Some Legal and Social Expectations for a Farmer’s Duty of Care

Mark L. Shepheard

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Mark Lewis Shepheard

Australian Centre for Agriculture and Law
University of New England

CRC for Irrigation Futures
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Executive Summary

The term ‘duty of care’ conceals a conflict of multiple meanings and unresolved debate about norms of environmental protection for farmers. This complexity makes clear definition of its practical meaning difficult. Despite this, a statutory duty of care is used in several Australian jurisdictions to define the environmental protection responsibilities of farmers. Such generally defined statutory duties in legislation with the lofty (and equally general) goals of achieving ecologically sustainable development are likely to lead to dispute when their practical meaning needs to be defined.

In the absence of direct legal precedent it is likely that a common law interpretation of a duty of care will be utilised to give clear meaning. Dispute over interpretation of statutory duties is likely, since their enforcement will probably impact the proprietary or economic interests of farmers. When this occurs it is expected that courts will become involved, and a tension will be exposed between the minimum accountability of ‘reasonable care’ under a common law interpretation of a duty of care, and the virtuous expectations of performance embodied within the statutory duties.

This report identifies the competing interpretations for a duty of care in its use to define farmers’ environmental protection responsibilities. A common law interpretation based on reasonable care is likely to be used by courts to interpret practical meaning for a poorly defined statutory duty of care for environmental protection. Such a minimal accountability interpretation is unlikely to meet the expectations of statutory duty advocates to legitimise a higher standard of virtuous performance and achieve environmentally benign farming systems.
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1. Introduction

In the past two decades there has been a number of government and academic enquiries into the potential use of the legal concept of a duty of care in statutes to encourage sustainable practices by farmers in their social roles as stewards of the land (Bates 2001; Department of Sustainability and Environment (Victoria) 2008; Gardner 1998; House of Representatives Standing Committee on Environment and Heritage 2000, 2001; Industry Commission 1998; Young et al. 2003). As a consequence, the duty of care has been adopted in a number of statutes dealing with environmental protection and natural resource management (examples are from statutes in Queensland, South Australia, Victoria and Tasmania detailed later in the report). The reason for this interest in a duty of care is that it has traditionally proven useful for setting boundaries for appropriate behaviour within society: it basically applies community norms of responsibility to assist in resolving complex disputes between neighbours. It does this in an apparently flexible way, taking into account the particular circumstances of the case.

There is some precedent for the use of a duty of care to define responsibility in legislation. It has worked successfully, for example, in the Corporations Act 2001 (Cth), with the general duties in sections 180 to 184: 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 information. However, such instances of success do not mean that the introduction of a duty of care into natural resources legislation will be trouble free. The reasons for this are partly to do with the relative novelty of modern expectations regarding stewardship of natural resources, and partly to do with the particular nature of a duty of care.

Confusion about natural resources regulation and policy is a practical concern for farmers. It creates ambiguity, legal risk and expense. In this report, I argue that the duty of care provides a recent example of regulation where the words used in statute create the potential for future conflict and confusion.

This report explores the problematic issues surrounding the introduction of a duty of care into natural resource legislation and how some of these problems might be addressed. At the heart of the problems is the tension created by differing understandings of the meaning of duty of care and the functional complexity in the implementation of the duty of care within the societal context. Whereas a common law duty of care is concerned with accepted norms of behaviour and minimum
accountability within those norms, statute is more likely to be focused on ambitions of responsibility that aspire to the 'virtuous behaviour' of natural resource users. But the aspirations are complicated by the fact that what constitutes 'good' environmental behaviour is often disputed. The implementation of the two forms of 'duties' also differ; a common law duty of care is adjudicated through the court system, and the statutory duty of care for environmental protection is adjudicated through government administrative frameworks, but with a possible recourse to the courts for administrative law failings.

This report begins by discussing the traditional, common law duty of care and how it differs from a statutory duty of care. It then outlines how various statutes in Australia have attempted to define a duty of care relative to natural resources. The different processes in the implementation of statutory and the common law duty of care are also reviewed.

There is a discussion of the nature of environmental responsibility in relation to farmers and how the changing nature of that responsibility is at the heart of understanding the emergence of statutory duty of care in natural resource regulations. The fundamental question is whether a statutory duty of care is intended to enforce a minimum level of performance or require virtuous behaviour that takes into account wider expectations about public responsibility. Both conceptualisations are present in advocacy of a farmer's legal duty of care for the environment, leading to competing meanings for the duty of care and what it can be expected to achieve.

The competing meanings translate into an unresolved debate about what norms for environmental protection and farming should be. This is a debate surrounding rights and responsibilities for access to resources that reinforces the competing meanings for a duty of care. The report then examines different interpretations of principles and standards underlying a statutory duty of care and how they impact on application of a statutory duty. Finally, the report discusses the implications of the unresolved conflict over the apportionment of cost and benefit between farmers and society embedded within the term duty of care.

The report is not intended to be a study of negligence or common law theory, but rather to explore practical issues surrounding implementation of statutes containing a duty of care and potential consequences of their implementation (as evidenced in the literature). The report does not explore legal technicalities such as jurisdiction or standing, though such matters will be important in the application of statute.
The research was partly funded by the Cooperative Research Centre for Irrigation Futures and the University of New England. As a result, the focus of the research is on rural implementation of the environmental duty of care, particularly related to irrigation farming. Observations made about effectiveness of a statutory duty of care are likely to have broader application for farming.

This report seeks to identify the responsibilities associated with farmers' natural resource management and the way in which a duty of care for the environment has been promoted as a way to define such responsibilities, as evidenced from literature. This also identifies complexities associated with defining farms' responsibilities using a duty of care.
2. A Duty of Care

2.1. The Common Law Duty of Care

The concept of a duty of care is a legal term with a long history of use in the common law through the tort of negligence. It obliges the holder of a duty to exercise reasonable care to avoid harms of the type to which the duty relates. Establishing the existence of a duty of care is a question of law about when an obligation exists to avoid behaviour that poses an unreasonable risk of harm to others (Fleming, 1998: 149). Whether a duty exists can be determined by an opinion of the court or an act of parliament. A failure to undertake adequate precautions in circumstances where a duty is found to exist may result in liability for breach of the duty (Lunney and Oliphant, 2003). What this means is a question of fact about whether what happened was careless.

Developing practical meaning for a duty of care requires consideration of the following factors (Fleming, 1998: 117). This consideration is also sometimes termed the ‘Shirt calculus’ since the leading Australian authority is Wyong Shire Council v Shirt (1980):

(i) Foreseeability of harm;
(ii) The circumstances in which harm arises;
(iii) The objective standard of care relevant to the circumstances, determined after the fact; and
(iv) Consideration of common practice.

The actions of the individual who is said to have breached a duty of care are tested against these factors to determine if there is in fact a breach, and then whether a monetary compensation for losses to the plaintiff should be awarded (Stapleton, 1998; Trindade et al., 2007). The right to sue is limited to the party who has suffered loss. Past civil law decisions guide the definition of ‘reasonable care’. In this way the practical meaning for a duty of care is distilled through the common law and matched with current circumstances. This, by inference, guides future behaviour. The common law duty of care helps define boundaries of responsibility within society (Cane, 2002: 181). But, because it applies ‘common practice’ or accepted ‘norms’ for determining the boundaries, the obligations defined are not so detailed that their discharge becomes onerous. The concern of the court is to distil contemporary standards, not to force the adoption of higher standards upon society. Courts consider freedom of action as an overriding interest to be preserved in defining reasonable care (Fleming, 1998).

It is important to note that 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 obligation to act reasonably to avoid inflicting physical harm or damage to another person or property. It does not impose a 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 limits when liability arises from careless behaviour, sometimes using public policy considerations to determine when, how and to whom a general duty ought apply. At times, these policy restrictions on duty mean 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.

The usual decision-making process within courts reflects the dominant property paradigm of freedom to exploit ‘property’ with minimal accountability. Civil duty of care, in essence, protects a limited range of interests, which are essentially private (e.g. health, property, money). It does not extend to what might be called ‘public harms’ unless such harms coincidentally correspond to private harms. It is a minimal standard, determining what conduct triggers compensation. It promotes accountability and is not concerned with rewarding virtue. Implicit is the belief that ‘property rights’ are paramount for most purposes in many Western democracies, translated into a judicial expectation that exploitative interests will be protected other than where there is an unambiguous statement by Parliament of its intent to overturn this interest, and where legislation is (from both a legal principle and an evidentiary perspective) specific and reliable.

The common law, therefore, has a limited interest in determining whether other conduct might have been better in promoting some desired end. This is different to the situation where duties are defined within the context of ‘command and control’ regulation, where the role of the legislature can be to create higher standards of behaviour by the application of punishments and incentives.

Much of the advocacy for a statutory duty of care proceeds from an expectation that it will promote ethical land management (a ‘virtue’ conception), institutionalising standards of conduct to be encouraged. In this expectation statutory environmental duties of care are conceptually different to the common law practice, but are still phrased in terms of ‘reasonableness’, giving an appearance of similarity to common law duty of care. Such apparent similarity could become significant should courts be called upon to adjudicate the application of these statutes.
2.2. A Statutory Duty of Care

A duty of care has been incorporated into land management statute in at least four Australian jurisdictions. These statutory versions illustrate two ways of expressing the duty of care; a brief form with the details imported by reference to a non-statutory code, or a detailed form fully expressed within the statute. Table 1 lists the legislation and form of expression of duty of care.

Table 1. Australian legislation incorporating a duty of care for the environment.

<table>
<thead>
<tr>
<th>Legislation</th>
<th>Source of duty</th>
<th>Expression of duty</th>
</tr>
</thead>
</table>
| **Environmental Protection Act 1994 (Qld)**      | s.319 General Environmental Duty | The act provides a list of relevant factors to consider in working out what reasonable and practical measures means,  
(a) The nature of the harm or potential harm  
(b) The sensitivity of the receiving environment  
(c) The current state of technical knowledge for the activity  
(d) The likelihood of successful application of the different measures that might be taken, and  
(e) The financial implications of the different measures as they would relate to the type of activity. |
| **Land Act 1994 (Qld)**                         | s.199 Duty of Care Condition | A land lease/permit holder must take all reasonable steps to;  
(a) Avoid causing or contributing to land salinity that (i) reduces its productivity, or (ii) damages any other land  
(b) Conserve soil  
(c) Conserve water resources  
(d) Protect riparian vegetation  
(e) Maintain pastures dominated by perennial and productive species  
(f) Maintain native grassland free of encroachment from woody vegetation  
(g) Manage any declared pest  
(h) Conserve biodiversity |
| **Catchment and Land Protection Act 1994 (Vic)**  | s.20 General Duties of Land Owners | A land owner must take all reasonable steps to;  
(a) Avoid causing or contributing to land degradation which causes or may cause damage to land of another land owner  
(b) Conserve soil  
(c) Protect water resources  
(d) Eradicate regionally prohibited weeds  
(e) Prevent the growth and spread of regionally |
<table>
<thead>
<tr>
<th><strong>Act</strong></th>
<th><strong>Section Number</strong></th>
<th><strong>Duty of Care</strong></th>
<th><strong>Interpretation and Examples</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Natural Resources Management Act 2004 (SA)</em></td>
<td>s.9 General Statutory Duties and s.133 Specific Duty to a Watercourse</td>
<td>Meaning of the duty of care be interpreted by reference to a complex set of statutory provisions (see Table 1.2)</td>
<td></td>
</tr>
<tr>
<td><em>Environment Protection Act 1993 (SA)</em></td>
<td>s.25 General Environmental Duty</td>
<td>Meaning of the duty of care be interpreted by reference to a complex set of statutory provisions</td>
<td></td>
</tr>
<tr>
<td><em>River Murray Act 2003 (SA)</em></td>
<td>s.23 General Duty of Care</td>
<td>Meaning of the duty of care be interpreted by reference to a complex set of statutory provisions</td>
<td></td>
</tr>
<tr>
<td><em>Pastoral Land Management and Conservation Act 1989 (SA)</em></td>
<td>s.7 General Duty of Pastoral Lessees</td>
<td>The duty of a lessee is; (a) To carry out the enterprise under the lease in accordance with good land management practices, (b) To prevent degradation of the land, and (c) To endeavour, within the limits of financial resources, to improve the condition of the land.</td>
<td></td>
</tr>
<tr>
<td><em>Environmental Management and Pollution Control Act 1994 (Tas)</em></td>
<td>s.23A General Environmental Duty</td>
<td>Requires all practicable and reasonable measures be taken...having regard to all the circumstances of the conduct of the activity, including but not limited to: (a) The nature of the harm or nuisance or likely harm or nuisance; and (b) The sensitivity of the environment into which a pollutant is discharged, emitted or deposited; and (c) The current state of technical knowledge for the activity; and (d) The likelihood and degree of success in preventing or minimising the harm or nuisance of each of the measures that might be taken; and (e) The financial implications of taking each or those measures.</td>
<td></td>
</tr>
<tr>
<td><em>Forest Practices Act 1985 (Tas)</em></td>
<td>s.31(1)</td>
<td>Creates a code of practice to provide for reasonable protection of the environment</td>
<td></td>
</tr>
</tbody>
</table>

An example of the brief expression is the general environmental duty stated in the *Environmental Protection Act 1994* (Queensland), which requires a person to take all reasonable and practical measures that prevent or minimise environmental harm. The Act also allows an industry code of practice to define the detailed meaning (under s 436(3) compliance with an approved code of practice is taken to satisfy the duty of care). A code has been prepared by the Queensland Farmers’ Federation to detail how farmers can meet the duty of care (Queensland Farmers’ Federation, 1998). The Federation’s code centres on six ‘expected environmental outcomes’. These are that all...
reasonable and practical measures should be taken with the constraints of a sustainable agricultural system to:

1. Conserve representative samples of native species and ecosystems;
2. Conserve the productive characteristics and qualities of the land and its soil;
3. Conserve the integrity of waterways and the quality of water;
4. Manage waste from on-farm activities;
5. Conserve the quality of air through minimising the release of contaminants; and
6. Minimise the impact of noise on environmentally sensitive places at sensitive times.

The Land Act 1994 (Queensland) provides another example of brief expression where a Crown Land lease, licence or permit holder has responsibility for a duty of care for the land (see s 199(1) for the duty of care condition). A leaseholder who complies with a land management agreement is also said to be satisfying a duty of care (Queensland Government, 2007).

Another brief and general statutory statement about reasonable land management behaviour exists for all land owners in Victoria under Section 20 of the Catchment and Land Protection Act 1994 (Victoria); Failure to comply with the duties stated in the Act is not an offence but may attract a land management notice (see s 37). Pastoral leaseholders in South Australia are similarly subject to a brief specification of the duty of care, where detailed meaning is specified in a land management plan for the property, see Section 7 of the Pastoral Land Management and Conservation Act 1989 (South Australia).

Another illustration of the brief form is the statutory duty of care in Tasmania where the obligation is to prevent or minimise environmental harm or environmental nuisance, under Section 23A(1) of the Environmental Management and Pollution Control Act 1994 (Tasmania). A code of practice is used to specify the requirements for compliance with the duty. The Forest Practices Act 1985 (Tasmania) creates a code of practice to provide for reasonable protection of the environment under Section 31(1). The code describes a landowner’s duty of care for the conservation of natural and cultural values, including measures detailed to protect soil and water values and preserve other significant natural and cultural values (Forest Practices Board, 2000).

Although such guidelines exist, they do not determine what is ‘reasonable’: the detailed meaning of which may be disputed politically or in court, particularly as it seeks to
supplant the implicit moral obligation connoted by the statutory duty with a series of technical procedures. For example, technical guidance about a landowner’s duty of care under the Tasmanian Forest Practices Code is extensive for forest access, timber harvesting, conservation and management practices. It does, however, leave substantial discretion about how these practices will be implemented and remains silent on identifying for whom and what the forest manager ought to be accountable (including specific legal obligations to the environment under other Tasmanian or Commonwealth legislation).

An alternate model for detailed statutory expression of the duty of care exists in legislation from South Australia requiring that meaning of the duty of care be interpreted by reference to a complex set of statutory provisions. For example, Section 9(1) of the Natural Resources Management Act 2004 (South Australia) contains a general duty to act reasonably in relation to the management of natural resources. What this means is determined by reference to factors to achieve: ecologically sustainable development (a complex term in itself, see s 7(2) of the act), reasonable measures and the statutory objects. The details regarding these factors are reproduced in Table 2.

### Table 2. Complex statutory factors relevant to determining reasonable behaviour in Natural Resources Management Act 2004 (SA).

<table>
<thead>
<tr>
<th>Achieving reasonable measures 9(2)</th>
<th>Objects of the Act s 7(1)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) The need to act responsibly in relation to the management of natural resources, and the potential impact of a failure to comply with the relevant duty</td>
<td>Promote ecologically sustainable development and use and management of natural resources that;</td>
</tr>
<tr>
<td>(b) Any environmental, social, economic or practical implications, including any relevant assessment of costs and benefits associated with a particular course of action, the financial implications of various measures or options, and the current state of technical and scientific knowledge</td>
<td>(a) Recognises and protects the intrinsic values of natural resources</td>
</tr>
<tr>
<td>(c) Any degrees of risk that may be involved</td>
<td>(b) Seeks to protect biological diversity and, insofar as is reasonably practicable, to support and encourage the restoration or rehabilitation of ecological systems and processes that have been lost or degraded</td>
</tr>
<tr>
<td>(d) The nature, extent and duration of any harm</td>
<td>(c) Provides for the protection and management of catchments and the sustainable use of land and water resources and, insofar as is reasonably practicable, seeks to enhance and restore or rehabilitate land and water resources that have been degraded</td>
</tr>
<tr>
<td>(e) The extent to which a person is responsible for the management of the natural resources</td>
<td>(d) Seeks to support sustainable primary and other economic production systems with particular reference to the value of agriculture and mining activities to the economy of the state</td>
</tr>
<tr>
<td>(f) The significance of the natural</td>
<td>(e) Provides for the prevention or control of impacts caused by pest species of animals and</td>
</tr>
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resources, including in relation to
the environment and to the
economy of the state (if relevant)

(g) The extent to which an act or
activity may have a cumulative
effect on any natural resources, and

(h) Any pre-existing circumstance, and
the state or condition of the natural
resources.

plants that may have an adverse effect on the
environment, primary production or the
community, and

(f) Promotes educational initiatives and provides
support mechanisms to increase the capacity
of people to be involved in the management of
natural resources.

<table>
<thead>
<tr>
<th>Factors relevant to achieving ecologically sustainable development s 7(3)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Decision-making processes should effectively integrate both long term and short term economic, environmental, social and equity considerations</td>
</tr>
<tr>
<td>(b) If there are threats of serious irreversible damage to natural resources, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation</td>
</tr>
<tr>
<td>(c) Decision-making processes should be guided by the need to evaluate carefully the risks of any situation or proposal that may adversely affect the environment and to avoid, wherever practicable, causing any serious or irreversible damage to the environment</td>
</tr>
<tr>
<td>(d) The present generation should ensure that the health, diversity and productivity of the natural environment is maintained or enhanced for the benefit of future generations</td>
</tr>
<tr>
<td>(e) A consideration should be the conservation of biological diversity and ecological integrity</td>
</tr>
<tr>
<td>(f) Environmental factors should be taken into account when valuing or assessing assets or services, costs associated with protecting or restoring the natural environment should be allocated or shared equitably and in a manner that encourages the responsible use of natural resources, and people who obtain benefits from the natural environment, or who adversely affect or consume natural resources, should bear an appropriate share of the costs that flow from their activities</td>
</tr>
<tr>
<td>(g) If the management of natural resources requires the taking of remedial action, the first step should, insofar as is reasonably practicable and appropriate, be to encourage those responsible to take such action before resorting to more formal processes and procedures</td>
</tr>
<tr>
<td>(h) Consideration should be given to Aboriginal heritage, and to the interests of the traditional owners of any land or other natural resources</td>
</tr>
<tr>
<td>(i) Consideration should be given to other heritage issues, and to the interests of the community in relation to conserving heritage items and places</td>
</tr>
<tr>
<td>(j) The involvement of the public in providing information and contributing to processes that improve decision-making should be encouraged</td>
</tr>
<tr>
<td>(k) The responsibility to achieve ecologically sustainable development should be seen as a shared responsibility between the public sector, the private sector and the community more generally</td>
</tr>
<tr>
<td>(l) The local government sector is to be recognised as a key participant in natural resource management, especially on account of its close connections to the community and its role in regional and local planning.</td>
</tr>
</tbody>
</table>

Detailed guidelines in statutes provide greater completeness in the legislation, but inevitably use generic words and concepts, such as ‘ecologically sustainable management’, to define reasonable behaviour. While the use of such terms is necessary, because they are intrinsic to care of the land, they often have multiple interpretations. This increases the practical complexity of definition for the duty holder.
2.3. **Administrative Enforcement of the New Statutory Duties**

The statutory duties of care identified above result from parliamentary inquiry recommendations that have drawn on the common law duty of care, but have not critically questioned the function and meaning of such duty in the new context of environmental law (House of Representatives Standing Committee on Environment and Heritage, 2001, Recommendation 5; Industry Commission, 1998 Recommendations 8.1 and 8.2). Statutory versions of the duty of care focus on creating boundaries of responsibility that are adjudicated through an administrative process, illustrated in Figure 1. Such a focus places a duty of care at the centre of natural resource stewardship (a virtue conceptualisation) (Gardner 1998: 63).

Administration of the statutory duties of care usually involves issuing an order or notice for which non-compliance is an offence. A third party may also be authorised to act to remedy the breach. Costs are then recovered or court orders issued.

![Figure 1. Generic compliance process for a statutory duty of care.](image)

A key feature of the approach in Figure 1 is enforcement by a local body (such as a catchment authority or a natural resource management board) with the relevant knowledge of standards concerning natural resource management and environmental protection. Such standards are usually embodied in a catchment or regional plan. Although different states have taken different approaches, the consequences of an administrative determination that a breach has occurred are similar, and potentially economically significant. They can be an order that involves additional costs, possible prosecution for non-compliance or loss of a leasehold interest. For example:

- Causing environmental harm is unlawful in Queensland under the *Environmental Protection Act* 1994 but it is accepted under Section 423 that a defendant has complied with the general duty of care if an approved code of practice was followed. For farming, this is provided by Queensland Farmers’ Federation. In
Queensland, a breach of the duty of care by a lessee of Crown land may attract a remedial notice under the *Land Act 1994* (Queensland).

- A land management notice issued under Section 234(b) of 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 Section 41 of the Act.

- In South Australia, failure to resolve a breach of the duty under the *Natural Resource Management Act* 2004 by negotiation and voluntary action may result in a notice to prepare an action plan under Section 122. Failure to comply with a notice is an offence under Section 123 (12). A breach of the duty may also be remedied through an order or authorisation (see s 193 protection orders, s 195 reparation orders, s 197 reparation authorisations). Failure to comply with these may result in a court order for non-compliance.

- Under the *River Murray Act* 2003, compliance with the duty of care may be enforced by an order or authorisation (see s 24 for protection orders, s 26 for reparation orders and s 28 for reparation authorisations). Failure to comply is an offence.

- Breach of a pastoral lessee’s duty in South Australia (SA) is enforced by a notice to prepare a property plan addressing the issues. Failure to comply may result in a plan being prepared by the pastoral board and failure to implement a plan is a breach of lease conditions (*Pastoral Land Management and Conservation Act* 1989 (SA) see s 41(1), s 41(5) and s 41(10) regarding preparation of a property plan. The cancellation of a lease for breach of conditions occurs under s 37). A breach of a lease may result in lease termination and/or civil action for damages.

- The general environmental duty in South Australia is enforced through an environmental protection order, clean up order or authorisation (*Environment Protection Act* 1993 (SA), see s 93 and s 94 for protection orders, s 99 for clean up orders and s 100 for clean-up authorisations). Failure to comply is an offence and may result in orders being issued by the court (*Environment Protection Act* 1993 (SA), see s 104 civil remedies). Failure to follow court orders may constitute contempt.

- In Tasmania, the code of practice and its duty (under the *Forest Practices Act* 1985) is enforced initially by a request for voluntary action. Failure to act on this triggers a regulatory compliance process commencing with a notice, issued under Section 41(2). Failure to comply is an offence, under Section 41(5). A third party
may then be authorised to carry out required works under Section 41(6) and the costs recovered from the offending landholder under Section 41(7).

2.4. Judicial Interpretation of a Statutory Duty of Care

Whether the duty is given brief or detailed expression in statute the fundamental purpose is the same. The essential characteristic (and arguably the appeal) of a civil duty of care process is its capacity to move the boundary of responsibility beyond statute into the field of unwritten social obligations. Duty of care moves legal responsibility for the environment towards the sphere of unstated (but often contested) social expectations. The common law has evolved a sophisticated reasoning process for defining boundaries and forming social norms. This role of interpreting community mores and giving them legal effect if parliament has not specified them in statute has, traditionally, been the role of the court. Given the evolving nature of what environmental care means, the courts may be called upon to make interpretations of a statutory duty.

There are two ways court interpretation may arise. First, is for litigation over the interpretation of reasonable care if a breach of the statutory environmental duty of care leads to harm in the form of damage to property (Lunney and Burrell 2006). A right of action in this form exists in South Australia under Section 104 of the Environment Protection Act 1993 (SA); and Tasmania (Tas), under Section 48(5) of the Environmental Management and Pollution Control Act 1994 (Tas). For such actions, the courts would be required to consider the existence, content and satisfaction of the duty of care to minimise or prevent environmental harm. This is likely to replicate a common law interpretation of meaning (Lunney and Burrell 2006). A second path to a court determination of the meaning and application of a statutory duty of care would be through appeals against the determinations of administrative bodies that enforce the duty of care. The potential for this type of appeal arises because administrative application of the environmental duty of care could impact private proprietary interests.

A statutory duty of care could face a similar judicial review process as has occurred with the statutory precautionary principle (also applied through administrative law). The legal history of the precautionary principle illustrates the potential for administrative policy pronouncements to require detailed refinement and interpretation through the courts. Judicial interpretation of the precautionary principle has occurred in the granting of emissions permits, Greenpeace Australia Ltd v Redbank Power Co Pty Ltd (1994); property development approvals, Brooks Lark & Carrick v Clarence City Council (1997); fisheries management, Bannister Quest Pty Ltd v Australian Fisheries
Management Authority (1997); and criminal liability for pollution, McLennan v Holden Ltd (1999).

It has been suggested that there is wide scope for review of administrative decisions involving the precautionary principle on the basis that its statutory form expressed political aspiration with the potential for “interminable forensic argument” in its application as a legal standard, see Talbot J in Nicholls v Director General National Parks and Wildlife Service (1994). It is not unreasonable to expect that the statutory duty of care may experience a similar future, with administrative decisions tested through appeals or other litigation. These issues are discussed in greater detail in Section 5 below.

In the absence of more definitive guidance, judges are likely to draw on the precedent of the common law duty of care as defining the process for establishing boundaries of responsibility and interpreting norms of behaviour. Attempts to reconcile the common law with the statutory environmental duty of care will bring multiple interpretations of an environmental duty of care into sharp focus. The cases on the interpretation of the precautionary principle illustrate that a process of administration that tries to exclude the courts is unlikely to be effective in doing so when the decisions have significant economic and political impacts (Martin and Verbeek, 2000).
3. Farmers’ Responsibility for Natural Resources

Duty of care has been incorporated into some natural resource statutes in the belief that it will provide an effective tool for advancing farmers’ sustainable use of natural resources. This broad ambition, however, conceals different expectations about what is meant by duty of care and what it can achieve. The expectations range from legally requiring the virtuous behaviour of farmers (achievement of which may deserve to be rewarded, perhaps by improved access to resources), to expectations of continuing minimal accountability (non-achievement of which may justify punishment, perhaps by denial of access).

3.1. Rights of Access and Use (Property Rights)

Property is about the rules governing access to and control of resources. It exists as a relationship between the giver and receiver of the access right (Stallworthy, 2002: 77-78). The relationship may be formally specified by rules governing access and use. These rules include limits upon a property owner’s freedom to exploit. The process of defining these bounds represents a framework through which ecologically and socially feasible behavioural norms are developed (Hajer 1995: 294). However, there is a range of competing views about what the bounds should be, making it difficult to reach a consensus of norms about farmers’ responsibility to the environment (Department of Sustainability and Environment (Vic) 2008).

Benefiting from property requires that the community as a whole supports, and defends, an owner’s ‘right’ to exploitation. For communities to invest in support and defence, they must feel comfortable that property owners will provide something beneficial to the community in return. That is, there must be a form of consensus about responsibility from and to the community (Martin and Verbeek, 2002).

Where the community is dissatisfied with the bargain, it can either take away the ‘right’ or impose constraints through statutes, or it can apply force or sanctions to ensure that the collective interest is not ignored (Coyle and Morrow, 2004; Raff, 2005; Stallworthy, 2002). It is normal for property rights to be subject to constraint. Land zoning, natural resource management legislation and industry or supply chain codes of practice are all partly expressions of the social consensus about responsibility. It is also a reality that the ‘boundary’ between public and private interests is often implicit and it is not fixed across time.
The dominant paradigm in Australia has been that farmer responsibilities for management performance are a mixture of accountability created by specific laws and obligations to neighbours not to infringe their exploitative property right. This is a minimum form of accountability (Bovins, 1998), an obligation to comply with the statutory and common law. Property is considered a largely un-attenuated right to exploit, with constraints imposed only where Parliament specifically makes clear this purpose or where exploitation may unjustifiably interfere with the interests of another property owner (or the physical well being of other people). Its emphasis is on minimum accountability for environmental protection with farmers’ freedom to exploit their property rights paramount (Fleming, 1998: 9). Within this traditional paradigm, the common law process for specifying reasonable care supports that freedom by specifying a level of accountability that is less onerous than the responsibilities that may be implicit in virtue-based expectations of the responsibility (Tucker L.J., in *Latimer v AEC Ltd*, 1953).

Recent inclusions of ‘duty of care’ into statutes dealing with natural resources, suggest a redefining of farmers’ boundaries of responsibility (as identified above, in statute from Queensland, South Australia, Tasmania and Victoria). A statutory duty of care seeks to import concepts of ethical responsibility or ‘virtue’ into farmers’ responsibilities as evidenced by the language of stewardship associated with a duty of care; (Department of Sustainability and Environment (Vic) 2008: 52; Queensland Government 2007; Robson, 1994). They implicitly define farmers as stewards of natural resources as part of new formal legal requirements. People have a right to know what such legal requirements do and do not allow, in a way that is clearly pre-stated (McBarnet and Whelan, 1991), yet stewardship requirements arguably reflect a change to the conditions of a farmers ‘social licence’ that is far from clear.

### 3.2. Social Licence

A social licence is about satisfying social expectations that go beyond the formal legal framework (Gunningham et al., 2002; Lynch-Wood and Williamson, 2007). The concept of a ‘social licence’ highlights that ownership of a legal right to resources does not guarantee community support for the exercise of that right. Rather the maintenance of a social licence depends on elements of law, beliefs, relationships, administration and expectations (Hone and Fraser, 2004b, 2004a; Lyons and Davies, 2007; Macintosh and Denniss, 2004; National Farmers’ Federation, 2004; Raff, 2003; Robertson, 2003; Shine, 2004; Spencer, 2005; WWF, 2005). Many aspects are inherently political and not necessarily ‘logical’ from the point of view of a farmer. The actual exploitative interest of the farmer can be a result of both well-defined property rights and poorly
defined social expectations acted out in the form of restriction or expansion of the social licence to use that property. What constitutes a social licence can be difficult to specify (Hutter, 2006) because social expectations cover a diversity of concerns about economic, political, ecological, social and cultural consequences (Epstein, 1987). The issues underlying social licence are often expressed vaguely and, for issues concerning farmers, are couched as arguments about environmental stewardship and ecologically sustainable development (McKay, 2006; Warhurst, 2005). They do not provide precise practical guidance, are not constrained by legal rights or obligations and do not necessarily respect private ownership (Lynch-Wood and Williamson, 2007).

For example, a water entitlement as a form of property, involves two rights: one is the (tradable) licence to extract some percentage of the available water, with availability being administratively determined; the second is the use right (usufruct) once that water is available. The volumes and conditions for beneficial use of water are continuously adjusted through mixed political, legal and administrative processes, including negotiation of water sharing plans and decisions about annual water allocations, the development of laws to determine the priority of water access and public investment in water infrastructure. Such processes determine the conditions for trading, use and the availability of water. Adjustments do occur with limited regard to the apparent security (or property right) that a tradable entitlement to water suggests.

Even more dramatic examples of the withdrawal of social licence are when communities punish actions that are legal but violate community expectations (even if the community expectations are changing ones), such as with the recent conflict about mulesing (Australian Wool Innovation ; Lewis, 2007; PETA, 2007). In that instance, farmers found themselves facing a loss of local and international markets because consumers were convinced that particular sheep husbandry practices were cruel. Regardless of legality, in order to regain the confidence of consumers, farmers have had to change their practices. Here the social licence to farm was powerfully demonstrated through buyers’ power to withhold access to consumer dollars.

3.3. Changing Responsibilities

The concept of ‘stewardship’ – the guardian of place, holding a position of responsibility (Pearsall and Trumble 2001) – has become important in modern conceptions of natural resource use and has been adopted in policies that advocate farmer responsibility for sustainable natural resource management (Barnes, 2009; Carr, 2002 ; Curry, 2002). In relation to farming, the core duties of stewards are conservation to keep resources for posterity and protection to save resources from harm (Barnes, 2009: 156). Such
responsibility is said, by critics, to be lacking in modern agricultural production systems (Balodock et al., 1996). Instead, industrial agriculture has been blamed for causing environmental decay (Beale and Fray, 1990; Cocklin, 2005; Curry, 2002; Fullerton, 2001; Roberts, 1995). What is being advocated is good environmental practices in which farmers do not deplete resources as part of their obligation to future generations (Royal Commission on Environmental Pollution, 1996: 22). Stewardship provides a conception of prudent or right behaviour to limit or reverse environmental harm (Lee, 2005: 207). Prudence is about ends: how to make important choices using a mixture of foresight, morals and self understanding; in effect a demonstration of virtue (Jacob 1995).

The discourse of stewardship seeks constraints on exploitation in the public interest. This paradigm anticipates the statutory duty of care as an effective way to define stewardship responsibilities. Stewardship acts to limit the exploitive freedom implicit in property rights. It helps form norms of conservation practice, and protects legitimacy and social trust in return for environmentally benign farming practice. It is a virtuous conception of performance supportive of social licence and characterised by higher conservation standards.

Figure 2 illustrates how this distinction between minimum accountability and virtue creates a tension between what political advocates expect a duty of care to mean and the meaning a legal boundary setting process will likely deliver.

Figure 2. Tension between competing expectations for the duty of care.

The dominant paradigm of property exploitation with minimum accountability
For example, a fully specified legal boundary of responsibility for reasonable care

Tension of meaning concealed in the duty of care

The alternate virtue paradigm of stewardship constraining exploitation
For example, an imprecise boundary of responsibility based on sustainability and the public interest
At a practical level, a failure to resolve the tension leads to a plethora of interpretations about the meaning of duty of care. The term hides competing expectations about the role that a duty of care can play in defining legally enforceable boundaries of responsibility for farmers. The tensions masked by the term ‘duty of care’ and its application are brought into focus when its practical meaning needs to be defined (Cocklin et al., 2007; Crosthwaite 2001).

3.4. Competing Interpretations for the Duty of Care

Rights and responsibilities are inseparable components of property (Brewer and Staves, 1995; Bryant, 1973; Demsetz, 1967; Hone and Fraser, 2004a; House of Representatives Standing Committee on Environment and Heritage, 2001; Raff, 2005; Rowley, 1993). A holder of legal property rights to beneficial use and enjoyment of land is bound by their legal responsibilities to neighbouring landholders (and through regulation to the broader community) (House of Representatives Standing Committee on Environment and Heritage, 2001: 28, para 44, Dr Murray Raff). Australian society is increasingly concerned about farmers’ natural resource management, illustrated by media coverage of land degradation, water use issues, drought and food production (Keogh, 2005). There is uncertainty about what duties a farmer has (or ought to have), reflecting both legal property rights and community perceptions of moral duties (House of Representatives Standing Committee on Environment and Heritage, 2001). 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 a legislated duty of care as providing greater freedom from government’s detailed prescriptive regulation that otherwise constrains farming. This position reflects a view that, provided farmers satisfy a narrowly defined responsibility to the environment, they ought to be free to operate unhindered and be compensated if their operation is otherwise interfered with in the public interest. This narrow accountability interpretation of a duty of care is represented by groups such as the Australian Farm Institute, NSW Farmers Association and the National Farmers Federation (Macintosh and Denniss, 2004; National Farmers’ Federation, 2003, 2004; Pape 2003; Sinden, 2002).

A 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 (Australian Farm Institute, 2001). This potential to support innovation by individual farmers in a way that helps meet public expectations has been highlighted (Bates, 2001; Young et al., 2003), suggesting that a legal duty may assist farmers to align their
operations with regional natural resource management plans using industry codes, best management practices and environmental management systems.

The duty of care is also supported by stakeholders with quite different aims and expectations. 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 detailed prescriptive regulation. Conservation interest groups argue that landholder responsibilities have been poorly defined (Australian Conservation Foundation, 2002b). These stakeholders often believe that farmers have an obligation to go beyond compliance with regulation in their land management. 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 decline’ in addition to responsibility for impacts on the farm (Australian Conservation Foundation, 2002b). This version of a duty of care presupposes that many public interests that farmers believe ought to be funded by the public should be satisfied without compensation (Australian Conservation Foundation; Moss, 2002; The Wentworth Group of Concerned Scientists, 2003; WWF, 2005).

The following examples illustrate this range of views about the obligations associated with land management and competing expectations of accountability as (a minimum standard of) reasonable care or virtue (a stewardship aspiration). The range of views are embodied within the advocacy of a duty of care and they highlight complexity as different interests with differing interpretations use competing meanings interchangeably.

The Earth Charter proposes a shared vision of values and principles as the standard for guiding and assessing conduct. Respect and care for the community of life includes: respect earth and life in all its diversity; care for the community of life with understanding, compassion and love, build democratic societies that are just, participatory, sustainable and peaceful; and secure the earth’s bounty and beauty for present and future generations (Earth Charter International, 2000). This places a duty or ethic of care as a central guide to resource use practice, drawing on a shared vision of land health (Freyfogle, 1996). It encourages farmers to adopt a sense ‘that they are part of a community of responsible neighbours, each guided by a similar vision of sustainable life, each knowing that ownership means duty, that duty means care, and that care, in the end, is our sole source of hope’ (Freyfogle, 1996). Responsible conduct promotes limits on farmers’ actions, emphasising the inherent social and environmental obligations of ownership where rights are reconceptualised based on
stewardship, and where reasonableness is equated to a prudent environmental enquiry (Raff, 1998). The Earth Charter vision proposes an allocation of responsibility based on virtue.

The NSW Department of Primary Industries has published a handbook on managing conflict about land use on the NSW North Coast. They define duty of care to mean the management of natural resources that takes all reasonable and practical steps to prevent harm to the environment, to people and to areas of cultural heritage (Learmonth et al., 2007). The message from this directive is mixed. On the one hand the implication is that ‘current best practice’ is synonymous with an obligation to use natural resources sustainably and to care for the land. On the other hand, the use of the terms ‘reasonable’ and ‘practical’ suggests minimum accountability for a duty of care.

Policy advice to the Commonwealth Minister for Agriculture refers to the duty of care as the statutory baseline or minimum standard of resource management that all farmers need to provide (Agriculture and Food Policy Reference Group, 2006), implying a statement of minimum accountability. However, the words further describing this duty suggest a virtuous conception, where reasonable care is: not harming the interests of other people in the catchment; not diminishing the productive potential of other land or water (including likely future productivity); not diminishing the contribution that remnants of native vegetation make to agreed regional, national and international biodiversity objectives; and not diminishing the quality of water supply, recreation, ecological and other services associated with water bodies.

Economic incentive payments in England illustrate a similar dichotomy in the application of land stewardship to farming, where good agricultural practice represents the level of management, inclusive of basic environmental standards, expected from farmers as part of their ordinary use of land (Rodgers, 2003). However, the mixed messages regarding extent of accountability demonstrate confusion about what good practice means. The European Union (EU) common agricultural policy uses good agricultural and environmental practice as a baseline standard of accountability for farmers (Rural Payments Agency and Department for Environment Food and Rural Affairs, 2006: 2). Land stewardship incentives encourage good farming practice beyond the good agricultural and environmental condition baseline (Rural Development Service, 2005). Such aspirations are similar to those underpinning Australia’s adoption of a statutory duty of care (Gardner, 1998; House of Representatives Standing Committee on Environment and Heritage, 2001; Industry Commission, 1998).
In England the accountability standard (good agricultural and environmental practice) is implemented using the ‘Single Payment System’ while the caring performance standard (good farming practice) applies under a tiered ‘Stewardship Scheme’.

Both these approaches incorporate soil protection, where management guidance is provided by reference to government guidelines and/or codes of practice. For example, one document to guide implementation of good agricultural and environmental condition and good farming practice is a manual for the assessment and management of soil erosion (Department for Environment Food and Rural Affairs, 2005). This document supports assessment of erosion risk on the farm but does not connect the farm with the catchment by addressing risks of cumulative soil and water movement off-farm and their potential impact on the ecological status of receiving waters (Boardman et al., 2009). This raises a question about whether responsibility is focused upon impacts within the bounds of property (an accountability perspective) or upon broader community and environment effects (a virtue perspective).

A more ambitious approach to the duty of care is as a means to establish social expectations for improved environmental management performance from farmers (Gunningham, 2007). Under this approach, regulation is used to specify the minimum standard of accountability, but higher expectations of stewardship are specified through environmental management systems and an approved code of practice (Gunningham, 2007). This places a duty of care as the link between voluntary industry codes and standards and mandatory legal obligations. This is reflected in the Queensland and Tasmanian implementation of a statutory duty for the environment, where the broad duty is translated into specific practices defined by the industry itself. The result is a juxtaposition of minimal accountability to satisfy specific rules upon a framework of ‘duty’ that aspires to virtue-based accountability. It is unclear in this approach what level of accountability the duty of care represents, leading to unresolved ambiguities.

Some duty of care proponents emphasise self-regulation for achieving increased virtuous stewardship. For example, a number of industries adopt principles and practices that define right conduct and specify a commitment to the community in accord with moral restraint and aspiration, often codified in voluntary standards (Gunningham and Rees, 1997). Such codes are generally virtue focussed, involving: a moral discourse to challenge conventional practice; conscious deliberation about industry custom and its role in guiding moral conduct; identification and accounting for broader moral issues beyond economic efficiency; legitimisation of aspirations other than profit as a good reason for action; a framework for the industry best practice with
standards; acceptance of the framework; and an account of behaviour to the public (Gunningham and Rees, 1997). This reflects a trend for rural industry to seek recognition for their codes of practice as demonstrating fulfilment of legal requirements for land management, such as with the duty of care formulations for Queensland and Tasmania, identified earlier. Martin et al. (2007) contains a detailed case study of co-regulation and the cotton industry as an example of the industry code trend.

In recognising industry codes as a means to fulfil legal requirements, the tension between stated aspirations of virtue and narrowly framed specific details of required practices become convoluted. The following discussion highlights various proposals to integrate concepts like duty of care, stewardship and catchment care with farm sector self-management and environment management systems.

Providing farmers with the means for self-regulation based on ‘reasonable care’, which is implicit in a duty of care, gives farmers the impression that it offers freedom to choose the appropriate way to meet self-defined obligations (Young et al., 2003). Here there is an emphasis on the ability for farmers to use their own attitudes and knowledge to define the expected environmental outcomes for their region in a way that fits in with their circumstances (Bates, 2001; Cocklin et al, 2007). Farmers are encouraged to achieve change by using a voluntary code that may be recognised under a catchment plan or other administrative requirement (Young et al., 2003).

The ‘catchment care principle’ is yet another means for defining farmers’ responsibility to the community, reflecting a standard of performance that distinguishes between ‘polluter pays’ and ‘beneficiary pays’ (Hatfield-Dodds, 2006). The focus of this obligation is on maintaining productive, functioning landscapes. Farmers’ responsibility is not to clear native vegetation where, on the best available science, such a move would be contrary to the long-term interests of rural industries (The Wentworth Group of Concerned Scientists, 2003). Best available science is structured around standards of performance for water quality, salinity, biodiversity and soil conservation. This approach explicitly avoids using the words ‘a duty of care’ to conceptualise responsibility on the basis that the duty is not flexible in adapting to performance requirements across different farming types and landscapes (The Wentworth Group of Concerned Scientists, 2003: 7). One is left wondering what, then, is the purpose of enacting legislation imposing a duty of care for the environment if it is not to require precisely this sort of flexible but disciplined balancing of interests.
Specifying the expected level of practice has been proposed by the Australian Farm Institute as a way for defining a duty of care to ensure that farming activities do not reduce the long-term productivity of the land (Keogh, 2005: 33). The suggested level of practice is based on reasonable care as a standard of performance to protect the access and use rights of farmers. It is an attempt to define the duty of care within the limits of the traditional right to exploit constrained by specific accountabilities. As with other proposals to integrate codes of practice with broader duties of care, the intention is to limit the obligation of the primary producer to well-specified (and preferably narrow) responsibilities. This is an attempt to limit the ambiguities of virtue-oriented requirements upon farmers, whilst still retaining the appearance of embracing the social licence connotations of the duty of care.
4. The Duty of Care as a Meaningful Boundary of Responsibility

The boundary between freedom to exploit and social obligations to conserve or restore is termed the boundary of responsibility. It is the practical expression of what farmers are expected to do. That is a general expectation that farmers will act responsibly and meet social expectations through environmental stewardship (Bowie, 1991; Moir, 2001; Warhurst, 2005). This typically entails not causing avoidable harm and honouring legal obligations (Bowie, 1991).

To bear responsibility requires acknowledgement of the potential to be called to account. This may be to a formal institution like a tribunal, commission or court; or an informal (but no less concrete) group like parents, children or a circle of friends; or to a metaphysical forum such as God or human kind (Bovins, 1998). Performance is judged by acting consistently within specified legal obligations and unspecified behavioural norms (Epstein, 1987). Farmers may be held accountable (formally or informally) should they transgress their boundaries of responsibility. The boundary is partly fluid, reflecting minimum accountability (against defined legal obligations) or more ambiguous expectations of virtue (Bovins, 1998). The legal duty of care is a process for defining a boundary of responsibility that seems to partly embody expectations of virtue. It sets a new boundary of responsibility but it is not clear the extent to which it expands the legal accountability boundary.

The boundary of responsibility is not one-dimensional. Farmers have many responsibilities: to their families, workers, community and the environment. For each aspect of responsibility, the boundaries are shaped by laws, norms and social expectations. For a boundary setting process to be practical, it needs to focus farmers’ effort and resources where responsibility clearly lies. This ought to provide a basis for genuine dialogue with stakeholders, an ability to develop skills (capacity building) with the effect to encourage action that is disciplined by clear expectations. Without this, farmers face significant practical problems, such as: investment in pursuit of fruitless causes; naïve awareness about the relevant social and environmental issues; a weak basis for working relationships; and reaction to demands without the benefit of strategy.

A number of factors determine expectations of what is ecologically and socially feasible (Hajer, 1995). These include; norms of behaviour, exploitive freedom of property rights, legitimacy and trust. These factors help shape a social discourse wherein boundaries of responsibility are constantly being renegotiated:
1. Norms of behaviour: Social ‘norms’ influence the expectations of industry behaviour (Hutter, 2006). Morals, ethics and values help define norms (Bowie, 1991; Carroll, 1991; Moir, 2001). Morals refer to personal standards of behaviour and distinguishing between right and wrong. Ethics is broader, including formal and informal rules of conduct, while values are beliefs about what is valuable or important (Pearsall and Trumble, 2001). Converting expectations to practice requires some correlation between the social norms, business culture and operating rules (Epstein, 1987). This is more likely when there is a mechanism to hold decision-makers accountable for their performance against the norms (Bovins, 1998).

2. Exploitative freedom of property rights: The social and legal expectation is that a property right carries a substantially un-attenuated freedom to exploit for private gain, subject to strictly delimited rights of the Crown applied through regulation and the obligation to avoid harm to other legal interests (Raff, 2005).

3. Legitimacy: This arises from accepted roles or from a dialogue with stakeholders reflecting genuine intent (Muller and Siebenhuner, 2007). It helps to ensure a focus on what is expected under the social licence rather than trying to address an open-ended range of socio-economic and environmental concerns.

4. Social trust: Social trust is a key consideration in the maintenance of social licence (Dovido, 2006; Siegrist et al., 2005; Weber and Hemmelskamp, 2005). During resource access conflicts, partisan arguments are weighed in the light of what is known about the social performance of the sector. Perceived failures of responsibility undermine credibility relative to other interest groups.

These factors suggest the difficulty of using a legal duty of care to specify expectations for good stewardship of natural resources. That is because if the boundary setting process is based on a common law interpretation of ‘reasonable care’, it will uphold the exploitive freedom of property within a defined level of (minimal) accountability. Such standards are unlikely to satisfy (virtuous) legitimacy and social trust concerns about stewardship of natural resources.

These factors generate competing expectations of behaviour, which suggests that clear boundaries between freedom to exploit for private gain, and constraints on exploitation in the public interest, will not be set by law alone.
Boundaries of responsibility (as reflected in a statutory duty of care) ought to reflect genuine dialogue with stakeholders over the relevant social and environmental issues associated with a social licence, and investment of resources to meet expectations. Clarity about boundaries of responsibility will not be found merely by responding to the ever-shifting expectations of society. What is absent from the documented dialogue about farmers’ responsibilities is a consensus, or even processes to seek consensus, about where the boundaries do lie. Competing propositions are advanced and remain unresolved.

Critical evaluation of the environmental performance of farmers occurs through networks such as local communities, environmental stakeholders or networks of competing water users. Networks are likely to be the ‘place’ where criticisms of farming acquire political power. Networks then are relevant for considering farmers’ responsibility and defence of the social licence as they can foster shared norms and support cooperation that leads to changes in wellbeing (Organisation for Economic Cooperation and Development, 2001).

Preparedness to act on responsibilities is likely to arise through awareness of community wellbeing and dialogue within the networks linking the farmer to society. Well-being is described as an overall satisfaction with life (Australian Bureau of Statistics, 2004). This has been proposed as a basis for developing expectations of performance associated with natural resource management (Lockie et al., 2002).

This suggests that boundaries of responsibility for farming may be best refined through a process where farmers develop networks with relevant communities, through which they explore their specific contribution to wellbeing. Attention to the welfare concerns of relevant networks makes it more likely that specific issues, circumstances and power relations will be reflected in a tacit agreement about social responsibilities. This would lead farmers (or a farming industry) to report against specific contributions to the welfare of specific networks, rather than more ill-defined generalities about the impact of farming on the environment. Common law duties imply a connection between a farmer’s natural resource management action and others who may be adversely affected by those actions (communities). Administrative law duties, however, speak of a relationship between the resource user and the agents of government.

A duty of care applied administratively suggests a hybrid arrangement under which bureaucracy acts as an arbiter of the needs and interests of the community. Whether such a complex role for a bureaucracy is what is intended, or whether the
Parliamentary intent is to limit the decision role of administrators to technical questions, is not clear on the face of the legislation. Neither is it clear what interpretive processes ought to be followed in applying the duty of care to specific situations. In the following section, I consider the implications of this type of ambiguity.
5. Application of a Duty of Care

A large part of the law is the interpretation of words relative to specific facts of particular cases before the court. Many terms of law carry deep specialist meanings and are highly nuanced. The words of statute are interpreted by government officers, those whose actions are being regulated, lawyers, commentators and particularly, judges. These various groups do not necessarily share the same understanding of terms or expectations of their application. Interpretation often takes place against the background of fact situations unanticipated by the legislature. Meanings can be attached to a statute’s words in unanticipated ways due to this intersection of complexities (Farrier et al., 1999: 65). An applied meaning of statutory words that differs from that intended by Parliament can result in outcomes that are contrary to policy intentions. Two examples from NSW, summarised in Table 3, demonstrate this: native vegetation legislation demonstrates the challenge of bringing new statutory principles into legislation, and the application of the precautionary principle demonstrates the difficulty of predicting how particular words will be interpreted in environmental courts.

The NSW Native Vegetation Conservation Act 1997 created new offences for unauthorised land clearing, with significant fines and potential criminal charges. The magnitude of the offence was calibrated to the scientifically determined ecological value and rarity of the vegetation. Proof of the offence also required technical evidence of the state of the vegetation prior to the alleged land clearing. The legislation assumed the availability of scientific data, or the capacity of science to make reasonably clear judgements about scientific ‘facts’ to determine the conservation value and extent of species and landscapes. The parliamentary debates over enactment of the legislation demonstrated the belief that it would be feasible to precisely categorise landscapes and estimate the ecological impacts of land use and land clearing (Yeadon, K., 1997), and the words of the legislation reflect this belief. The reality demonstrated by practice was that scientific certainty was not possible for large parts of the landscape. Standards of reliability generally accepted for science were far from sufficient for legal prosecution for unauthorised land clearing.
Table 3. Examples of statutory implementation challenges.

<table>
<thead>
<tr>
<th>Statutory Intention</th>
<th>Application Problems</th>
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<tr>
<td>Conservation and management of native vegetation by the control of land-clearing</td>
<td>Due to the reliance in the legislation on scientific processes which were not reliable at the evidentiary level required for prosecution, the law proved impractical to successfully prosecute for land-clearing. Consequently it was difficult to enforce the protection of native vegetation. After six years the act was replaced.</td>
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<tr>
<td>under the Native Vegetation Conservation Act 1997 (NSW).</td>
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<tr>
<td>The precautionary principle for decision making in the Protection of the Environment</td>
<td>The “Precautionary Principle” is a term with apparent clarity of meaning in environmental policy. In 1991 it was incorporated into environmental impact assessment of proposed developments. However, twelve years of judicial interpretation has been required in the New South Wales Land and Environment Court about what the principle demands of a decision making process in practice. The deliberations often resulted in significant variations in the legal principle applied in practice. Gradually the courts have developed a detailed legal framework to apply the principle.</td>
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<tr>
<td>Administration Act 1991 (NSW)</td>
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Five years after enactment of the NSW Native Vegetation Conservation Act (1997), the Auditor-General found that no strategic approach to vegetation conservation had been established and that there was a lack of comprehensive, scientific information about the status of vegetation in NSW which would enable the effective and efficient application of the Act; no prosecutions for vegetation clearing under the Act were successful in court (Auditor-General of New South Wales, 2006). The impracticality of the legislation due to the limits of science has led to legal and political conflict, economic cost and undermined the credibility of government agents charged with its enforcement (Auditor-General of New South Wales, 2006; Martin et al., 2007; Productivity Commission, 2004). A similar problem exists with the effectiveness of the Environment Protection & Biodiversity Conservation Act 1999 (Cth), which is currently under parliamentary review (Standing Committee on Environment, Communications and the Arts, 2009). Implementation experience has shown that for such environmental laws, feasibility in practice requires substantial complementary investment in science data and methods coupled with the availability of detailed legal principles established either in the legislation itself or sourced from legal precedent.
The fraught implementation of legislation to protect native vegetation illustrates the extent to which environmental law statutes are dependant on complimentary scientific data and its interpretation. In the absence of clear principles and reliable evidence, courts are obliged, by the burden of proof and procedural requirements, to be conservative in the application of a statute.

The challenge of legal application of the language of environmental policy, through administrative law, is further illustrated with the precautionary principle. The precautionary principle has been incorporated into a number of Australian statutes. Problems that have emerged with the application of the principle illustrate the potential difficulties that arise when there is no suitable precedent upon which the judiciary can rely to develop detailed interpretative procedures. The term itself has a well-developed meaning in policy science and debate (though there are significant disputes about what it requires when applied in practice). Through the Biodiversity Convention it has become embedded as a principle in international environmental law (Convention on Biological Diversity, opened for signature 5 June 1992, 31 ILM 822 (entered into force 29 December 1993), 1992). However, its translation into local law through application by administrators and appeal to the courts has proven vexed, largely because of the lack of a body of precedent to explain the nuances of its application. Much like duty of care, the words are a shorthand for a reasoning process and courts tend to seek to find (or create) a more detailed description of the reasoning processes so that the community can have a clear normative sense of what is likely to be required of them.

The Protection of the Environment Administration Act 1991 (NSW) introduced a statutory precautionary principle (s 6(2)(a)) in determining development approvals by local government or state ministers. The economic consequences of applying the precautionary principle have led to court challenges. In court, the principle was initially described as representing political aspiration, with the potential for ‘interminable forensic argument’ (Talbot J. in Nicholls v Director General National Parks and Wildlife Service, (1994) 84 LGERA 397). It has taken twelve years of legal interpretation before the courts have been able to provide a detailed judicial explanation of the principle and specified a procedure for its application (Preston CJ. in Telstra Corporation Ltd v Hornsby Shire Council [2006] NSWLEC 133 (24 March 2006) para.127-183).

The same interpretive problems seem likely to arise from incorporation of the duty of care into natural resource legislation. Courts are likely to find it difficult to invest the term with the more detailed processes they require and will likely resort to the common law duties of care where this language is part of a well-defined reasoning process.
As explained in the introduction, a duty of care in common law is short hand for a reasoning process that has developed over centuries. Duty of care is traditionally used in resolving disputes between citizens for damage to their private interests. In its new sustainability application, duty of care is intended to be used for setting boundaries of responsibility between citizens and the state, about the ways in which the citizen is entitled to treat the environment, or perhaps more suitably, ecological systems. The objectives are, in themselves, complex and the evaluation of environmental impact and causation from particular management action is far from simple, reflecting the complexity of completing an assessment that incorporates ecology, soil sciences, environmental economics, ethics, planning and land use change. (Hey, 2000). Whilst there are some indications of expected content, there is no clarity about the reasoning process to be applied. For example, see the Queensland Code of Practice for Agriculture, which supposedly clarifies what is required for farmers to meet the general environmental duty of care in s.319 *Environmental Protection Act 1994* (Qld) (Queensland Farmers Federation 1998).
6. Principles and Standards for Sustainable Agriculture

Sustainability is primarily about the management of behaviour. Regulation is one tool for managing behaviour, but standards and principles must be clear otherwise it is not possible to implement the environmental management regulation (House of Representatives Standing Committee on Environment and Heritage, 2001; Martin, 2006). The literature reveals a number of different approaches to defining what the legal principles and standards for land use management should be. These are examined below as policy principles, farm systems management and science based principles.

6.1. Policy Approach

Table 4 shows land management policy principles that have been suggested as the way to convert broad aspirations into actionable legal duties (House of Representatives Standing Committee on Environment and Heritage, 2001; Industry Commission, 1998). These are suggested to represent the formal regulatory expectations of land managers as expressed at a policy level. In 1998, the Industry Commission Inquiry into Ecologically Sustainable Land Management identified five principles (summarised in column 1 of Table 4). The Inquiry investigated the use of agricultural land and natural resources in light of ecologically sustainable management. It generated a view that recasting the regulatory regime was necessary to ensure that owners and managers of resources take environmental impacts into account in their decision-making. A recommendation for a statutory duty of care was part of the outcome of the Inquiry and this has been adopted into statute in several Australian states.

Table 4. Policy principles for a farmer’s duty of care.

<table>
<thead>
<tr>
<th>Principles for land management, natural resources and environmental protection (Industry Commission)</th>
<th>Principles of public good conservation (Parliamentary Inquiry)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) Land managers duty of care for the environment established by statute, with the associated rights and obligations as far as is reasonable and practical,</td>
<td></td>
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<tr>
<td>(ii) To identify and manage the risks of causing harm to the environment,</td>
<td></td>
</tr>
<tr>
<td>(iii) To inform those directly at risk of foreseeable personal or financial harm,</td>
<td></td>
</tr>
<tr>
<td>(iv) To inform the regulatory agency of the risk of foreseeable harm to the environment,</td>
<td></td>
</tr>
<tr>
<td>(v) To consult with those at risk of foreseeable harm.</td>
<td>(i) Landholders rights in respect of land use,</td>
</tr>
<tr>
<td></td>
<td>(ii) Statute establishes a landholders duty of care to manage land in an ecologically sustainable manner,</td>
</tr>
<tr>
<td></td>
<td>(iii) Policies and programmes must focus on outcomes,</td>
</tr>
<tr>
<td></td>
<td>(iv) Repairing past damage is a shared responsibility,</td>
</tr>
<tr>
<td></td>
<td>(v) All programmes must be tailored to meet the needs of the circumstances,</td>
</tr>
<tr>
<td></td>
<td>(vi) All programmes must be based on the latest and best scientific data.</td>
</tr>
</tbody>
</table>
Another set of principles was suggested by the Parliamentary Inquiry into Public Good Conservation in 2001 (summarised in column 2 of Table 4). This inquiry focussed on the impact of public good conservation measures imposed by government on landholders and farmers. In part, it sought to identify potential policy means to equitably share the costs of public good conservation across the community. A statutory duty of care was recommended as a way of clearly defining rights and responsibilities for access and use to natural resources, and establishing eligibility for public funding. Interestingly for this research, the parliamentary committee considered that a landholder’s duty of care should be clearly defined and that the courts would provide the proper forum to test the application of a duty of care to the environment (House of Representatives Standing Committee on Environment and Heritage, 2001: para 6.23 to 6.26).

While both sets of principles are sound aspirations, they do not provide the type of specific guidance that courts have demonstrated that they need if they are to apply (or to interpret how administrators should apply) a new legal obligation that can result in substantial private costs. Courts require greater specificity that is provided by such political rhetoric.

### 6.2. Farming Systems Management

Farming systems research has also attempted to define specific standards and principles to guide sustainable natural resource use. For example, ‘Critical success factors for multi-purpose farming systems’, shown in Box 1 below (Southorn, 2004). These are intended to provide practical guidance about the management approach that underpins sustainable agriculture. It is an attempt to specify behavioural norms for sustainable land management. This has been an area of fertile contribution from academic sources about the essence of sustainability in practice for agriculture. Other similar approaches include ‘principles for rural land management’ (McIntyre, 2002), ‘fundamental requirements for sustainable farming systems’ (Passioura, 1999), and the principles for ecologically sustainable farming systems in Australia (Watts, 2004).

As statements of aspiration without legal implications, such statements are useful in focussing management, however, their usefulness as a basis for specifying farmers’ legal responsibilities is limited.
Box 1. Critical success factors for sustainable farm management.

(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

6.3. Science Based Principles

Greater specificity in defining good (or bad) resource management can be found in the natural resource science literature. Some advocates of a duty of care approach to farmers’ accountability refer to science-informed sustainability practices as the platform for sustainable land use. In practice, the interface between the scientific and legal paradigms is far from seamless.

By way of illustration, the approach in New South Wales is one where science-based environmental standards underpin regulation of farming practice. 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), Native Vegetation Act 2003 (NSW). These three Acts need to be considered together for this purpose as they integrate to establish state-wide standards and targets, establish statutory catchment plans and link those to on ground performance via property vegetation planning. Although not linked to a statutory duty of care for environmental protection, such standards and targets provide a good example of using a scientific approach to define responsibility. This regulatory framework follows the recommendations made by the Wentworth Group of Concerned Scientists (The Wentworth Group of Concerned Scientists, 2003). The standards address water quality, salinity, biodiversity and soil conservation. Under this model, the regulation requires that a property vegetation plan be drawn up, which becomes the de-facto contract between a farmer and the state. Such plans are used to; define offsets associated with clearing approval under the Native Vegetation Act 2003 (NSW), to support an application for native vegetation incentive funding, or to define when future clearing approval will not be required (New South Wales Government, 2005). These plans are intended to provide land managers with investment security,
management flexibility, and an opportunity to access financial support (The Wentworth Group of Concerned Scientists, 2003: 9).

These standards are more detailed than is traditionally specified in 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.

These issues are illustrated by several authors: where Government mandated legislation related to catchment management and its administration has the effect of crushing local initiative (Carr, 2002); 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 (House of Representatives Standing Committee on Environment and Heritage, 2001: 66); there is a disconnect between government desire to sustain natural capital, the 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 (Tonts, 2005). Much of the science that relates to such environmental protection remains uncertain at the local level (Martin et al., 2007: 72). There are also unintended costs that arise due to an insufficiency of data and analytic processes, causing frustration for farmers who must delay carrying out normal farming activities while they wait for bureaucratic processes to be followed through and data to be evaluated (Martin et al., 2007).

Principles and standards may play an important role in moving policy intentions to practical outcomes for natural resource management. They can help to define the sort of behaviour that is expected of farmers. However, to date they have not proven to be a robust basis for applying even very specific legal obligations not to destroy vegetation or to cause other specific harms. As already discussed, a legal duty of care is likely to require that administrators (and eventually courts) convert broad aspirations into specific requirements. The legal system will require the satisfaction of a burden of proof in order to impose any penalty, which requires specific proof of violation of specific obligations upon the farmer. There is sufficient reason to believe, based on the history of other new statutory enactments for the environment, that this hurdle will be difficult to overcome.
7. Conflict over Cost Apportionment

Central to the legal burden of proof is the legal convention that neither cost nor penalty should be imposed unless there is an unambiguous legal obligation to bear the burden. A significant impact on the application of the duty of care does not concern the debate about meaning and expectations surrounding duty of care; it concerns the 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. Farming interests argue that, other than where the farmer is the harm-doer, imposed public good costs should be funded from the public purse (Australian Farm Institute, 2001).

Conservation interests suggest applying the ‘polluter pays’ principle as part of the duty of care (Australian Conservation Foundation). 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 (Watts, 2004).

However, ‘polluter pays’ faces particular difficulties in a farming context:

- The nature of farming requires the maintenance of land in an artificial state for the benefit of society: many types of ‘environmental harm’ are intrinsic to normal farming practices. For example, in irrigation farming, water is redirected, chemicals are applied and fauna and flora (which may be native) are controlled.

- The unresolved question of the extent to which private property rights should be constrained for the public good (Australian Conservation Foundation, 2002a; Craik, 2000; Keogh, 2000; National Farmers’ Federation, 2003). On the one hand, there is the expectation that farmers’ responsibility for public good is extensive. The Australian and New Zealand Environment and Conservation Council (ANZECC) proposed that a farmer’s 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’ (ANZECC, 2000). On the other hand, farmers argue that such expectations place an unjust economic burden on them. For example, ‘we have approximately 500 acres of bush land which cannot be cleared. Before the regulations came in this was worth approximately $125.00 per acre. Now it’s battling to be worth $10.00 per acre. This is an injustice that I have had to suffer. It’s alright for all those people in the cities who want to save
trees, etc. but I am the one who bears the cost of it. I am the one responsible for the rabbits in that area, I am the one responsible for the weeds, I’m the one who has to do the fencing around the area. I believe that I should have been entitled to some form of compensation, or even better still, they could have bought the land at valuation, the cost of saving native vegetation would then have been borne by all the community’ (House of Representatives Standing Committee on Environment and Heritage, 2001: submission No. 38).

These issues regarding who should bear the cost of increased stewardship responsibilities by farmers are not the subject of this report. However the legal system requires a high level of proof of both parliamentary intent and specific breaches of the law before it will impose economic costs and restrict private property use. This raises the question of whether a statutory duty of care is sufficiently specific and unambiguous to be applied in any other than the most remarkable circumstances (when other more specific environmental crimes may be more readily proven). That is a question to be dealt with elsewhere.
8. Conclusions

A statutory duty of care for environmental protection and stewardship of natural resources exists in four Australian jurisdictions. These are worthy as general political principles of aspiration, but do not in their own terms specify the practical meaning of the obligations they create. This is likely to lead to disputes where the problem of uncertainty of meaning and proof of breach will have to be resolved. These disputes may involve the courts and the application of common law principles.

The common law duty of care as a process for boundary formation views the facts of a situation against what would be considered reasonable behaviour in the same circumstances. Foreseeability of harm, the standard of care and consideration of common practice are relevant. Both in its civil use and because of judicial standards of burden of proof in administrative law and statutory settings, a duty of care defines meaning based on minimum accountability, suggesting that minimal environmental protection is the most likely outcome of the statutory duty of care.

The effectiveness of stewardship is its effect on the exploitive freedom of property, forming norms of conservation behaviour, and providing legitimacy and social trust for environmentally benign farming industries. This suggests high conservation standards (a different meaning than ‘reasonable care’). There appears to be a fundamental tension between what political advocates expect a duty of care to mean and the meaning a legal boundary setting process is likely to deliver. This important difference between legal accountability and social virtue is concealed by the words ‘a duty of care.’
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Telstra Corporation Ltd v Hornsby Shire Council [2006] NSWLEC 133 (24 March 2006)

Wyang Shire Council v Shirt (1980) 146 CLR 40

9.2. Legislation

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Catchment and Land Protection Act 1994 (Vic).

Corporations Act 2001 (Cth)

Environmental Management and Pollution Control Act 1994 (Tas).

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

Environmental Protection Act 1994 (Qld).

Environment Protection Act 1993 (SA).

Forest Practices Act 1985 (Tas)

Land Act 1994 (Qld).

Native Vegetation Act 2003 (NSW)

Natural Resources Commission Act 2003 (NSW)

Natural Resources Management Act 2004 (SA).

Pastoral Land Management and Conservation Act 1989 (SA)

Protection of the Environment Operations Act 1997 (NSW)

River Murray Act 2003 (SA)

Threatened Species Conservation Act 1995 (NSW)

Water Act 1912 (NSW)

Water Management Act 2000 (NSW)

9.3. Conventions

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(entered into force 29 December 1993).