Professor Paul Martin
Director
Australian Centre for Agriculture and Law
University of New England
Armidale NSW 2351
Australia
www.une.edu.au/Aglaw

Committee Secretary
Senate Standing Committee on Rural Affairs and Transport
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Sir,

Submission to the Inquiry on the Management of the Murray Darling Basin

I write to make a submission in relation to the management of the Basin. In particular, I wish to raise concerns about the legal framework created by the *Water Act 2007*, its implications for Basin Communities, and some far larger implications for the rule of law and governance by Parliament in Australia. I believe that the conflicts that have emerged over the Guide to the Plan are indicative of a larger fundamental problem with this legislation than has been thus far discussed, and that the Inquiry ought highlight this concern not only with the Murray Darling Basin Plan as proposed, but with the legislative approach that is reflected in the *Water Act*.

My submission does not argue that any particular set of interests (the economy, the environment or the community) ought be given greater priority than they have been, though I expect that other submissions will do so. The purpose of my submission is that regardless of any such arguments the fundamental structure of the *Water Act* contains major risks to Parliamentary democracy and the rule of law, and that this ought be remedied both in this act, and also in future natural resource management legislation.

The role of the law is to provide a fair legal mechanism for the contesting of social conflict, and the role of parliament is to provide a fair political mechanism for re-ordering social priorities and intervening to support social norms. These normal mechanisms to contest social priorities, individual interests and opinions have been largely ousted by the way this legislation has been designed (most clearly demonstrated by the way it has been faithfully implemented). The most likely results of this in practice will be insufficient contesting of privileged views that will impact on many people, potentially resulting in inefficient and possible inequitable decisions. I do not believe that democratic government ought oust the normal safeguards of citizen interests in the manner that this legislation has demonstrated.

This jurisprudential issue is separate from any discussion about whether the environment or production ought be paramount, or the extent of water that is available for any particular use at any time. These are important issues, but my concern is the fundamental failings of the legal instrument and the hazardous approach that is embedded within it.

The legislative architecture

Section 10 of the *Water Act 2007* (Cth) states that the basis for the legislation is that:

> '… the inefficient and/or inappropriate use of the Basin water resources would have a significant detrimental economic and social impact on the wellbeing of the communities in the Murray–Darling Basin …' (*Water Act* s. 10(2)(g)).

A hierarchy of values is evident in the architecture of the legislation. Even if this were not clear from the legislation it would be clear from the pattern of the studies conducted by the Murray Darling Basin Authority, and by the Guide to the Plan. Paramount is scientific advice about ecological sustainability to set the limits of extraction and the priority sites for protection. This is done in large part through the use of modelling. Within this water extraction boundary the maximisation of commercial value is to be achieved through the mechanism of trading of water entitlements, and as a result most of the analysis that is used in setting policy is economic modelling. There is no ready mechanism to contest the science or economic values that inform this prioritisation, even if the acting out of these values substantially affects an individual's interests or if they disbelieve the epistemology embedded in these decisions.

That this privileges some sorts of knowledge and interest over all others ought be apparent. It privileges the epistemology of scientific modellers and experts and economists. It subordinates the views of those whose interests are not readily converted into this form, or which are not backed by the science and economic establishments. It cuts off most conventional avenues for the less privileged who seek to adjust the operations of government or the market to be heard and have their grievances resolved in ways that take into account a wider variety of concerns and interests in society. A citizen has no real mechanism to contest adverse effects on their personal interest, nor to contest key aspects of how such decisions are made.

I understand that it has been advised that the trading rules for implementing the Plan should be made more explicit in their ouster of direct intervention by Parliament or the courts in the operation of the water market. This reflects the received economic 'wisdom' that to the maximum extent possible all tradable entitlements should be un-attenuated and un-contestable other on the basis of commercial law within commercial courts. This belief is based upon a misunderstanding of the nature of markets. It is clear from history that entrepreneurial behaviour does not require 'full-blown' private ownership and security of title (for if this were the case property crime, which is entrepreneurial behaviour with negative property interests, could not thrive).

In the last 2 decades Australian Parliaments have created a new form of property in water, and have allocated it largely without cost to some citizens. We have made its' withdrawal a matter requiring mandatory compensation, and indeed have paid out billions of dollars to reclaim the interests that they have created. There has been good justification for doing so to achieve public good (environmental) benefits. However Australia's water property rights are the most secure in the world, and there is no indication that a lack of legal certainty is impeding efficient use. The impedences are in other aspects of water management.

In the interests of trading efficiency (S.10) proposed regulations under the Act are expected to further oust the traditional safeguards of Parliamentary or court intervention that are the normal avenues when citizens feel their rights have been violated. In effect, this would

further place the judgements of scientists above normal processes of legal review, and place the interests of the wealthiest private traders above all other interests in water. Whilst this may be seen as a desirable development from the perspective of those economists and scientists who fully embrace the conventional rationales of their disciplines, it runs counter to normal concepts of social justice, legal accountability, and Parliamentary governance that are the fundamentals of our democratic legal system.

Further, this ouster of the potential for legal intervention raises the prospect that untested incorrect assumptions and judgements may be implemented without due processes of contest and testing. This may result in environmental, social and economic harms that could be circumvented through better public scrutiny and testing of these matters.

Whilst hydrological or economic modelling are truly valuable inputs into contemporary decision-making, they are only evidence. Often that evidence is misleading or wrong. This is demonstrated every time one model is replace by another, better, model; or when new data cause revision of conclusions that were reached on the basis of less reliable data. Models are limited, intrinsically unrealistic reflections of a far more complex real world. They are subject to limitations of understanding and skill, error, and data. The Australian experience in water management points clearly to the limited reliability of any modelling science. It is disconcerting that few models used in water policy highlight their own limits, assumptions and uncertainties, which one ought expect to be highlighted if the science is to be properly contested. It is only through court and parliament that one can expect such limits to be brought to light.

Whilst economics and the use of market instruments such as trading are important in our society and increasingly important in the management of the environment and the allocation of scarce resources, markets can and do often fail. They often do result in exacerbation of disadvantage. The fundamental function of markets is to use the price mechanism to reallocate resources towards those who are most economically competent away from those who are less economically competent. This transfer results in the efficiency and innovation benefits of the use of markets can achieve. However since this transfer from the less to the more economically competent is most likely to mean from the poor to the rich, the potential for social harms is naturally embedded in the market mechanism. This is one reason why Parliaments so often 'interfere' in markets. Social values of fairness and sympathy for the less privileged require complex tradeoffs that cannot be delivered mechanistically (and cannot be delivered through genuflection to scientific modelling or the operation of markets).

Most Australians would expect that the actions of government are subject to effective rule by Parliament, and that citizen interests would be actively safeguarded through the courts. Intrinsic to the rule of law is that the courts and the parliament can effectively intervene, and that the courts or the parliament will be the venue in which the legitimacy and balancing of interests will occur. Most Australians would expect that scientific hydrologic, ecologic or economic models that underpin administrative decisions would be contestable where they adversely impact on citizens, and that if there is a public good need, Parliament can directly intervene in markets. Implicit in this is the expectation that within the courtroom or Parliament it will be possible for citizens whose social or economic interests are harmed or whose values are violated will be able to question the choices that have been

made that are objectionable to them. They would expect that scientific or economic determinations that cause them harm would be contestable by Parliamentary debate, or by testing as evidence in a court of law. The *Water Act* fundamentally undermines these assumptions, which are at the heart of the system of rule by the law and accountability to Parliament.

There has been a gradual development in Australian water law, which has tended incrementally away from a system of laws rooted in human (riparian) relations towards a system of law reflecting administered commercial interests (water licenses), through to one that uses the market to allow negotiation of commercial interests (tradeable entitlements to extract). The pattern has been one of movement towards an erosion in practice of the *de jure* proposition that water is a common good. However at all times the Parliament and the courts have retained their role in providing at least minimal safeguards for the public interest, and the interest of the ordinary citizen. The *Water Act* has substantially eroded this protection.

It is simply untrue to say that the ouster of the courts and parliament are necessary in order to give sufficient certainty so that markets can operate. If such certainty were essential to private enterprise, then history must lie. The great outburst of mercantile entrepreneurship around the world occurred at a time when the Crown could (and did) override private rights. If absoluteness of interests were the essence of private entrepreneurship, then property crime cannot exist, for it operates in an environment where there are negative property rights and no legal certainty. Security of property rights is an important concern but it is not a paramount concern for the operation of environmental or other markets. Nor should the sanctity of the private market be the paramount concern for water public policy.

The implementation of the Act

The way in which the Act has been implemented demonstrates the risks to non-privileged interests that I have highlighted above. By limiting rights other than administrative appeals over the totality of the Plan, or commercial disputes over trades within the operation of the market, the *Water Act 2007* has radically excised the rights of adversely affected citizens to litigate. The Act seeks to deprive government of the opportunity to intervene in relatively newly created (by Parliament) water property interests without payment of compensation (by Parliament). In less than 3 decades, some citizens have been granted, with very little cost to themselves, new property rights. Some of these have received large payments from government to surrender these rights. Whilst this may be an efficient mechanism to bring water use back into balance, it ought be also recognised as a transfer of wealth that ought be publicly accountable. An inability to openly contest what is happening compounds the risks that consultants, modellers or government officers will make mistakes or overlook important interests, by making it unlikely that the courts or parliament can intervene to correct these mistakes. Good governance requires a robust ability to contest and intervene.

I have had the privilege to prepare a 'peer review' report for the Authority on socio-economic matters considered in preparing the Draft Murray Darling Basin Plan. I have been advised that this will soon be made public by the Authority, Once this review document is made public I would be happy to have it attached to this submission, but pending this step by the Authority I would be uncomfortable with doing so, as the work was carried out under contract to the Authority. My comments below reflect information to which I have had

access whilst conducting this review. I should stress that since this work was done substantial additional work has been done by the Authority. I can make no authoritative statement about the content of the Plan itself, which has not been released.

Subordinate to the legislated architecture that embeds certain science and economic perspectives, the Authority is charged with the responsibility for considering socio-economic matters. It is stated that the legislation will promote 'the economic and social wellbeing of the communities in the Murray Darling' (*Water Act* s. 10(2)(h)(vii)). The *Water Act* states that 'decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations' (*Water Act* s. 4(2)). The Commonwealth Water Minister is required to take these principles into account under s. 21(4)(a) of the Water Act, and must 'act on the basis of the best available scientific knowledge and socio-economic analysis;' and have regard to 'social, cultural, Indigenous and other public benefit issues' (s. 21(4)(c)(v)). The purpose of the Basin Plan includes 'the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes' (s. 20(d)).

The mandatory content of the proposed Basin Plan includes identification of uses to which Basin water is put, with special reference to Indigenous people, identification of the users and the social and economic circumstances of communities dependent on Basin water resources. This suggests that it is intended that the plan specifically engage with community issues — particularly with Indigenous community issues — in evaluating social and economic optimisation under s. 20(d) of the *Water Act*, with which the outcomes of the Basin Plan must be consistent.

From my review of the Peer reviews, other documentation, and the early draft of the *Guide to the Murray Darling Basin Plan* my opinion expressed to the Authority was that the needs and interests of the community have been subordinated to the other priorities. This is a natural result of the legislative architecture, and it reflects the dangers in that design. It is disingenuous to suggest that the deficiencies in dealing with various interests represents some sort of egregious failure of the Authority itself, for the path they have followed is the one that was laid down by the legislation. It is disingenuous to suggest that the Authority had ample freedom to re-prioritise what they are required to do under the Act so as to give equal weighting to issues other than ecology and the economic market for water. Whatever mistakes that may have been made in how the Basin Plan has been prepared, what the Authority has done is to follow that path set out by the Act with energy and urgency, as it has been required to do.

Because the Act does not provide mechanisms for contests of interests other than through limited rights of appeal under administrative law, or by trading water rights on the market, the non-wealthy citizen's opportunities to address their concerns are very limited. It is by an accident of politics, rather than as a matter of institutional governance, that this Senate inquiry is able to look at these matters. This situation is not indicative of an institutional arrangement that gives robust protection to the interests of the normal citizen.

The Western democratic tradition respects private property and the importance of the economy. It respects the credibility and integrity of science, and increasingly places great emphasis on sustainability. This is as it ought be. My concern is however that the *Water Act* privileges science and commerce almost absolutely over all other interests, largely ousting major elements of legal democracy. Science should be given a high priority as evidence, but

it should be contestable in the courts. The property interests of commerce should be given a high priority, but should not be above intervention by Parliament or the courts where other social interests are at risk.

The essential role of the law is to provide a framework within which potential disputes and social contests can be 'elevated' and dealt with in a way that is objective and which ensures a fair framework for hearing of interests. The essential role of Parliament is to intervene, even at the cost of private property interests, when the public interest requires this. It is my submission that the Water Act needs to be reformed. It is necessary to reinstate Parliamentary and legal mechanisms for oversight and review, particularly where the operation of the act has the potential to create social injustice. This is essential to the reinstatement rule of law and of Parliament and the protection of the individual citizen. It is, I believe, also an important mechanism to ensure that water is used optimally in accordance with the overarching requirements of s10 of the Act itself. History has shown that it only through open public contestation that failures of science and the market can be exposed, and true advances made.

Yours faithfully

Paul V. Martin