practices that encouraged clearing of vegetation have led to the serious environmental problems that Australia now faces, including biodiversity loss. Over 60% of the Australian land mass is now managed privately, with much of it assigned to agricultural or pastoral production. In these areas effective biodiversity conservation is largely dependent on the willing participation of land managers in actively managing native flora, fauna and their habitats.

Governmental oversight of biodiversity conservation in the past has relied heavily on regulation, particularly on public land. Regulation on private land has been less effective, and a range of voluntary approaches to conservation, including financial incentives, moral persuasion and, more recently, programs fostering an ethic of stewardship among landholders, have been employed. While these approaches have achieved important outcomes for biodiversity conservation, each has limitations. According to the most recent State of the Environment report (Cork, Sattler, & Alexandra, 2006), our biodiversity is still declining, particularly in the agricultural zones. Other research suggests that reliance on voluntary approaches alone is unlikely to occur at a scale that will address environmental problems (Pannell et al., 2006). A statutory duty of care has been suggested as another, complementary, approach to environmental management (Industry Commission, 1998), and to biodiversity management in particular (Bates, 2001).

Since 2000, primary responsibility for natural resource management on privately managed land has been vested in 56 regional catchment management organisations across Australia. Our research is exploring what a duty of care for biodiversity means, particularly in relation to the concept of stewardship (see Earl, Curtis, & Allan, in prep.), and how it could be implemented to improve biodiversity outcomes at a regional catchment scale. This presentation focuses on an operational framework for a duty of care for biodiversity.

## **Methods**

We have adopted a qualitative research approach that includes extensive review of literature including past and present policies and practices in biodiversity management, common law, environmental law and economics. From this a framework for a duty of care for biodiversity has been devised suitable for operation at a regional catchment scale.

The framework is currently being tested in two Victorian Catchment Management Areas. Interviews and focus group meetings are being carried out in each catchment to ascertain the acceptability of the framework among key stakeholders, including staff from a range of government agencies, landholders, industry groups and conservation groups. In this presentation key elements of the framework are explained.

## **The framework**

### ***Introduction***

The duty of care framework is presented as a policy instrument to assist with the maintenance or improvement of ecological processes, which is an important element of biodiversity conservation (Lunt et al., 2007). It intentionally does not focus on assets of high 'value', but instead seeks to cater broadly for all species and the ecosystems they survive in, by supporting underlying ecological processes.

The framework follows closely the model proposed by the Industry Commission (1998) and Bates (2001) for a statutory duty of care, but it is designed to operate within the existing State-based systems of responsibility for natural resource management, and is focused on application at a regional catchment or sub-catchment scale. It is proposed as a statutory instrument containing both mandatory (regulated) and voluntary elements, and provides positive pathways for action leading to compliance with the duty and ongoing improvement, as well as tiered sanctions to discourage or penalise noncompliance. The framework is designed to accommodate changes in the duty of care that will inevitably result over time, with the advent of new technology, new knowledge, new expectations from society, or new climatic conditions in relation to biodiversity conservation.

It also draws on the traditional duty of care elements of *reasonable care* and *foreseeable harm* to influence how duty-holders should be sanctioned (negatively or positively) in the event of noncompliance or during a time of change. In this way, the duty of care can be tailored to take account of individual situations – environmental, social and economic.

### ***How could a statutory duty of care for biodiversity be phrased?***

In statutory law, it is imperative that terms used in the body of legislation be clearly defined. Where uncertainty about the meaning of terms arises in the courts, judges will refer back to common law interpretations to provide clarification (Bates, 2001). A duty of care for biodiversity could be phrased in the following way:

*All resource managers have a duty to the community (that values biodiversity), to take reasonable care to ensure that their land management does not cause foreseeable harm to the biodiversity which they have influence over.*

This statement provides a simple statement of a duty of care for biodiversity that could appear in the *body* of the legislation. As well as *biodiversity* and *land management*, it contains a number of terms including *resource managers*, *the community*, *reasonable care* and *foreseeable harm* that would require clear definition within the terms of the statute. These definitions are discussed in the presentation.

### ***Key elements of the framework***

The framework sets out a process for determining whether a duty of care for biodiversity has been met. It is intended for use by regional natural resource managers and landholders, and offers multiple pathways for positive management of biodiversity while retaining the capacity to invoke stronger sanctions where management is deemed to be causing foreseeable harm to biodiversity. Core elements of the framework are the *desired outcomes* for an ecosystem, and the *current recommended practices* that, based on the best available information, are likely to lead to the desired outcomes.

#### *Desired outcomes*

Desired outcomes are intended to maintain or improve ecological processes for an ecosystem at a landscape scale (Lunt et al., 2007). They need to be consistent with higher order targets such as regional catchment targets, but tailored to be locally relevant. Once the desired outcomes for an ecosystem in an area have been negotiated, they could become incorporated into the statutory legislation, for example as a listed schedule. Responsibility for determining what the desired outcomes should be would rest with a committee of appropriately informed and reasonable people, comprising representatives with an interest in biodiversity drawn not only from the local community, but also more broadly. A model for this type of committee was set up for the now defunct Regional Vegetation Planning process in NSW.

#### *Current recommended practices*

To support progress towards the desired outcomes, a set of current recommended practices (CRPs) for an ecosystem is proposed. CRPs would be based on the best science and information available, notwithstanding the imperfect knowledge about biodiversity and ecological processes. Unlike the desired outcomes, CRPs would remain voluntary, but their adoption would guarantee compliance with the duty of care.

Together, the desired outcomes and the CRPs would elaborate a standard of normal biodiversity management for each ecosystem. Landholders employing management practices that were deemed insufficient to meet the desired outcomes would not be meeting the duty of care.

#### *Compliance with the duty of care*

It is envisaged that most landholders would achieve compliance with the duty of care. Compliance would enable landholders to be eligible for stewardship or other incentives for any additional measures undertaken to promote biodiversity, as that work would be seen as providing biodiversity conservation beyond the duty of care.

#### *Non-compliance with the duty of care*

Non-compliance with the duty of care would remove eligibility for stewardship incentives, addressing the problem of ‘crowding out’, where the prospect of financial subsidy may stifle individual motivation to act voluntarily (Reeson & Tisdell, 2006). A range of sanctions for addressing noncompliance are proposed, depending on the risk to biodiversity, and the context of the noncompliance (whether ‘reasonable steps’ were taken, and whether the harm to biodiversity was ‘foreseeable’). Sanctions include positive measures, such as education, information, and transition incentives, to assist non-compliant but willing landholders to move to a level of compliance, as well as stronger punitive measures, including financial and legal penalties, for unwilling landholders. Where costs are involved in the transition from non-compliance to compliance, the framework draws on the concept of ‘reasonable’ measures, incorporating economic and social considerations, to determine whether an impacter-pays or a beneficiary-pays approach should be adopted. Where it is deemed unreasonable for a landholder to pay all costs in order to achieve compliance with the duty, financial assistance may be given to assist the transition to compliance. Transition payments should be distinguished from stewardship payments for biodiversity conservation above the duty of care, in name, intent and duration. It is envisaged that peer pressure, along with the legal status of the duty of care and the desired outcomes, would play a strong role in encouraging positive measures to achieve compliance with the duty of care.

#### *Managing change*

Over time, changes in knowledge, in technology, and in community expectations will occur. A duty of care framework needs to have the flexibility to adapt with these changes. It is proposed that a review process be undertaken at least every 10 years, to allow the duty of care to be adapted. Where this entails changes to the desired outcomes and/or CRPS, it is envisaged that transition payments would be available for a specified period, where it was deemed unreasonable for landholders to fund changes alone. As above, transition payments should be distinguished from stewardship payments. After the transition period, the new desired outcomes and CRPs would be incorporated into the new duty of care, embodying a new standard of normal biodiversity management.

#### *Other considerations*

Additional aspects of the framework still require articulation. These include issues concerning the impact on property rights, monitoring for ecosystem outcomes and monitoring for compliance, as well as the procedures for resolving issues of non-compliance. These will be explored during case studies.

### **Concluding remarks**

This research represents a novel attempt at designing an operational duty of care suitable for use at a regional catchment scale, but does so by harnessing many practices and approaches currently used in biodiversity management into a coherent framework. It provides a focus for the management of biodiversity as a whole, including the ordinary, the insignificant and the unknown, and the ecological processes on which they depend, complementing existing approaches which have a stronger focus on more ‘valued’ assets, such as threatened species. The framework also identifies a number of points for government intervention.

The potential benefits of an operational duty of care for biodiversity could be felt by a number of stakeholders:

For biodiversity program managers, the framework offers a policy instrument to guide and make transparent decision-making in relation to biodiversity management on private land.

For landholders, the framework provides an educational and information instrument that sets out and encourages standards for responsible management of biodiversity.

For the community interested in biodiversity conservation, the framework provides an instrument that sets out a process of accountability for biodiversity management.

## References

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