




# Environmental Governance Issues in the Context of International Environmental Law: An Australian Perspective



Michael I. Jeffery QC  
Director, Centre for Environmental Law  
Macquarie University  
Sydney, Australia



# Environmental Governance

- *Environmental Governance* encompasses the relationships and interactions among government and non-government structures, procedures and traditions, where power and responsibility are exercised in environmental decision-making.
  - Emphasis on citizen or community participation
  - 'Governance' must be distinguished from 'government'
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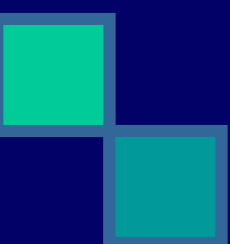



# International Instruments that deal with Environmental Governance:

- *The Earth Charter Initiative*
  - *Agenda 21*
  - *IUCN Draft International Covenant on Environment and Development*
  - *Aarhus Convention*
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# The *Aarhus Convention*

- Full name: *UNECE Convention on Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters*
  - Adopted 25 June 1998 in Aarhus, Denmark; entered into force 30 October 2001
  - Applies primarily to the region of Europe, yet has global significance for the promotion of environmental governance
  - Focuses on the need for civil participation and the importance of access to environmental information held by public authorities (see paragraphs 7 and 8 of the Preamble.)
  - Article 4: When it is appropriate for access to information to be denied, for example, when confidentiality is related to national intelligence or security (Article 4 (3) (c)).
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# Potential limits on good environmental governance:

- National sovereignty
  - Cultural relativism: international principles arguably not universal in nature
  - Geographical differences between states and within states
  - Uneven distribution of natural resources and implementation capacities
  - Wealth disparities
  - These factors must not be seen as complete hindrances to success. A common, yet differentiated approach is required between countries.
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# The importance of civil participation: resources and funding

- Imbalance of resources and finances between proponents and opponents in development cases is a major constraint on environmental governance, as it restricts potential for effective citizen participation and balanced environmental decision-making.
  - *Participatory tokenism* must be avoided. Public interest litigants need funds and resources to hire legal counsel, retain expert witnesses, produce documents and conduct research. Participation must not just be visible, it must be meaningful.
  - Australian jurisdictions have loosened the *locus standi* criteria in recent times, and have developed a scheme of not awarding costs against environmental litigants to address this issue.
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# Not awarding costs against unsuccessful environmental litigants

- ***Oshlack v Richmond River Council (1997) 152 ALR 83***: Costs were not assessed against unsuccessful environmental litigants, due to the deterrent effect awarding costs might have on public interest representation.
- Toohey J, of the Australian High Court observed “there is little point in opening doors to the courts if litigants cannot afford to come in.”
- This principle is commendable, yet it does not promote effective citizen participation. It reimburses the opponent after the fact, instead of when funds are most needed, at the preparatory stage.

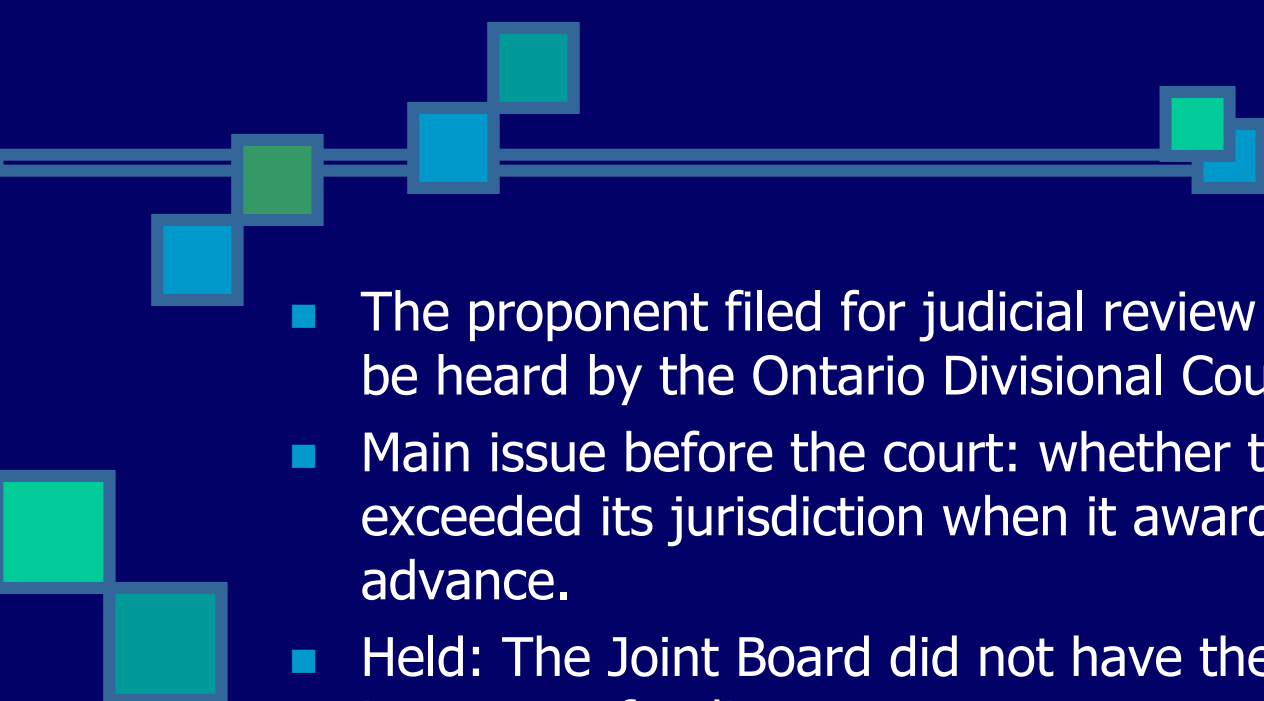



## A potential step forward- the **Intervenor Funding** model

- Where the necessary financial resources are provided in advance of a hearing, paid for either by the proponent or the government.
  - Australia does not accept this model.
  - This scheme is likely to promote meaningful public participation and more balanced, well-informed environmental decision-making.
  - Provision of intervenor funding by the proponent may be viewed as an additional fee or project cost, much like an impost charge imposed upon developers.
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# Intervenor Funding in Ontario, Canada

- The Province of Ontario, in Canada, adopted the intervenor funding model for a number of years, under the *Intervenor Funding Project Act 1989*, before it was repealed by a change of government.
- This initiative traces its origins to the decision of the Joint Board in *Re Regional Municipality of Hamilton-Wentworth*
  - Two separate citizen groups brought action against the development of a highway, and called for financial assistance to be able to participate effectively as opposition to the proponent.
  - The Joint Board awarded the two intervenors a total of \$75,000 as 'costs in advance,' to be paid for by the proponent.
  - The reason for the decision was to balance the perceived inequity between the parties and enable more informed outcomes.

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- The proponent filed for judicial review of the decision, to be heard by the Ontario Divisional Court
  - Main issue before the court: whether the Joint Board had exceeded its jurisdiction when it awarded costs in advance.
  - Held: The Joint Board did not have the power to award intervenor funding.
  - Comments on the Divisional Court's decision:
    - Failed to view environmental litigation differently from other forms of litigation
    - Treated environmental approval proceedings from a costs perspective
    - Public interest component was marginalised
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## **Intervenor Funding Project Act, 1988**

- In the year after the Divisional Court's ruling, Ontario saw a change of government, who enacted the Joint Board's intervenor funding concept.
  - The Act has a number of eligibility requirements for intervenor funding, and accountability provisions to overcome potential for abuse.
  - Resulted in significant improvements in the quality of environmental decisions being made
  - Presents us with a novel initiative which could be adopted in Australia and other countries.
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# Alternatives to intervenor funding:

- **The public defender model:**

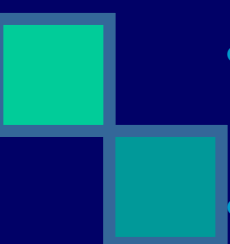

Environmental Defenders Office established in each state and territory in Australia to represent the public interest in an environmental context. Suffers from inadequate funding and does not involve direct public participation.

- **Legal Aid schemes:**

Increased funding to legal aid schemes suggested. Means tests can be quite restrictive, and often attorneys end up funding most of the costs themselves. Also does not enhance civil participation.



## Why intervenor funding is the preferred model:

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- Intervenor funding helps in preventing citizen involvement merely being *participatory tokenism*
  - The cost of providing adequate funding is very small compared to the project cost by the proponent's development. For example, the amount of funding provided under the *Intervenor Funding Project Act* in Ontario, was estimated to be 1-2% of the development cost.
  - Would lead to more balanced evidence placed before the decision-maker, and better decisions being made.
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# Indigenous Rights and Participation in Environmental Management

- Very important in terms of good environmental governance
- Generally, Indigenous rights to land and land use have only received small recognition:
  - ILO's ***Convention (No.169)*** was the first instrument designed for the protection of Indigenous rights and interests.
  - ***Convention on Biological Diversity***; Article 8 (j): signatories are to 'respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and use of biological diversity.'
  - UN ***Draft Declaration on the Rights of Indigenous Peoples***, will provide for the right to self-determination. Also articulates rights to land, resources, water, seas, biological resources and intellectual property.



# The situation in Australia:

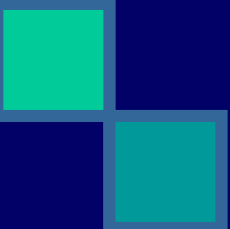
- Improved, yet imperfect system
  - Increased trend towards agreements and contractual relationships between Indigenous groups and public sector agencies, to facilitate Indigenous participation and responsibility.
  - ***Environment Protection and Biodiversity Conservation Act 1999 (Cth)***
    - One objective of the Act is to facilitate and utilise Indigenous knowledge, and to involve the holders of that knowledge.
    - Provides for the establishment of co-management schemes
    - Provides for an Indigenous majority on Joint-management Boards
    - Allows for the continuation of traditional hunting methods and ceremonial activities.
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# Co-management schemes in Australia

- Also referred to as *joint management*
- *Co-management* is a system of environmental management, where aspects of both the Indigenous system and the state system are incorporated. It involves the sharing of power between the government and the Indigenous community organisation. (From Donna Craig, 'Recognising Indigenous Rights Through Co-management Regimes: Canadian and Australian Experiences' (2002) 6 *New Zealand Journal of Environmental Law*, p13)
- The first joint management scheme in Australia was Gurig National Park, set up in 1981.
  - Board of Management had an Aboriginal majority
  - The park was not leased back to the government
  - Annual fee was paid to traditional owners for maintenance and use of the land




## ■ Kakadu National Park, Northern Territory

- A Federal joint management agreement, under the *Environment Protection and Biodiversity Conservation Act*. The park is World Heritage Listed.
  - Board of Management has an Aboriginal majority
  - Terms of lease provide for the promotion of the interests of the Indigenous people and the development of cross-cultural training programs for the workers on behalf of the government agencies in the park.
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# Positive aspects of co-management schemes

- Traditional Indigenous owners have been able to access the resources of the National Parks Services and other government conservation agencies.
  - Conversely, the National Parks Services have been able to access Indigenous knowledge concerning the land and wildlife.
  - Greater education and awareness of Indigenous culture, values and issues.
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## Concerns with co-management schemes

- A focus on participation and consultation, rather than clear property rights and the right to self-determination.
- Caution must be exercised to avoid treating Indigenous communities as a resource, or a means to the end of better environmental management.
- The lease-back scheme is paternalistic, and it detracts from full legal recognition of Indigenous ownership of traditional lands.
- Despite their being an Indigenous majority on Management Boards, the Government still has ultimate control via the role of the minister and through funding mechanisms.
- Inadequacy of funding is still an issue.



## Lessons to be learnt from Zimbabwe- the *CAMPFIRE Project*

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- Communal Areas Management Plan for Indigenous Resources (the *CAMPFIRE Project*) in Zimbabwe.
    - Agreements in the form of Community Wildlife Management (CWM), which encourage conservation through granting self-determination and full ownership.
    - Full ownership means the communities are able to benefit economically from the use of the land, for trade and tourism; and they will therefore have more of an incentive to manage the land sustainably.
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The Australian approach remains co-management, but much insight can be gained from Zimbabwe's experience. It is a model Australia should consider for adoption.



# CONCLUSIONS:

## Environmental Governance

- We must continually assess the participation of the community and specific stakeholders in environmental management.
  - We must also ensure governments and their authorities are kept accountable. This is why access to information and resources are crucial to *good environmental governance*.
  - The avoidance of unnecessary litigation should be encouraged. Proponents of development projects should hold information sessions and engage with the public, at very early stages in the project.
  - Environmental governance and the means of implementation are primarily domestic responsibilities. International hard and soft law instruments play an integral role in raising awareness, providing guidelines and in fostering accountability.
  - *Participatory tokenism* must be avoided. Participation must be meaningful, and not merely visible.
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