2

Policy ideas and framework for public good conservation.

> The notion of a public good is not new and its extension to use in conservation is not unnatural. It is important to get the concept right at the outset because, when one comes to saying, 'How do we address conservation issues,' we have to be careful not to be driven too heavily by the public good theory because it was developed in the specific context of pure public goods and has extended from there.[1]

Introduction

2.1 All public policy rests upon ideas. These ideas should be clearly articulated and appropriate to the issues that the policy is supposed to address, so that the outcomes required may occur as intended. Moreover, clear ideas and definitions are required so that the expectations of different stakeholders may be aligned.

2.2 Evidence provided to this inquiry indicated that the ideas underpinning the policies and programs for public good conservation are not always clearly defined and the resulting programs are not always sharply focused on producing the outcomes wanted. This has caused, the Committee was advised, tensions between policy makers and landholders and, in some cases, contributed to hardship for some landholders. The evidence indicated that the tension between the current directions in public good conservation policy and the effect of these policies upon landholders appears to be exacerbated by a fundamental disagreement between the

1 Mr Ted Evans, Secretary of the Treasury, *Transcript of Evidence,* p. 543.

major stakeholder groups. The disagreement centres on the definition of key terms, such as 'public good', 'duty of care' and 'property rights', and the policies that flow from the meaning that is attributed to those terms.

Who manages the land?

2.3 The terms of reference focus this inquiry on the effects of public good conservation measures on landholders and farmers. 'Landholder' does not refer to a single sort of relationship to land, but one that has many facets.

2.4 Evidence indicated that landholders can be classified by way of their land use. For example, there are farmers, graziers, market gardeners, foresters and miners. Landholders can also be classified by way of their tenure; that is the legal relationship they have to the land that they manage.

2.5 Dr Murray Raff, a constitutional and property law expert, advised the Committee that all land is held from the Crown, via one or another type of tenure.[2] The most familiar is freehold tenure. There are other sorts of tenure, such as crown leases and mining rights.

2.6 The purpose for which land is used can vary widely. Some landholders manage land on a 'for profit' basis; others on a not-for-profit basis; and others on a combination of these reasons. An example of a not-for-profit landholder is the National Trust of South Australia[3] or any of the Crown lands that are held as national parks or other forms of reserve in public or Crown ownership and managed by an agency of either a Commonwealth, state or territory or local government.

2.7 The Committee received submissions and evidence from landholders in all these categories. The Committee did not focus on one or other type of landholder. Rather, the inquiry examined the way that public good conservation measures affected *any* sort of landholder. In particular, the inquiry looked at the way that the landholders' use of the land over which they have tenure may have been affected as a result of the public good conservation measures imposed upon them by one or another level of government.

2 Private briefing, 16 August, 2000.

3 See submission no. 258 and *Transcript of Evidence*, pp. 488-499.

What is public good conservation?

2.8 A major point of tension in the submissions and evidence received by the Committee was the definition of 'public good conservation'. The Committee was advised by Environment Australia that 'conservation'

> … refers to the management of natural resources to protect biological diversity and the ability to provide flows of various values and services. These include the capacity of natural resources to provide:
>
> - a range of marketable goods (such as water, food, fibre, available energy, and genetic resources);
> - non-marketed or non-commercial use benefits (such as cultural and recreational use);
> - ecosystem services supporting both production and the natural environment (including global water and carbon cycles, pollination services, insect control, water purification, groundwater recharge, and fishery spawning grounds); and
> - other indirect-use and non-use values (including existence and bequest values, and ethical and spiritual considerations).[4]

2.9 Many submissions would agree with some or all of this definition. It seemed to the Committee, from submissions and testimony, that although the definition may not disputed by all stakeholders, where people mainly disagree is over the extent to which a landholder has a responsibility to meet each element of the definition. This is discussed further in following chapters.

2.10 Some submissions took a strict, technical, economic definition. For example, the Pastoralists and Graziers Association of Western Australia advised the Committee that:

> A public good is a thing or circumstance that provides amenity to individual people but from which they are not excluded and therefore cannot be charged. Often this is because people cannot practicably be excluded. Streets lights are a commonly employed text book example. It is a much-abused term. Prevention of salt encroachment upon neighbouring property, visual amenity and much else are inherent public goods, that is, there is no way yet known of establishing private property rights and hence incentives to conserve them. The preservation of a rare species might or might not be inherently a public good depending upon the circumstances.[5]

4 Submission no. 231, p. 4.

5 Submission no. 49, p. 3. Emphasis in original.

2.11 The CSIRO supplied a similar definition:

> In economic theory, a public good is described as a non-able good whose production (e.g. by a landholder) cannot be appropriated for exclusive use (e.g. by a willing buyer). These public goods have two essential characteristics – consumption of the good by one party cannot exclude consumption by others, and the potential cost of excluding non-payers exceeds the value that any one consumer might place on the good (and be willing to pay for it). These two characters combine to create a market failure whose resolution usually requires multi-lateral bargaining, as opposed to the more typical bilateral market transaction for private goods.[6]

2.12 The Institute of Public Affairs supported the substance of these definitions:

> Public goods are best thought of as goods from which people cannot readily be excluded. As a result, unlike food, warmth and shelter, their provision cannot easily be left to individuals pursuing their own separate interests. Clean air is often cited as the classic example.[7]

2.13 The key feature of the technical definition of 'public goods' is that no one can easily be excluded from consuming the good, once it is available,[8] for example, because it is impracticable to provide public goods to one person exclusively as any person may obtain access to them. As a result, there is an incentive for an individual consumer to consume the good but not pay for it; that is, there is an incentive to 'free ride'. As a consequence of this, there is no incentive for suppliers to manufacture the good because there is no effective way to get a consumer to pay for it and therefore, an effective market cannot develop. The overall result is that insufficient levels of public goods may be supplied, and market failure results.[9]

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6 Submission no. 154, pp. 2-3.

7 Submission no. 156, p. 1.

8 Typically, a particular good is a 'public good' because it meets two conditions. The first is that it has a particular nature that prevents it being provided exclusively; for example, fresh air. The cost of making the good exclusive is so greater than any individual would be willing or capable of paying to obtain the good. The second attribute is, that consumption by one person does not reduce the consumption of the good by any other person. This is the so called "non-rival" condition. (See B Aretino *et al*, *Cost sharing for biodiversity conservation: A conceptual framework*, Productivity Commission, staff research paper, Canberra: Commonwealth of Australia, 2001, p. vi; ABARE, *Alternative approaches to natural resource management*, Canberra: Commonwealth of Australia, 2001, pp. vi and 12; Productivity Commission, *Report on government services 2000*, Canberra: Commonwealth of Australia, 2001, p. 4.) However, as ABARE notes in its report, *Alternative policy approaches to natural resource economics* (p. vi), 'Public goods will also usually be nonrival but that will not always be the case'.

9 This account is also reflected in B Aretino *et al*, *Cost sharing for biodiversity conservation*, p. vi; ABARE, *Alternative approaches to natural resource management*, pp. vi and 12; Productivity Commission, *Report on government services 2000*, p. 4.

2.14 Evidence collected by the Committee indicated that this technical, economic definition should be contrasted with a commonsense definition of "public good". The Committee itself began with a commonsense definition[10] and it was this definition that was reflected in the vast majority of submissions from landholders and community groups and even some government agencies.[11] For example, Mayne – Wilson & Associates advised the Committee that 'public good = a good or service provided or funded by the public sector on the basis of a perceived benefit to the community'.[12] Environment Australia advised the Committee that public good conservation:

> … refers to conservation activities where all the benefits, or a significant portion of the benefits, are not able to be captured by the individual undertaking the activity.[13]

2.15 In testimony, Mr Steve Hatfield Dodds representing Environment Australia advised the Committee that:

> Public good conservation is considered to occur where all, or a significant proportion of, the benefits of conservation are not captured by the individual that undertakes that activity …[14]

2.16 The difference between the commonsense definition and the technical definition is that the technical definition takes potential exclusivity (or lack of it) as the defining feature, whereas the commonsense definition focuses upon who in practice is likely to, or as a matter of fact does, derive a benefit from some activity. Irrespective of whether the good can be made exclusive, if the benefit of producing it flows without charge to someone other than the producer, then it is a public good, in commonsense terms, rather than a private good.

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10 See the Committee's *Issues Paper* for this inquiry, http://www.aph.gov.au/house/committee/environ/pubgood/issuespp.pdf. In the issues paper the Committee stated that:

For the purpose of its inquiry, the Committee will take the term, 'public good conservation' to mean conservation activities undertaken by private land users which bring environmental benefits to the community at large. In some cases, such activities are carried out to the detriment to the landholder, as in the case of legislated prohibition on clearing land that the landholder wishes to cultivate or stock. Alternatively, conservation activities may be good for the landholder as well as for the wider community; retaining native vegetation as a wind break would be an example... In this case, elements of private and public good result from the single activity.

11 For example, submission no. 231 (Environment Australia).

12 Submission no. 1, p. 2.

13 Submission no. 231, p. 4. The idea that a public good provides a benefit to the broad community is also explicitly stated in submission no. 202, p. 1, which in other respects adopted the economic definition.

14 *Transcript of Evidence*, p. 91.

2.17 This leads the Committee to observe that those people making submissions who adopted a technical, economic definition have failed to understand that the inquiry is examining conservation undertaken by individuals *for* the public good, not conservation *of* public goods created by public agencies.

Is the distinction between public and private goods useful?

2.18 The next question that arises is whether the distinction between public and private goods is useful when allocating the cost associated with conserving the environment. The Committee received evidence that the there was no neat division between the respective responsibilities and beneficiaries of public good conservation activities:

> … when the owner of land takes measures to conserve the environmental quality or sustainability of land the environment is the immediate beneficiary. The owner, and his or her descendants, will always benefit because the land has benefited and the long term interests of all are enmeshed. Wider society will also benefit for similar reasons from the conservation of environmental quality …[15]

2.19 The South Australian Government advised the Committee that 'the distinction between private and public good components of government imposed conservation measures and the valuation of these components is not a straightforward matter' but that it is necessary to draw such a distinction 'in order to equitably assign the cost of these measures between private individuals and the public at large'.[16]

2.20 Similarly, Environment Australia stated in its submission that:

> Most conservation activities, including those occurring on private land, provide public benefits to some degree. However, the character of conservation activities, and the balance between public and private costs and benefits, varies significantly between different resources and environmental functions.[17]

15 Submission no. 25, pp. 1, 4. Submission 52 appears to make a similar point. See paragraphs 4 and 6, pp. 2-3.

16 Submission no. 246, p. 10. A point also made by the New South Wales Farmers' Association, see Submission no. 177, p. 3.

17 Submission no. 231, p. 5.

2.21 Environment Australia then observed that:

> … determining the public element of the conservation activity is often difficult as there is very rarely a simple division between public and private conservation costs and benefits. For example, while the costs of re-vegetating a property (or conversely, the benefits of land clearing) may occur entirely on-site, the benefits (or costs, in the case of land clearing) will be distributed among a number of parties.
>
> … Cost-sharing principles vary widely and will result in different cost-sharing outcomes, recognising underlying responsibilities for management and conservation outcomes, and evolving community expectations. In practice, however, cost-sharing arrangements for public good conservation measures have usually been based on relatively arbitrary formula or lengthy negotiations. This suggests that there may be benefits from the development of more sophisticated rules of thumb, based on some general categorisation of public good activities.[18]

2.22 In the same vein, the Australian Bureau of Agricultural and Resource Economics (ABARE) linked the attribution of costs to the distinction between public and private goods, but also indicated the difficulty of attributing costs on this basis. ABARE wrote:

> Identifying and valuing the private and public benefits from landholders' conservation efforts is an important step in identifying any underlying rationale for government intervention in the provision of such services. This can be a complex task especially when the effects and costs of changes in biophysical outcomes are poorly understood or non-market effects are involved …[19]

2.23 The complexity of the task was well attested in this comment from Mr Rei Beumer:

> … as far as public-good conservation measures are concerned, it is pointed out that the issue of private benefit and public-good benefit is often not clear cut. Even when a conservation measure is deemed to have only private benefits, there is often a public benefit associated therewith – e.g. laser-levelling of irrigation bays means more efficient use of water, therefore less water use and increased production. This means that the farmer saves on water costs and receives a higher return from crops and therefore laser-

18 Submission no. 231, pp. 5 and 10

19 Submission no. 173, p. 9.

> levelling is deemed to be for private benefit. There is, however, a flow on effect for the public-good in that less water used means more water available for other uses, including environmental, and higher production means more input to the local community in terms of produce, jobs and wealth. This is not to suggest that laser-levelling should be flagged as a public-good conservation measure, but just to highlight that there is generally a public-good benefit flow-on effect from the implementation of conservation or environmental measures.[20]

2.24 The practical difficulty of attributing costs was also revealed to the Committee during hearings by Mr Matt Giraudo, Wetlands Project Officer, Mid-Upper South East Local Action Planning Committee of South Australia:

> Remnant vegetation in this case is worked out on the benefit from windbreaks. There is a little note down there, 90 per cent of revegetation projects were windbreaks. .... The economists have sat down and figured a cost and a return and, on the basis of that return, say, 'There is some benefit to the land-holder.' There is also a benefit to the land-holder through localised recharge control. Then there is the benefit to the wider community.
>
> They have gone through it [the cost share ratios] a couple of times. It has been a protracted exercise and it is difficult to do in a lot of cases because you are trying to separate out public versus private good obviously. They give you the ballpark figure basically. For agro-forestry basically the land-holder is doing pretty well out of it, but for protecting remnant veg he is not getting much, whereas the broader community is. They are our cost share now. Basically what you will find is they are reasonably good except that with remnant veg when the economists sit down and do it they say it is about a 90 per cent public benefit and about a 10 per cent land-holder benefit. In that case, and when you look at these, the land-holders are losing out.[21]

2.25 The difficulty was also brought out in a submission from the CSIRO:

> An important issue that is related to the provision of public goods, especially when environmental management considerations are central to their production, is determining the extent to which private self-interest is also being catered to. A naïve assumption underpinning much economic theory is that private producers will at least cater optimally to their own self-interest. Moreover, this

20 Submission no. 187, p. 3.

21 *Transcript of Evidence*, p. 513.

> will be done within an environment of near-perfect (or well-informed) knowledge of the transformation processes that link the outputs to all of the inputs associated with production. However, in the case of the environmental inputs to beef production, these linkages are neither well-defined or known with any certainty. … Therefore, part of the return to investments in environmental management, whether imposed or voluntary, will be captured by the private landholders themselves. Whether this private gain (insurance) is substantial or not is not really known.

2.26 The CSIRO also advised the Committee about the consequences for the rural community of trying to allocate costs on the basis of a distinction between public and private benefit:

> This raises an issue that is a source of major contention with private landholders when defining and exploring the impact of providing public goods. Many landholders accept that there is necessarily a "duty of care" to maintaining their land resources in good condition and they do place private values on certain ecosystem services (e.g. clean water, shade, shelter, soil fertility, wildlife, rural amenity etc). Indeed, most landholders aspire to pass their resources on to future generations in better and more productive states than when they were acquired by the present generation of managers. It remains an open question, therefore, what is the magnitude of the flows of benefits that would fairly be apportioned between the private landholders and the wider community were these respective private and public values known.[22]

2.27 The issue that prompted this inquiry and which was reflected in the evidence from landholders is that many believe they are increasingly required to undertake activities on land that they manage, and do so at a cost to themselves, when the landholders performing the work are not the prime beneficiaries of the required actions. The evidence indicated that, as a matter of practice, the landholders believe that they may not be able to derive a benefit from some activity, at all or in any reasonable time, leaving the landholder to foot the bill while someone else derives the benefit.

2.28 Evidence provided to the Committee by state and Commonwealth agencies indicated the reason for this. It is generally accepted at a state and Commonwealth level that public investment should not be provided to projects where it is possible for individuals to derive a private benefit from a project (because the good conserved is in theory a private good); or

22 Submission no. 154, p. 6.

where the landholder has a duty of care, unless the landholder pays for their benefit themselves.[23] The approach adopted appears to ignore not only the practical considerations involved in deriving private benefits from conserving the natural environment, but also the fact that as a matter of practice a landholder may not derive a benefit from an activity.

2.29 The Committee recognises that the practice of allocating costs on the basis of disentangling public and private goods, as defined by economic theory, is fraught with difficulties. The Committee does believe, however, that a more practicable approach can be developed. The Committee will outline its preferred approach in chapter 6.

Property rights

2.30 Over the past two decades the laws governing land use in all Australian jurisdictions have changed markedly. Practices formerly encouraged, subsidised and often made a condition of becoming a landholder are now prohibited.

2.31 It was suggested to the Committee in submissions to this inquiry and from testimony that many landholders consider that the practices, that they were permitted or required to do when taking up the management of land, conferred upon them rights to act in certain ways.

2.32 Evidence to this inquiry indicates that the most common way that these rights to use land are thought of by landholders is that they constitute a type of property right. This point was made, explicitly or implicitly, in many submissions, and these words are indicative: 'Over the last 20 yrs the property rights of rural landowners have been eroded by Government legislation'.[24]

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23 See Standing Committee on Agriculture and Resource Management, *A discussion paper on principles for shared investment to achieve sustainable natural resource management*, 1998. This was provided to the Committee by the Department of Agriculture, Fisheries and Forestry – Australia, submission no. 238, attachment 2. The discussion paper states that 'Shared investment by government is not relevant where … private benefits are sufficient' (pp. 3, 4) and 'Government only contribute to activities or parts of projects where there are significant public benefits. Users, both existing and future, are expected to pay for activities that increase their wealth or the income stream they can expect to receive', p. 4. These principles have been endorsed by Commonwealth agencies, such as AFFA (submission no. 238), and state governments, for example, Western Australia (submission no. 243, p. 2), New South Wales (submission no. 234, p. 4).

24 Submission no. 99, p. 1.

2.33 This view was reiterated in many submissions and in testimony. For example, Mr Graham Dalton, Executive Director of the Queensland Farmers Federation, told the Committee that:

> Our members have bought properties. They have acquired them for the sole purpose of turning them into a farm and developing them. They have that development right. That development right is now being taken away for a range of reasons, some of which are environmental, some of which are scientifically based, such as greenhouse. Some are probably aesthetic and some are probably ideological; the people of Australia like trees rather than grasslands. We are saying that that development right is being removed. The property is worth less as a result of the removal of that property right. That loss of value should be compensated. That is fairly simple stuff. It equates to this: if someone took your backyard, you would be compensated for it. The people of Australia are taking our economic backyard as well. That is not a hard concept.[25]

2.34 It is clear that at the core of the relationship that landholders believe they have to the land that they manage, is that all landholders are property holders. The Committee was advised that the changes in the laws governing land use involved therefore an alteration of a landholder's property rights:

> The central principle is that property is not a singular concept. Property is a *bundle* of rights and different owners can co-exist by owning different services on the same piece of land – the normal case in Australia for mining rights and is also found with water rights. But if any of these rights is taken away the owner is deprived of something.[26]

2.35 The rights that landholders who made submissions to this inquiry claim in respect of the land include not only what they could do at the time of acquisition, but also what they anticipated or expected to be able to do. The rights some landholders claim have been lost include not only rights to use land as it is currently used, but also the right to develop land as they expected or intended to be able to do.

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25 Mr Dalton, *Transcript of Evidence*, p. 141.

26 Submission no. 156, p. 9. See also, Mr Graham Dalton, *Transcript of Evidence*, p. 136 and National Farmers' Federation, submission no. 216, p. 3.

2.36 This view was reiterated in other submissions. For example, the PGA wrote that:

> Whether in cash, shares, superannuation policies, machinery, leasehold and freehold land, mining, forestry and fishing titles or any of thousands of other forms, property has these features:
>
> - It is always a bundle of rights—the right to possess, to occupy, to build upon, to plough, to graze, to fish, to extract minerals, to give, sell, lease, etc., etc.
> - Its value is the value of its attendant rights.
> - It is brought into private ownership by work and by saving.
>
> Should the Crown remove a property right the property in question is inevitably reduced in value.[27]

2.37 The PGA repeated this in testimony provided to the Committee:

> … whether your property is in cash, shares, a superannuation policy or you have put your savings into land, it is in fact, in the end, a bundle of rights. My background is agriculture, so I will take an agricultural example. I am said to own a farm, but if I am not allowed to grow sheep on it or crop it, its value falls away to almost nothing. Some property rights have a lot of value attached to them, some only modest rights attached to them.[28]

2.38 Many examples were provided to the Committee of the gradual, incremental removal of perceived property rights.[29] The examples provided by the PGA are indicative:

> Some examples of the taking of private property rights that have actually occurred within Western Australia in recent times illustrate the point. A paddock that by an order to preserve remnant vegetation could not be cleared and farmed was reduced to little value to its owner. A piggery denied the ability to dispose of waste is now empty. Properties in the Peel region were hugely devalued when denied the right to use their river frontages. Others were devalued by the erection of power pylons that at least took away their owner's visual amenity.[30]

2.39 These comments reinforce the view put to the Committee by many landholders that there has been a gradual and incremental removal of land-use rights, and this is creating considerable anger and hardship in the rural community. Landholders feel that their property is being

27 Submission no. 49, p. 1.

28 *Transcript of Evidence,* p. 393. See also submission no. 49, p. 1.

29 The effect of such removals will be explored in chapter 3

30 Submission no. 49, p. 1.

expropriated without consultation and without adequate recompense, either for the value of the land, the income that could have been derived from the land, or for the ongoing management costs for land from which they can no longer derive benefit.

2.40 Witnesses challenged the nature and extent of the property rights that landholders claimed in respect of the land they manage. For example, Mr David Hartley,[31] testified that:

> The legal situation under our legislation is that there is no property right and there is no legal requirement to pay compensation under the Soil and Land Conservation Act …[32]

2.41 This is true in all other Australian jurisdictions, as the Committee discovered when it considered evidence from Dr Raff: [33]

> In Common Law systems there is no such thing as *absolute* property in land. One does not own the land, one holds an estate or an interest in it.[34]

2.42 According to Dr Raff, the Crown has 'ultimate or radical title' to the land and all people who possess property do so by virtue of having some sort of estate or interest in a tenure from the Crown. There are various tenures that a person may hold, such as freehold, leasehold, or life estate. This does not alter the fact, Dr Raff advised, that 'there is no absolute property in Australia; all freehold land is still held of the Crown'.[35]

2.43 Dr Raff also explained to the Committee that the expectations that landholders may have had when purchasing the land does not give rise to a legal claim for compensation if land use changes and the expectations become unrealisable. The purchase of land is still governed by the legal doctrine of *caveat emptor*, Dr Raff advised. He said that it is the responsibility of the purchaser to ensure that the property being purchased will meet their expectations. Dr Raff said that if a person purchased land that had to be fundamentally altered to be used in a particular way, then the purchaser was taking a risk that they were able to achieve that. There was no legal enforcement of the purchasers' expectation that they would be able to develop the land as they anticipated, Dr Raff told the Committee. [36]

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31 Executive Director, Sustainable Rural Development, Agriculture Western Australia.

32 *Transcript of Evidence*, p. 382.

33 Submission no. 25 and private briefing on 16 August, 2000.

34 Submission no. 25, p. 2.

35 Private briefing, 16 August, 2000.

36 Private briefing, 16 August, 2000.

2.44 Dr Raff also advised the Committee that the law did not confer upon a landholder a right to use land as he or she pleased.[37] A landholder is entitled to make beneficial use and enjoyment of the land they manage, not anti-social, sick or desperate use. Owners have in law, Dr Raff said, responsibilities to their own landholdings. Dr Raff also said that owners have responsibilities to neighbouring land and these can be enforced through the common law by way of actions for nuisance or trespass.[38]

2.45 In hearings and in submissions, the issue of compensation was raised. Landholders told the Committee that if the rights that they believed they had, in respect of the land they managed, were altered and they suffered some sort of loss, then they were entitled to compensation. Some submissions advised the Committee that they believed the *Constitution* of the Commonwealth provided this right to compensation.[39]

2.46 Dr Raff advised the Committee that 'mere regulation of the use of land does not generally create an entitlement to compensation'.[40] Dr Raff went on to explain that:

> According to the British constitutional principles we have inherited in Australia – the common law of the Constitution – there is no automatic entitlement to compensation even if the full title to the land is taken from the private citizen. The entitlement is created by legislation at the State level and at the Federal level by section 51 (xxxi) of the Australian *Constitution*, which is given effect by the *Lands Acquisition Act 1989 (Cth)*. In Australia we do not have a constitutional declaration of human rights which would otherwise protect private property rights – it is generally thought that the common law is sufficient. In the absence of these legislative provisions there would be no entitlement to compensation if the Crown *resumed* the title to land according to its powers of eminent domain implicit in the doctrine of tenures, according to which, all estates and interests in land are held ultimately of the Crown.[41]

2.47 Dr Raff advised the Committee that a 1997 High Court judgement held that there would be compulsory acquisition of land under section 51 (xxxi) of the *Constitution* if there was complete economic sterilisation of the land[42]. This judgement applied to a mining lease rather than freehold land.

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37 Submission no. 25, p. 2.

38 Private briefing, 16 August, 2000.

39 Submission no. 49, p. 1.

40 Submission no. 25, p. 1 ; Private briefing, 16 August, 2000.

41 Submission no. 25, p. 2.

42 Private briefing, 16 August, 2000.

The principle set out would seem to suggest that if the land had some sort of continued economic use, then the controls imposed upon it would not amount to compulsory acquisition under the 'economic sterilisation' test developed by the High Court.[43]

2.48 The result is that the sorts of controls being imposed upon landholders do not in general prevent the land that they manage being used for some sort of economic purpose. Consequently, there is no right guaranteed by the *Constitution* of the Commonwealth to compensation for any rights to land use that may be resumed by public good conservation laws as currently understood. In any case, section 51 (xxxi) binds only the Commonwealth Government, not the states.

2.49 The Committee accepts that in law the property rights that many landholders believe they have in respect of the land they manage, are limited, or do not exist to the extent commonly believed or argued for by some landholders. However, where landholders took up land on specified conditions or on commonly held assumptions, that they were encouraged to maintain, the Committee does believe that landholders *do* have various perceived moral rights that entitle them to receive greater consideration than they do at present when land use permissions change. It appears from the evidence provided to this Committee that these perceived moral rights have been overlooked at times in the design of programs intended to promote public good conservation. As a consequence, many landholders are angry, alienated and experiencing hardship, because their plans have been thwarted and what they believe to be their rights have been removed.

2.50 In particular, those landholders, who acquired land before the changes in the laws relating to land use commenced or advanced to their present stage, have been disadvantaged. The Committee heard from a number of landholders who indicated that they had purchased land or leased land many years ago, intending to progressively clear the land and place it under various forms of production. Some indicated that the land represented a form of superannuation to them. At the time the landholder acquired the land, there was no indication that landholders would be restricted in the uses to which they could put land under their management. Even when some restrictions had been implemented, the extent to which restrictions would grow could not have been foreseen.

43 Private briefing, 16 August, 2000.

2.51 The Committee does not, therefore, believe that it is entirely reasonable to agree with the simplistic conclusion of the Western Australian Native Vegetation Working Group which stated in its final report that:

> While clearing controls have disrupted the business plans of a number of landholders, and in some cases may have rendered the farming operation (existing or proposed) unviable, the imposition of controls fits into the category of a business risk, no different from the everyday risks facing all businesses.[44]

2.52 Risks that can be foreseen can be planned for; risks that cannot be foreseen can be insured against. Neither option is available in this case and ordinary landholders are vulnerable to changes of government policy much more so than other businesses. Moreover, many land management controls were implemented over a relatively short time frame. Landholders may have acquired the land they manage many years ago when the land management requirements were quite different. It would have been difficult to foresee the extent to which land use laws would change. Furthermore, the extent of changes in permissible land use has in many ways been mandated by the advances in science and understanding of the environmental problems facing the nation. This has often necessitated swift action that no reasonable person could have foreseen even a few years before. It is a misleading analogy, therefore, to suggest that the risk of increasing regulation of land use is an everyday business risk like fire or on-the-job-accidents.

Recommendation 1

2.53 **The Committee recommends that when programs are designed that aim to promote public good conservation, the generally perceived moral rights of landholders are acknowledged and taken into account in the design of programs.**

44 Native Vegetation Working Group, *Final Report*, Perth: Agriculture Western Australia, 2000, p. 2.

Duty of care

2.54 Underlying land management policy in all jurisdictions of the Commonwealth is the belief that landholders have a duty of care towards the land they manage.[45] The notion that a landholder has a duty of care, and that this duty of care provides the foundation for acceptable land stewardship, has been enshrined in legislation in Western Australia, South Australia, Victoria, and Queensland.[46]

2.55 The purpose behind attributing to landholders a duty of care is to provide a basis for determining the point where the responsibility for private investment in public good conservation activities may cease and public responsibility for investment should begin.

2.56 With this approach to attributing responsibility for funding conservation measures, financial assistance would normally only be available to landholders for environmentally necessary activities that go beyond the landholder's duty of care. Financial assistance would not be paid to landholders to meet their duty of care for sustainable land management.[47]

2.57 This was reflected in a considerable amount of information provided to the Committee. For example, Dr Carl Binning and Dr Mike Young asserted that the costs incurred in meeting a landholder's duty of care should be counted as part of the normal costs of production. No financial public support should be provided, while landholders should receive public funding for necessary actions in excess of their duty of care.[48] The

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45 Environment Australia stated in its submission that 'The ANZECC [Australian and New Zealand Environment and Conservation Council] National framework for the management and monitoring of Australia's native vegetation was developed by State, Territory, and Commonwealth governments through the Standing Committee on Conservation of the Australian and New Zealand Environment and Conservation Council (ANZECC). The framework has been endorsed by all levels of government through the ANZECC process. The ANZECC framework includes broad guidelines on "duty of care"…' (Submission no. 231, p. 18). See also Australian and New Zealand Environment and Conservation Council, *National framework for the management and monitoring of Australia's native vegetation*, Canberra: Commonwealth of Australia, 2000, p. 10.

46 Industry Commission, *A full repairing lease: Inquiry into ecologically sustainable land management*, Canberra p. 136; Submission no. 238, p. 1; *Transcript of Evidence*, p. 132.

47 ANZECC, *National framework for the management and monitoring of Australia's native vegetation* , p. 18; Submission no. 231, p. 19.

48 C Binning and M Young, *Motivating people: Using management agreements to conserve remnant vegetation*, National research and development program on rehabilitation, management and conservation of remnant vegetation, Research report 1/97, Canberra: Environment Australia, 1997, p. 15.

Government of South Australia also supported this approach and advised the Committee that it:

> … recognises that while it is reasonable that landholders should undertake their duty of care responsibilities at their own expense, where they are expected to exceed a reasonable duty of care, the issue of compensation arises.[49]

2.58 Using a duty of care as a basis for allocating responsibility for funding has been explored by the Standing Committee on Agriculture and Resource Management (SCARM). In 1998, SCARM endorsed a set of principles for shared investment by the public and private sectors to attain sustainable natural resource management.[50] These principles have been endorsed in evidence to this inquiry by the Commonwealth Department of Agriculture, Fisheries and Forestry[51], the New South Wales government[52] and the Western Australian Government.[53] They are also generally endorsed by the Australian and New Zealand Environment and Conservation Council.[54]

2.59 SCARM proposed that the investment of public funds in public good conservation activities was not appropriate when a duty of care applies. SCARM stated that:

> Landholders and other resource users have a *duty of care* to take all fair and reasonable measures to ensure that they do not damage the natural resource base.[55] In many circumstances, this legal or moral requirement will cause landholders to pay all costs associated with on-ground works because such works are part of their duty of care. Such expenditure is a requirement of their stewardship role and no funding support or compensation need apply to these investments. In these situations the role of government is often in education, research and advice to support and raise landholders' awareness of their *duty of care.*
>
> Where a landholder or their manager employs exploitative or damaging practices that are inconsistent with a *duty of care* then such users should be responsible for making good any damages

49 Submission no. 246, p. 1.

50 *A discussion paper on principles for shared investment to achieve sustainable natural resource management practices*, submission no. 238, attachment 2

51 Submission no. 238, p. 7.

52 Submission no. 234, pp. 3-4.

53 Submission no. 243, pp. 3-4.

54 See ANZECC, *National framework for the management and monitoring of Australia's native vegetation*, p. 18.

55 In the original there is a footnote at this point. The material in the footnote has been incorporated into the text of this report at para. 2.72.

> incurred as a result of their actions, be those damages on-site or off-site. If it is cost-effective and feasible technically to trace quantifiable off-site damage to a specific source, then the full cost of ameliorative works should be borne by the polluting firm or landholder (impactor pays principle). In these situations the role of government is to regulate, advise and police exploitative management, rather than co-fund the activity.[56]

2.60 This approach is supported in principle by peak industry groups such as the National Farmer's Federation:

> NFF supports the concept of duty of care. This duty of care could be defined in terms of actions applied by farmers on their land to farm it as sustainably as current knowledge and technology allow.[57]

2.61 Using the duty of care as the criterion for determining the responsibility for funding public good conservation projects was also supported by Dr Jennifer Marohasy, Environmental Manager of Canegrowers. Dr Marohasy testified that:

> Our policy does not support compensation for the protection of vegetation that should be retained because it is on land vulnerable to degradation or the protection of vegetation that should be a land-holder's duty of care. But where vegetation is being protected solely for community benefit that is beyond duty of care, then there should be fair and equitable compensation.[58]

2.62 The evidence provided to the Committee indicated that, although the notion that landholders have a duty of care and its purpose in public policy is widely supported, the notion itself is unclear. For example, the lack of clarity attaching to the notion of "duty of care" was referred to by the North Conargo Land Management Group, which complained about the poor definition.[59] The lack of clarity in the definition was also pointed out to the Committee by the National Farmers' Federation:

> The concept of a duty of care is increasingly used by Government and by the conservation movement to justify placing the burden of public good conservation on farmers. However, while duty of care is frequently referred to in discussions on this topic, it seems

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56 Standing Committee on Agriculture and Resource Management, *A discussion paper on principles for shared investment to achieve sustainable natural resource management practices*, submission no. 238, attachment 2

57 Submission no. 216, p. 4.

58 *Transcript of Evidence*, p. 131.

59 Submission no. 127, p. 2.

> that interpretation of the concept is somewhat subjective and less well defined than it might be.[60]

2.63 This view was also supported by the South Australian Government which advised the Committee that it recognised 'that consistent application of the duty of care principle is not a simple matter'.[61] The view of the South Australian Government was reiterated by Dr Christopher Reynolds, Legislative and Legal Policy Consultant, South Australian Department for Environment and Heritage. He advised the Committee that:

> The problem with the concept of duty of care is that it has a number of meanings and a number of different contexts. It is a term that is regularly used in common law, for example, as an element of a negligence action. It is also increasingly finding its way into statutes ...[62]

2.64 This problem was also acknowledged in testimony from officials of the New South Wales Department of Land and Water Conservation. Ms Leanne Wallace, the Department's Executive Director, Regional and Commercial Services, testified that:

> The New South Wales government Department of Land and Water Conservation has been working with the Native Vegetation Advisory Council attempting to define 'duty of care'. There are different ways you can define it. You can define it from a legal perspective or from the perspective of pure moral responsibility. The big question is where it stops being your duty as a land-holder and where what you are doing becomes part of a benefit to the broader community. That will differ depending on what you are doing and what area of the state you are in. No matter how you define 'duty of care', how it applies on the ground is going to vary across the state. That is an issue for us in terms of how we put duty of care into place.[63]

2.65 Ms Sarah Lewis, Policy Development Officer, South Australian Farmers' Federation testified before the Committee in a similar vein:

> Certainly a farmer has a duty of care to manage his or her land on a sustainable basis environmentally and economically. Where it crosses the line and becomes more a public good are definitely issues of setting aside areas of vegetation on that property through

60 NSW Farmers' Association, submission no. 177, p. 17.

61 Submission no. 246, p. 1.

62 *Transcript of Evidence*, pp. 464 – 465.

63 *Transcript of Evidence*, pp. 359 - 360.

> either heritage or setting it aside voluntarily. Yes, it is a bit of a fine line.[64]

2.66 From the evidence provided to the Committee it appears that while all the key stakeholders agree that landholders have a duty of care, they do not agree on what a landholder's duty of care amounts to and, as a result, there is disagreement over who has the responsibility for meeting the costs of various conservation activities.

What is a duty of care for the environment?

2.67 In 1998 the then Industry Commission published *A full repairing lease: Inquiry into ecologically sustainable land management*in, which it recommended that a statutory duty of care for the environment be enacted[65]. The Industry Commission proposed a duty that would 'require everyone who influences the management of the risks to the environment to take all "reasonable and practical" steps to prevent harm to the environment that could have been reasonably foreseen'.

2.68 The Industry Commission proposed that the duty of care would not be confined to landholders but that it would apply also to all those who manage any other natural resources, for example water and vegetation, and others 'who indirectly influence the risks of environmental harm that resource managers confront'. Moreover, the duty would apply in respect of harm that a person may cause to the living as well as future generations. The commission's proposal would not require the remediation of environmental harms that that have been caused through past actions.[66]

2.69 The Industry Commission's proposal represented an extension and codification of the common law duty of care. The common law does not recognise and has never recognised that a duty of care may be owed to the environment of itself. Duties of care in the common law are owed to other people and to their property, and breaches of a duty of care occur when another person is harmed either by way of harm being done to their person or to their property.[67]

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64 *Transcript of Evidence*, p. 520.

65 Canberra: Commonwealth of Australia, 1998, p. 134. The Industry Commission was later replaced by the Productivity Commission.

66 Industry Commission, *A full repairing lease: Inquiry into ecologically sustainable land management*, pp. 134–135; A Gardner, "The duty of care for sustainable land management", *Australasian Journal of Natural Resources Law and Policy*, 5, 1998, pp. 29–63.

67 Industry Commission, *A full repairing lease*, p. 134; G. Bates, 'A duty of care for the protection of biodiversity on land', Canberra: Productivity Commission, 2001, p. 15.

2.70 Dr Christopher Renyolds amplified the commission's proposal and testified that:

> Under common law, duties of care have been owed to a limited group of people, normally neighbours, but if imposed under statute, then the duty is owed more widely. It could be owed to the community, it could be owed conceptually to the environment itself. It could be owed to future generations in terms of who might have the duty of care. I am sort of emphasising the Productivity Commission's ideas in its report *Full repairing lease* in 1999. The duty of care should certainly, if it exists, apply to owners and occupiers, but arguably it could go broader than that to also apply to people whose dealings affect the land— contractors, for example. If an aerial sprayer, for example, manages to degrade land or damage the land in some way through their activities, then arguably the duty of care should be cast broadly enough to apply to those activities as well.[68]

2.71 The approach of the Industry Commission has been maintained in publications of the commission's successor, the Productivity Commission. The Productivity Commission has defined a duty of care as:

> An obligation not to harm another person or their property. In the context of conservation, it is a legal obligation requiring individuals to not use their land, or permit it to be used, in a way that interferes with another person's right to use and enjoy their land.[69]

2.72 In its discussion paper on the principles for shared investment, SCARM agreed with this approach to defining a duty of care, namely that a landholder's duty of care should be considered an extension of the common law duty:

> "Duty of Care" has been defined as the common law duty of care, which applies to everyone who may harm another as a consequence of their actions. Duty of care applies to harm that might be caused to both a) those who are living at present; and b) those who are yet to be born. Essentially resource managers should have a duty to take all "reasonable and practical" steps to prevent their actions causing foreseeable harm to the environment.
>
> Land holders are "stewards of the land" and land is only held in trust for subsequent generations. The duty is about preventing harm being caused or about to be caused to the environment.

68 *Transcript of Evidence*, p. 464–465.

69 Aretino *et al*, *Cost sharing for biodiversity conservation*, p. v.

2.73 An expanded, common law duty of care was also set out in the *National framework for the management and monitoring of Australia's native vegetation*:

> A 'duty of care' with regard to 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, e.g. from salinity or erosion, protection of riparian vegetation, protection of vegetation on lands of low agricultural capability and protection of vegetation on acid sulphate soils. Depending on regional circumstances, duty of care may invoke other management actions or priorities.[70]

2.74 Dr Christopher Reynolds also supported an expanded notion. He testified that:

> In a natural resources sense it seems to me that a duty of care is a duty not to damage or degrade land or water. It is a duty to act sustainably rather than unsustainably. It is a duty that applies to things that occur simply on your property—for example a contaminated site would be that—but it also applies to things that affect other people's property or a common resource like rivers or aquifers.[71]

2.75 Apart from government and semi-government agencies, non-government organisations also supported the expansion of a landholder's duty of care in this direction. For example, Ms Felicity Wishart, representing the Queensland Conservation Council, testified that:

> The Queensland Conservation Council's view is premised on the whole notion of ecologically sustainable development and the principles that underlie that. They are principles such as maintenance of biodiversity. So we would want to see a duty of care include protection of the biodiversity, say, within a property and recognition of the off property, or the biodiversity beyond that. That would be one principle. The principles would be things like the maintenance of natural capital. We would also seek protection and nurturing and, in a sense, the maintenance of things like the soils and the water supplies that pertain to that property.[72]

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70 ANZECC, *National framework for the management and monitoring of Australia's native vegetation*, p. 17; submission no. 231, p. 18.

71 *Transcript of Evidence*, p. 465.

72 *Transcript of Evidence*, p. 191.

2.76 Although this account of the duty of care in the context of natural resource management has, according to SCARM, only limited statutory backing in Australia at present, it was noted by SCARM that this may change in the future along with the common understanding of its meaning.[73]

2.77 It would appear from evidence available to the Committee that the common law notion of duty of care is, however unofficially, supported in a very broad sense in those areas of government dealing with the formulation of policy and programs. For example, Mr David Hartley said, in response to a question from the Committee as to whether the government agency he directs had ever considered the division between the duty of care of a property owner to maintain and look after the environment and responsibility of the general community, that:

> This is something that we have thought about a lot. I believe that all farmers do have a duty of care to ensure that there are not any off-site impacts resulting from their farming operations, such as erosion running off into streams, causing siltation and eutrophication, and that it is not going to cause rising watertables on adjoining property ...[74]

The limits of a landholder's duty of care

2.78 Under the extended common law duty of care, a landholder has a duty to take all actions that are reasonable and practicable to ensure that their land management actions do not harm the environment, other people or their property. The limits of "reasonable and practicable" is a matter of dispute. Dr Alex Gardner, a legal academic, wrote in a published paper that he provided to the Committee that:

> The limit of "reasonable and practical steps" is taken from the common law and balances the risk and severity of harm that may occur against the cost and inconvenience of preventing it. The test is an objective test of what a "reasonable person" would require and would, in the absence of relevant specific standards, be determined in light of custom and practice in that industry. The requirements of reasonable and practical steps would vary with the circumstances of the case, having regard to the present state of the environment and the time over which the actions may be taken. The duty holder could choose the least costly means of

73 *A discussion paper on principles for shared investment to achieve sustainable natural resource management practices*, n. 3, submission no. 238, attachment 2.

74 *Transcript of Evidence*, p. 371-372.

> managing a risk, only incorporating new technology when it is cost-efficient to do so.[75]

2.79 Inter-governmental organisations have acknowledged that drawing such a line is difficult. For example, the Australian New Zealand Environment and Conservation Council reported that

> Determining where 'duty of care' stops and 'public conservation service' begins is a difficult issue. We suggest that the dividing line should be drawn between those management practices required to achieve landuse objectives at a landscape or regional scale and any additional practices required to sustain sites of unique conservation value. Hence, a public conservation service is provided when the community's interest lies in securing active and ongoing management of a particular site.[76]

2.80 This definition was supported by Dr Carl Binning and Dr Mike Young. They delimited a duty of care in these terms:

> … essentially a requirement for sustainable land management. It is not possible to define any particular threshold as social and economic issues need to be considered in addition to environmental thresholds. Pragmatically, we suggest that the dividing line be drawn, at this stage in Australia's development (not biological evolution), between the management practices required to achieve sustainable land-use objectives at a landscape or regional scale and any additional practices required to sustain particular sites of unique conservation value.[77]

2.81 The positions of the various governments and governmental agencies in the Commonwealth can be contrasted with the attitude towards a landholder's duty of care taken by landholders themselves and peak landholder organisations. Not surprisingly, landholders and peak landholder organisation took a somewhat different view. For example, the National Farmers' Federation advised the Committee that, in its view, a duty of care comprised the following elements:

1 it provides a mechanism for land owners undertaking current actions to farm more sustainably to be recognised (such as landcare projects, farm forestry),

2 provides an incentive for land owners who have not shifted to more sustainable practices to do so, and

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75 A Gardner, 'The duty of care for sustainable land management'.

76 ANZECC, *National framework for the management and monitoring of Australia's native vegetation* , p. 17; submission no. 231, p. 18.

77 C Binning and M Young, *Motivating people*, p. 15.

> 3 should provide a bench mark from which the community is able to identify actions that they wish to see undertaken in a region, which go beyond the duty of care, for example conservation of biodiversity on private land and therefore has a public good component which should be funded by the government on behalf of the wider community.[78]

2.82 Peak landholder organisations disagreed with extending the common law notion to include the protection of the environment in general. They tended to suggest that a landholder's duty of care was limited to the land directly under the landholder's control and immediate harm to others that may be caused. A landholder's duty of care did not, in their view, include wider environmental considerations, such as biodiversity. For example, the New South Farmers' Association advised the Committee that:

> Farmers do not wish to deny their 'duty of care' however this concept implies avoiding actions that may damage another's property or person. Actions such as pollution control come under a duty of care but the preservation of biodiversity clearly does not.[79]

2.83 This point was explained to the Committee by Dr Marohasy who testified that:

> Duty of care for a cane grower is very different to protection of native vegetation for community benefit. They are two very different things. When you are talking about on-farm operations, we are committed to continuing improvement. … We are hoping that down the track from a marketing perspective we may get a premium for our sugar because it is produced clean and green, with no impacts downstream. …
>
> When you are talking about tradeable rights and native vegetation that the community wants to protect because of its intrinsic value, we are not talking about duty of care any more, we are talking about vegetation that needs to be protected and managed for the benefit of the Australian community. For us it is not a continuum. There is duty of care and there is native vegetation that needs to be protected for the community benefit.[80]

2.84 Mr Mick Keogh, Policy Director, New South Wales Farmers' Association, was asked by the Committee how the Association differentiated between what farmers considered to be good management as far as the

78 Submission no. 216, p. 5.

79 Submission no. 177, p. 3.

80 *Transcript of Evidence*, p. 146.

environment is concerned and what is termed 'public good conservation'. He replied that:

> Legally that differentiation is established in the concept of duty of care and nuisance. So if something that you do on your property creates a nuisance or a harm to someone else's property, the law has regarded that you are in breach of your duty of care and that you, therefore, are required by regulation to stop doing that. That is a well-tried legal precedent that has been established for quite a long while. Where land-holders, in particular, believe regulations go well beyond that is on issues like biodiversity, where no-one has been able to point out to an individual land-holder what private benefit they get from the conservation of biodiversity. … We believe that certainly in relation to biodiversity and threatened species the sorts of regulations we see go well beyond that duty of care ...[81]

2.85 Mr Paul Bidwell, General Manager, AgForce, Queensland testified that, in his view, the extent of a person's duty of care was linked to the economic viability of a farming enterprise:

> … private duty of care is anything that has an impact on the bottom line for that enterprise. I will give you an example. It makes good economic sense to retain riparian strips, shade clumps, windbreaks—those sorts things. There have been trials done, through various departments of primary industry across Australia, which show that an impact gives you a positive bottom-line effect by leaving an amount of vegetation for those purposes. So that is private benefit.[82]

2.86 Mr Bidwell expanded on this and claimed that the duty of care of landholders was limited only to what occurred on their own land:

> Just as an example of the difficulty we have got in discussing where the duty of care lies, I will deal with tree clearing, which causes salinity. If, on my property, I am told by the scientists that if I clear these trees I would have a salinity problem on my property, we are saying that is duty of care. It makes no sense for me to go and clear it. But if I clear trees on my property, which causes Senator Hill to have salty drinking water, so the externality, we are saying that is not a duty of care.[83]

81 *Transcript of Evidence,* p. 297.

82 *Transcript of Evidence,* p. 132.

83 *Transcript of Evidence,* p. 137.

2.87 This view was expounded clearly in AgForce's submission:

> AgForce defines conservation activities and measures that have on-farm economic benefit as "private benefit" (e.g. wind breaks and shade clumps and strips). Furthermore, these activities and measures comprise the landholder's "duty of care". That is, landholders can reasonably be expected to undertake and comply with these activities and measures. In many cases these activities and measures will be undertaken voluntarily. …
>
> Measures, which do not have an on-farm economic benefit beyond the duty of care (eg. retaining endangered vegetation communities), are of "public benefit".[84]

Difficulties with a legislated duty of care based on the common law

2.88 The evidence provided to this inquiry indicates that there is little agreement between key stakeholders concerning the meaning of duty of care. Moreover, it appears that it may well be difficult to obtain agreement between stakeholders, because the very task of defining duty of care is itself fraught with problems.

2.89 Examples of the difficulties that emerge when defining duty of care were provided to the Committee by Ms Leanne Wallace. Ms Wallace advised the Committee that in New South Wales legislation is written in such a way that a definition is not required, because it was difficult to allow for the incorporation of new information that may affect what a duty of care might involve:

> We do not use the term 'duty of care' in the New South Wales legislation [Native Vegetation Conservation Act]. It is difficult to articulate. We do not have a ready solution as to how you give that certainty but, at the same time, take account of the fact that you will get new information. Things change, and you have to be able to take action as things change. That means that there is less certainty. It is difficult to enshrine certainty in legislation over a very long period of time.[85]

84 Submission no. 123, p. 1.

85 *Transcript of Evidence*, p. 362.

2.90 There are, however, other difficulties that emerge when attempting to define duty of care using some modification of the common law definition. Under the common law approach, the specific actions that a landholder would be required to perform – what actions fall under the duty – are determined by what is reasonable and practical. This is explained by the Productivity Commission in its submission:

> A duty of care seeks to have natural resource managers — from small farmers to government agencies — meet the cost of protecting the environment where and when it is expected to be economically efficient to do so from a community perspective. The main effect of 'reasonable and practical' is that the requirements for a particular duty holder will vary with the circumstances in each case. This allows a balancing of the risk and severity of the potential harm to the environment with the costs of preventing it.[86]

2.91 The common law test of 'reasonable and practical' may lead landholders to do the minimum and not engage in the latest technological advances. As well, this test, even if 'objective', will naturally attract litigation. In fact, landholders and government agencies may disagree over what is reasonable and practical and end up going to court to resolve the matter, rather than focusing on the main task: the ecologically sustainable development and use of Australia's land.

2.92 Moreover, what is 'reasonable and practical' can vary from landholder to landholder, even if they face the same problems. As a result, two similar landholders may, if each is to meet the duty of care that attaches to their respective land, have to expend different amounts of time, energy and money while receiving differing levels of support. This may well fuel feelings of inequity.

2.93 Another problem was noted by Mr Gerry Bates, writing in a consultancy report for the Productivity Commission. Mr Bates observed that:

> An alternative to providing ongoing sharing of costs may be to adjust what is considered 'reasonable and practical' under duty of care required of resource users. The difficulty with this approach is that the statutory scheme may be compromised if standards for fulfilment of the duty fall below best practice.[87]

86 Submission no. 189, pp. 9-10.

87 'A duty of care for the protection of biodiversity on land', Canberra: Productivity Commission, 2001, p. 32.

2.94 The point can be illustrated this way. Appropriate or best environmental practice may be higher than the practices that a landholder has a duty to do, as measured by what is reasonable and practical. If governments are unwilling to meet the shortfall, and there is evidence that they are not willing,[88] then coherent programs to address Australia's environmental problems will not emerge; programs may not be undertaken or may not be completed.

2.95 There is also a potential conflict with other policy approaches, such as ecologically sustainable development. This also could lead to the overall public good conservation effort being undermined. The potential for conflict has been noted by Mr Alex Gardner:

> My only concern with this limit [i.e. that a landholder has to take reasonable and practical steps] is how it corresponds with the objectives of ecologically sustainable development, especially the precautionary principle.[89]

2.96 Moreover, no statute can exhaustively set out the variety of cases that will in time be covered by it. As Mr Gerry Bates explained, the courts, of necessity, will have to interpret the statute and in doing so will draw on the doctrines of the common law:[90]

> A duty of care incorporated in a statute can be more precise about the circumstances in which the duty will arise. However, because courts are heavily influenced by the common law, any introduction of a duty of care into statute will need to define (as clearly as possible) the circumstances in which it is intended to arise, how it may be broken , what defences are possible, and what remedies may be available. … Lack of clear definition may result in judicial interpretation along the lines of current common law thinking.[91]

2.97 Current common law thinking does not, as noted already, recognise a duty of care directly to the environment, but only to people. On the one hand, a poorly drafted law may not create a duty of care towards the environment to the extent wanted. On the other hand, a law that does effectively create such a duty could be so overly complex that it would be unworkable and may create more problems than it remedied.

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88 See this Committee's previous report, *Co-ordinating catchment management*, Canberra: Parliament of the Commonwealth, December, 2000.

89 A Gardner, 'The duty of care for sustainable land management'.

90 'A duty of care for the protection of biodiversity on land', p. 15.

91 'A duty of care for the protection of biodiversity on land', p. 20.

2.98 Finally, the proposals for codification rest upon two assumptions:

1 that the harm that a landholder is doing can be identified and quantified separately from some earlier action the landholder has performed or that some other landholder has performed; and

2 that there is sufficient knowledge of environmental processes to enable a calculation to be done to assess what is reasonable and practical, and so balance the risk and severity of the potential harm to the environment with the costs of preventing it.

2.99 In many cases, the harm being done to the environment is not the result of one single action. It is often the combined result of many actions. It may well be impracticable and difficult to apportion with accuracy responsibility for a problem in the lower reaches of a catchment to a particular action by a particular landholder in the upper reaches of the catchment.

2.100 The result of this is that it would be difficult to determine what actions by landholders in recent times caused what harm. It may be possible to say that the actions are harmful; however, unless the extent of the harm can be measured by identifying each individual landholder's harmful actions, the extent of the landholder's responsibility cannot be determined and consequently the costs of remediation cannot be apportioned.

2.101 In order to determine what is reasonable and practical, a cost-benefit analysis must be carried out for any proposed action. However, the cost to future generations of failing to undertake remedial action in a particular location is not known, because we do not yet know with certainty how all the natural systems in Australia interact, and the consequences of many land use practices are only now becoming evident. As a result, it is difficult to perform the cost-benefit calculation that the codification of the duty of care requires. It is difficult therefore to determine what a particular landholder's duty of care is.

2.102 After considering these matters, the Committee concludes that a comprehensive and equitable codification and extension of the common law duty of care would be difficult to develop for the purposes of allocating available resources and apportioning costs for public good conservation programs.

2.103 The Committee does believe that establishing clearly a landholder's duty of care, on a generally agreed basis, could provide certainty for all stakeholders concerning the actions they can and cannot perform in respect of the environment. The Committee will discuss this further in chapter 6.

Ideas in action – Cost sharing principles

2.104 The ideas considered in this chapter have been brought together in a set of cost-sharing principles. In 1998, SCARM endorsed a set of principles to be used to determine the cost sharing arrangements for conservation activities that were intended to achieve sustainable natural resource management practices.[92] These principles have been endorsed during this inquiry by the Governments of Western Australia[93] and New South Wales,[94] and Commonwealth administrative departments, the Department of Environment and Heritage[95] and the Department of Agriculture, Fisheries, and Forestry.[96] The SCARM principles also underpin other natural resource management frameworks, such as the *National framework for the management and monitoring of Australia's native vegetation,* and they appear to underpin the approach to cost sharing used in South Australia.[97]

2.105 The approach to cost sharing embodied in the SCARM principles has two components. The first sets out the principles that are to be used to determine whether a proposed conservation activity will be eligible to receive public funds at all. The second component sets out the principles to be used to determine the respective shares of the cost of a public good conservation activity, in those cases where some public funding is found to be appropriate.[98]

2.106 According to the SCARM principles, public funding may be inappropriate:

- When applying regulatory or legal solutions alone may not be cost-effective and joint investment in the short-term may be preferred.
- Where government contributions can facilitate a faster change in management practices towards a more sustainable system.
- When additional investment is required to further improve an on-site or off-site environmental value, when the on-site benefits may be insufficient to make the investment attractive to the resource user.[99]

92 Submission no. 238, p. 7.

93 Submission no. 243, pp. 2-3.

94 Submission no. 234, pp. 3-4.

95 Or as it is usually known Environment Australia, submission no. 231, pp. 10-13.

96 Or as it is usually known, AFFA; submission no. 238, attachment 2.

97 Submission no. 246, pp. 10 – 12.

98 Submission no. 243, p. 2.

99 This information is condensed from: AFFA, submission no. 238, attachment 2.

2.107 However, the SCARM principles indicate that using public funds for public good conservation activities is considered not to be appropriate where:

- a duty of care applies;
- arivate benefits provide a sufficient incentive;
- there are more appropriate approaches;
- there are too few benefits to justify the cost.

2.108 According to the SCARM approach to cost sharing landholders have a duty of care. This is the core of the SCARM approach; it is used as the major criterion for determining whether a conservation project is eligible for public funding. According to the SCARM approach, landholders should be expected to meet the costs of achieving acceptable environmental standards; in other words, their duty of care. Assistance should be reserved for activities that go beyond a landholder's duty of care.[100]

2.109 Where a landholder deliberately violates the duty of care attached to the land they manage, then the landholder should meet the cost of repair:

> Where a landholder or their manager employs exploitative or damaging practices that are inconsistent with a *duty of care* then such users should be responsible for making good any damages incurred as a result of their actions, be those damages on-site or off-site.[101]

2.110 SCARM explicitly rules out providing public funds to landholders in order to procure remedial conservation actions that will enable a property to attain a duty of care standard. The role of government is to 'regulate, advise and police exploitative management, rather than co-fund the [remedial] activity', even when the landholder is unable to fund the conservation activities:

> … it needs to be recognised that poor enterprise viability or management is not a justification for governments to substitute public funds for landholder funding of remedial works.[102]

100 See paragraph 2.59, above.

101 Submission no. 238, attachment 2, p. 3.

102 Submission no. 238, attachment 2, p. 4.

2.111 The practical operation of the "duty of care" criterion was set out by the NSW Government:

> In terms of principles for government involvement … individuals should be expected to meet the costs of conservation activities that are required to achieve generally expected environmental standards, and assistance should be limited or targeted to circumstances where parties are moving beyond those expected standards. To ensure that the most affected groups are treated reasonably and equitably, implementing this principle should take account of the evolution or changes to these perceived responsibilities and standards, particularly the notion of land-holder duty of care.[103]

2.112 If a project is considered eligible for public funding, the second set of principles is used to determine the share of costs between the public sector and the private sector. The first principle used is:

- Government [should] only contribute to activities or parts of projects where there are significant public benefits. Users, both existing and future, are expected to pay for activities that increase their wealth or the income stream they can expect to receive.[104]

2.113 The SCARM discussion paper then provides a lengthy note, diluting the effect of this principle:

> Public benefit alone may not be sufficient reason for government investment, particularly in cases where there is a clear responsibility - duty of care - for particular activities Public benefit is a condition of government funding, not a purpose.
>
> However, there are situations where improvement in environmental amenity bestows significant public benefits such as protection of rare or endangered flora or fauna and public funding may be applicable. There are also cases where market incentives result in under-investment in knowledge about environmental conditions or less than socially optimal generation of environmental amenity. In these cases there may be a clear role for public funding, rather than sole reliance on private funding.[105]

103 *Transcript of Evidence,* p. 91.

104 Submission no. 238, attachment 2.

105 Submission no. 238, attachment 2.

2.114 A second principle limits the level of support that can be provided:

- Government should, in general, contribute to works only up to a level sufficient to trigger the necessary investment towards self-correcting, self-perpetuating natural resource management systems that operate effectively.[106]

2.115 This principle is also followed by a note, limiting the operation of the principle:

> Public funds should not be applied in such a way that they substitute for the responsibility of others nor weaken others' perception about their own resource management responsibilities.[107]

2.116 A third principle sets the scope of any evaluation of a conservation project:

- Before government will contribute to any land, vegetation or water management activity, the activity must be technically sound, produce outcomes consistent with identified priorities, and the benefits must justify the costs. In considering costs and benefits, economic, social and environmental factors all need to be adequately considered.[108]

2.117 The SCARM approach also contains a number of principles that are designed to ensure that the costs of conservation are recovered from the users of eco-services. The effect of the application of these principles is to further restrict access to public funding. The principles are used by those preparing projects for funding consideration and those assessing the projects. The principles are that 'impacters' (or polluters) pay for damage caused and beneficiaries – whether direct or indirect - pay for eco-services received:[109]

- All natural resource users and managers have a duty of care not to damage the natural resource base. Users should be responsible for making good any damages incurred as a result of their actions.
- Where polluters or impacters can be identified, the full cost of the impact prevention and control attributable to them, including the cost of required activities, should be borne by them.

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106 Submission no. 238, attachment 2.

107 Submission no. 238, attachment 2.

108 Submission no. 238, attachment 2.

109 Submission no. 238, attachment 2, p. 6. According to the SCARM principles, 'Direct beneficiaries are landholders (public or private) whose potential income and / or capital value will be increased as a result of the activity', while 'Indirect beneficiaries are those who will enjoy qualified benefits, such as improved biodiversity, recreational benefits'.

- Where the work being undertaken will not benefit the landholder(s) or resource users and there is no duty of care, particularly a financial benefit (in the form of production or potential future capital gain), it is appropriate for beneficiaries to reimburse private individuals for the cost of actions over and above those generally expected of a private resource user in the region. This beneficiary-reimburses principle ensures that the public pays for public benefit in a manner that does not entitle a person to withhold opportunities to realise these benefits from the public.

2.118 Even if a potential project passes all these hurdles, it may still fall at the last, which provides a categorical limitation on eligibility for public funds:

- There should be no public money invested in a project that will be dependent on continued subsidy or public payment, unless there is a clear and inalienable responsibility for government in addressing the issue.[110]

2.119 SCARM also sets out a number of principles that "should be used at a local level when developing the mechanisms for shared investment appropriate for the proposed activities". The most significant is that:

- Due recognition should be given to labour or other in-kind contributions from landholders when the input into the project is above the expected land management activities of the property. This input should be considered part of the landholders' contributions.[111]

2.120 The Committee received evidence that the cost allocation approach embodied in the SCARM principles, when put into practice is confusing and unclear. This appeared to be occurring in South Australia, as Mr Matt Giraudo testified:

> I know this year Bushcare money has been withheld from a lot of projects in South Australia and is still being withheld now. It is very difficult. We have had the problem with this Devolved Grant Scheme of trying to implement the scheme and not really knowing what your income stream is at any point in time. When you are two-thirds of the way through the financial year and you are still unsure about your income stream, it makes it very difficult. We are in the situation now where we have had to put a hold on the project and we were very much in the position of losing the momentum.[112]

110 Submission no. 238, attachment 2, p. 6.

111 Submission no. 238, attachment 2, p. 6.

112 *Transcript of Evidence*, p. 511.

2.121 At the same hearing Mr Giraudo told the Committee about the protracted cost allocation exercise:

> The economists have sat down and figured a cost and a return and, on the basis of that return, say, 'There is some benefit to the landholder'. There is also a benefit to the landholder through localised recharge control. Then there is the benefit to the wider community. I was not involved in the actual economics of doing it. It has been done a couple of times, first when the project was done and then they sat down and did it state-wide for all the devolved grant schemes …
>
> … They have gone through it [the cost allocation process] a couple of times. It has been a protracted exercise and it is difficult to do in a lot of cases because you are trying to separate out public versus private good obviously. They give you the ballpark figure basically. For agro-forestry basically the land-holder is doing pretty well out of it, but for protecting remnant veg he is not getting much, whereas the broader community is.[113]

2.122 Moreover, the 'principles' themselves are principles in name only, because they fail to provide clear directions to guide action or policy development. For every principle, there is, in the SCARM paper, a list of exceptions and 'ouster clauses', providing a rationale to evade the operation of a particular principle. As well, because many of the criteria rely upon subjective judgements, it is difficult for landholders, landcare organisations and officials to determine which projects are likely to receive funding and which are not.

2.123 In addition, given the way some principles are cast, it is possible that they could be used to deny public funding to worthwhile public good conservation projects because of 'high principle', rather than a sober evaluation of the public good conservation outcomes wanted. A case in point is the 'test' to be applied to determine whether a project is eligible for public funding:

> One test for the extent to which a public payment should be made is the extent to which the proposed payment would increase land values. If the result is payment for work to provide public benefits that can not be provided profitably by private entrepreneurs then there may be no increase in land value as a result of the proposed cost-sharing arrangement.[114]

113 *Transcript of Evidence*, p. 513.

114 Submission no. 238, attachment 2, p. 5.

2.124 The idea embodied in this test, and underpinning the SCARM approach, is that any person who receives a benefit or could be thought to receive a benefit from a conservation activity, which should pay for the benefit and public funding should not be provided. The SCARM principles appear more concerned to prevent landholders obtaining an unearned benefit, even at the cost of not supporting worthwhile conservation activities,which may not occur without some financial support.

2.125 Moreover, the SCARM approach is based upon the public providing the minimum by way of funding while obtaining the maximum in benefits. The Committee has already noted the SCARM principle that 'Government should, in general, contribute to works only up to a level sufficient to trigger the necessary investment towards self-correcting, self-perpetuating natural resource management systems that operate effectively'. The Productivity Commission described this approach as the 'Public "free riding" on the delivery of public benefits provided through private initiatives". In addition, the Productivity Commission described this as 'good policy because it embodies an efficient use of public funds'.[115]

2.126 That this is the way the policy operates has not been lost on landholders. A number of submissions referred to the public forcing landholders to undertake public good conservation activities while not providing adequate or appropriate payment. Moreover, while it may be in the view of some "good policy", many landholders who submitted evidence to the committee suggested that it is also a policy that is fostering considerable resentment and anger amongst landholders.

2.127 The approach being pursued in Australia stands in contrast to that taken in the United States and in the European Union where there is a conscious policy to procure public good conservation outcomes even if in the process some individuals may obtain for themselves some benefit. The underlying assumption appears to be that the overall public benefit will justify the creation of some private benefit to landholders.

2.128 Mr Steve Hatfield Dodds from Environment Australia testified that:

> While in some cases the private or individual benefits from … conservation activity will outweigh the costs, there will often, or usually, be cases where the conservation activity will not be undertaken unless there is some cost sharing with the broader community.[116]

115 B Aretino, *Cost sharing for biodiversity conservation*, p. 17.

116 *Transcript of Evidence*, p. 91

2.129 This assessment by Environment Australia of the SCARM approach would appear accurate:

> Cost-sharing principles vary widely and will result in different cost-sharing outcomes, recognising underlying responsibilities for management and conservation outcomes, and evolving community expectations. In practice, however, cost-sharing arrangements for public good conservation measures have usually been based on relatively arbitrary formula or lengthy negotiations. This suggests that there may be benefits from the development of more sophisticated rules of thumb, based on some general categorisation of public good activities.[117]

2.130 The Committee will develop such an approach in the last chapter.

Conclusion

2.131 Evidence provided to this inquiry and recounted in this chapter indicates that there is considerable uncertainty at present over what actions landholders are permitted or required to take in respect of the land they manage. Moreover, the cost-sharing principles that are often used to determine levels of public subvention are not focused on outcomes, but more narrowly on attributing responsibility. These principles rely upon fundamental ideas (such as duty of care) that evidence provided to this inquiry indicated are unclear and disputed by stakeholders.

2.132 It is the Committee's view that there must be certainty regarding the duties of landholders and the duties of the community. Such certainty would enable programs to be developed, funds to be raised and actions to be implemented. At present, the programs that should address public good conservation measures are not being developed as fast as is needed.

2.133 The need for, and advantages of, certainty were reflected in evidence. Dr Reynolds testified that:

> If I was in a position of having a duty of care in this context, I would want certainty. One of the best ways of achieving certainty is for landowners and occupiers and managers to agree on how a duty of care is discharged. If you can get that agreement then of course you can find formal mechanisms easily enough to incorporate them within statutes. For example,

117 Submission no. 321, p. 10. The Productivity Commission also advocates the use of 'rules of thumb' in certain situations; see B Aretino *et al, Cost sharing for biodiversity conservation: a conceptual framework*, p. 36-38.

> you might allow a statute that imposes a duty of care to call up a code of practice and then say that compliance with that code is deemed to discharge the duty of care. … So within that process as well there is lots of opportunity and scope for negotiation and discussion.[118]

2.134 As noted earlier, the common law definition of 'duty of care' or any legislated extension of it, in the Committee's view, has limitations in the extent to which it assists in the promotion of public good conservation. Likewise, the definition of duty of care adopted by some landholders and peak organisations is similarly limited.

2.135 Nevertheless, the Committee does believe that the term has some merit. The term can, potentially, be used to set out the sorts of actions that must be engaged in or not engaged in, so that the ecologically sustainable use of Australia's landscape occurs. However to be useful, duty of care must be clearly defined.

2.136 People do have duties to ensure that their actions do not harm others or others' interests, even if we cannot identify which particular action produces the harm or if the harm emerges out of a series of actions over a long period of time. This means that a landholder's duty of care does not cease at the farm fence, but extends into the neighbour's property and ultimately down the catchment and even, in some cases, further afield.

2.137 Another factor in developing a definition of 'duty of care' is that the actions a particular landholder will need to perform, to discharge his or her duty of care, will vary from location to location and region to region. There is support for this view from witnesses, For example, Mr Paul Bidwell testified that

> … You cannot have a state wide duty of care, from the grazing industry's perspective at least, because things need to be done differently in different parts of the state. So what is a fair standard in the gulf country is not a fair standard in south-east Queensland or for the Channel Country.[119]

2.138 In a similar vein, Ms Leanne Wallace testified that:

> You cannot define it in words. You have got to define it in the way that actions have been put in place on the ground. You have got to say, 'In this area of the state, you will need to retain X per cent of native vegetation on your property as your duty of care. If you retain more than that, then it is a public benefit and we will pay you to manage that'. That is the level of detail that you need to get

118 *Transcript of Evidence*, p. 468-469.

119 Mr Paul Bidwell, *Transcript of Evidence*, p. 135.

> down to, so that people understand what it means for them as an individual land-holder on their property. That will vary across the state. We have got some regions of the state where there is only five per cent of the vegetation cover left on the whole of the landscape. That is a bit different to the north west where you have got substantial areas of vegetation left. The duty of care there will be different because of the nature of the vegetation.[120]

2.139 The Committee endorses the approach of defining 'duty of care' from a policy perspective; that is, in terms of the outcomes that are wanted. In this respect, the Committee supports the observation of Ms Leanne Wallace, who testified that:

> … it gets down to the issue of whether you define 'duty of care' in a legal sense or from a policy perspective and actually articulate what it means on the ground.[121]

2.140 This is the approach that appears to be supported by the South Australian Government. The Committee was advised by the South Australian Government that:

> Given the emergence of the duty of care principle as a conservation measure imposed by statute, the South Australian Government considers that a consistent national approach to the application of this principle is required. The Government also considers that this principle can be given greater clarity when expressed in the form of behavioural standards that apply to individuals.[122]

2.141 The Committee agrees with this approach. Given these sorts of considerations, the Committee comes to the conclusion that landholders do have a duty of care to manage the land in their charge in a way that is ecologically sustainable, given their particular geographical location, and based upon the latest scientific information. This approach imposes scientifically ascertainable behaviour requirements upon landholders. It sets clear criteria to determine what actions should be performed and what should not, whether a landholder has sufficient information and wherewithal to carry out the actions required, and what additional support from the community is necessary. What this will mean, in any particular location, will depend upon the specific circumstances.

120 *Transcript of Evidence,* p. 360.

121 *Transcript of Evidence,* p. 360.

122 Submission no. 238, p. 2.

Recommendation 2

2.142 **The Committee recommends that**

- **the Commonwealth seek agreement with the states and territories for a commonly accepted definition in principle of a landholder's duty of care;**
- **this definition be that landholders have a duty of care to manage the land in their charge in a way that is ecologically sustainable, given the particular geographical location, and based upon latest scientific information;**
- **all legislation in all jurisdictions be amended to incorporate this duty of care, as a minimum standard of land management; and**
- **all Commonwealth funding for public good conservation activities and ecologically sustainable use of Australia's resources be dependent upon the recipient accepting this duty of care.**