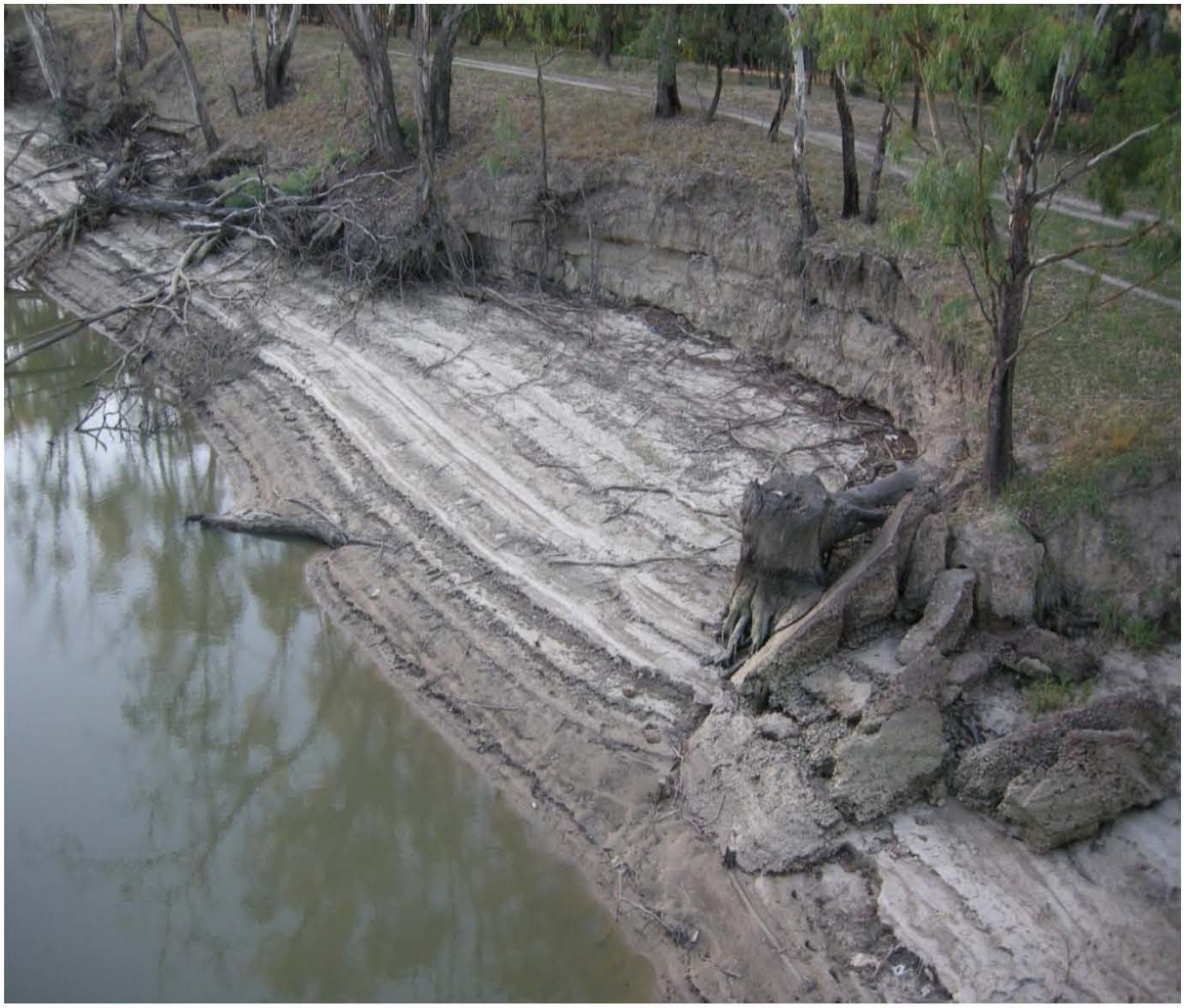
SUBMISSION TO

THE PROVISIONS OF THE WATER ACT 2007

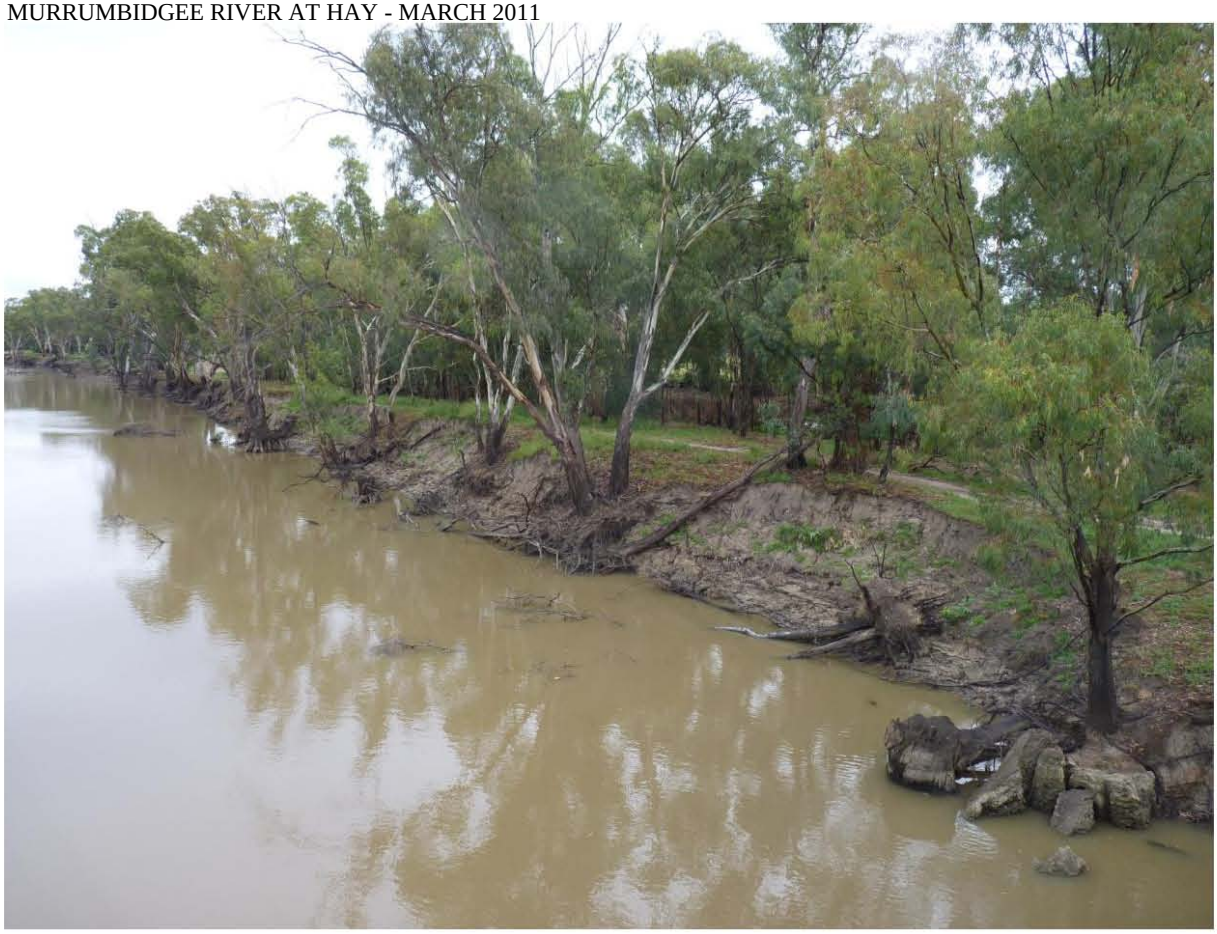
18 MARCH 2011



MURRUMBIDGEE RIVER AT HAY- FEBRUARY 2008

MARIA I E RIEDL

MURRUMBIDGEE RIVER AT HAY - MARCH 2011



INTRODUCTION

Grateful thanks to the Committee for giving us the opportunity to make a comment to the provisions of the Commonwealth Water Act 2007.

My name is Maria Riedl, and I have been interested in the manner the Commonwealth government has managed the issue of over-allocation in the Murray-Darling Basin. I have attended information sessions held by the Productivity Commission into returning water to the system. I made the effort to go to a fair few of the sessions held by the Murray-Darling Basin Authority both in the lead-up to trying to figure out how to approach the over-allocations and then when they went around Australia with the pre-Draft Plan (one which they did not have to release and consult on), trying to get a handle on the social and economic impacts. There is no doubt that the Authority made an effort to engage the community, and not only look at the environmental requirements that underlie the legal actions of the Water Act 2007 but also ask about the social and economic repercussions of implementing a new cap and a new legal order for the MDB. I have sent attachments that support this.

THE BALANCE

I have sent 14 or so attachments that all have information that should be regarded in your deliberations, as some of them (and they are no means complete) demonstrate that the MDB Authority has had regard for the Water Act, which does incorporate the consideration of the social and economic impacts of the act and the forthcoming Murray-Darling Basin Plan.
It is quite clear from other attachments I have sent you that the only way that the Murray-Darling Basin can continue to provide ecosystem services to irrigators and agriculture and people who live and depend upon it natural resources, is to regain a balance in its use. At the moment, the use of natural resources; such as water (both surface and underground), ecosystems, wetlands, flood plains, minerals; land, forests and the increasing loss of species and biodiversity is totally out of balance. Social and economic interests preclude the environment and ignore the services that they provide. (If one wants to look at it from a totally anthropomorphic bias).

The Commonwealth Water Act 2007 sets in place a legal avenue to address the imbalance. The competing interests of state governments, big users such as mining companies, farming corporations and urban areas, are continually encouraging the community to use more and more natural resources, and grow bigger and bigger farms and mining enterprises, and create more and more profits for shareholders, companies and government. To now state that this act does not protect the social and economic interests of these groups, and places an unfair balance which tips towards the environment, does not recognise the terribly fragile state that we humans have reduced the Murray-Darling Basin to. The only way we can prevent the losses of more and more ecosystems and more and more of our biodiversity and species is to ensure that the Water Act **does** put an emphasis on protecting the Murray-Darling Basin water resources, both above and below ground.

It is no longer acceptable to continue along a 'business-as-usual' path, expanding like a huge toad selfishly drinking up all the water to stop the environment from getting its fair share just because he can is simply ridiculous. (there is an aboriginal legend about this toad) This fear and misinformation that is being spread by certain sectors of government, decision-makers and big business is getting to be old hat.

The problems are not with the act, the problems are with government at all levels. The decision to upgrade infrastructure and buy back water, without first using science to give you the information on how much water is required for the health of the MDB, is the major disastrous decision and this is what has caused the unrest and anger of irrigators who live and utilise the waters of the Murray-Darling Basin as well as the overlapping Great Artesian Basin (which is the next to be over-allocated). The act is trying to do what it is set out to do and this is to bring back a balance to an over-allocated system. Who over-allocated it? All layers of governments, who had no regard for long periods of drought when they instituted a cap that had the effect of continuing to over-allocate the systems. They did not look at the science, at historical droughts and rains and instead looked at wet years for implementing a cap that was over-allocated almost the day they set the first cap.

The balance has tipped to the human requirements with total disregard for environmental requirements. One only has to draw your attention to some of the other attachments I have emailed you where the Victorian Water Act does nothing to protect environmental water requirements and instead gives untold powers to the Victorian Water Minister to keep on

taking environmental water reserves and entitlements down a huge 6 foot pipeline, which is out of an already degraded system and is listed as a Heritage River under the Victorian Water Act; the Goulburn River. I am talking about the North-South pipeline which the previous Victorian government approved, as did the Commonwealth Environment Minister against all recommendations and without any investigation of the availability of the water and where and who it was being taken from. This after the COAG agreement was signed, agreeing that the MDB was over-allocated, and action had to be implemented and a new cap instituted to ensure the survival of the MDB.

It behoves us to remember that the Water Act came about because of the dire state of the rivers and wetlands, flood plains and river red gums, and their inability to function because of both over-allocation and an unprecedented drought that seemed to have no end in sight. There was a combined state and federal government agreement, to prevent further degradation and a recognition that if nothing were agreed to the whole Murray-Darling Basin system would collapse and the result would be devastating not only to the environment but the social and economic wellbeing of those communities dependent upon the system.

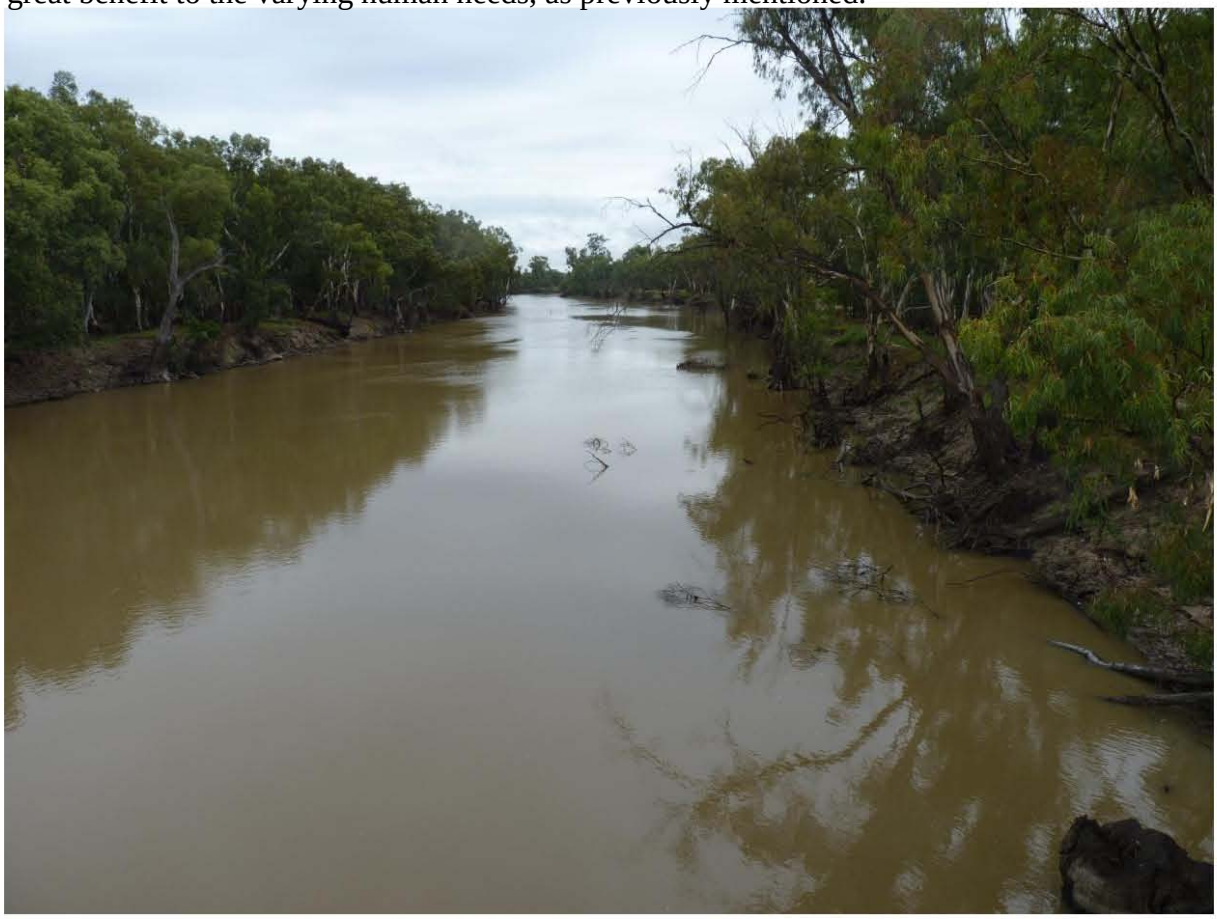
Considering the fact that Australians' are seriously concerned about climate change (though we have some nameless politicians who continue in blissful ignorance to reject and scoff at the science of climate change!) and world food security; it cannot be left to industry lobby groups to control what happens to our common right to a fair and equitable share of water. Obviously this sharing must include a recognition that we have failed to share the water with the natural environment creating an imbalance that can only be addressed by instituting a law that corrects that imbalance.

The Water Act readdresses this balance: to 'promote the use and management of the Basin water resources in a way that gives effect to relevant international agreements, and to ensure the return to environmentally sustainable levels of extraction for resources that are over-allocated or overused; and to protect, restore and provide for the ecological values and ecosystem services of the Murray-Darling Basin (taking into account, in particular, the impact that the taking of water has on the watercourses, lakes, wetlands, ground water and water-dependent ecosystems that are part of the Basin water resources and on associated biodiversity.'

It has to be stated that the Water Act as it stands, ensures the sustainable management of the Murray-Darling Basin. The entire system has been over-allocated since the first cap was placed on the system, and without this act, this allocation will not be addressed in any meaningful manner. To now say that perhaps the act tilts too much towards the environment is missing the entire point of why it was written and agreed to. There was insufficient water to run the entire MDB system, there was absolutely no flow at the mouth to the sea, and the mighty Murray River was dying from the mouth up, as rivers do.

It is not fair to say that the Water Act must give equal weight to the environment, social and economic interests. This act is clear with its obligations to protect the system that is of such

great benefit to the varying human needs, as previously mentioned.



MURRUMBIDGEE RIVER IN FLOOD AT HAY MARCH 2011

CONCLUSION

We live in a world where man is self-centred, and has god-like tendencies, with regard to their belief that they can ‘take’ and ‘control’ our natural environment without conscience and oversight or impunity. By disregarding the benefits of a healthy environment, which the act recognises as of vital importance, government and vested interests, are ignoring the science that has stated that the entire MDB is in disrepair and in danger of collapsing, with little hope of recovery if the over-allocation of its natural resources is not immediately addressed.

Governments, both state and federal must take the higher ground and think of the national interest. Not forgetting its international obligations regarding wetlands, flood plains and rivers, and protected species and communities. If the over-allocation is not addressed, and they allow the ‘business-as-usual’ extractions to continue (because of pressure groups-eg mining, forestry, irrigation, agriculture, industry and urban areas), even though we have had a bit of a reprieve from the drought, the failure to leave an act that has teeth and sets out in no uncertain terms its intention to address the degradation of the Murray-Darling Basin in a time when the effects of climate change are accelerating, then we will again be addressing this in a few years’ time, yet again.

Urgent action has to be taken. Climate change, added to drought, added to over-allocations, added to greed, added to the privatisation of water, added to the sale of water from one

catchment to another and changing balances in insidious ways, added to government inaction, will result in the eventual collapse of an entire catchment. This is not in the national or international interest. It will have unacceptable and avoidable impacts on other ecosystems and also on our ability to grow food and be environmentally sustainable. We also tend to forget that ecosystems overlap and things are connected. There are also accumulated impacts of separate actions that must be seriously considered.

Population growth is yet an unconsidered issue and this is remiss, because of the demand for more water, the demand for more natural resources cannot be left unchecked. More people mean more food, more water, more... I have attached the American Legacy Act, which though not yet enacted in law endeavours to set out a balance. By taking stock and an accounting of all of our natural resources, then putting aside a set amount into an untouchable column, then another column of useable resources and one that is to be left for future generations we might be able to ensure that we do not use up all natural resources in one or two generations simply for profit!

It is self-evident that a healthy environment underpins communities, businesses, and indeed enables us to meet our international and national obligations and those important obligations of inter-generational equity. Our natural resources can be recycled and reused over and over again, without allowing them to be 'used up'. Ensuring that government actively encourages and supports innovation, treats our natural resources with respect, valuing them, limiting their abuse and overuse and by implementing laws such as the Water Act 2007 and by not weakening them at the first sign of unrest, our natural resources will be healthy and their benefits will ensure an environmentally sustainable future.

THE RENEWAL OF RED GUMS WITH THE FLOODS NEXT TO THE MURRUMBIDGEE AT HAY MARCH 2011

FINAL WORD

While I do not agree with altering the balance of the Water Act, as I believe the environment is silent and is always taken advantage of because it has no real status in law, (always weakened to suit government ambitions-look at the climate change debate!) I do want to state that **all** users, not just irrigators utilise water and this includes **mining, industry, forestry and urban areas and other,** must be required to play their part in ensuring that water and our natural resources are not over-allocated. Seems to me irrigators are being targeted to the exclusion of other users and that is not fair or equitable and this is why they are angry.

Leave the Water Act as it is and be fair about where and how the over-allocation is address. This is a matter of equity and the common good. Selling our water to foreign companies does not benefit anyone. The privatisation of water was the beginning of the end as money and markets have never put a value on the environment.

THE MURRAY RIVER IN FLOOD AT BURONGA NSW NEAR MILDURA VICTORIA FEBRUARY 2011

The following are a couple of extra articles that I have included for your edification.

Thank you

Maria Riedl

The Mono Lake Story - The Draining of a Lake #1 & the Public Trust Doctrine

It is time the "Public Trust Doctrine" became enshrined in South Australian and Australian Law!

The Mono Lake Story
United States

"In 1941, the Los Angeles Department of Water and Power began diverting Mono Lake's tributary streams 350 miles south to meet the growing water demands of Los Angeles. Deprived of its freshwater sources, the volume of Mono Lake halved, while its salinity doubled. Unable to adapt to these changing conditions within such a short period of time, the ecosystem began to collapse. The photo at left was taken in 1962, after the lake had already dropped almost 25 vertical feet. Islands, previously important nesting sites, became peninsulas vulnerable to mammalian and reptilian predation. Photosynthetic rates of algae, the base of the food chain, were reduced while reproductive abilities of brine shrimp became impaired. Stream ecosystems unraveled due to lack of water. Air quality grew poor as the exposed lake bed became the source of air-borne particulate matter, violating the Clean Air Act. If something was not done, Mono Lake was certain to become a lifeless chemical sump. The photo at right was taken in 1968. The one below was taken in 1995, at a lake level over 40 vertical feet below the pre-diversion level."
http://www.monolake.org/about/story

Political & Legal Chronology
Over the years the Mono Lake Committee, working with the National Audubon Society and CalTrout, has pursued litigation which can be divided into two broad categories:

1. The protection of Mono Lake through the enforcement of the Public Trust Doctrine. Dating from the time of Roman law, this ancient legal doctrine protects navigable bodies of water for the use and benefit of all the people. In a 1983 precedent-setting decision, the California Supreme Court ruled that the state has an obligation to protect places such as Mono Lake "as far as feasible," even if this means a reconsideration of past water allocation decisions.

2. The protection of fisheries in the streams tributary to Mono Lake through the enforcement of California Fish and Game codes. These codes, which can be described as a legislative expression of the Public Trust, were previously unenforced. Section 5937 states: "the owner of any dam shall allow sufficient water at all times to pass over, around, or through the dam, to keep in good condition any fish that may be planted or exist below the dam." Section 5946 states: "no...license to appropriate water (in portions of Mono and Inyo counties) shall be issued...unless conditioned upon full compliance with section 5937."

These legal principles are the basis of the landmark 1994 decision made by the State Water Resources Control Board, in which the Department of Water and Power's (DWP's) water licenses were amended. In the decision, the state had to comply with Fish and Game code requirements for Mono Lake's tributary streams, and, on top of the water needed to protect the fisheries, ensure that the lake's public trust values (such as air quality, scenic and wildlife values) were protected.
http://www.monobasinresearch.org/timelines/polchr.htm

The Public Trust Doctrine
California State Lands Commission

Origins of the Public Trust
The origins of the public trust doctrine are traceable to Roman law concepts of common property. Under Roman law, the air, the rivers, the sea and the seashore were incapable of private ownership; they were dedicated to the use of the public. This concept that tide and submerged lands are unique and that the state holds them in trust for the people has endured throughout the ages. In 13th century Spain, for example, public rights in navigable waterways were recognized in Las Siete Partidas, the laws of Spain set forth by Alfonso the Wise. Under English common law, this principle evolved into the public trust doctrine pursuant to which the sovereign held the navigable waterways and submerged

lands, not in a proprietary capacity, but rather “as trustee of a public trust for the benefit of the people” for uses such as commerce, navigation and fishing.
http://www.edo.org.au/edonsw/site/pdf/presentations/coastal_solutions_forum.pdf

Perception of Water in Australian Law: Re-examining Rights and Responsibilities
Academy Symposium 2003
Australian Academy of Technological Sciences and Engineering

Introduction: Changing Perceptions of Water in Australia
Patterns of Australian life since European colonisation have been characterised by periods of ‘boom and bust’. Many of these cyclical trends have been linked to the periodic droughts that affect the Australian continent.1 Water and its availability has long been a key issue in Australian society. A significant proportion of Australia’s public resources and private investment has been devoted to overcoming perceived deficiencies in water supply and/or its distribution.2 As Australia continues to be heavily dependent on primary industries,3 and as the demands for urban water supply continue to grow,4 water will remain a sensitive issue in economic, social and political terms. In many ways, water is a more acute indicator of trends in development and conservation than the land itself, even though the interrelationship between land and water is now beginning to be given due acknowledgement.5 The more diffuse interaction between water, environmental sustainability and human quality of life arguably remains largely under explored. However, the recent attention directed to water issues in Australian society highlights, yet again, how integrally water is connected to a diverse range of human and environmental outcomes.6
http://www.atse.org.au/index.php?sectionid=629

Diving into the deep: water markets and the law
Poh-Ling Tan* Institute of Public Affairs

"Introduction - The central objective of the current reforms - to develop a water market - has triggered polarised debate between the advocates of markets and advocates of regulation. Yet in western USA, where water markets have been recommended since the 1960s and a common reality since the mid 1980s, water practitioners have accepted a role for both markets and regulation. The problem is to identify for what purposes each should be used. A purely regulatory approach did not work, but neither would a pure market approach, if only because of the need to provide for environmental flows. The two approaches need to be integrated."
http://www.ipa.org.au/library/0804paper_tan.pdf

Metropolitan Region Scheme Amendment No 1001/33 South West Districts Omnibus (No 3A) Jervoise Bay
Motion for Disallowance WA Legislative Council

having lost over eight per cent of the Sound's seagrass habitat since 1970 we are gravely concerned at the prospect of losing still more of what remains".

"We are opposed to this development in relation to both location and design. We are sure that the contemporary view is that it is simply no longer acceptable to have such valuable community recreational asset taken away, irreversibly changed and downgraded. The Commonwealth Government in the light of its coastal protection pledge, funded by the sale of Telstra, would need to be cautious of partly funding a potential environmental disaster. This project should go straight back to the drawing board and an appropriate consultative process be developed for alternative solutions, particularly in view of the proposals for further harbours in Cockburn Sound. This could incrementally destroy this wonderful area".

The footnote reads -

*RECFISHWEST represents Western Australia's 520,000 recreational fishers.

In terms of the spokesperson's comment that it is simply no longer acceptable to have such a valuable community recreational asset taken away, irreversibly changed and downgraded, I will read an item from "Earth 2000" of 12 January 1998. It was looking at this issue which was dealt with by Robert Kennedy Jnr and John Cronin in a book and who are experts in environmental law and were

representing the work of a group named Hudson Riverkeeper Inc in the United States. An article in The West Australian dated 12 January 1998 stated -

In their book, Cronin and Kennedy say the rights of fishermen and other river users are enshrined in the New York State constitution and statutes but are based on the oldest body of law on which so many English-speaking democracies rest - the Public Trust Doctrine. "Appearing in the English Common Law and Roman Law before it," write the pair, "that doctrine establishes public ownership of certain natural resources and is one of two ancient principles that underlie modern environmental law and virtually all Riverkeeper's work. "According to the Public Trust Doctrine, the public owns common or shared environments. Government trustees are obligated to maintain the value of these systems for all users - including future generations. Like other rights, public trust rights are said to derive from 'natural' or God-given law. They cannot be extinguished." These rights, enshrined in the Magna Carta, ensured public access to clean natural resources for ever.

That is a principle which does not seem to be familiar to this Government. It seems to think that our community assets belong to certain key interest groups from which the Government receives most of its election funding.
http://www.parliament.wa.gov.au/hansard/hans35.nsf/16ab30a0303e54f448256bf7002049e8/e8ce49e4dfb5508c4825673d002db441?OpenDocument

Public trust doctrine
From Wikipedia, the free encyclopaedia

The public trust doctrine is the principle that certain resources are preserved for public use, and that the government is required to maintain it for the public's reasonable use. Origins - The ancient laws of the Roman Emperor Justinian held that the seashore that were not appropriated for private use were open to all. This principle became the law in England as well. In the Magna Carta in England centuries later public rights were further strengthened at the insistence of the nobles that fishing weirs which obstructed free navigation be removed from rivers. These rights were further strengthened by later laws in England and subsequently became part of the common law of the United States as established in Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892). In that case the Illinois Legislature had granted an enormous portion of the Chicago harbor to the Illinois Central Railroad. A subsequent legislature sought to revoke the grant, claiming that original grant should not have been permitted in the first place. The court held that common law public trust doctrine prevented the government from alienating the public right to the lands under navigable waters (except in the case of very small portions of land which would have no effect on free access or navigation). In subsequent cases it was held that this public right extended also to waters which were influenced by the tides regardless of whether or not they were strictly navigable. This concept also has been found to apply to the natural resources (mineral or animal) contained in the soil and water over those public trust lands.
http://en.wikipedia.org/wiki/Public_trust_doctrine

Subject: Media Release: AbitibiBowater NAFTA settlement has privatized Canadian water, trade committee hears

MEDIA RELEASE
March 8, 2011

AbitibiBowater NAFTA settlement has privatized Canadian water, trade committee hears

Ottawa -- The record-setting $130-million NAFTA settlement with AbitibiBowater has effectively privatized Canada's water by allowing foreign investors to assert a proprietary claim to water permits and even water in its natural state, says trade lawyer and Council of Canadians board member Steven Shrybman, in a presentation to Parliament today.

"It would be difficult to overstate the consequences of such a profound transformation of the right Canadian governments have always had to own and control public natural resources," says Mr. Shrybman in his presentation to the Standing Committee on International Trade, which is studying the AbitibiBowater NAFTA settlement from last August.

"Moreover, by recognizing water as private property, the government has gone much further than any international arbitral tribunal has dared to go in recognizing a commercial claim to natural water resources."

In 2008, AbitibiBowater, a Canadian firm registered in the United States, closed its pulp and paper mill in Grand Falls-Windsor, NL. The company asserted rights to sell its assets, including certain timber harvesting licenses and water use permits. These permits were contingent on production. More importantly, under Canada's constitution they are a public trust owned by the Province, not by private firms. So the Newfoundland government moved to re-appropriate them as it has a right to do under Canadian law. AbitibiBowater sidestepped the courts to challenge the Newfoundland government.

"The case clearly put the concept of water as a public trust on a direct collision course with treaty-based corporate and commercial rights. However, rather than defend public ownership and control of water, the federal government has agreed to settle AbitibiBowater's claim," says Mr. Shrybman. "By stipulating that the payment of compensation is on account of rights and assets, the government of Canada has explicitly acknowledged an obligation to compensate AbitibiBowater for claims relating to water taking permits and forest harvesting licenses."

By settling with the company rather than challenging its case, we have no response from the federal government to refute the company's proprietary claims to water and timber rights, explains Mr. Shrybman.
The settlement also fails to identify the particular rights for which compensation will be paid, and makes no attempt to exclude any of the company's claims, "thereby acknowledging the validity of the claims."

"Moreover, by recognizing a proprietary claim to water taking and forest harvesting rights, Canada has gone much further than any international tribunal established under NAFTA rules, or to our knowledge, under the rules of other international investment treaties," he says.

A statement by the government that the settlement shall not set a precedent is "entirely ineffective," because of NAFTA's National Treatment clause which grants foreign companies treatment no less favourable than national companies in like circumstances.

"It is not therefore an overstatement to describe the consequences of this settlement as effectively representing a coup-de-grace for public ownership and control of water and other natural resources with respect to which some license or permit had been granted."

Shrybman suggests water takings by tar sands operations in Alberta, a golf course in Ontario or a water bottling plant in Quebec are other examples of where even a partial recovery of water rights by the provinces could detrimentally affect business. If any of these companies were foreign owned they could claim compensation on the same terms granted AbitibiBowater.

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The Council of Canadians strongly believes there is no place in existing or future trade agreements for such overstretching investment protections. It has repeatedly called on the federal government to reopen NAFTA to remove the investor-to-state dispute process. The Council also recently joined several other Canadian organizations in writing to all members of the European Parliament urging them to reject the inclusion of NAFTA-like investment protections in the Canada-EU Comprehensive Economic and Trade Agreement (CETA), which could be signed by the end of the year.

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For more information:

Dylan Penner, media officer, Council of Canadians: 613-795-8685, dpenner@canadians.org

To read Mr. Shrybman's full presentation to the trade committee: http://canadians.org/