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Scientific and practical development of agricultural law in the EU, in countries and in the WTO – Développement scientifique et pratique du droit rural dans l'UE, dans les pays et dans l'OMC – Wissenschaftliche und praktische Entwicklung des Rechts des ländlichen Raums in der EU, in den Ländern und in der WTO

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**A statutory duty of care and farmers' natural resource
management**

Report for Australia

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Summary

The statutory duty of care as a basis of legal accountability for farmers' sustainable land management is a legal development in Australia that is the focus of this report. Using a duty of care in this way raises issues about the tensions between farmers and society and the absence of clear definition of boundaries of responsibility. The intention of the statutory form is difficult to achieve given that administrative enforcement processes are favoured over a civil process. Administrative actions to enforce the legislation are however likely to be challenged in court due to the potential effects on farmers' property interests, requirements for expenditure or possible criminal sanctions for non compliance. When this occurs the courts will draw on the common law duty of care from civil negligence, in the absence of other clear direction, for guidance about how this new statutory form may function. This expectation of judicial review mirrors the experience with implementation of the statutory precautionary principle, from initial confusion over the practicality of political aspiration in the statement, to a detailed judicial interpretation of its use in decision-making. Legislation for native vegetation conservation provides another example where political aspirations for sustainability have proven impossible to enforce. Implementation of sustainable development through law is a field where political aspirations are likely to be frequently dashed. Testing the potential effect of judicial review through an experimental moot court, where legal practitioners and a judge applied their expertise to a hypothetical problem involving enforcement of a farmers' statutory duty of care confirmed the anticipated challenges for implementation of a statutory duty of care.

II. Questions

1. What are the main legal developments (legislation and jurisprudence) in recent years, including the WTO, EU and national law in the following areas, seen from your national view: Rural environmental law?

The main legal development examined in this report is the attempt to reinsert concepts of ethical responsibility or 'virtue' into natural resource management for farmers. Incorporating a duty of care and ecologically sustainable development into statute are examples of how this has been implemented in Australia. A statutory duty of care provides the most overt attempt by the State to use moral relationships as a basis for management.

In various Australian jurisdictions the common law duty of care to avoid harm to one's legal neighbour has been extended by statute to a duty of care for the environment.¹ Their application has not yet been tested in court. While there are expectations that a duty of care will provide a practical means of ensuring accountability at lower cost than more prescriptive methods, there is also the possibility that the approach will prove to be challenging to the courts, to the affected communities, and will be difficult to apply. While the language has roots in civil litigation, the framing of statutes demonstrates intent to apply the term differently.

The statutory versions represent Parliamentary intent to create a new approach for environmental protection and natural resource management by farmers. This is embedded within the words 'a duty of care'. The circumstances for application of this new duty are highly varied. While its policy advocates believe its application will be relatively simple, the possibility is that court interpretation will eventuate and highlight complexities glossed over in the political and parliamentary processes. This is a concealed multiple reference inherent in a duty of care, as the words are capable of varied practical meaning dependant on the view of those using the term.²

There is a variety of expectations about a duty of care (table 1). These interpretations highlight the difficulty of reconciling social and political expectations with a legal application of the concept. Competing interpretations lead to our expectation that its enforcement will be open to challenge by judicial review.

¹ See s.319 (1994). Environmental Protection Act. Queensland. See s.199 (1994). Land Act. Queensland. See s.20 (1994). Catchment and Land Protection Act. Victoria. See s.25 (1993). Environment Protection Act. South Australia. See s.9 and s.133 (2004). Natural Resources Management Act. South Australia. See s.23 (2003). River Murray Act. South Australia. See s.7 (1989). Pastoral Land Management and Conservation Act. South Australia. See s.23A (1994). Environmental Management and Pollution Control Act. Tasmania. See s31(1) Code of practice to provide reasonable protection to the environment (1985). Forest Practices Act Tasmania.

² Stone, J. (1968). Legal System and Lawyers' Reasonings. Stanford, California, Stanford University Press. See page 246.

Table 1 Variations for a duty of care and natural resource management by farmers

Interpretations of the 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?

We expect that the courts will be faced with obstacles to the practical implementation of a duty of care. These include; the variety of expectations and interpretations of a duty of care (table 1), its enactment as an administrative instrument, enforcement of political intentions being tested in the court, and the implications of the courts likely reliance on common law to develop a new meaning for the duty of care in pursuit of sustainability.

2. Which of the legal development(s) stated above (see point 1), do you consider of greatest practical importance? Why?

The practical importance of a statutory duty of care is its potential as a process for defining clear boundaries of responsibility. This potential may be foiled by the problem of defining clear practical expectations for stewardship by farmers and by the administrative enforcement regime.

The problem is one of drawing clear boundaries between an owner's private rights to exploit and the community's interest in conservation.³ Property rights reflect the fact that ownership requires the community as a whole support that owner in defending their interest. Thus there is a form of consensus involved about responsibility from and to the community.⁴ Where the community is dissatisfied with this bargain it can impose constraints through statutes, or it can apply force or sanctions to ensure that the collective interest is not ignored.⁵ The boundary between public and private is not specified, nor is it fixed across time. The use of a statutory 'duty of care' is intended to better reflect this flexibility than would more specific and detailed requirements.

³ Stallworthy, M. (2002). Sustainability, land use and environment. A legal analysis. London, Cavendish Publishing Limited. See page 78.

⁴ Martin, P. and M. Verbeek (2002). Property Rights and Property Responsibility. Property: Rights and Responsibilities. Canberra, Land and Water Australia: 1-12. See page 1.

⁵ Stallworthy, M. (2002). Sustainability, land use and environment. A legal analysis. London, Cavendish Publishing Limited. See page 79. See generally Raff, M. (2005). Toward an Ecologically Sustainable Property Concept. Modern Studies in Property Law. E. Cooke. Oxford, HART Publishing. Coyle, S. and K. Morrow (2004). Philosophical foundations of environmental law, property, rights and nature. Oxford and Portland Oregon, HART Publishing. See page 2, where such boundaries are usually the subject of environmental statute with its policy driven limitations on private entitlements.

Generally the statutory versions require farmers to undertake all reasonable and practicable measures or exercise reasonable consideration or exhibit reasonable land management behaviour, to prevent or minimise environmental harm or harm to land. Advocates of this form of duty expect it to offer farmers a self regulatory way to acquit their responsibilities.⁶ Administrative enforcement, rather than private litigation or policing, is intended to remove the spectre of litigation. Because the outcome of these administrative decisions can affect property interests (leaseholds particularly), require expenditure, and have the potential for criminal sanctions for non-compliance, the potential exists for judicial review.

Administrative enforcement raises significant uncertainties about how a duty of care may be applied including:

1. The reasoning steps that will be applied
2. The type of evidence that may be required as a result; and
3. Whether the enactment will be read to broaden or to narrow the type of obligations on the resource user.

These are significant uncertainties, since the duty ostensibly sets the minimal statutory standard of stewardship for millions of hectares; and the issue of degrees of responsibility is a hotly contested issue. Despite the preference in statute for administrative enforcement, it is our expectation that such conflict will lead to opportunity for judicial review.

The indeterminacy of the accountability coupled with the likelihood of administrative appeal suggests that judicial interpretation will arise once the duty is applied in ways that impact on land users.⁷ The indeterminacy also suggests that administrative implementation and judicial interpretation will be complex, and that more specific guidance will be required by land users. This type of dynamic has been evident with interpretation of the statutory precautionary principle by the courts.

⁶ Industry Commission (1998). *A Full Repairing Lease*. Inquiry into Ecologically Sustainable Land Management. Canberra: 544, Australian Farm Institute (2001). *Statutory Theft. Occasional Papers*. Sydney, Australian Farm Institute, House of Representatives Standing Committee on Environment and Heritage (2001). *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. Canberra, The Parliament of the Commonwealth of Australia: 240, Australian Conservation Foundation (2002). *The Ecovine Project: from agricultural environmental management systems to regional outcomes*. Melbourne, Griffin/Alexandra & Associates for Land & Water Australia, Southcorp & Australian Conservation Foundation, Australian Conservation Foundation (2002). *Rights and Responsibilities in Land and Water Management. Discussion Paper*. Melbourne, Australian Conservation Foundation, Keogh, M. (2002). *Property rights and farming in Australia. Defining duty of care for farm land*. Sydney, NSW Farmers Association, The Wentworth Group of Concerned Scientists (2003). *A New Model for Landscape Conservation in New South Wales*. Sydney, WWF, Young, M., T. Shi, et al. (2003). *Duty of care: An instrument for increasing the effectiveness of catchment management*. Melbourne, Department of Sustainability and Environment, National Farmers' Federation (2004). *Policy on Sustainable Production, Land and Native Vegetation*. Canberra, National Farmers' Federation, Watts, M. C. (2004). *Getting on track? A discussion paper on Australia's progress towards ecologically sustainable management of our rural landscapes*. Melbourne, Australian Conservation Foundation.

⁷ Stapleton, J. (1998). *Duty of Care Factors: a Selection from the Judicial Menus. The Law of Obligations: Essays in Celebration of John Fleming*. P. Cane and J. Stapleton, Clarendon Press. See page 76 regarding the indeterminacy concern.

At common law the duty of care functions as a two stage process, setting flexible standards. Contexts and relationships are examined to decide whether one person is under an obligation and has acted reasonably towards 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 the action needed to satisfy the duty, arise once the general obligation to take reasonable care is established. Norms are established by patterns of judicial decision making over many particular claims of breach. Creating these requires that issues be contested before the courts.

The boundary setting role of the courts in giving practical meaning to the duty of care is downplayed by the administrative enforcement approach of statutory enactments in Australia. This usually involves issuing an order or notice for which non compliance is an offence. Action by 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 (Figure 1).

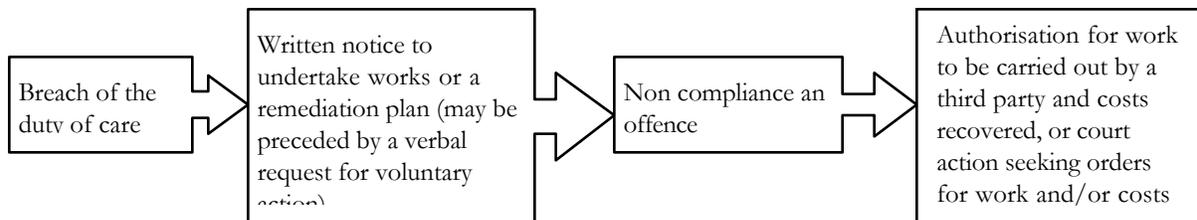


Figure 1 A generic compliance process for a statutory duty of care

A key factor in this model is enforcement by an administrative body (such as a department, catchment authority or natural resource management board) with the relevant knowledge and standards about natural resource management and environmental protection. The generic consequence of this process for the farmer can be an order which involves additional costs, possible prosecution for non compliance, or loss of a leasehold property interest. These economic consequences are likely to create an incentive for judicial review where the practical meaning for a statutory duty of care will need to be established.

3.1 Which of the above (see point 1) stated legal developments you consider as particularly successful? State why?

Using a statutory duty of care as a legal principle for sustainable land management has potential to embed virtue as a new policy direction for natural resource management unlike institutional designs such as traded market instruments or policed controls that eschew virtue. Often, instead of relying on the moral commitment of resources users to environmental outcomes or to their neighbours, policy makers have assumed that virtue is a scarce resource. The assumption has been that if we are to choose between two alternative systems, one which relies on the commitment of agents to moral principles and which does not, we should choose the one which is more parsimonious about virtue. Initially faith was placed in regulation which was reliant on the control capacity of government. Actors would be motivated to constrain self-interest by fear of legal sanction. In recent times that faith has been transferred to the market, the idea being that the self-interest of economic agents will lead them to act in ways that promote the common good. These virtue parsimonious responses are evident in water policy. Institutional responses which are 'virtue-rich' require a greater concern with individual moral virtue as a habit of practice in natural resource management.

A primary role for law in agriculture is to define the responsibilities of access and use of natural resources. These can be structured around accountability as a minimum required level of

behaviour, or virtue as a desired standard of ethical performance. This is a distinction pertinent to global expectations about sustainability and universal responsibility. The responsibilities associated with natural resources are linked to access and use rights. Rights exist as a legally supported relationship between people governing control and access to resources. Within this relationship there is potential for virtue to shape relationships which reflect moral expectations to the broader community, and to immediately affected neighbours.

Over the long term, the model of responsibility in water access and use has shifted from a regime of private (riparian) rights reflecting moral obligations, to regulation and planning with its focus on accountability and punishment, and then to market mechanisms that reward the private good in defining the 'most appropriate' access and use regimes. The historical notion of riparian rights suggests that each downstream riparian owner has the right to receive a flow of water unaltered in flow or quality and each upstream user has an obligation to ensure that is the case.⁸ These are private rights enforceable by civil litigation. A habit of caring for others is embedded in riparian rights. The utility of such an approximation of virtuous practice was diminished in statute with its reliance on planning and enforcement as a way to manage resource access and use. The market with its focus on the supremacy of private economic interest also lacks a morally oriented view. Virtue and duty offer an approach related to ethical boundaries of responsibility.

3.2. Which of the above (see point 1) stated legal developments you consider as particularly unsuccessful? State why?

Natural resource conservation legislation which presumes the availability of scientific data, or the capacity of science to make reasonably clear judgements about scientific 'facts' has demonstrated problems of practical application. In Australia, vegetation conservation legislation, and use of the precautionary principle in environmental assessment legislation, embeds the expectation that scientific data will allow precise categorisation of landscapes, and estimation of the ecological impacts of land use. In making the legislation, Parliament anticipated that this would be scientifically feasible.⁹

In practice categorisation terms themselves have often proven to be legally or scientifically imprecise, and data inadequate, for easy implementation of the legislation. Both those regulated and those regulating have found themselves lacking scientific resources which the words of the legislation presumed. This has resulted in legal and political conflict, economic cost, and undermined the credibility of the government agents charged with enforcement.¹⁰ It seems likely

⁸ Howarth, W. (1992). *Wisdom's Law of Watercourses*. Crayford, Kent, Shaw & Sons Limited.

⁹ (1997). Native Vegetation Conservation Bill (New South Wales) Second Reading Speech.

¹⁰ For a discussion about the tension in this science-law interface see Martin, P., R. Bartel, et al. (2007). *Developing a Good Regulatory Practice Model for Environmental Regulations Impacting on Farmers*. *Research Report*. Surry Hills, Australian Farm Institute. Also note the terms of reference for (2009). *Inquiry into the operation of the Environment Protection and Biodiversity Conservation Act 1999*. *The Senate Standing Committee on Environment, Communications and the Arts*. Canberra.

These show that uncertainty about effectiveness of regulatory measures remains a concern of Parliament. For an overview of problems with meeting evidentiary requirements and measuring clearing of native vegetation in NSW see Auditor-General of New South Wales (2002). *Performance Audit Department of Land and Water Conservation, Regulating the Clearing of Native Vegetation* Sydney, NSW Audit Office. and Auditor-General of New South Wales (2006). *Performance Audit. Regulating the Clearing of Native Vegetation. Follow-up of 2002 Performance Audit*. Sydney, The Audit Office of New South Wales. For a review of the economic cost of weeds to agriculture and public conservation management see Sinden, J., R. Jones, et al. (2004). *The economic Impact of Weeds in Australia*. *CRC for Australian Weed Management Technical Series*. Glen Osmond, CRC for Australian Weed Management. For a critique of markets that do not represent environmental costs in natural resource management and suggested effective alternatives see Chaudhri, V. (2003). *Market-like Policy Options*, Department of Sustainability and Environment (Victoria). For an assessment of

that further legislative change and science investment will be needed to overcome these unanticipated problems.

The statutory duty of care is often contained in legislation with objects to achieve or promote ecologically sustainable development or sustainable management.¹¹ Ecologically sustainable development is a central element of decision making about natural resources,¹² with detailed meaning interpreted by reference to a range of principles. The statutory precautionary principle is one that has proven difficult to implement and been the subject of judicial reinterpretation through administrative review of planning decisions. This provides an example to reinforce our expectation about the fate of a statutory duty of care.

The *Protection of the Environment Administration Act* (NSW) 1991 introduced a statutory precautionary principle within its definition of ecologically sustainable development.¹³ This has been adopted into other statutes dealing with environmental protection, planning and natural resource management.¹⁴ The economic consequences of enforcement of the precautionary principle have meant that its use by administrative bodies has been challenged in court. The principle has been found to represent political aspiration with the potential for “interminable forensic argument” in its implementation as a legal standard.¹⁵ Interpretation has required detailed judicial explanation and a procedure for application to be developed by the courts.¹⁶ It is our expectation that the statutory duty of care will be subject to similar judicial refinement.

With native vegetation, the NSW Parliament intended to provide a scientifically rigorous approach with workable solutions for farmers to achieve sustainable land management.¹⁷ Five years after the legislation was enacted the Auditor-General found no strategic approach to vegetation conservation had been successfully established and that the regulator lacked comprehensive information about the status of vegetation to effectively and efficiently regulate for its conservation.¹⁸ No prosecutions for clearing under this legislation were successful in court.

the economically optimal provision of native vegetation and biodiversity conservation see Productivity Commission (2004). Impacts of native vegetation and biodiversity regulations. Melbourne.

¹¹ See s.3 (1994). Environmental Protection Act. Queensland. S.4 (1994). Land Act. Queensland. S.10(1)(a) (1993). Environment Protection Act. South Australia. S.7 (2004). Natural Resources Management Act. South Australia. S.6(1)(d) (2003). River Murray Act. South Australia. S.8 and Schedule 1 (1994). Environmental Management and Pollution Control Act. Tasmania. Schedule 7 (1985). Forest Practices Act Tasmania.

¹² See para 57. (2006). Bentley v. BGP Properties Pty Limited. *NSWLEC*, New South Wales Land and Environment Court. **34**.

¹³ See s.6(2)(a)

¹⁴ For example see (1974). National Parks and Wildlife Act. New South Wales, (1979). Environmental Planning and Assessment Act. New South Wales, (1995). Threatened Species Conservation Act. New South Wales, (2000). Water Management Act. New South Wales.

¹⁵ Talbot J. in (1994). Jeffrey Nicholls v. Director General National Parks and Wildlife Service. *LGERA*, New South Wales Land and Environment Court. **84**: 397.

¹⁶ Preston CJ in (2006). Telstra Corporation Limited v. Hornsby Shire Council. *NSWLEC*, New South Wales Land and Environment Court. **133**. See paras 127 to 183.

¹⁷ (1997). Native Vegetation Conservation Bill (New South Wales) Second Reading Speech.

¹⁸ Auditor-General of New South Wales (2002). Performance Audit Department of Land and Water Conservation, Regulating the Clearing of Native Vegetation Sydney, NSW Audit Office. A follow-up audit identified that many of the concerns about enforcement had been addressed by the changes to exemptions and responsibility for clearing in the new vegetation legislation, see Auditor-General of New South Wales (2006). Performance Audit. Regulating the Clearing of Native Vegetation. Follow-up of 2002 Performance Audit. Sydney, The Audit Office of New South Wales. The new legislation referred to is (2003). Native Vegetation Act. New South Wales. It was enacted to

4. Can you make out, considering the above developments, any new or existing trends? How do you assess future developments in that issue?

Our view is that implementation of a statutory duty of care for natural resource management will be difficult and slow. This has been illustrated by the experience with implementation of the statutory precautionary principle, and problems with native vegetation conservation legislation. The potential impact of administrative decisions on property interests suggests the likelihood of court challenges to enforcement decisions.

5. How do you assess the overall role of international and European legislation for the development of rural areas?

International and European law can provide insights into the use of a statutory duty of care to achieve stewardship of natural resources by farmers. In all jurisdictions there is confusion about a standard of performance that society expects of farmers, highlighting the difficulty of linking political aspirations to practice.

Policy for environmental stewardship by farmers in England reflects these tensions. The EU common agricultural policy uses good agricultural and environmental practice as a normative standard for environmentally friendly farming performance.¹⁹ This is the baseline standard of accountability for farmers.²⁰ Land stewardship incentives also seek to establish good farming practice beyond the good agricultural and environmental condition baseline.²¹ It is this latter use that reflects aspirations in Australia to use a statutory duty of care as the basis for a new ethic of virtuous land management behaviour by farmers.²² In England the accountability standard (good agricultural and environmental practice) is implemented via the 'Single Payment System' while the virtuous performance standard (good farming practice) applies under a tiered 'Stewardship Scheme'. These illustrate two standards of performance that could validly be required of farmers to meet their duty of care. Confusion remains over which of these approaches it should be.

A second tension that is highlighted by European farm stewardship policy is the difficulty in matching policy aspirations to practice. Both the approaches above contain soil protection components, where management guidance is provided by reference to government guidelines

end broad scale clearing by providing clear objects to end clearing, standard definitions about what vegetation is protected and not, allowing for routine agricultural management and providing a consent process based on property planning. See (2003). Native Vegetation Bill (New South Wales) Second Reading Speech.

¹⁹ Rodgers, C. P. (2003). Agenda 2000, land use, and the environment: Towards a theory of 'environmental' property rights? *Law and Geography. Current Legal Issues 2002*. J. Holder and C. Harrison. Oxford, Oxford University Press. 5: 239-258. Rural Payments Agency and Department for Environment Food and Rural Affairs (2009). The Guide to Cross Compliance in England. Department for Environment Food and Rural Affairs (UK).

²⁰ See page 2, Rural Payments Agency and Department for Environment Food and Rural Affairs (2006). Single Payment Scheme. Cross Compliance Guidance for Soil Management. Department for Environment Food and Rural Affairs (UK)..

²¹ Rural Development Service (2005). Entry Level Stewardship Handbook. Terms and Conditions and How to Apply. Department for Environment Food and Rural Affairs (UK).

²² Gardner, A. (1998). "The Duty of Care for Sustainable Land Management." *The Australasian Journal of Natural Resources Law and Policy* 5(1). Industry Commission (1998). A Full Repairing Lease. Inquiry into Ecologically Sustainable Land Management. Canberra: 544, House of Representatives Standing Committee on Environment and Heritage (2001). 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. Canberra, The Parliament of the Commonwealth of Australia: 240.

and/or codes of practice. For example, one document referenced to guide implementation of both the good agricultural and environmental condition and good farming practice is a manual for the assessment and management of soil erosion.²³ The guidance provided by this document leads to an assessment of erosion risk on the farm, which it does very well, but it does not connect the farm with the catchment by assessing the risks of cumulative soil and water movement off-farm and the potential significant impact on the ecological status of receiving waters.²⁴

Another example of the difficulty in linking political aspirations to practice exists with the implementation of sustainable development. Sustainable development is recognised internationally in a range of commitments and obligations about needs, limits, equity and integrated systems.²⁵ For Australia these are assumed into domestic law in fragmented ways, one of which is the creation of environmental duties of care in statutory form in several jurisdictions.²⁶ Whilst the connotations of sustainable development and a duty of care are readily accepted politically and legally, when it comes to denoting particular behaviours with specific (economic) consequences the terminology may prove to be more slippery than one might expect.²⁷ The competing expectations that a statutory duty of care will better encourage sustainable management and at the same time reduce the high transaction costs, complexity and inflexibilities claimed of traditional regulation may not be reconcilable in practice.²⁸ The expectations associated with a statutory

²³ Department for Environment Food and Rural Affairs (2005). *Controlling Soil Erosion: A Manual for the Assessment and Management of Agricultural Land at Risk of Water Erosion in Lowland England*. Department for Environment Food and Rural Affairs (UK).

²⁴ Boardman, J., M. L. Shephard, et al. (2009). "Soil Erosion and Risk-assessment for On- and Off-farm Impacts: A Test Case Using the Midhurst Area, West Sussex, UK." *Journal of Environmental Management in press*(doi:10.1016/j.jenvman.2009.1.018).

²⁵ Sands, P. (2003). *Principles of International Environmental Law*. Cambridge, Cambridge University Press. See page 266. See also World Commission on Environment and Development (1987). *Our Common Future*. Oxford, Oxford University Press.

²⁶ For ecologically sustainable development see; Ecologically Sustainable Development Steering Committee and The Council of Australian Governments (1992). *National Strategy for Ecologically Sustainable Development*. Department of Environment Water Heritage and the Arts, Commonwealth of Australia., (1991). *Protection of the Environment Administration Act*. New South Wales. (1999). *Environment Protection and Biodiversity Conservation Act*. Commonwealth of Australia. A statutory duty of care reflecting ecologically sustainable development exists in (1985). *Forest Practices Act Tasmania*, (1993). *Environment Protection Act*. South Australia, (1994). *Environmental Protection Act*. Queensland, (1994). *Land Act*. Queensland, (1994). *Environmental Management and Pollution Control Act*. Tasmania, (2003). *River Murray Act*. South Australia, (2004). *Natural Resources Management Act*. South Australia.

²⁷ Lee, M. (2005). *EU Environmental Law: Challenges, Change and Decision-Making*. Oxford, Hart Publishing. See page 25.

²⁸ House of Representatives Standing Committee on Environment and Heritage (2001). *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. Canberra, The Parliament of the Commonwealth of Australia: 240. Industry Commission (1998). *A Full Repairing Lease*. Inquiry into Ecologically Sustainable Land Management. Canberra: 544. Gardner, A. (1998). "The Duty of Care for Sustainable Land Management." *The Australasian Journal of Natural Resources Law and Policy* 5(1), Martin, P., R. Bartel, et al. (2007). *Developing a Good Regulatory Practice Model for Environmental Regulations Impacting on Farmers*. Research Report. Surry Hills, Australian Farm Institute. Australian Farm Institute (2001). *Statutory Theft*. *Occasional Papers*. Sydney, Australian Farm Institute, Australian Conservation Foundation (2002). *Rights and Responsibilities in Land and Water Management*. *Discussion Paper*. Melbourne, Australian Conservation Foundation, Keogh, M. (2002). *Property rights and farming in Australia*. Defining duty of care for farm land. Sydney, NSW Farmers Association, Young, M., T. Shi, et al. (2003). *Duty of care: An instrument for increasing the effectiveness of catchment management*. Melbourne, Department of

duty of care have already been highlighted by the interpretations in Table 1. Many of these reflect a varied understanding of the process that the duty of care provides in the common law. While making the duty an administrative instrument may (perhaps) prevent the courts from being involved in attempting to resolve the irreconcilable meanings, it will not prevent political disappointments from the implementation of this approach.

On the basis of this exploration of a particular component of the abstract ideas embodied in sustainability, we question whether better legal mechanisms might be needed to give effect to this ideal. The implications for sustainable development internationally are that political expectations are unlikely to be realised when the legal mechanisms do not create clear accountability.

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