Governing the Murray
who are its people, and what are their responsibilities?

Presented by Hon Dr Ken Coghill at La Trobe University Albury-Wodonga Campus, 11th October 2018

Introduction
Let me commence with the Wodonga City Council’s customary acknowledgement of the traditional owners of the land on which we meet, which I extend to the Aboriginal nations of the Murray, and pay my respects to their elders, past, present and future, for they hold the memories, the tradition and the culture of all Aboriginal and Torres Strait Islander people.

Let me also pay my respects to the Mann Family, sponsors of this Lecture. I was privileged to know Dr David Mann and have fond memories of our sometimes spirited debates.

Veterinary link
As you know, my personal background includes a veterinary degree. That is much more relevant to tonight’s address than may be obvious. My veterinary work was mostly here as Wodonga District Veterinary Officer, dealing with diseases affecting herds and flocks of farm animals rather than treating individual animals. Disease outbreaks in herds and flocks are systems involving a range of interacting factors – for example, whether the animals are susceptible to a particular infectious organism, so that TB can infect most species but footrot does not spread from sheep to cattle; footrot spreads in moist conditions but not where pastures are dry and hot. Footrot is not spread by cool air currents; foot and mouth disease can be, over many kilometres distances. Differences like these are explained by the science of epidemiology: they are system effects. It is my interest in systems that links my veterinary education and work with this address.

Let me now move to tonight’s topic.

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1 Over 100 years ago Jonathan Mann and his family moved to ‘Murray Glen’, a farm on the banks of the River Murray. A committed family man, Jonathan became a stalwart in the region by embarking on many business endeavours including establishing a local produce store. Jonathan firmly believed that the Murray “was the only true source of wealth in Australia”. Following the Mann family’s commitment to the community, Dr David Mann endowed La Trobe Albury-Wodonga campus with the annual Jonathan Mann Memorial Lecture which commenced in 1993. David proudly attended every lecture until his death in 2012. The Mann Family continues to support this lecture series that focuses on the Murray and its People.

2 Associate Professor, Monash University; Adjunct Professor, Swinburne University.
The Murray and its People

The theme of the Jonathan Mann Memorial Lectures is ‘the Murray and its people’. Note the literal meaning of the words. It is not the people’s Murray; it is the Murray’s people. The Murray I take to refer to the Murray River, including its catchments.

The Murray is in crisis, which desperately needs to be addressed. The current crisis is partly due to the current drought, but that in turn is much more likely because of climate change. The crisis is as much a crisis in responsibility for the state of the Murray and trust in governance.

I will argue for reform of governance of the Murray to address the low trust among its people in the exercise of responsibility for the well-being of the Murray. Specific issues, such as the Sustainable Diversion Limit adjustment mechanism, are important but they are secondary – the outcomes of governance. Without good governance they can amount to little or nothing, such as when grand scale water theft goes undetected and unpolic ed. Secondary issues are not the focus of this lecture.

Accordingly, this address will take its lead from the theme of the Jonathan Mann Memorial Lectures – the Murray and its People - and consider three sub-themes. The first two sub-themes provide the context for the third and major sub-theme. As I will explain, we cannot understand and act to save the Murray unless we consider each aspect.

First, let us think about what we mean by “the Murray”.

Secondly, let us reflect on who are its people.

Thirdly, let us think about governance - the relationships between the Murray and its people – the governance system with its many elements and interactions.

I will then conclude by drawing together thoughts on these three subthemes to propose major reform of the Murray’s governance.

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1. The Murray

The Murray means many things to many people. Is the Murray made up of just the river and waterways or the land through which these waters flow? Should we be viewing the Murray as a larger eco-system or, more radically, as part of Mother Earth? Let us explore these themes, including reference to Aboriginal tradition.

First let us briefly look at the Murray as a waterways system. Any river is a product of its catchment and the catchment necessarily includes tributaries. Although here we are relatively close to the headwaters of the Murray River, it is useful to remember that the Darling is a tributary of the Murray. We should logically think of the Murray-Darling Basin as our catchment. The first slide (Figure 1) shows the sub-catchments within the Murray Darling Basin. However, the Murray Darling Basin is a complex, interconnected river system rather than a series of separate catchments. Some watercourses rarely contribute to the Murray's flow. For today's purposes, I'll focus of the system's complexity rather than get bogged down in detail.

![Figure 1. Murray Darling Basin Plans Regions](image1)

The second slide (Figure 2) shows the geology of the Murray Darling Basin. Again, it is complex, albeit with slightly fewer elements but with limited correspondence between geology and catchments.

![Figure 2. Tectonic units within the Murray-Darling Basin.](image2)

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Another major feature is revealed by the third slide (Figure 3).  

The areas able to sustain irrigated agriculture are relatively small areas of the Murray Darling Basin and are mostly within what is known as the southern basin and upstream of where the Darling flows into the Murray – roughly south of a line drawn west north-west from Sydney.

Note that the catchments draining the Great Dividing Range on the south-east and southern margins of the Basin make the largest contributions to total runoff, despite their smaller size. Overall, around 86% of the Basin contributes almost no runoff to the river system, except in times of flood.

The Alps of the southern basin thus contribute most of the Murray's flows.

However, the waters of the Murray and lands through which they flow are a much more complex system that these very limited physical descriptions. At the very least it is in fact an eco-system including more than the water, rocks, soils and atmosphere. These physical elements support and interact with the living flora and fauna, ranging from micro-organisms to kangaroos, other mammals and birds, magnificent river red gums, and mankind. Thought of in this way, it is an ecological system.

We may feel emotional relationships with land we occupy or broader landscapes.

We can also look at it as a social system.

It comes as something of a surprise to learn that some societies personify and in other cases deify the natural environment – seeing it as a spiritual being and Mother Earth as a philosophy of life. A number of countries enshrine Rights of Nature in

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law. This has some parallel with Gaia, the personification of the Earth in Greek mythology. Several South American countries use the concept of Mother Earth in laws, which provide for the protection of Mother Earth.

For example, Bolivian law states:

Article 3. Mother Earth is a dynamic living system comprising an indivisible community of all living systems and living organisms, interrelated, interdependent and complementary, which share a common destiny.

The Law of Mother Earth and more generally rights of nature law has been used to take court action to prevent damage by humans to parts of the natural environment.

To summarise, we can think of the Murray from something as basic as, on the one hand, water flowing through geological formations to, on the other hand, a complex ecological system including both inanimate and living elements.

Which-ever way we think of the Murray, it is dependent on water. However, that most fundamental part of the Murray - water - is a limited and diminishing resource. The Murray is at severe risk due to declining rainfall, increasing frequency and severity of extreme weather events, unsustainable diversions and other human activities.

Let us now turn to think about the people of the Murray and their activities.

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2. The Murray’s People

Over two million people live in the Murray Darling Basin and about another one million, mostly in Adelaide, rely on its water.¹³

The strongest claim to be the Murray’s people comes from the indigenous people. For millennia – science tells us that the Murray Darling Basin supported an Aboriginal population for over 50,000 years. That is 500-1000 times the average one of us here tonight has lived. The climate and hence the population that could be sustained has changed during that period. We know from archaeological research at Lake Mungo that areas which are now semi-arid once supported communities.

The early explorers to make contact with the Aboriginal communities in the Murray Darling Basin documented far more developed societies than that taught in my school days.

The Basin’s societies can be identified by their languages, shown in slides 4 and 5 (Figures 4 & 5).¹⁴, ¹⁵

It is only in recent years that researchers have used the diaries and writings of explorers and others to reveal to us what was destroyed and lost in the course of the invasion of this land and conquest of its people.

For example, in that excellent history Sharing the water. One hundred years of River Murray politics (2016), Guest recounts:

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A landowner near Swan Hill recorded traditional stories of the Wati Wati people, which included accounts of food production, soil preparation and storage of surplus at harvest time. The use of fish traps, dams and fishing techniques was observed throughout the Murray Darling Basin. The construction of permanent dwellings, enclosed compounds for containing animals, and seasonal fire management of grasslands and woodlands for hunting and harvesting were all noted.16

Elsewhere, Bruce Pascoe has reported that explorers recorded coming across villages with as many as 1000 people.17 These were no nomadic primitives sleeping in temporary lean-to shelters and at no time did these Aboriginal nations cede or give up their right to sovereignty to occupy and control the land.

Today’s People
Important as history is, let’s focus on today’s circumstances. The Murray Darling Basin population has a rich diversity. There are over 40 Aboriginal nations in the Murray Darling Basin.18

The non-Aboriginal residents range from the descendants of those who first occupied Aboriginal land to recent immigrants to the Murray Darling Basin - some from elsewhere in Australia; others new arrivals to this country.

We can readily identify them as people of the Murray simply because of their status as residents of a spot within the Murray’s catchment. We do this without questioning their ancestry, skin colour, age, occupation, language or any other human characteristic.

However, is residence in the Murray Darling Basin the only basis on which to consider someone to be one of the Murray’s people?

Consider a family living on the watershed. Some family members live in a house within the catchment but work outside it – say in Bendigo and Melbourne respectively. Other family members are in the reverse situation. Which are the Murray’s people? Those who live in the catchment, those who work in it, or both?

In business, we use the term stakeholder to recognise people who have some form of relationship with a business. For example, a stakeholder may be a supplier, a customer, or a downstream victim of pollution of the atmosphere or water. The manner and extent to which a stakeholder’s interests are taken into account varies from organisation to organisation, varies between stakeholders and changes over time. This way of thinking can be applied to the Murray. For example, it is no longer

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acceptable to discharge raw sewage into any river, as once occurred. We accept the rights of downstream stakeholders.

One of the issues that the Albury-Wodonga project raised in the 1970s was the risk of increased downstream salinity in the Murray. No-one seriously suggested that people in this part of the Murray should disregard its downstream effects. In the same way, Albury and Wodonga are stakeholders with interests in what happens upstream to affect their water supplies.

As illustrated in this example of these twin cities, the Murray is a system in which there is a complex web of interconnected stakeholder relationships.

Let us apply this thinking to the Murray Darling Basin as a whole. The Murray’s people need goods and services not made or grown within the Basin - items as obvious as clothing, foods such as bananas, electric appliances and motor vehicles. Less obvious is tourism to the seaside and beyond and many government services. The suppliers of these are among the Murray’s stakeholders. The Murray’s people depend on such suppliers. It is reciprocal: suppliers depend on the Murray’s people to use their services and buy some or all of their products.

Conversely, the Murray’s people supply goods and services used by consumers outside the Murray Darling Basin. They produce vastly greater quantities of food than they consume. They help feed other Australians and the world’s people. They also produce services that attract people into the Murray Darling Basin such as country music, tourism, rural research, and courses at universities including New England, Charles Sturt and La Trobe’s non-metropolitan campuses.

The point of this is that the Murray is an integral part of a broader area – most immediately the Australian continent and nation. Just as the Murray’s people, as Australians, have a stakeholder interest in the conservation of the Great Barrier Reef, so all Australians have a legitimate stakeholder interest in the well-being of the Murray Darling Basin.

What does this mean for the Murray’s people? It means that the Murray’s people certainly includes its residents but others also have legitimate stakeholder interests. The relationships between stakeholders within and without the Murray constitute its governance – the third theme of this address.
3. The Murray’s Governance

British visitors to the Murray two centuries ago recorded Aboriginal societies with highly developed beliefs and practices governing their relationships with the land and waters. The records that they wrote are reported in excellent research published in recent years by authors including Bill Gammage (*The Biggest Estate on Earth: How Aborigines made Australia*. 2012), Bruce Pascoe, (*Dark Emu. Black Seeds: Agriculture or Accident*. 2014) and Chris Guest (*Sharing the Water: One hundred years of River Murray politics*. 2017).

These books are real eye-openers to the realities of how well country was cared for before the destructive effects of colonial settlement on the waters and land.

However, this lecture deals with the Murray as its people find it now.

Present-day governance of the Murray is so complex as to risk being bewildering, as shown in slide 6 (Figure 6), which lists stakeholders (institutions and organisations),
regulations and actions in one catchment within the Murray Darling Basin.

It is simplified to the extent that it does not show interactions.

Again, let’s skip the detail and focus on key points.

First a definition. Governance

is the complex mechanisms, processes, relationships and institutions through which citizens and groups articulate their interests, exercise their rights and obligations and mediate their differences.

Let’s begin by summarising governance in a simple diagram. This diagram (slide 7; Figure 7) is a theoretical explanation of how almost all societies function: the community is organised as a society through

- state or government functions which make policy and and enforce rules,
- market functions that produce and trade goods and services, and
- civil society functions including advocacy, spiritualism, mutualism and professional standards.

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21 The distinction that I make between communities and societies comes from the French philosopher Jean-Luc Nancy: a community is a population living in a territory (an area of land) and sharing a sentiment, which might be a language, loyalty to fellow members of the community or to the territory or common spiritual beliefs; a society is a community’s social structures, which are established and maintained through rules and norms of behaviour. Source: Nancy, J.-L. (1991). *The Inoperative Community* (translation of *La communauté désœuvrée*). Minneapolis: University of Minnesota Press.
The relative size, power and influence of each function varies with time and circumstance.

![Diagram of three sectors of society: Government, State, Civil Society, Market, and community. Diagram illustrates interconnected, interdependent interactions and rule-setting power, coercive power, and persuasive power.]

State, Market and Civil Society interconnected, interdependent & interacting as a complex evolving

**Figure 7. Three sectors of society**

**Three sectors of society**

The key to the success of governance is the relationships between the people, their organisations and the environment. In the context of this lecture, the environment is the physical environment of the Murray – the waters, the land and the atmosphere that produces the Murray’s climate. The relationships can extend from damaging or hostile to sustaining or cooperative.

Low levels of trust undermine governance; high levels of trust strengthen governance.

Climate change is increasingly accepted as a major factor, but is not part of the Murray Darling Basin Authority’s brief.

The governance of the Murray Darling Basin is largely derived from the Agreement between the States, the ACT and the Federal Government, which was passed into law by the Federal Parliament’s Water Act 2007. Parallel legislation was passed by the State and Territory parliaments (e.g. the Victorian (Water (Commonwealth
Powers) Act 2008)), authorising the federal parliament to legislate in an area of state constitutional power. The Water Act established the Murray Darling Basin Authority.

However, there are continuing administrative roles for the States as confirmed by the controversy over the failure of the NSW authority to detect and prevent grand theft of water.

Together, these laws establish and define powers and public sector organisations intended to regulate mankind’s management of the Murray Darling Basin’s water resources and activities which impinge on them.

This brings us to the principles that should apply in the legal provisions and their administration.

**Fiduciary Duty and the Public Trust**

Members of the parliament who create these laws have “a fiduciary relation towards the public” and “undertake and have imposed upon them a public duty and a public trust”.22 In other words, the law must be made and applied in the interests of the public in general ahead of any personal or special interests.

This fiduciary responsibility reflects a fundamental common law principle - the **public trust principle**, based on ancient Justinian law, which stipulates that every person elected or appointed to a public position is appointed as a trustee and is responsible for the public trust, i.e. those things such as waterways that the community holds in common. As trustees, public officers must put the public interest ahead of private interests, whether those are their personal, family, business, political donor or even political party interests.

This principle has some parallel with traditional aboriginal beliefs and practice, summed up by Bill Gammage as:

> The Law – an ecological philosophy enforced by religious sanction – compelled people to care for all their country. People lived and died to ensure this. The Law prescribed that people leave the world as they found it. 1788 practice was therefore conservative, but this did not impose static means. On the contrary, an uncertain climate and nature’s restless cycles demanded myriad practices shaped and varied by local conditions. Management was active not passive, alert to season and circumstance, committed to a balance of life.23

Wade Davis expressed it a little differently:

> In the Aboriginal universe .... There is no notion of linear progression, no goal of improvement, no idealisation of the possibility of change. To the contrary, the entire logos of the Dreaming is stasis, constancy, balance, and

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consistency. The entire purpose of humanity is not to improve anything. It is to engage in the ritual and ceremonial activities deemed to be essential for the maintenance of the world precisely as it was at the moment of creation.\textsuperscript{24}

Australian Aboriginal philosophy can be seen to be consistent with the public trust principle in that both call for the exercise of responsibility to defend and protect the public trust.

However, can we today see the public trust principle being applied to protect the land and water held in trust by parliaments, Ministers and public servants? The evidence shows that the Murray has been greatly changed and severely damaged compared with conditions recorded two centuries ago. As Bill Gammage puts it “In most other societies an urge for change is so entrenched as to be thought natural”.\textsuperscript{25} In other words, seeking to change the environment in the name of progress is not a value supported universally by all peoples.

However, it is now widely recognised that the damage done to the Murray waterways and the risk of climate change wreaking further damage is so great that our governments have been driven unknowingly to adopt an approach similar to Aboriginal philosophy, at least to the extent of “maintenance of this part of the world as we now find it.” Indeed the NSW Government states “The preservation of Crown land is the responsibility of all NSW residents”. That affects over 50 percent of the land area of New South Wales.\textsuperscript{26}

A key issue here is timescale. Taking a short-term view has been a disaster for the Murray and its people. Responsibility for the Murray must aim for sustainability over decades and centuries, not the next harvest or the next budget.

Much of this responsibility in the Murray Darling Basin is exercised over human activities affecting water and land, such as licences to irrigate land. That immediately brings us to reflect on the rights of landholders.

In the case of leases held over Crown land, that is clear. Such as land is owned in common by the State and leaseholders occupy and use it according to lease conditions.

Freehold is less understood. Ownership of everything associated to the land is not absolute, as the States and Australian Government are empowered to withhold certain rights, such as the right to any minerals or petroleum located on the land. In other words, freehold only grants rights to use the land in perpetuity, subject to conditions defined by the State.

Native title is an overlay that does not apply to freehold titles. It is only since the NSW Aboriginal Land Rights Act (1983) and the Mabo decision of the High Court recognising native title (1992) that limited rights began to be recovered by traditional custodians. The patchwork of claims submitted and granted to date is shown in Slide 8 (Figure 8).\(^{27}\)

Let us now turn to the structure of Murray Darling Basin governance (slide 9; Figure 9).\textsuperscript{28}

A major omission from the diagram is who actually implements and enforces the agreement. The answer is the Basin States i.e. the governments of the four states and one territory.

That aside, the governance arrangements are reasonably clear.

Taking these functions in numerical order:

1. the Commonwealth Minister has overall responsibility but is most unlikely to act without, much less contrary to, the advice of the Ministerial Council and the Murray Darling Basin Authority;
2. the Murray Darling Basin Authority is the central public service agency implementing the Basin Plan, subject to direction by and providing advice to the Ministerial Council;

\textsuperscript{28} Murray Darling Basin Authority (no date) *About us.* Retrieved from https://www.mdba.gov.au/about-us
3. the Ministerial Council has policy and decision-making roles for matters such as state water shares, and the funding and delivery of natural resource management programs;

4. the Basin Officials Committee is designed to facilitate cooperation and coordination between the Commonwealth, the Basin states and the Murray Darling Basin Authority in funding works and managing the Basin water and other natural resources;

5. the Basin Community Committee is intended to engage with other advisory communities established by the Authority and to provide the Murray Darling Basin Authority with a community perspective on a wide range of water resource, environmental, cultural and socioeconomic matters.

Here I see room for improvement

Let us look at a key aspect of governance in contemporary democracies – open government. Australia is one of over 70 countries belonging to the Open Government Partnership. I have been a member of Australia’s Open Government Forum, which recommends reforms to improve our country’s governance under four main commitments –

1. Increase the availability of information about governmental activities;
2. Support civic participation;
3. Implement the highest standards of professional integrity throughout our administrations; and
4. Increase access to new technologies for openness and accountability.

Open government’s big advantages include that it can tap into information held by local people in ways that are near impossible, with the best will in the world, by senior officials sitting in offices in Sydney, Melbourne or even more so, Canberra. It is a two way road, in which government learns from local communities and the people get a better idea of what government is doing and why they are doing it. Together they lead to higher levels of trust, better policies, better administration, and better outcomes. I want to focus on support for civic participation as it has the potential to ameliorate the alienation that many feel with our parliamentary system. This brings us back to the Basin Community Committee - number 5 in Figure 9.

(hands up if you have heard of it before this; keep you hand up if you know what it actually does.)

29 Unlike most ministerial councils, this is not a COAG ministerial council. The Murray–Darling Basin Ministerial Council was established by the Murray–Darling Basin Agreement, Schedule 1 to the Water Act 2007 (Cth).
Basin Community Committee

The Basin Community Committee has 16 members “selected based on their expertise or interest in water use, water management, Indigenous and local government matters.” Its function is “to advise the Authority about the performance of the Authority’s functions, including advising about:

(a) engaging the community in the preparation of each draft Basin Plan; and
(b) community matters relating to the Basin water resources; and
(c) matters referred to the Committee by the Authority.”

“... They report on community concerns and issues around Basin Plan implementation and provide information to Basin communities on our programs”.32

These are fine objectives. In particular, “engaging the community” sounds much like the Open Government Partnership Commitment to “support civic participation”.

This is important, as governance has been demonstrated to lead to better outcomes where affected communities have been actively involved in decisions affecting them.33 Furthermore, people more readily accept decisions, even when they disagree, if they have had an opportunity to participate or their peers have been involved.34 These participatory modes of decision-making are more successful where there is discussion and deliberation rather than merely expressions of opinion.

Another aspect is essential to the effectiveness of community engagement. Members of the community must feel that their participation will be respected and have real effect on the final decision or decisions. If those affected feel that the process is mere tokenism, they will not want to waste their time and will become more alienated from those exercising the real power, whether the Murray Darling Basin Authority, the Basin state authorities, the Ministerial Council or the Parliament.

This fits with last year’s Mann Lecture, in which Nick Bond and Jacki Schirmer were reported as saying “People feeling their voices haven’t been heard drives a lot of the negative perceptions.”35 It also has some resonance with Cathy McGowan’s 2014

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Mann Lecture, when she said “I think what we know is that top-down doesn’t work and being told to do things hasn’t got a good future.”

A recent report has confirmed the inadequacy of the Murray Basin Plan process. The report gave a resounding “NO” to communication about the Plan with those it affects.

So the question is: to what extent has the Basin Community Committee applied these tried and tested principles.

The Basin Community Committee published one communique last April and another following the appointment of new members. Neither of these refer to engagement of the community.

Contrast that with the advice of one of Australia’s most respected retired public servants, Terry Moran. He says ‘Governments will achieve their goals better if they also use other ways to engage with citizens and reinforce our fundamental democratic institutions’.

In saying that I do not diminish the expertise and knowledge of their communities that members contribute to the Murray Darling Basin and bring to the Basin Community Committee. What I do say is that the Basin Community Committee is not seen as meeting the demand for engagement with the community.

Effective community engagement is an essential feature for the exercise of responsibility and high levels of trust between the Murray’s people and those who have decision-making power.

Civil Society in the Murray.

One example of the important roles that civil society organisations can play in the Murray Darling Basin is the Murray Darling Association, which recently staged its 74th Annual Conference. Its purpose is “to provide effective representation of local government and communities at state and federal level in the management of Basin resources by:

1. providing information;
2. facilitating informed debate; and
3. seeking to influence government policy.”

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37 Howard, John H et al 2012 Public Policy Drift, IPAA


4. The Murray’s Future

The Murray Darling Basin is currently facing especially severe stress due to drought. The overwhelming evidence is that climate change will make extreme weather more severe and more frequent. Allowing that to progress endangers the Murray’s people and is an affront to the public trust principle and responsible governance.

It follows that the governance of the Murray – that is the relationships between the Murray and its people – needs to adapt to mitigate the effects of extreme weather as they become more the norm and as we adjust to a de-carbonised society.

However, for this to be effective, we must reflect on the underlying beliefs and philosophy, which have driven the harm done to the Murray Darling Basin over two centuries. We must rethink prevailing attitudes to the traditional ecological philosophy, that applied throughout this land, by which people were obliged to care for all their country - the water and the land.

We should ask if the Basin Community Committee could take a wider, leadership role in helping the Murray Darling Basin make the transition to sustainability. Could the Basin Community Committee engage with societies across the Murray Darling Basin? If the answer is yes, then are the Basin governments willing to empower the Basin Community Committee so that it has a major influence in decision-making up to ministerial level? Again, if the answer is yes, will they resource the Basin Community Committee to do so?

To conclude: The Murray is facing a crisis in its physical state and a crisis in the trust between its people and those in power. Those in power have a responsibility to trust the people through a much higher priority to community engagement.