

Legal Obligations of the ACT Government

Regarding

The Management of Nature Reserves

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Background

This report presents exploratory research on the main stewardship obligations with respect to the nature reserves managed by the ACT Government. The context is deliberation about where, for the purpose of evaluating suitability of sites for biodiversity offset management, a line is to be drawn between –

- actions in pursuit of the duty of care that a manager has to a site, and
- actions that are additional.¹

In his report, Dr Gibbons has not dealt with any duty of care that may exist in common law because “... this is still an evolving area, remains imprecise and is therefore difficult to codify in a regulatory instrument.”² While that is undoubtedly true, it is a task that must be undertaken and I have been requested to complete legal research into stewardship obligations broader than but including “statutory duties of care”. It is, however, not possible within a useful timeline, or in creating a text of useful succinctness for present purposes, to undertake a comprehensive or exhaustive study and it is understood that this report is necessarily thematic.

My Expertise

I have pursued strong academic and professional interests in Environmental & Planning Law and Property Law for many years. I acted in my first Environmental Law case in 1985. I assisted to found the Environment Defenders Office (Victoria), a

¹ As described by Dr Philip Gibbons, *Potential Biodiversity Offset Actions and Sites for the Australian Capital Territory*, ACT Office of the Commissioner for Sustainability and the Environment, August 2010, 2.

² *Ibid*, 5, referring to G Bates, *A Duty of Care for the Protection of Biodiversity on Land*, Consultancy Report, Report to the Productivity Commission, AusInfo, Canberra, 2001.

community legal centre for Environmental & Planning Law issues, and joined its board in 1992. I chaired the board for six years before taking up my position at University of Canberra in 2006. My work on the Land Law Reference at the Law Reform Commission of Victoria touched on many environmental issues, such as development of the Planning & Environment Act 1987 (Vic) and the Flora & Fauna Guarantee Act 1988 (Vic). My Ph D work, published by the international publisher Kluwer Law International,³ examined in depth the way that a land stewardship ethic influences German civil law, identifying a seed of the same ethic in Australian property law.⁴ I have established new units in Environmental & Planning Law and taught them in the law schools at University of Melbourne (1993 to 2000), Victoria University (2001 to 2006) and University of Canberra (2007 to date).

ACT Land Tenures

The nature of land tenures is highly relevant to any question of abstract stewardship obligations arising with respect to them. The legal background to land tenures in the ACT is unique in Australia.⁵ Section 125 of the Australian *Constitution* states that the land provided for the seat of government "... shall be vested in and belong to the Commonwealth ...". Some of the effects of the Seat of Government Acceptance Act 1909 (Cwth) and the Seat of Government (Administration) Act 1910 (Cwth) were that all land in the ACT was to be held of the Commonwealth⁶ and private title to it could not be granted in freehold,⁷ in order to secure a range of benefits in the common interest. Private title to land in the ACT is a form of Crown lease.⁸

A large measure of political and legislative autonomy was accorded the ACT by the Australian Capital Territory (Self Government) Act 1988 (Cwth), however, the accompanying Australian Capital Territory (Planning and Land Management) Act 1988 (Cwth) did not vest land in the ACT. On the contrary, the land remained Crown land held by the Crown in right of the Commonwealth and a distinction was created for land management purposes between "National Land" and "Territory Land".⁹

National Land is a specified area of land in the Territory declared by the relevant Commonwealth Minister by notice published in the Commonwealth Gazette to be National Land.¹⁰ National Land is land used or intended to be used by or on behalf of

³ M Raff, *Private Property and Environmental Responsibility – A Comparative Study of German Real Property Law*, Kluwer Law International, The Hague, 2003.

⁴ Most recently dealt with in M Raff, 'Torrens, Hübbe, Stewardship and the Globalisation of Property Law Systems' (2009) 30 *Adelaide Law Review* 245-289 (symposium edition for the 150th Anniversary of Torrens Title Symposium held at the Law School, University of Adelaide, on 20th June 2008)

⁵ A J Bradbrook, S V MacCallum & A J Moore, *Australian Real Property Law*, 4th ed, Law Book Co, Sydney, 2007, Chapter 5 'Public Lands' provides an excellent overview of public land tenures at a national level.

⁶ s 7 Seat of Government Acceptance Act 1909 (Cwth)

⁷ s 9 Seat of Government (Administration) Act 1910 (Cwth)

⁸ See further, Bradbrook, MacCallum & Moore (2007), above note 5.

⁹ ss 27 and 28 Australian Capital Territory (Planning and Land Management) Act 1988 (Cwth).

¹⁰ s 27, *Ibid*. See for example, Notification of Declaration of National Land of 23 August 2007 (Paddy's River) and accompanying Explanatory Statement, containing a questionable reference to a "... transfer legal ownership of [the] land ... from the ACT Government to the Commonwealth." See also Revocation of Declaration of National Land of 8 February 2010

the Commonwealth.¹¹ National Land is managed by the National Capital Authority [NCA]. It is recorded in the National Capital Plan.¹² Examples include the Parliamentary Triangle, Commonwealth administrative areas and some other areas considered nationally significant, such as approaches to Canberra like the Monaro Highway.

Land in the Territory that is not National Land is *Territory Land*.¹³ Section 29 of the Australian Capital Territory (Planning and Land Management) Act 1988 (Cwth) provides for the administration of Territory Land, and most relevantly –

29 Administration of Territory Land

- (1) The Executive, on behalf of the Commonwealth:
 - (a) has responsibility for the management of Territory Land; and
 - (b) subject to section 9 of the *Seat of Government (Administration) Act 1910*, may grant, dispose of, acquire, hold and administer estates in Territory Land.¹⁴

A further category of land created for planning purposes, the *Designated Area*, is referred to in s 10(1) of the Australian Capital Territory (Planning and Land Management) Act 1988 (Cwth) –

The [National Capital] Plan may specify areas of land that have the special characteristics of the National Capital to be Designated Areas.

The National Capital Plan prevails over an enactment that is inconsistent and no act may be undertaken that is inconsistent with it by the Commonwealth, a Commonwealth authority, the Territory or a Territory authority.¹⁵ The National Capital Plan may set out the detailed conditions of planning, design and development in Designated Areas and the priorities in carrying out such planning, design and development.¹⁶ No work may be undertaken in a Designated Area unless the NCA has approved the works in writing and the works are in accordance with the National Capital Plan.¹⁷ The National Plan, and amendments to it, are drafted by the NCA, submitted to consultation with the Territory planning authority and the public, and approved by the Commonwealth Minister responsible for administration of the Australian Capital Territory (Planning and Land Management) Act 1988 (Cwth).¹⁸

(Gungahlin and Canberra Central) and accompanying Explanatory Statement, which describes the change of public land tenure in terms that following revocation the land will be recognised as Territory Land and “... the ACT Government will assume management and control.”

¹¹ s 27(2) Australian Capital Territory (Planning and Land Management) Act 1988 (Cwth).

¹² A map of Declared National Land may be found in Appendix D of the National Capital Plan: see www.nationalcapital.gov.au/downloads/planning_and_urban_design/NCP/ncp_images_maps_PDF/EDIT_declarednationalland.pdf See also Index to the National Capital Plan at: www.nationalcapital.gov.au/index.php?option=com_content&view=article&id=1273&Itemid=452

¹³ s 28 Australian Capital Territory (Planning and Land Management) Act 1988 (Cwth). See generally *Canberra Drag Racers Club Inc v Australian Capital Territory and Commonwealth of Australia* [2000] ACTSC 61

¹⁴ The remaining three subsections deal with private tenure issues, perhaps illustrating general pre-occupation with the ACT leasehold system.

¹⁵ s 11 Australian Capital Territory (Planning and Land Management) Act 1988 (Cwth).

¹⁶ s 10(2)(c), *Ibid.*

¹⁷ s 12, *Ibid.*

¹⁸ Part III, Division 2, *Ibid.*

The ultimate object of the Territory Plan, made and administered by the Territory government, "... is to ensure, in a manner not inconsistent with the National Capital Plan, the planning and development of the Territory to provide the people of the Territory with an attractive, safe and efficient environment in which to live and work and have their recreation."¹⁹ It is expressly provided in s 25(6) that the Territory Plan does not apply to Designated Areas. There is considerable potential for overlap of the National Land and Designated Area categories, because of the national character of Commonwealth governmental activities pursued in the capital and this is in fact the case; for example, the Parliamentary Triangle. At the same time, areas *designated* for "special characteristics of the National Capital" might not be used or intended to be used by or on behalf of the Commonwealth and so be classified as Territory Land, although subject to the considerable powers of the NCA in relation to designated areas, described above. An example in the National Capital Plan of a consultative approach to the management of overlap pursued by the NCA and the ACT government may be found in the National Capital Open Space System [NCOSS].²⁰

The purposes of the land management categories of National Land and Territory Land and the planning category of Designated Area must always be kept in mind. As a matter of public land tenure, as noted above,²¹ regardless of these categories, the dictate of s 125 of the Australian *Constitution* prevails with the effect that land occupied by the Australian Capital Territory remains vested in the Commonwealth.

Section 30 of the Australian Capital Territory (Planning and Land Management) Act 1988 (Cwth) goes on to deal with liability issues –

30 Territory liable as manager of Territory Land

- (1) Where, apart from this section, the Commonwealth would be liable in respect of an act done or omitted to be done by the Territory in the performance of its functions under section 29,²² the liability is vested in the Territory and ceases to be a liability of the Commonwealth.
- (2) Where:
 - (a) a liability arises in respect of land at a time when it is Territory Land; and
 - (b) the liability arises from a covenant given by the Commonwealth at any time in its capacity as owner of the land;the liability is vested in the Territory and ceases to be a liability of the Commonwealth.

The provision is fairly clear that the liability of the Territory is in reference to acts or omissions with respect to management functions. Other liability not caught by this provision would remain with the Commonwealth, or at least be shared or divided between the Territory and the Commonwealth according to other responsibilities.

Section 51(1) on the other hand provides that –

The Commonwealth shall indemnify the Territory, and keep the Territory indemnified, against any action, claim or demand brought or made against the Territory in respect of any act done

¹⁹ s 25(2), *Ibid*.

²⁰ See National Capital Plan, 8. National Capital Open Space System at: www.nationalcapital.gov.au/index.php?option=com_content&view=article&id=1223&Itemid=463

²¹ See above, in text at note 9.

²² Administration of Territory Land. An extract of s 29 is set out above, in text at note 14.

or omitted to be done by or on behalf of the Commonwealth, being an action, claim or demand that, apart from this Act, could be brought or made against the Commonwealth.

The indemnity extends to damages, expenses and costs.²³ It does not apply to actions, claims or demands in respect of liabilities referred to in s 30.²⁴

The question of liability in respect of National Land managed by the Territory under separate agreements made with the Commonwealth is not answered by s 30. Under general principle, the Commonwealth would remain at least partly liable for acts or omissions of the Territory unless the separate agreement specified otherwise, or the Territory was acting outside the scope of the separate agreement at the time of the relevant act or omission. In cases of part liability in respect of acts or omissions of the Territory in its management of National Land under a separate agreement made with the Commonwealth, s 51 could well have the effect of indemnifying the Territory in respect of its part. Again, this might not be the case if the separate agreement provided otherwise, but query whether this statutory indemnity may be contracted out of, or if the Territory was acting outside the scope of the separate agreement at the time of the relevant act or omission.

Stewardship Principles

There has been a significant effort to find a legal stewardship principle, as distinct from an ethical or political one, in the common law legal systems, including Australia. This is a question with legal philosophical dimensions. In the past a conventional liberal view held that a land owner could do whatever he or she wished with the object of property unless constrained by express clear law or the land owner was interfering with the legal rights of another. Blackstone's misunderstood²⁵ description of ownership as a "sole and despotic dominion" was not far from the courts' treatment of the issue.

The issue is often described as a question of whether the land owner has a legal "duty of care" to his or her land. This terminology follows from work of Dr Gerry Bates for the Productivity Commission.²⁶ Other terms include "stewardship" and "responsible proprietorship". In his most recent treatment of the topic,²⁷ Dr Bates seems pessimistic about the progress made by the courts with respect to this question.

However, we are, I suggest, at a stage of watching every case that comes before the courts to detect how they will respond when a clear deserving case for protection is put before them with no other direction that might be taken to resolve it.²⁸ Naturally, it is difficult to foresee precisely which way the courts will go, however, it is the role of

²³ s 51(2) Australian Capital Territory (Planning and Land Management) Act 1988 (Cwth).

²⁴ s 51(3), *Ibid.*

²⁵ M Raff 'Toward an Ecologically Sustainable Property Concept' in E Cooke (ed), *Modern Studies in Property Law – Volume III*, Hart Publishing, Oxford, 2005

²⁶ Referred to by Dr Gibbon in his paper: see above, notes 1 and 2.

²⁷ G Bates, *Environmental Law in Australia*, 7th ed, LexisNexis Butterworths, Chatswood, 2010, 41-43 and 45-55.

²⁸ One emerging opportunity for the High Court of Australia to take a progressive step with respect to stewardship is *Spencer v Commonwealth of Australia* [2010] HCA 28, for which the full High Court gave leave to appeal on the 1st September 2010.

legal research to present a plausible analysis of this and examine ways forward that take account of likely directions.

Discussion of the issue is generally divided between (1) stewardship of private land tenures, and (2) the public trust doctrine in connection with public land.

(1) Stewardship of Private Land Tenures

This question is not so relevant to the question addressed in this paper. However, one might observe that planning appeal tribunals are much more willing to enforce planning restrictions imposed for environmental reasons than they were 20 years ago, and the courts more readily uphold these decisions. Indeed, as an illustration of the “despotic dominion” approach, court treatment of planning instruments in the earlier 20th Century was hostile.²⁹ The German legal system provides an illustration of how a stewardship principle might be handled by the courts – sympathetic implementation of environmental protection legislation is one key point.³⁰

(2) The Public Trust Doctrine

The public trust doctrine has been embraced most enthusiastically by the courts in the United States with respect to public land and resources, such as parks, national parks and rivers, and occasionally private land that has taken on a public characterisation, such as shopping malls. In essence, public administrators are, as a matter of law, required to act in demonstrable public interest when they make decisions about such public land and resources.³¹ As beneficiaries of the trust, members of the public have standing to enforce it.

By way of hypothetical illustration, an ACT government land release in an ecologically sensitive area intended to achieve no more than enhanced general revenues for the government of the day, while compromising other common interests, could well be found to contravene the public trust doctrine, assuming it applies in the ACT in the same way. The government could successfully answer such an assertion by demonstrating objective investigation and weighing of the issues because in these circumstances the courts are unlikely to second-guess a serious good faith investigation. Environmental issues surrounding a project within a nature park, such as building a new access road, could similarly give rise to public trust issues, however, present statutory planning and environmental impact assessment processes, faithfully applied to arrive at an objective decision, would generally satisfy the requirements of the public trust doctrine as explicated in the United States.

Would the doctrine of public trust apply in the ACT? Bates casts doubt on the development of the doctrine in Australia³² because of comments by Justice Preston, now Chief Justice of the New South Wales Land & Environment Court,³³ that the doctrine added nothing to the statutory scheme of the Environment Protection Act

²⁹ M Raff, ‘A History of Land Use Planning Legislation in Victoria’ (1996) 22 *Monash University Law Review* 90.

³⁰ M Raff, 2003, above note.3.

³¹ See Bates, 2010, above note 27, 41-43.

³² *Ibid*, 43.

³³ *Environment Protection Authority v Ballina Shire Council* [2006] NSWLEC 289, §§ 77-83.

1997 (NSW). In my opinion this reads too much into the decision in question. Again, like the planning cases referred to above,³⁴ the courts today are much more sympathetic toward the statutory scheme of the EPA and rigorous application of the scheme to public authorities could be seen as an implementation of or vehicle for the same public trust ethic.³⁵

(3) Conclusion on stewardship principles

My conclusion is that Bates is too pessimistic about development of the doctrine of public trust in Australia. We are most likely to see continuation over the next ten years of the growing sympathy of the courts for the objectives of environmental legislation and recognition of the need for the rights and entitlements of land tenure holders, public and private, to be balanced beside responsibilities to maintain ecological characteristics of their land. One might also anticipate that within the next twenty years the courts here or in the United States will explicitly connect a general public trust or stewardship principle to principles of ecologically sustainable development [ESD] or principles analogous to them.³⁶

Other Common Law Principles

Stewardship is about the responsibilities that we have to use what we own appropriately. I mentioned above that the conventional liberal views of property that the courts have observed might not have recognised stewardship of one's own land but did constrain the land owner who would interfere with the legal rights of another. The common law doctrines generally found in this category are –

- trespass, a direct and intentional interference with another's land,
- nuisance, public and private, an interference that is not necessarily direct or intentional,
- negligence, damage caused through an act or omission which in breach of a duty of care (the existence of the duty of care follows from some kind of harm being a reasonably foreseeable result of the act or omission),³⁷ and
- occupier's liability, for injury or damage caused to someone on premises, including land, through the occupier's failure to take sufficient care.³⁸

³⁴ See above, in text at note 29.

³⁵ The scheme was described as "... quite authoritarian, if not draconian ..." in *Protean (Holdings) Ltd v EPA* [1977] VR 51 at 55-56. A high level of tolerance for situations of heavy pollution was very much evident in *Window v The Phosphate Co-operative Co of Australia Ltd* [1983] 2 VR 287. Although a majority of the High Court expressed a sympathetic interpretation of an EPA scheme in *The Phosphate Co-operative Company of Australia Ltd v EPA* (1977) 138 CLR 134, strangely it was the very conservative dissenting judgment of Justice Aickin that was drawn upon in *Palos Verdes Estates Pty Ltd v Carbon* (1992) 6 WAR 223, 250-251.

³⁶ See the separate opinion of former Vice-President of the ICJ, Justice Weeramantry, in the *Case Concerning the Gabčíkovo-Nagymaros (Hungary/Slovakia)*, International Court of Justice, 1997 no 92 [the "Danube Dam Case"].

³⁷ This common law concept of negligence is codified in ss 42 & 43 of the Civil Law (Wrongs) Act 2002 (ACT).

³⁸ A new definition of occupiers' liability is provided by s 168 of the Civil Law (Wrongs) Act 2002 (ACT).

In the scenario of nature park management, liability in nuisance could, for example, arise through trees or poor drainage damaging neighbouring property. Land being a source of the seeds of weeds or feral animals in unreasonable proportions has also been held to be a nuisance in the legal sense. The doctrine of nuisance also has a principle of “reasonable user”, meaning that legal expectations are scaled to the nature of land in question. The application of this principle to land at the border of an urban area and a nature park is not an easy question, however, the buffer area measures described in the *Canberra Nature Park Management Plan*³⁹ seem quite reasonable in this regard.

Negligence is a very broad head of claim resting on a legal concept of “fault”. If it is reasonably foreseeable that some harm could follow from an act or omission, a duty of care is established. If harm does follow, the duty is breached and the person responsible for the act or omission is liable. Clearly this would embrace safety issues involved in falling trees, collapsed walkways, etc. Until 1994 a landowner was considered strictly liable, rather than on proof of fault, for things that escape from the land. That principle has now been absorbed into the broader doctrine of negligence, however, the courts have warned that a very high level of responsibility for the escape of dangerous things remains.⁴⁰ This is particularly relevant to the escape of fire from land. There are many fine questions involved in the question of liability for fires that could emanate from a nature park and damage surrounding land; the contrast, for example, between a fire caused by a lightning strike in the park and one caused by an act or omission of park staff. Section 170 of the Civil Law (Wrongs) Act 2002 (ACT) limits liability for fires that start accidentally, such as a lightning strike, but not those that start negligently, such as by acts or omission of park staff. Nevertheless, fire prevention and control is certainly within the common law duty of care of a landowner.

Occupiers’ liability operates on very similar principles to those of negligence, with the standard of care required adjusting to the circumstances, including the nature of the premises, including land, and the reason for the presence there of the injured party. The definition provided by s 168 of the Civil Law (Wrongs) Act 2002 (ACT) preserves the basic negligence principle – an occupier of premises owes a duty to take all care that is reasonable in the circumstances to ensure that anyone on the premises does not suffer injury or damage because of the state of the premises, and then goes on to limit liability on the basis of the nature of the premises and circumstances of the injured party’s presence. Accordingly, one would say that s 168 is a codification of the essential common law principles but also a great simplification of the historically derived common law position.

³⁹ *Canberra Nature Park Management Plan*, Department of Urban Services, Conservation Series No. 14, October 1999.

⁴⁰ *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42. Section 215 of the Civil Law (Wrongs) Act 2002 (ACT) limits the former principle to the extent it applies in relation to damage caused by escape of animals. With absorption of the ‘escape principle’ into negligence generally, a duty of care under negligence principles would remain.

Responsibilities in Legislation

(1) Environment Protection & Biodiversity Conservation Act 1999 (Cwth)

One significant area of this Commonwealth Act potentially relevant here is the assessment and approval of controlled actions, particularly in respect of threatened species and their ecological communities, under Part 3, as well as protection of listed species and measures to arrest threatening processes. Observance of the provisions in this Act would also form part of the duty of care with respect to a nature park.

(2) Domestic Animals Act 2000 (ACT)

This Act allows the Minister to declare areas to be exercise areas⁴¹ or areas where dogs are prohibited.⁴² The Domestic Animals (Dog Control Areas) Declaration 2005 (No 1) made in exercise of these powers provides for dog exercise areas, determined by a published map. Sections 42 and 43 provide for standing prohibited areas, where dogs may not be taken, generally for the protection of children and people participating in sport, and a permit system. Sections 44 and 45 provide for the restraint of dogs generally, including in public places.⁴³ Section 46 requires the removal of dog faeces. Maintaining a regime of control with respect to domestic animals present in nature reserves, or present on neighbouring land and able to enter nature reserves, proportionate to risk posed to the ecological values of the reserves, could be well be seen as a stewardship obligation implicit in managing the reserve, or as a duty of care associated with public tenure of that land. It would be advisable to review relevant legislation to ensure the effectiveness of these powers in relation to nature reserves.

(3) Emergencies Act 2004 (ACT)

This Act establishes a legislative framework for the coordination of emergency services in the ACT, particularly with respect to fire protection. Section 72 delegates authority to the Minister to make a strategic bushfire management plan for the ACT. This authority was exercised in making the Emergencies (Strategic Bushfire Management Plan for the ACT) 2009.⁴⁴ Section 77(2) provides that a manager of unleased Territory land must "... as far as practicable, ensure that the area is managed in accordance with the strategic bushfire management plan" and "must comply with any bushfire management requirement for the manager or the land". However, a plan of management in force under the Planning and Development Act 2007 prevails in the event of inconsistency: s 77(3). There is further provision for the preparation of bushfire operational plans: s 78. The Minister may give a written direction to a land manager in connection with compliance with a bushfire management requirement: s 81. The chief officer (rural fire service) may, at any time

⁴¹ s 40 Domestic Animals Act 2000 (ACT).

⁴² s 41, *ibid*.

⁴³ s 42, *ibid*, contains its own definition of a "public place": s 42(5). However, the definition applicable in respect of other relevant sections traces to the Roads and Public Places Act 1937 (ACT): **public place** means un-leased territory land that the public are entitled to use or that is open to, or used by, the public. Nevertheless, the definitions are consistent and embrace nature reserves. See also s 68 Nature Conservation Act 1980 (ACT).

⁴⁴ Disallowable Instrument DI2009-211

in accordance with the strategic bushfire management plan and the Environment Protection Act 1997 (ACT), light a controlled fire in a rural area for the purpose of reducing the risk of bushfire or the spread of bushfire: s 84. Division 5.4.1 of the Act provides for a range of notices to be given with respect to premises, including land, with the objective of reducing fire risk. A land manager must take all reasonable steps to prevent and inhibit the outbreak of fire: s 120.

These provisions effectively require a precautionary approach with respect to the general common law responsibilities of a land owner at common law with respect to potential liability for damage caused by fire.⁴⁵ That they are not a *carte blanche* is evident from provisions such as s 77(3), referred to above, and s 123(6) which provides that permissions with respect to fire lighting do not relieve application of the provisions of the Environment Protection Act 1997 (ACT). So far as statutory obligations to reduce fire hazard are consistent with a precautionary approach, and are carried out in ways consistent with objectives of a nature reserve with respect to its ecological integrity, they should be assessed as part of the duty of care of the holder of a public land tenure.

(4) Nature Conservation Act 1980 (ACT)

The provisions in this Act concerning conservation of declared and protected species and their ecological communities, as well as measures to arrest threatening processes, would also form part of the duty of care with respect to a nature park.

(5) Pest Plants and Animals Act 2005 (ACT)

This Act provides for the declaration of pest plants and animals and preparation of management plans with respect to them. If the pest plant or animal is declared “notifiable” a duty arises to report its presence to the Chief Executive within two working days. If it is declared “prohibited” it is an offence to undertake a wide range of activities in relation to it, including propagation of the pest plant or keeping of the pest animal, reckless use of a vehicle or machinery in ways that might spread it and reckless disposal. Observance of the provisions in this Act would also form part of the duty of care with respect to a nature park.

(6) Planning and Development Act 2007 (ACT)

Chapter 10 of the Planning and Development Act 2007 (ACT) provides a legislative framework for the general management of public land by means of reservation for purposes ranging from wilderness areas to heritage areas, including nature reserves,⁴⁶ and development of management objectives and plans of management for defined reserved areas.⁴⁷

Whether the detail of management objectives and plans of management for a specific defined reserve area are an expression of a duty of care or stewardship obligation in respect of the ecological characteristics of the area of reserved land, or whether they provide a level of requirements above and beyond the “business as

⁴⁵ See text above, following note 40.

⁴⁶ s 315 Planning and Development Act 2007 (ACT).

⁴⁷ s 316-320, *ibid.*

usual” scenario required in the calculation of environmental offsets, could only be determined through an evaluation of each set of management objectives and each management plan in light the characteristics of each area.⁴⁸ An evaluation at this level of detail could be undertaken in a further research project.

Conclusion

I have reviewed duty of care in the full legal sense, extending beyond the concept of “statutory duty of care” employed by Dr Gibbon,⁴⁹ in order to assist determination of the “business as usual” scenario required in the calculation of environmental offsets. I will be very happy to investigate any aspect further, such as a more comprehensive review of applicable legislation.

It is useful to present the particular legal obligations identified in this report in tabular form –

	Title	Source	Established or Emerging	Content
1	Stewardship - Public Trust Doctrine	Common Law	Emerging	Decision makers to act in demonstrable public interest and objectively when they make decisions about public land and resources. Future – consistency with principles of ESD or analogous principles.
2	Trespass	Common Law	Established	No direct and intentional interference with enjoyment of land neighbouring nature parks
3	Private nuisance	Common Law	Established	No indirect interference with enjoyment of land neighbouring nature parks
4	Public	Common Law	Established	No indirect interference with reasonable comfort or convenience of an identifiable group of citizens generally.
5	Negligence	Common Law, modified by the Civil Law (Wrongs) Act 2002 (ACT)	Established	Take care not to act or omit to act in situations where it is reasonably foreseeable generally that damage could ensue. Examples; unsafe trees and walkways that could injure visitors to the park, escape of fire, seeds of weeds or feral animals.
6	Occupiers' liability	Common Law, modified by the Civil Law (Wrongs) Act 2002 (ACT)	Established	Take care not to act or omit to act in situations where it is reasonably foreseeable that damage could ensue, with specific application to people present on the land. Examples; unsafe trees and walkways that could injure visitors to the park.
7	Environment Protection & Biodiversity Conservation Act 1999	Statute	Established	1) Assessment and approval of controlled actions, particularly in respect of threatened species and their ecological communities 2) Protection of listed species 3) Measures to arrest threatening processes.

⁴⁸ Mention has been made of the Canberra Nature Park Management Plan above: see text above at note 39

⁴⁹ Above note 2.

	(Cwth)			
8	Domestic Animals Act 2000 (ACT)	Statute	Established	<ul style="list-style-type: none"> 1) Powers to control domestic animals in public places 2) Query consistency with broader duty of care to control domestic animals on neighbouring land that might enter a nature reserve, placing ecological values at risk
9	Emergencies Act 2004 (ACT)	Statute	Established	<ul style="list-style-type: none"> 1) Legislative framework for the coordination of emergency services in the ACT, particularly with respect to fire protection 2) Powers to issue notices with respect to fire risk 3) Obligations to prevent and inhibit the outbreak of fire 4) Most requirements form a precautionary approach to prevention of breach of other landholder obligations under common law.
10	Nature Conservation Act 1980 (ACT)	Statute	Established	<ul style="list-style-type: none"> 1) Protection of declared and protected species and their ecological communities 2) Measures to arrest threatening processes
11	Pest Plants & Animals Act 2005 (ACT)	Statute	Established	<ul style="list-style-type: none"> 1) Pest plants and animals declared “notifiable” to be reported to the Chief Executive within two working days 2) Pest plants declared “prohibited” not to be propagated 3) Pest animals declared “prohibited” not to be kept 4) Care to be taken not to use vehicles or machinery in ways that might spread pest plants or animals declared “prohibited” 5) Care to be taken when disposing of pest plants and animals declared “prohibited”
12	Planning and Development Act 2007 (ACT)	Statute	Indistinct as an expression of duty of care or stewardship principles	<ul style="list-style-type: none"> 1) Reservation of public land for distinct purposes 2) Development of management objectives and plans of management for defined reserved areas. 3) More precise identification of duty of care or stewardship principles could only follow evaluation of individual reservations, objectives and plans, in light of the ecological characteristics of the defined area of reserved land in question.

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14 April 2011