ENVIRONMENTAL GOVERNANCE: A COMPARATIVE ANALYSIS OF PUBLIC PARTICIPATION AND ACCESS TO JUSTICE

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INTRODUCTION: ENVIRONMENTAL GOVERNANCE

We now possess the knowledge that our actions do have a real impact on the environment. Ignorance is no excuse for inaction. With knowledge comes the moral responsibility to act carefully in regards to the environment, on a global, domestic, and local scale. The concept of *environmental governance* incorporates this ethic. *The Earth Charter Initiative*[1] expresses this sense of environmental responsibility by stating that the improvement of democratic practices, transparency and accountability of government institutions, along with civil participation in decision making, are strongly related factors to the objectives of the protection of the environment and social and economic justice. This paper will deal with the broad concept and practice of environmental governance, with a focus on the controversial but prudent issue of intervenor funding; and the growing awareness and recognition of the special contribution to be made by indigenous communities in maintaining ecosystems and teaching us about the sustainable use of our natural resources.

The concept of environmental governance encompasses the relationships and interactions among government and non-government structures, procedures and conventions, where power and responsibility are exercised in making environmental decisions. It concerns *how* the decisions are made, with a particular emphasis on the need for citizens, interest groups, and communities generally, to participate and have their voices heard.[2] Therefore, the concept does not apply to the province of government alone,[3] and the term 'governance' must be distinguished from 'government.'[4] It is imperative that we study the actions of the government in terms of environmental policy and decision-making, but we must also observe how citizens take on their own responsibility and develop environmental initiatives.

As an extension of the concept of environmental governance, *good environmental governance* is measured by the effectiveness of strategies and initiatives implemented to achieve environmental goals. These goals may be capacity building, increased access to environmental information, participation and justice.[5] International environmental law instruments, such as *The Earth Charter Initiative*, *Agenda 21*,[6] and the World Conservation Union's (IUCN) *Draft International Covenant on Environment and Development*,[7] set out the framework for achieving environmental goals such as these.

The *Aarhus Convention*,[8] although it presently applies primarily to the region of Europe, has global significance for the promotion of environmental governance. The Convention, which has the current status of 40 signatories and 35 parties who have ratified or acceded to it, focuses on the need for civil participation in environmental issues, as well as the importance of access to environmental information held by the government and its public authorities. *Aarhus* goes further than previous international conventions, in providing explicit linkages between environmental rights and human rights. Commencing with the preamble, it states in the 7th and 8th preambular paragraphs:

> Recognising also that every person has the right to live in an environment adequate to his or health and well-being, and the duty, both individually, and in association with others, to protect and improve the environment for the benefit of present and future generations,'
> 'Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights. [9]

The Convention also deals forcefully with governmental accountability, as it grants the public rights of access to information and imposes obligations on public authorities to provide this information. Access to environmental information leads to a well-informed public, who are more able to question the actions of the government. These factors can then lead to more accountable environmental decision-making and greater potential for environmental justice. Article 4 outlines when it is appropriate for access to information to be denied, these circumstances being when the public authority does not have the information requested;[10] when it is unreasonable to provide the information;[11] and when confidentiality is in the public interest,[12] for example, with intelligence or national security information. Moreover, information can be refused if disclosure will adversely affect factors such as the course of justice[13] and intellectual property rights.[14] At the first Meeting of the Parties to the Convention,[15] the Parties noted the revolution in electronic information technology as being very important to the promotion of environmental governance. The Meeting's declaration called on parties to the Convention to make government environmental information progressively available electronically, yet for these services to be kept under frequent review.[16] The Meeting of the Parties stressed that the Convention was largely about building partnerships between an empowered civil society and the government, and that the public had responsibility for sustainable development too. It was stated:

> The engagement of the public is vital for creating an environmentally sustainable future. Governments alone cannot solve the major ecological problems of our time. Only through building partnerships within a well-informed and empowered civil society, within the framework of good governance and respect for human rights, can this challenge be met.[17]

The *Aarhus Convention* is a clear advance in the area of environmental governance. It is an instrument that is being considered for its merits not only by European countries, but also by many countries around the world. The *Aarhus Convention* presents us with the type of model for environmental governance that will be discussed in this paper, that is, one that factors in civil empowerment, through access to information and resources; and participation by civil society and certain stakeholders, such as Indigenous groups.
There are numerous impediments to achieving good environmental governance. The most obvious limit is sovereignty,[18] that is, each country being an independent state, free in theory from external interference in the running of their affairs.[19] With this limit in mind, international environmental law can appear ineffective. However, the ability of international organisations, both intergovernmental and non-governmental, and the application of widely accepted principles to keep governments accountable must not be overlooked.[20] Furthermore, as another limitation on good governance, the principles set out in the various hard and soft international environmental law instruments are arguably not universal in nature. Different cultures or societies may conceive of good environmental governance differently. For instance, some systems may give priority to individual rights, whereas others will instead emphasise communal obligations and the public good.[21] In addition, it must be accepted that the world is non-homogenous in nature. Some countries have vastly different natural landscapes to others, and this necessitates varied governance approaches. Of course, there is also the consideration that there is a clear disparity between countries, and even within countries, in terms of their capacity to implement better environmental

practices and the distribution of natural resources across the globe. Cultural relativism, geographical differences and wealth disparities may be seen as challenges to the development of good environmental governance schemes around the world, but these factors must not be seen as complete hindrances to success. Instead, they are factors that require focused and concerted attention. A common, yet differentiated approach between countries is necessary. The means of achieving better environmental protection may be different, yet the goals of sustainability and conservation can be shared.

The clear imbalance of resources and finances between proponents and concerned individuals or community groups in development cases is a major constraint on good governance, as it limits the potential for effective citizen participation, deliberation and balanced environmental decision making. This concern will be one of the primary issues examined in this paper, in relation to environmental governance. Sufficient resources are needed for effective participation in order to encourage concerned citizens taking advantage of the opportunities provided to challenge decisions and/or seek other avenues of redress. In some instances, it is left up to public groups to highlight inadequacies in decision-making and to see that the relevant laws are actually enforced. These groups will be unable to perform this function effectively if they have little or no funds to hire legal counsel, retain expert witnesses, produce documents and conduct research. Because members of the public have such an important role to play, they should not be left to rely on the ability to raise their own funds, or on funds from benevolent donors. Participation is one thing, but funds and resources are needed in order for there to be effective, meaningful participation. *Participatory tokenism* must be avoided.[22] This is why the issue of intervenor funding is very relevant.

STANDING AND INTERVENOR FUNDING AS MATTERS OF ENVIRONMENTAL JUSTICE

The scope given to public interest litigants to have standing to sue is a very important aspect of environmental governance, as it concerns the principles of participation and environmental justice. The rules regarding *locus standi*, determining who has the right to sue to enforce the law or highlight erroneous decisions, have traditionally been strict in Australia. The tests for standing for environmental advocates in Australia has arguably been revolutionised in recent times, going back to the creation of the Land and Environment Court in 1979 in New South Wales. In Section 123 of the *Environmental Planning and Assessment Act 1979* (NSW), open standing provisions were incorporated to permit 'any person' to approach the Court to seek to enforce any breach or apprehended breach of the law. Since then, open standing provisions have been extended to most, if not all planning and environmental statutes. At the Commonwealth level, the application of open standing provisions has been extended to non-government organisations (NGOs) under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).[23]

The traditional, strict test of standing can be found in the case of *Boyce v. Paddington Borough Council* [1903].[24] Here it was decided that the plaintiff must have suffered 'special damage peculiar to himself from the interference with the public right.'[25] Almost eighty years later, the High Court of Australia, in *Australian Conservation Foundation Incorporated v. Commonwealth*,[26] decided the expression 'special damage' from *Boyce*, could also mean 'having a special interest in the subject matter of the action,'[27] yet an interest 'does not mean having a mere intellectual or emotional concern.'[28] This case concerned a proposed development in the state of Queensland, which required Commonwealth approval and an Environmental Impact Statement to be completed under the relevant legislation, the *Environment Protection (Impact of Proposals) Act 1974* (Cth). The Australian Conservation Foundation (ACF) submitted written comments to the Minister concerning the Environmental Impact Statement, stating that there were environmentally damaging aspects of the proposed development. The Minister soon announced that the development would go ahead, and ACF sought declarations and injunctions to halt the development, but the Court held they lacked standing to sue. In the words of Gibbs J, "A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor *locus standi*."[29]

The environmental concerns of the Australian Conservation Foundation, one of Australia's major independent environmental organisations, were deemed not enough, despite their wish to see the relevant legislation enforced. Rules like these could seriously hinder the development of good environmental governance, and sustainable development. The environment cannot speak for itself. It needs willing individuals or groups to defend it, especially if the relevant legislation is ineffective and not enforced in any other way.

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) has now widened the scope for conservationists and conservation groups to seek judicial review, and obtain remedies, such as an injunction, to prevent breaches of the Act.[30] Under Section 475, public interest litigants (people or bodies involved in conservation activity or detailed research) are given the power to seek an injunction on the grounds of false or misleading information being detected in an application for a development approval or an Environmental Impact Statement. This has been applauded as a positive move towards better environmental decision-making, as environmentally committed citizens or groups have an avenue to voice their concerns in court.

On the other hand, the necessary limit that there must be false or misleading information can be criticised as still too restrictive. Furthermore, loosened standing rules might mean there is increased potential for public participation, yet this participation can be described as almost meaningless, or tokenistic, in the absence of the environmental advocates having sufficient resources to be able to present a strong argument. The unfair lack of balance between wealthy developers and concerned citizen groups is not dealt with by changes to *locus standi* rules, but rather through the application of a court or tribunal's power to award costs or through an integrated system providing for legal aid and/or intervenor funding.[31]

In terms of environmental governance, the funding of intervenors and environmental defenders is very important in promoting the principles of participation, access to information and social and economic justice. An individual or group may not be directly involved in a dispute, but they can seek to intervene as a party to the proceedings in order to protect their interests, where those interests are different from the existing parties.'[32] If the court grants this party leave to intervene, they become a party to proceedings and can appeal and tender evidence. In *Levy v. Victoria* (1997),[33] Brennan J commented on intervention in the following words, "A non-party whose interests would be affected directly by a decision in the proceeding- that is, one who would be bound by the decision albeit not a party- must be entitled to intervene to protect the interest liable to be affected."[34]

In a similar sense to the general standing rules, a party who seeks leave to intervene, is subject to the requirement that their interests be affected, and that they need not just to have a mere intellectual or emotional desire for the law to be of a certain character.[35]

Australia has demonstrated a level of commitment to the public interest by its reforms to standing provisions. The state of New South Wales established the Land and Environment Court (LEC) in 1979 solely to adjudicate matters of environmental and planning law. In recent times, Australia has also adopted the approach of not assessing costs against unsuccessful environmental litigants, due to the negative deterrent effect awarding costs against them might have on public interest representation. In *Oshlack v. Richmond River Council*,[36] the rationale behind not assessing costs against unsuccessful public interest litigants was that 'there is little point in opening doors to the courts if litigants cannot afford to come in,'[37] and that the fear of the possibility of having to pay the costs of the other side if unsuccessful 'must inhibit the taking of cases to court.'[38] The Court considered the role of public participation in the environmental law process, and saw the special circumstances of public interest litigation as a reason to depart from the traditional rule of costs.[39] This case was a significant and commendable advance in environmental law. Australia, however, has still been reluctant to take a step further to accept the intervenor funding model, either funded by the state or by proponents themselves.

It is recognised that in an adversarial system, the mere idea of proponents funding their own opposition may be considered somewhat revolutionary and inappropriate, however, a strong argument can

nevertheless be mounted on the basis that the proponent in most cases stands to gain financially if successful in the regulatory proceeding leading up to the granting of a permit, license or approval to proceed with the project.

The primary purpose of the environmental regulatory regime in most instances, is to ensure the protection of the *environment* and consequently, it is critical that the decision maker be in the position of making an informed decision based on appropriate evidence put before the court by parties other than the proponent. In this context, the provision of intervenor funding by the proponent may be viewed as an additional fee much in the same nature of an impost charge imposed upon developers in regards to obtaining development approval. In circumstances where intervenor funding is considered absolutely necessary in order to ensure good environmental governance, a case can be made that the intervenor should not be forced to bear the expenses related to meaningful participation.

The point in time when public interest or environmental litigation most requires assistance is at the preparatory stage, not after the case has been decided. Reimbursement for certain expenses at the end of the case does not address the timing issue, as this form of assistance comes too late to effectively encourage public participation in ensuring that environmental law is enforced. Most environmental 'enforcers' 'or intervenors' are private citizens, non-profit organisations or non-governmental organisations. Often these parties may not be able to afford to bring an action, despite the chance that they will later be reimbursed. They may not be able to cover expenses like attorney or agent fees, expert witness fees, and the cost of studies, reports, tests or projects in advance.[40]

More pragmatically, legal counsel and/or expert witnesses are generally not prepared to participate on the basis that they 'may' as opposed to 'will' receive their fees at the conclusion of the proceeding. Therefore, awarding costs after the fact does not effectively promote citizen participation, which is one of the main principles of good environmental governance. Nor does it enable those intervenors who nevertheless choose to participate with little or no resources at their disposal, to place before the decision-maker the kind of evidence that will lead to a more balanced and better environmental decision.

Lack of adequate funding more often results in ineffective participation at best, or in many cases, it places a chill on the ability of the public to exercise their rights to participate in environmental decision making altogether. Not many jurisdictions do support the intervenor funding model, where the necessary financial resources are provided in advance of a hearing. However, the Province of Ontario, in Canada, did adopt the model for a number of years, under the *Intervenor Funding Project Act 1989*, before it was later repealed by a change of government.[41] The Canadian experience illustrates how this sort of model is more likely to promote public participation and better environmental decision-making. The initiative largely originated in a decision in *Re Regional Municipality of Hamilton-Wentworth*,[42] made by the Joint Board, which at the time, was chaired by this writer.

The decision concerned an application by the Regional Municipality of Hamilton-Wentworth for the approval to construct an eleven-kilometre highway that would connect two provincial highways in the city of Hamilton, Ontario. The provincial government required the proponent obtain a number of environmental and planning approvals before construction. Two separate citizen groups brought action against the developer and called for financial assistance to be able to participate effectively in opposition to the proponent. Although it was a controversial decision, the Joint Board awarded the two intervenors a total of $75,000 as 'costs in advance,' to be paid by the proponent.[43]

The focus of the decision was on the quality of environmental decision-making, trying to balance the perceived inequity between the positions of the parties, to enable more informed outcomes. Without such a scheme, the essence of the hearing process would be negated, that is, the provision of an open forum where citizens could effectively participate in the decision-making process, and where decisions are based on the evidence given by both the proponent and the opposition.[44]

The decision was met with immediate protest and controversy from within groups such as the media, the government and the corporate sector. The proponent, who was ordered to fund the opponents' case in advance, filed for a judicial review of the decision. The judicial review was initially heard by the Ontario Divisional Court, a Division of the Ontario Supreme Court, now known as the Superior Court of Justice.

The question before the court was primarily whether the Joint Board had exceeded its jurisdiction under the relevant statute when it awarded costs in advance. The Divisional Court concluded the Joint Board did not have the power to award intervenor funding, no matter how desirable effective opposition might be.[45] This decision was disappointing because it once again failed to perceive environmental litigation differently from other forms of litigation, and treated environmental approval proceedings from a costs perspective as any other civil proceeding. To a large extent, the very significant public interest component was marginalised.

The year after the Divisional Court's decision, Ontario saw the first change of government in over four decades. The new Attorney General had been counsel representing one of the intervenors in the judicial review the year before, who argued in favour of upholding the Joint Board's decision. The new Government enacted the *Intervenor Funding Project Act 1988*.[46] The government was careful to build into the Act appropriate eligibility criteria and accountability provisions to overcome the potential for abuse. For instance, the relevant funding panel was to determine what proponents should provide funding,[47] and how much funding; and funding proponents had the right to object to the making of a funding order.[48] Furthermore, Section 7 of the Act provided detailed eligibility criteria for intervenor funding. For example, the issue must affect a significant segment of the public, and the issue must not just have been a private interest.[49] In addition, the funding panel was to consider a number of points, such as whether the intervenor had adequate resources to present their interest;[50] whether the intervenor had made reasonable efforts to raise funds from other sources;[51] whether the intervenor had an established record of concern and commitment to this interest;[52] and whether the intervenor had a clear proposal for their use of any funds which might have been granted.[53] In determining the quantum of the funding, one of the responsibilities of the funding panel was to deduct from the award funds which were reasonably available from other sources.[54] Such provisions were designed with the aim to overcome potential for abuse. Any inappropriately received funds could be 'clawed back' to the proponent.[55]

Although controversial, the Act made a significant achievement in regards to citizen involvement, and in the opinion of this writer, resulted in a significant improvement in the quality of the environmental decisions being made. It put the concept of winners and losers, in the context of environmental and public interest litigation, to rest.[56] The legislation presents us with a novel environmental initiative, which could and some would argue should be considered for adoption in Australia and other countries. It would enhance environmental governance in a number of respects, namely, access to information, public participation, and justice. More balanced environmental decision-making would be the most direct result.

Alternative ideas for funding and citizen representation and participation have been suggested by those who do not support the implementation of the intervenor funding model. For example, there is the public defender model. The Environmental Defenders Office established in each state and territory in Australia was intended to represent the public interest in an environmental context. The offices that exist in New South Wales and elsewhere have over the past twenty years, changed their focus, and in some cases, have had their funding reduced substantially. Jurisdictions that have adopted the public defender model, although purporting to represent the public interest, do not substantially enhance the citizens' ability to participate directly in environmental decision-making.[57] Therefore, the public defender model does not promote good environmental governance as well as the intervenor funding model does.

The extension of legal aid schemes to work with environmental litigation, and increased funding to legal aid offices is also a suggested alternative to intervenor funding. Legal aid, however, suffers from similar disadvantages to the concept of awarding costs after the fact.[58] Legal aid does not provide the funding when it is most necessary, at the preparatory stage. Furthermore, the fees and general funding provided for legal aid schemes are at rates which are seriously unattractive to many experienced lawyers. Those attorneys who do participate in such cases ultimately end up funding the costs of the litigation themselves in advance.[59]The means tests that usually accompany legal aid schemes are often too restrictive, therefore preventing a large proportion of the public from gaining access. The disadvantages of the legal

aid model are complex, and display its poor ability to enhance good environmental governance.

The rationale behind the intervenor funding model is sound. As part of good environmental governance, participation must be meaningful, and not merely visible. Giving deserving opponents the funds needed to present their cases would overcome many of the difficulties experienced in the current system. The loosening of standing requirements are commendable in the sense that they allow for participation of some citizens and groups, however as mentioned at the outset of this paper, the extra step of the provision of funding is necessary to avoid citizen involvement being *participatory tokenism*.

Environmental litigation needs to be viewed differently to other forms of litigation, primarily because the environment does not have a voice of its own. It often needs committed representatives, independent from the government. The cost of providing adequate funding usually pales in comparison to the profit made by the proponent's development. For example, in the time during which the *Intervenor Funding Project Act* was in use in its jurisdiction, the amount of funding provided under this regulation on a case by case basis was estimated to be approximately 1 to 2% of the development project cost. That is a small price to pay to achieve a better outcome in the context of environmental decision-making and enhanced public participation. Unless adequate resources are provided for, the real cost will be suffered by the public at large, measured by a poorer quality of environmental decisions. Such decisions are usually a result of the imbalance of information and evidence between proponents and opponents.

PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING IN DEVELOPING NATIONS OF THE SOUTH PACIFIC

By way of a contrast to the more developed Australian and Canadian legal environmental context, the developing Nation States in the South Pacific such as Fiji continue to face significant challenges or impediments to achieve good environmental governance. In particular the command and control style of environmental legislation enacted by the colonial predecessors, has been ineffective in providing for public participation in environmental decision-making processes. In the past inadequate levels of planning, technical expertise, financial and human resources has not enabled planners to appreciate the extent and likely consequences of certain resource uses[60], which has in turn constrained the ability of environmental knowledge and awareness to filter down to the grass roots community level in the form of capacity building, training and education. A fundamental issue is the dominance of social and economic interests in policy development that has been at the expense of environmental concern. Therefore, to a great extent it has been the Environmental NGO's such as the South Pacific Action Committee for Human Ecology & Environment (SPACHEE) engaging with the community, that has educated the public through environmental programs on the important issues of sustainable use of biodiversity in social and economic development.

The enactment in 2005 of the *Environment Management Act* (*Fiji)* provides through certain provisions the opportunity to redress some of the above mentioned deficiencies, namely public participation in the context of environmental decision-making and for the potential future development of good environmental governance. The Act implements some of the provisions of Fiji's *National Biodiversity Strategy and Action Plan* (NBSAP) in accordance with the *CBD Compliance Report 2002*[61], although there is also a *Sustainable Development Bill* currently under review[62], which will be essential for integrated natural resource management.

The key provisions for public participation in environmental decision making in the *Environment Management Act* 2005 (Fiji) include: section 27(1) that requires an approving authority for a development application to undertake an Environmental Impact Assessment on whether the proposal is likely to cause a significant environmental or resource management impact. This includes taking into account any public concerns relating to the development activity or undertaking (section 27(2)(d)), and conducting a public hearing in the area of the proposed development. In addition a proponent may be required to invite public comments on the report at the proponents cost, in the manner prescribed by regulations (section 30(2)) and further to allow the public to inspect the Environmental Impact Assessment (section 30(3)). The potential

for good environmental governance is promoted in section 31(1), which may require a cash bond to be deposited into a trust fund to secure against the probable cost of mitigating environmental damage in the area of proposed development and its surrounds.

Section 54(1) of the Act is a significant provision, it enables "Any person" to institute proceedings in a court to compel the performance of the Minister, a statutory authority or government department its functions under the Act, this includes carrying out Environmental Impact Assessments under section 27. In the past there does not appear to have been any attempts to force local authorities in Fiji to perform their legal duties in relation to the enforcement of pollution laws, nor has the Land Conservation Board in the past prosecuted anyone for poor agricultural land management practices[63], and there has been clearly a need for greater incentives for better husbandry practices.

However, section 54(1) may not help to overcome the fragmented nature of environmental responsibility, when there are at least 14 different ministries, statutory bodies or other agencies and at least 25 other Acts and numerous *ad hoc* committees, operating without adequate implementation of integrated environmental management practices[64]. This fragmentation has in effect created loopholes in the law allowing unsustainable development practices to occur. It is essential that for section 54(1) to operate effectively that the public and concerned NGOs know in whom responsibility is vested for the purpose of enforcing their compliance with the Act.

The Act also provides a system of monetary reward for the public under *section 60* for the reporting of breaches of development permits or conditions that may help to overcome the entrenched negative public attitudes towards the enforcement of environmental offences[65]. Further, one of the objectives of Fiji's NBSAP is the second focal area of "Improving our Knowledge"[66]. Its aim is to improve biodiversity studies and the value of traditional ethno-biological knowledge in formal educational and professional curricula. This raising of public awareness in conjunction with the recognition of the publics environmental rights under the *Environment Management Act* 2005 (if they are made sufficiently well known), will make it possible to provide the political impetus for formulating and implementing appropriate environmental protection, environmental management policies and public participation in environmental decision-making for good environmental governance.

The legislative measures in the *Environment Management Act* 2005 (Fiji) like section 475 of the *Environment Protection and Biodiversity Act* 1999 (Cth) in Australia offers an opportunity for individuals and groups concerned with the environment to defend it against the legislation. However, without an *Intervenor Funding Model* as in the Canadian legal system, or an ability to obtain legal aid to support the granted *locus standi* under the Act, the opportunity for public participation in decision-making may be offset by a significant imbalance in the financial resources available to both the developers and the government bureaucracy to defend a cause of action by concerned citizen groups.

Another inhibiting factor may be the inability to combat false and misleading environmental information because there is no general right of access to freedom of information in Fiji, as is the case in Australia and Canada, for example, under the *Commonwealth Freedom of Information Act 1982* and the *Access to Information Act (R.S. 1985, c. A-1)* respectively, to enable concerned citizens and NGO's to scrutinise the actions of public officials and government departments. This is despite the fact that such a right is entrenched within section 30 and section 174 of the *Fiji Constitution Act* 1998 that prescribes that:

> As soon as practicable after the commencement of this Constitution, the Parliament should enact a law to give members of the public rights of access to official documents of the Government and its agencies. [67]
>
> Accountability and good governance can only be achieved if members of the public have access to information...[which] is essential to the proper functioning of a democracy.[68]

Therefore, this lack of information and financial resources to commence an action in court may further

perpetuate the public's silence on issues concerning the environment because of an inability to articulate concerns as well as unwillingness and inability to act on them, and will continue to hinder the development of good environmental governance.

The government of Fiji stated in the *CBD Compliance Report 2002* that *Article 8J* of the *Convention on Biological Diversity* is a high priority and adequate resources are available for meeting its objectives and recommendations. However, indigenous Fijian's remain marginalised and impoverished despite the transition to independence[69], as legislation has commonly ignored traditional methods of resource management and traditional conservation methods.

This marginalisation is further compounded by the fact that although 50% of the population are indigenous people who own more than 80% of the land and natural resources[70], the control and administration of all native land is vested in the Native Land Titles Board as trustees under section 4 of the *Native Land Trusts Act* (Fiji) 1940,[71] and sustainable land utilisation has tended to give way to more aggressive exploitation for cash revenue. It was held until recently that there was no standing for and individual to institute proceedings against the NLTB for the native landowners, over a failure to administer the land and resources for the benefit of native Fijian people.[72] However, the case of *Native Land Trust Board v. Narawa* [73] not only overturned the existing law on the issue of standing to sue, but also has raised issues of fundamental importance to the native traditional land owners, namely the potential for the law of Fiji to recognise rights and interests under customary law and thus the potential for indigenous participation in environmental decision making.

The facts in *Native Land Trust Board v. Narawa* were that two agreements had been entered into by the NLTB and the Conservator of Forest with Timbers (Fiji) Limited for the felling, taking and selling of timber, that provided inter alia, for the payment of royalties and fees. The plaintiffs in the case were members of the *Yavusa Burenitu* who claimed declarations that Timbers (Fiji) was in breach of these Agreements; that the NLTB was not acting as required by the Native Land Trust Act in that it failed to administer them for the benefit of the Fijian owners, and also that it was in breach of its fiduciary duties to the members of the *Yavusa Burenitu* by condoning and supporting the continuing breaches of Timbers (Fiji).

The primary trial judge in the High Court of Fiji applied the existing authorities and dismissed the action instituted by the *Yavusa Burenitu* stating that:

> The composition, function and management of a *mataqali* and the regulation of the rights of members in relation to each other and to persons and things outside it are governed by a customary law separate from and independent of the general law administered in this court.[74]

The *Yavusa Burenitu* then appealed to the Court of Appeal. In its judgement, the Court of Appeal approved the decision of Cullinan J in *Waisake Ratu No 2*. Who considered that the *mataqali* or a *tokatoka* were not institutions alien to the applied law of Fiji.

In addition, the cases had made it clear that the person seeking to bring an action in a representative capacity did not have to obtain the consent of those whom he purported to represent. And although land holdings might be individual in places, such individual rights were nonetheless held under communal proprietary rights[75]. The Court of Appeal then referred to various authorities relating to the common law recognition of customary title including *Re Southern Rhodesia* [1999] at 211; *Amodu Tijani v. The Secretary of Southern Nigeria*; [76] and *Mabo v. The State of Queensland*.[77]

The Court of Appeal concluded that if the agreements had not been properly administered and Timbers (Fiji) were guilty of breaches for which damages had been payable but had not been claimed; the members would also have a common grievance. Whether that was so in fact could only be determined at trial.

In response to the Court of Appeal decision the NLTB sought special leave to appeal the decision in the Supreme Court. The Supreme Court judges at [40] stated that there was no doubt that the present case

could give rise to far reaching matters of law and matters of great public importance concerning whether customary communal entitlements were recognised by the common law, and the effect of existing statutory provisions in relation to such rights.

The important questions of law and fact that need to be decided in relation to the recognition of Native Fijian's customary law, within the Fijian legal system, also has the potential for positive and far reaching consequences for good environmental governance. This is because decisions which are made concerning land use and practice by those who possess a wealth of traditional ecological knowledge, promotes an equitable and sustainable system of environmental management for the future social and economic development of the Nation of Fiji as a whole. Therefore, to simply continue to impose command and control policies and legislation from above, without regard to indigenous as well as community support and input at the grass roots level, will prove to be as ineffective as past practices to stem environmental degradation and unsustainable land and water resource management practices, and fail to achieve good environmental governance.

INDIGENOUS RIGHTS AND PARTICIPATION AS IMPORTANT ASPECTS OF ENVIRONMENTAL GOVERNANCE

Recognising and facilitating the contribution of Indigenous groups in matters of conservation and sustainable development is very important in regards to the promotion of good environmental governance. A number of international hard and soft law instruments deal with this issue, but generally indigenous rights to land and the use of natural resources have only received small recognition. The International Labour Organisation's *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*[78] was the first international law instrument designed for the protection of Indigenous rights and interests. Another expression of the need to account for Indigenous interests can be found in Article 8(j) of the UNCED's *Convention on Biological Diversity*.[79] This Article states that signatories to the convention are to 'respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.'

Furthermore, although it is still making its way through the UN process, the *Draft Declaration on the Rights of Indigenous Peoples*[80] provides for the right to indigenous self-determination,[81] and also articulates rights in regards to land, resources, water, seas, biological resources and intellectual and cultural property. Article 15 of the *Draft Declaration* recognises the rights of Indigenous peoples to the natural resources on their lands, and to participate in the use, management and conservation of these resources.

Although these expressions of Indigenous rights and interests have signalled a move forward, Indigenous commentators have criticised the approaches taken as focusing on participation and consultation, rather than clear property rights, and rights to self-determination.[82] A participation-based framework is a good move forward, but it must not be seen as an alternative or a substitute to a rights-based framework. Caution must be exercised in order to avoid treating Indigenous communities as a resource, or a means to the end of better environmental management. This is why participation rights in sustainable practices and wildlife management cannot be separated from the granting of other rights, namely property rights.[83]

There is a perceived conflict between Indigenous interests and conservation efforts. For instance, international schemes focusing on conservation often concern the resources, or species that are the traditional subjects of hunting and gathering practices. It can be argued, however, that Indigenous peoples have been using these resources for thousands of years, and that the practice is sustainable. The balance between natural and cultural heritage is often difficult to maintain.[84] A good approach to environmental governance must consider these factors, and attempt to develop a balance, or a compromise. Indigenous co-management schemes are an example of an endeavour to overcome this obstacle.

In many states including Australia, there has been an increased trend towards developing agreements and

contractual relationships between Indigenous organisations and public sector funding agencies, on behalf of the government. These agreements have come in the form of land and cultural heritage management agreements; joint management agreements for protected areas; and Indigenous land use agreements under the *Native Title Act 1993* (Cth).[85] They aim to facilitate Indigenous participation, responsibility and control over the land.

The turning point in Australia's approach to Indigenous land rights was the case of *Mabo v. Queensland (No. 2)* (1992).[86] In this case, the High Court of Australia recognised the existence of native title, that is, the right of Indigenous people to the use and enjoyment of their ancestral lands, in accordance with their traditional customs. The implications of the case did not turn out to be as massive as was originally predicted. However, *Mabo* and the *Native Title Act 1993*, because they did recognise native title to land and marine resources, have lead to the enhancement of the rights of Indigenous people to be considered as stakeholders in a range of land management issues.[87] This has meant improved, yet imperfect recognition of Indigenous interests.

The key environmental regulatory instrument at the Federal level in Australia is the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). Its jurisdiction is over Commonwealth lands and matters of 'national environmental significance.' Various provisions in the Act recognise the important contributions to be made by Indigenous Australians to conservation and sustainable development. These provisions were a result of the negotiating processes of the houses of Federal parliament, giving insight into how balance of power considerations can be important for environmental governance, and minority interests. One of the objectives of the Act is the utilisation of Indigenous knowledge, and the involvement of the owners or holders of that knowledge. In regards to co-management schemes, there is provision for a majority of the members of Management Boards to be Indigenous. Special rules for co-management of Commonwealth reserves in the Northern Territory and Jervis Bay Territory are established. Finally, the Act allows for the continuation of traditional hunting methods and ceremonial and religious activities by Indigenous communities.[88]

Partnership and co-management arrangements in Australia and elsewhere recognise that particular Indigenous groups have a special and meaningful contribution to make in conservation efforts, and environmental management regimes generally.[89] In other words, Indigenous groups and organisations have an integral role to play in environmental governance.

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 community organisation.[90] Management that incorporates Indigenous participation, but not power sharing, is referred to as *consultative management.*[91] Care must be taken to distinguish co-management with *collaborative management*, which once again, is about participation and transparency, but is not associated with the devolution of government power to the stakeholders involved.[92]

Collaborative and co-management schemes are strong features of modern environmental governance, as they are meant to provide Indigenous occupants of traditional lands a voice in regards to the management plans of the land. Examples of these schemes suggest they are a good development in terms of governance, yet there are a number of ways in which they could be improved.

The joint management model for protected areas such as national parks is the most significant for Australia, even though Indigenous groups are increasingly asserting the need for self-government and complete control, over the shared approach. Indigenous co-management or joint management emerged as a concept in the late 1970s and early 1980s, as legal recognition of Aboriginal rights to traditional lands grew.[93]

There are a variety of different joint management approaches in operation in Australia currently, some legislated by the Federal government, and others established by state schemes. Each plan or agreement is distinct from the others, with varying levels of resources, Indigenous management and involvement.[94]

The first joint management scheme in Australia, set up in 1981, was Gurig National Park. It was jointly managed between traditional Aboriginal owners and a government conservation agency. The Park's Board

of Management had an Aboriginal majority; the park was not leased back to the government; and an annual fee was paid to the traditional owners of the land for maintenance and use of the land.[95] Other models, such as the Uluru-Kata Tjuta National Park model and the Queensland model (state models), adopt the lease back scheme, where the land is leased back to the government, instead of giving full ownership.

Some commentators have been critical of the lease back approach, and this issue will be discussed shortly. Even though joint management schemes do not provide property rights, there have been positive results from their implementation. For instance, the traditional Aboriginal owners have been able to access and use the resources of the National Parks Services (NPS) and other government conservation agencies; and conversely, the National Parks Services have been able to access increased knowledge by involving Indigenous groups in management.[96] Finally, the agreements can provide some assistance in educating non-Indigenous Australians in regards to Indigenous culture, values and issues.[97] These characteristics within a system are integral to good environmental governance. For instance, the *Aarhus Convention*[98] cites resources, access to information, education and awareness as the most important elements of environmental governance.

An example of a Federal joint management agreement is that of Kakadu National Park, in the Northern Territory, Australia. The agreement is made under the *Environment Protection and Biodiversity Conservation Act* of the Commonwealth. The park has been included on the World Heritage List, under the *World Heritage Convention*. It is believed that Aboriginal people have lived within Kakadu continuously for over 50,000 years.[99] Under this agreement, the Board of Management, with 14 members in total, comprises of 10 adult Aboriginal people nominated by the traditional owners of the land, 3 representatives from various government agencies and one prominent conservationist.[100] The terms of the lease also provide for the promotion of the interests of the Aborigines and the development of cross-cultural training programs for the workers on behalf of the government agencies in the park.[101] Co-management or joint management schemes like this one are the most significant development in Australia in regards to Indigenous participation in conservation and sustainable development efforts.

There are other forms of agreements or programs in Australia between the government and traditional Indigenous owners of lands, to facilitate participation, which are also part of Australia's approach to environmental governance. For example, there are financial assistance agreements under the *Natural Heritage Trust of Australia Act 1997* (Cth), to support conservation efforts. Indigenous communities have recently gained increased access to funds under the Natural Heritage Trust, however, the argument has been raised that the funds they access are grossly inadequate, proportionately, to the amount of land they look after.[102] Furthermore, there is the Indigenous Protected Areas program, where the Commonwealth provides funds on the condition that landholders agree to use their land for the aim of conservation of biodiversity. An Indigenous Protected Areas Advisory Group provides advice to Environment Australia about the administration of the Indigenous Protected Areas program.[103] The main concerns with these initiatives are that funding is not always secure; progress is dependent on political will; and that generally, the policies are focused on the short term.[104]

Australian governments, at both the federal and state levels, have been reluctant to give full ownership and control to traditional Indigenous owners of land, preferring co-management arrangements. Australia could therefore learn a lesson from the African experience with the Communal Areas Management Plan for Indigenous Resources (the *CAMPFIRE Project*) in Zimbabwe. The recent trend in Africa has been towards agreements in the form of Community Wildlife Management (CWM), which encourage conservation through granting self-determination and full ownership. By giving the communities ownership, they are given the most meaningful form of representation in the decision-making process; they are able to derive economic benefit from the use of the land, in terms of trade and tourism; and they will have more of an incentive to manage the land in a sustainable way.[105] Australia has adopted some schemes at the local and regional level that resemble the CWM model from Zimbabwe, for instance, the Indigenous peoples' use and management of terrestrial vertebrates and some marine species, dugongs and

turtles.[106] However, the main approach to wildlife management in Australia remains co-management, and this could be limiting the potential for better environmental governance.

It will be very difficult in Australia to convince governments to devolve ownership of wildlife to Indigenous communities. This is due to the perception that wildlife is part of the national heritage, and it therefore must be protected and controlled by the government. [107] If the CWM model was to be adopted more readily, however, there is the chance it could be unsuccessful where Indigenous peoples are not willing to participate and manage the wildlife, such as in areas of extreme poverty, where conservation could interfere with the potential for economic development.[108]

In addition, it cannot be assumed that Indigenous communities do have the required knowledge and resources, such as funding, to successfully manage the wildlife. The traditional knowledge may no longer be possessed by the community, due to societal and cultural change.[109] These considerations may then necessitate some sort of government involvement, even at a minimum level, in the management of wildlife. Funding is certainly the most important role for the government here.

Joint management in Australia has taken a somewhat minimalist approach in terms of granting secure property rights to Indigenous communities. Joint management has tried to recognise Indigenous concerns and interests, yet it must be realised that the right and ability to participate meaningfully cannot be separated from other rights, in particular, property rights and the right to self government. Australia's joint management schemes have achieved some positive results in terms of conservation and environmental governance generally, but there are aspects of the schemes which are unnecessary or need improving.

The lease-back arrangement is paternalistic, and it detracts from full legal recognition of Indigenous ownership of traditional lands. The lease-back arrangement is not necessarily required for effective co-management. Contractual agreements between the government and the relevant Indigenous groups, with terms and conditions concerning management, would be sufficient.[110]

Moreover, adequate resources are crucial to the success of these schemes. Indigenous communities struggle to meet their joint management lease obligations without the necessary financial support. As a final point here, despite there often being an Indigenous majority on Joint Management Boards, the government still has ultimate control via the role of the minister and through funding mechanisms.[111]

Nevertheless, the existence of the joint management system is better than its non-existence. It currently provides the minimum conditions for cooperation,[112] and it will not be able to grow without the move towards adopting a rights-based approach, instead of continuing to focus on Indigenous 'interests' and participation.

CONCLUDING COMMENTS

The concept of *environmental governance* is primarily about *how* to reach environmental goals, such as conservation and sustainable development. Analysing approaches to environmental governance then requires a study of the policies and structures in place that determine how power is exercised and how environmental decisions are made. Most importantly, we must observe the ways in which citizens, community groups and non-government organisations participate and keep the authorities accountable. Participation of stakeholders, for example, Indigenous communities; access to information; adequate funding; and government transparency and accountability are crucial to the development of good environmental governance.

As an aspect of citizen participation and responsibility, a good approach to environmental governance would be encouraging the avoidance of unnecessary and expensive litigation. It is beyond the scope of this paper to consider the efficacy of environmental mediation as opposed to environmental litigation. Environmental mediation even in complex cases involving a large number of stakeholders can have an important role to play in resolving the less contentious issues and thus considerably shortening the litigation proceedings with significant consequential costs savings. In this writer's experience, however, environmental mediation is rarely successful as an alternative method of dispute resolution particularly where there is a significant public interest component at stake. In such cases, it is often necessary for an

apolitical, independent court or tribunal to adjudicate and frequently impose a decision where consensus is not achievable. Proponents of potentially damaging projects should be encouraged to engage in conversation with the public from a very early stage in the proposal.

Deliberative mechanisms, such as joint meetings or seminars, where information is provided to the public and open debate is facilitated, could foster this sort of relationship. Concerned members of the public would be given the chance to respond, and to discuss matters at very early stages, which could prevent further disputes later on. Mechanisms for conversation with developers or proponents are important for environmental governance, as concerned citizens or groups can be given the chance to speak up, before resorting to litigation. Moreover, this relationship will help those who are concerned understand the point of view of the developer and the plans of the project very early on, instead of hearing the proponent's perspective in court. These are ways of mitigating the impacts of such disputes on the legal system.

Finally, the objective of good environmental governance and the means of implementation are domestic responsibilities. International hard and soft law instruments play an important function in raising awareness, providing guidelines and fostering accountability. Lessons can be learnt from the approaches to environmental governance in other jurisdictions, for example, Ontario's intervenor funding experience, and Zimbabwe's Community Wildlife Management scheme. The recent *Native Land Trust Board v. Narawa*[113] case in Fiji may indeed point the way towards a more enlightened and long overdue approach with respect to customary law's position within a common law legal system. Good governance is dependent on there being adequate financial and technological resources, and the meaningful participation of stakeholders. In reference to Indigenous communities, effective participation and management of the environment cannot be separated from other rights, such as to property and self-determination. *Participatory tokenism* must be avoided at all costs. An active and aware citizen population can lead to better and more balanced environmental decision-making. Prioritising the protection of the environment can lead to better quality of the environment. A healthy environment means we are more likely to benefit from economic prosperity. In this sense, poverty eradication and the protection of the environment are interrelated. The benefits of environmental protection are unlimited: we can appreciate the aesthetic beauty of nature, experience health benefits, and have some peace of mind that future generations will also have access to these benefits.

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[1] *The Earth Charter* (2000) The Earth Charter Initiative, <http://www.earthcharter.org/files/charter/charter.pdf> (Accessed 4 November 2005).

[2] John Graham, Bruce Amos and Tim Plumptre, *Governance Principles for Protected Areas in the 21st Century*, 2003, World Parks Congress 2003, Durban, iii.

[3] John Scanlon and Francoise Burhenne-Guilmin (eds.), *International Environmental Governance- An International Regime for Protected Areas*, 2004, 2.

[4] Ibid, 1-2.

[5] Michael Jeffery, 'An International Regime for Protected Areas' in Scanlon and Burhenne-Guilmin eds., above n 3, 11.

[6] (1992) United Nations Department of Economic and Social Affairs, Division for Sustainable Development, <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm> (Accessed 4 November 2005).

[7] (2004) 3rd ed, IUCN The World Conservation Union.

[8] United Nations Economic Commission for Europe, *Convention on Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998 in Aarhus, Denmark; entered into force 30 October 2001,

<http://www.unece.org/env/pp/documents/cep43.e.pdf> (Accessed 4 November 2005).

[9] Ibid, see Preamble, paragraphs 7 and 8. The linkage between environmental rights and human rights is further articulated in the stated objective of the Convention (Article 1) as follows: 'In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well being, each party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.'

[10] Ibid, Article 4 (3) (a).

[11] Ibid, Article 4 (3) (b).

[12] Ibid, Article 4 (3) (c).

[13] Ibid, Article 4 (4) (c).

[14] Ibid, Article 4 (4) (e).

[15] Held in Lucca, Italy, 21-23 October 2002.

[16] Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, *Draft Lucca Declaration*, 2002, <http://www.participate.org/conferences/mp.pp.2002.crp.1.e.pdf> (Accessed 4 November 2005), paragraphs 14 and 27.

[17] Ibid, paragraph 1.

[18] Jeffery, 2004, above n 5, 31.

[19] Peter Nygh and Peter Butt (eds.), *Butterworths Concise Australian Legal Dictionary*, 1998, p. 404.

[20] In recent years, a number of important declarations and principles developed by the international community such as ecologically sustainable development, the precautionary principle, and the principle of inter-generational equity (usually categorised as soft law) are the subject of such widespread acceptance and usage by nation-states, that recognition of some of these principles as customary international law (and therefore, binding) may not be far off.

[21] Graham, Amos and Plumptre, above note 2, 7.

[22] Michael Jeffery 'Intervenor Funding as the Key to Effective Citizen Participation in Environmental Decision-Making: Putting the People Back into the Picture' (2002) 19(2) *Arizona Journal of International and Comparative Law*, 18.

[23] *Environment Protection and Biodiversity Conservation Act 1999* (Cth); See section 475.

[24] 1 Ch 109.

[25] Ibid, at [114].

[26] (1980) 146 CLR 493.

[27] Ibid, per Gibbs J, at [530].

[28] Ibid.

[29] Ibid.

[30] Chris McGrath, *An Introduction to the Environment Protection and Biodiversity Conservation Act 1999 (Cth)*, 2001, Community Biodiversity Network, <http://nccnsw.org.au/member/cbn/projects/upload/EPBCActintroduction_McGrath.pdf> (Accessed 4 November 2005), 16.

[31] Various jurisdictions have attempted to address this critical issue through a variety of approaches. For example, the Land and Environment Court of New South Wales adopted a policy of taking a hard line on applications for security for costs, emphasising the importance of the public interest nature of the litigation. An equally forceful line was taken in considering whether or not to require an applicant for an interim injunction, to give to the court an undertaking as to damages and perhaps, most importantly, to adopt the position that in the context of genuine public interest litigation, costs should not automatically follow the event. The latter development was endorsed by the High Court of Australia in upholding the

principle that the nature of public interest litigation was a relevant factor in exercising the cost discretion: *Oshlack v. Richmond River Council* (1998) 193 CLR 72 (HCA). Other approaches have included the establishment of Environmental Defender Offices (EDOs.) EDOs now exist in each Australian state and territory. Furthermore, a National Association of Environmental Defenders Offices has recently been established to deal more effectively with environmental issues of national importance. In some jurisdictions legal aid is provided for certain types of environmental proceedings, and in a few jurisdictions, there have been initiatives involving the provision of statutory intervenor funding.

[32] Roger Douglas, *Douglas and Jones' Administrative Law*, 2002, 4th Ed., 422.

[33] 189 CLR 579; 146 ALR 248 High Court of Australia.

[34] Ibid, per Brennan J, at [600].

[35] Dixon J, in *Australian Railways Union v. Victorian Railways Commissioners* (1903) 44 CLR 319, at [331].

[36] (1997) 152 ALR 83.

[37] Toohey J in *Oshlack v. Richmond River Council* (1994) 82 LGERA 236 (The Land and Environment Court) at [238]; Approved of by Kirby J (majority) in *Oshlack*, above n 31, at [115].

[38] Ibid.

[39] Edwards K., 'Costs and Public Interest Litigation After *Oshlack v. Richmond River Council*' (1999) 21 *Sydney Law Review*, 681, 682.

[40] Jeffery, 2002, above n 22, 15.

[41] Ibid, 20.

[42] 51 O.R. (2d) at 23.

[43] Jeffery, 2002, above n 22, 20.

[44] Ibid, 21.

[45] Ibid, 28.

[46] R.S.O. 1990 c. I.13. This Act was repealed in 1996.

[47] Ibid, Section 4 (2).

[48] Ibid, Section 6.

[49] Ibid, Section 7 (1) (a) and (b).

[50] Ibid, Section 7 (2) (c) .

[51] Ibid, Section 7 (2) (d).

[52] Ibid, Section 7 (2) (e).

[53] Ibid, Section 7 (2) (g).

[54] Ibid, Section 7 (3) (c) .

[55] Jeffery, 2002, above n 22, 32.

[56] Ibid, 33.

[57] Ibid, 19.

[58] Ibid, 18.

[59] Ibid.

[60] "Existing Institutions And Measures For Integrating Environmental Concerns Into Development Planning And Decision-Making For Suva City". *Integrating Environmental Considerations into the Economic Decision-Making Process, Vol. II , Local/Provincial Level, the Pacific Islands, Fiji (Suva),* United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP). <http://www.unescap.org/drpad/publication/integra/volume2/fiji/2fjindex.htm>
(Accessed 4 November 2005).

[61] CBD Second National Report 2002-Niue <http://www.biodiv.org/doc/world/nu/nu-nr-02-en.pdf> (Accessed 4 November 2005).

[62] Ibid; Fiji National Assessment Report 2003, Small Island Developing States Network, at 18. <http://www.sidsnet.org/docshare/ other/20031230154545_Fiji_NAR_2003.pdf> (Accessed 4 November 2005).

[63] *Fiji Environmental Analysis: A Report on the Consultative Workshop*, Findings and Conclusions, Asian Development Bank 2004 <http://www.adb.org/Documents/Events/2004/Fiji-Environmental-Analysis/conclusions-recommendations.pdf> (Accessed 4 November 2005).

[64] 'Existing Institutions And Measures For Integrating Environmental Concerns Into Development Planning And Decision-Making For Suva City', *Integrating Environmental Considerations Into the Economic Decision-Making Process, Vol. II , Local/Provincial Level, the Pacific Islands, Fiji (Suva),* United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), <http://www.unescap.org/drpad/publication/integra/volume2/fiji/2fjindex.htm> (Accessed 4 November 2005).

[65] Above n 1.

[66] Above n 3, (Conference of the Parties *Decision V/17. Education and Public Awareness).*

[67] Citizens Constitutional Forum: A Freedom of Information Law for Fiji, March 2004, 3.

[68] Ibid.

[69] *Taukei (Indigenous Rights) and the New Face of Western Hegemony in Fiji,* Lashley, Marilyn E. Howard University. Sixth Conference of the European Society for Oceanists (EFSO)-Pacific Challenges: Questioning Concepts, Rethinking Conflicts. Marseille (France), 6-8 July 2005.

[70] Above n 6.

[71] Sharma, Sunil., "The Control And Protection Of Native Lands In Fiji", 3 *Journal of South Pacific Law* Working Paper 6 1999.

[72] *Meli Kaliavu v. Native Land Trust Board* (1956) 5 FLR 17; *Naimisio Dikau No 1 & Ors v. Native Land Board & Anor*, CA No 801/1984; and *Waisake Ratu No 2 v. Native Land Development Corporation & Anor* (1987) Civil Action No 580 of 1984.

[73] [2004] FJSC 7; Cbv 0007.02s (21st May, 2004) <http://www.paclii.org/fj/cases/FJCA/2002/9.html> (Accessed 4 November 2005).

[74] *Dikau No 1 & Ors v. Native Land Board and Anor* Civil Action No 801 of 1984.

[75] *Markt & Co Limited v. Knight Steamship Company Limited* [1910] 2 KB 1021 at 1039.

[76] [1921] 2 AC 399.

[77] (No 2) (1992) 175 CLR 1.

[78] Adopted 27 June 1989 by the General Conference of the International Labour Organisation, entered into force 5 September 1991 <http://www.unhchr.ch/htm/menu3/b/62.htm> (Accessed 4 November 2005).

[79] (1992) United Nations Environmental Programme, <http://www.biodiv.org/welcome.aspx> (Accessed 4 November 2005).

[80] United Nations High Commissioner for Human Rights, <http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol) /E.CN.4.SUB.2.RES.1994.45.En?OpenDocument> (Accessed 4 November 2005).

[81] Ibid, Article 3.

[82] Michael Jeffery 'Environmental Ethics and Sustainable Development: Ethical and Human Rights Issues in Implementing Indigenous Rights' (2005) 2 *Macquarie Journal of International and Comparative Environmental Law* 11.

[83] Craig D. and Ponce Nava D., 'Indigenous Peoples' Rights and Environmental Law,' in Craig D., Robinson N. and Koh K. eds., *Capacity Building for Environmental Law in the Asian and Pacific Region: Approaches and Resources*, 2002, Vol. 1, 34 .

[84] Michael Jeffery and Donna Craig, *Wildlife Management in Australia: Different Perspectives on Indigenous Participation*, 2004, Prepared for presentation at the 8th International Environmental Law

Conference, Sao Paulo, Brazil, 9.

[85] Garth Nettheim, Gary D Meyers and Donna Craig, *Indigenous Peoples and Governance Structures*: *A Comparative Analysis of Land and Resource Management Rights*, 2002, 378.

[86] 175 CLR 1.

[87] Marcus Lane and Allan Dale, 'Project Assessment in Australian Indigenous Domains: The Case for Reform' (1995) 2 (1) *Australian Journal of Environmental Management*, 36.

[88] Nettheim, Meyers and Craig, above n 67, 395.

[89] Graham, Amos and Plumptre, above n 2, 5.

[90] Donna Craig, 'Recognising Indigenous Rights Through Co-management Regimes: Canadian and Australian Experiences' (2002) 6 *New Zealand Journal of Environmental Law*, 13.

[91] Ibid.

[92] Ibid.

[93] Ibid, 47.

[94] Nettheim, Meyers and Craig, above n 67, 400.

[95] Ibid, 400-401. Refer to this source for further discussion of the different models of joint management.

[96] Ibid, 401.

[97] Ibid. See also New South Wales National Parks and Wildlife Service, <http://www.nationalparks.nsw.gov.au> (Accessed 4 November 2005).

[98] United Nations Economic Commission for Europe, above n 8.

[99] Craig, 2002, above n 72, 50.

[100] Nettheim, Meyers and Craig, above n 67, 402.

[101] Ibid.

[102] Ibid, 403.

[103] Ibid, 409-410.

[104] Ibid, 423.

[105] Suchet, S (2001) "Challenging 'Wildlife Management' Lessons for Australia from Zimbabwe, Namibia and South Africa" in Jeffery and Craig, above n 66, 20.

[106] Jeffery and Craig, above n 66, 21.

[107] Ibid, 26.

[108] Ibid.

[109] Ibid, 27.

[110] Craig, 2002, above n 72, 55.

[111] Jeffery and Craig, above n 66, 28.

[112] Ibid, 58.

[113] Above n 73.