Climate Law Bulletin

The monthly climate update from the Environmental Defender's Office

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edo ENVIRONMENTAL DEFENDER'S OFFICE NSW

Sydney
Level 1, 89 York Street
Sydney NSW NSW 2000
T (02) 9262 6989
F (02) 9262 6998
E edonsw@edo.org.au
W www.nsw.edo.org.au

Northern Rivers
1/71 Molesworth Street
Lismore NSW 2480
T 1300 369 791
F (02) 6621 3355
E edonr@edo.org.au

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1. 'Climate Litigation – Lessons learned and future opportunities': by EDO NSW Principal Solicitor Kirsty Ruddock and EDO Vic Principal Solicitor Felicity Millner in Alternative Law Journal Vol 36(1) 2011 pp. 27-32

The following is an extract from an article that was first published in the Alternative Law Journal Vol 36(1).

There is increasing global recognition that climate change is in part a human-induced phenomenon; we have also seen an increase in climate litigation emerge as a means to redress the human induced aspects of climate change. Environmentalists have taken to the courts as a means of addressing the various issues associated with climate change, and have also been criminally prosecuted for their protest action against the causes of climate change.

There has been a significant expansion in climate litigation internationally in the past five to six years to redress the lack of international consensus on how to reduce greenhouse gas emissions worldwide. Litigation in Australia has been a key part of that trend and the Environmental Defender's Office has played a key role in the litigation from the start of this process.

Climate litigation has been occurring for some time. The first case was brought 20 years ago in the United States.[1] Here in Australia, the first case to raise such issues was brought 16 years ago by Greenpeace, which was successful in obtaining conditions to mitigate the impact of greenhouse gas emissions of a coal-fired power station.[2] Climate change case law continues to develop and evolve across a number of areas of law. Much of the litigation, particularly the earlier climate change cases, has been in the administrative law area, focused on environmental legislation and development approvals processes. Often, these earlier cases sought to ensure that governments considered greenhouse gas emissions in the process of approving new developments. However, climate law is now seen to reach across a breadth of areas as diverse as merits challenges, pollution, trade practices and Indigenous issues. Future cases will undoubtedly spread across a range of areas.

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[1] *City of Los Angeles v NHTSA* 912 F3d 478 (DC Cir 1990).

[2] Greenpeace Australia Ltd v Redbank Power Company (1994) 84 LGERA 143.

Public interest litigation has always played a key role in ensuring that citizens are heard and their rights protected. Public interest litigation differs from private litigation (where private actions are brought by people suffering damage by climate change) because those bringing the litigation have nothing to gain financially or personally from the outcome. In the environmental law area, usually the litigation is brought by those who are seeking to improve environmental protection through litigation. The advantage of public interest litigation is that it can focus public attention on a particular issue through media exposure. It can also encourage society to debate public values and the need to protect our environment.[3] Even unsuccessful cases can expose weaknesses in the law and highlight the need for law reform. Unsuccessful cases have often provided a vehicle for the development of the law, allowing subsequent cases to build on the legal arguments and scientific evidence presented.[4]

To continue reading this article, please visit the Alternative Law Journal by clicking here. The Alternative Law Journal is offering Climate Law Bulletin readers a special subscription offer (four copies of the Journal for an annual subscription rate of $66, that's an $11 saving on the standard subscription rate of $77). To subscribe, please fill in and return this form to Christine McGrath by email, or by quoting the code EDO 5/11 to access this special deal.

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National Update

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2. EDO Climate Change Cases Update: *Hunter Community Environment Centre Inc v Minister for Planning and Delta Electricity* ("the Munmorah case"); and

***Ned Haughton v Minister for Planning and Macquarie Generation; Ned Haughton v Minister for Planning and Delta Electricity* ("the Ned Haughton cases")**

We are awaiting judgement in both of these climate change cases presently before the Land and Environment Court ("LEC").

In the Ned Haughton cases, the former NSW Minister for Planning (Tony Kelly) granted concept approvals for two new coal or gas fired power stations – the Bayswater B Power Station and the Mount Piper Power Station Extension. Both proposals have been declared to be 'critical infrastructure' projects under the *Environmental Planning and Assessment Act 1979* ("the EP&A Act"), which means that the approvals cannot be challenged by third party objectors without the Minister's permission.

If the power stations are powered by coal, they are likely to increase NSW's annual carbon dioxide

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[3] Brian Preston, 'The Role of Public Interest Environmental Litigation' (2006) 23 *Environmental and Planning Law Journal* 337, 347.

[4] Joseph Smith and David Shearman, Climate Change Litigation: Analysing the Law, Scientific Evidence & Impacts on the Environment, Health and Property (2006) 12.

emissions by over 15% and will have a significant adverse impact on the State's ability to meet its targets in relation to the reduction of greenhouse gas emissions and the consumption of renewable energy.

The EDO is acting for Ned Haughton - a student and environmental activist – who is challenging the Minister for Planning's approvals in two sets of LEC proceedings. Mr Haughton seeks declarations that the concept plan approvals are invalid and of no effect; orders quashing the concept plan approvals; and injunctions restraining each of the proponents from taking any action in reliance on the concept plan approvals.

The LEC proceedings are the latest climate change cases seeking to require decision makers to properly consider the impacts of coal-fired power generation on global greenhouse gas emissions and the implications of climate change for NSW and Australia. Mr Haughton is challenging the validity of the approvals on several grounds, but most significantly, on the ground that the Minister failed to consider the impact of the projects (both alone and together) on climate change.

These cases were heard in September 2010. In February 2011, the Minister for Planning took the unusual step of writing to the Chief Judge of the LEC saying that the judgment from Justice Craig was overdue (further to an LEC practice note, a letter may be written if a judgement is not handed down within 3 months). Justice Craig responded via the Chief Judge by saying the judgement would not be handed down prior to the end of April. We are presently still waiting for judgement. For more information about the Ned Haughton cases, please click here.

The Munmorah case was due to be heard on 31 April and 1 May. However, the hearing was postponed pending the judgment in the Ned Haughton cases because the Munmorah case shares a number of grounds that will be considered by the Court in the Ned Haughton cases.

For more information about the Munmorah case, please click here.

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3. EDO Lodges Complaint Against 'Shock Jock'

The EDO, on behalf of the Australian Climate Justice Program and the Climate and Health Alliance, has made a complaint to Radio 2GB in relation to alleged breaches of the *Commercial Radio Australia's Codes of Practice* ("CRA").

The complaint follows a recent episode of ABC's Media Watch program 'A hot debate' on 21 March 2011, which highlighted the tendency of some talkback radio 'shock jocks' around the country to take a less than balanced approach to discussions on the topic of climate change.

Of most concern was the tendency of some presenters to misstate scientific facts. For example, Alan Jones on the Alan Jones Breakfast Show of 15 March 2011 said: "*Nature produces nearly all of the carbon dioxide in the air. Human beings produce 0.001% of the carbon dioxide in the air*."

Leading climate scientists have confirmed that based on data from the Intergovernmental Panel on

Climate Change ("IPCC"), human activity is in fact responsible for 28% of the carbon dioxide in the air.

The EDO in lodging a complaint asserting that there was a breach of Code 2.2 of the CRA which aims to promote accuracy and fairness in news and current affairs programs.

The first step in the complaint process is to deal directly with the broadcaster – in this case 2GB. If 2GB does not respond or if the response is inadequate, a complaint may be referred to the Australian Communications and Media Authority. EDO is currently awaiting 2GB's response.

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4. Vale Peter Gray

The EDO staff would like to express a heartfelt farewell to a valued client, Peter Gray, who passed away peacefully at home on Saturday 30 April 2011 with his wife, Naomi, by his side. The fact that Pete was able to stay strong for so long after falling ill, is testament to his deep strength of spirit. EDO staff members also wish to express their deep condolences to Pete's friends and family.

Pete was a member of Rising Tide Newcastle, an activist and supporter of the North East Forest Alliance and the Newcastle Branch of The Wilderness Society. Pete's commitment to save the environment brought him into contact with the legal system on a number of levels. His fights were not limited to exposing problems with the criminal law in relation to logging and climate change protest actions, but extended into the complexities and nuances of planning law and, most recently, through *Gray & Hodgson v Macquarie Generation*, pollution law.

He had an innate sense of justice, and was visionary, strategic, and always, without exception, calm and respectful to all around him. He was an inspiration, a pleasure to work with, and we will miss him deeply.

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5. The Carbon Farming Initiative Legislation

On 25 March 2011, the Senate referred the following Bills to the Environment and Communications Legislation Committee for inquiry and report by 20 May 2011:

- *Carbon Credits (Carbon Farming Initiative) Bill 2011;*
- *Carbon Credits (Consequential Amendments) Bill 2011*; and
- *Australian National Registry of Emissions Units Bill 2011.*

The Carbon Farming Initiative ("CFI") intends to give landholders and forest growers the chance to access carbon markets through the generation of carbon offset credits by undertaking certain emissions abatement activities. These credits are referred to as CFI credits. Put simply, the scheme

offers to pay landholders for storing carbon on farms by implementing carbon sequestration schemes (such as planting trees) or avoiding additional carbon emissions to the atmosphere by implementing carbon avoidance farming techniques (such as reduced tillage land management). The Australian Network of Environmental Defender's Offices ("ANEDO") welcomes this opportunity for the land sector to combat climate change, restore the landscape and improve regional developments all at the same time.

However, ANEDO also has some serious concerns with the scheme as currently proposed. These concerns are outlined in its submission to the Senate Environment and Communications Legislation Committee Inquiry into the Carbon Farming Initiative Bills. If the Government does not get the design of the CFI right, it could not only miss this opportunity but also undermine many of the Government's other proposed climate policies (especially the carbon price). ANEDO has recommended that the Government rethink several aspects of the CFI to improve its design.

The CFI is a market mechanism that purports to respond to climate change by creating incentives for people to carry out offsets projects and increase carbon abatement, whilst maintaining and preserving Australia's natural environment. For the market to work, a strong carbon price would be needed to stimulate demand for carbon credits.

Farmers will be encouraged to generate carbon credits from a range of possible eligible carbon mitigation or abatement activities such as:

- reforestation and revegetation;
- reduced fertiliser emissions;
- manure management;
- reduced emissions or increased sequestration in agricultural soils (soil carbon);
- savanna fire management;
- burning of stubble/crop residue; and
- reduced emissions from landfill waste deposited before 1 July 2011.

ANEDO has concerns about using a carbon offset scheme to drive greenhouse gas abatement in the land sector. Carbon offset schemes cannot guarantee net emissions reductions. For example, if one landholder reduces their stocking rate, there is every possibility that other landholders will increase theirs to respond to the market's demand.

Under the scheme, eligible offset projects must meet the following criteria:

- be located in or carried out in Australia;
- be covered by a methodology determination (by the Minister);
- meet the relevant methodology requirements;
- meet the "additionality test" (see below); and
- the applicant must be a recognised offsets entity.

Market confidence in the CFI will directly affect how much buyers are willing to pay for CFI credits. For this reason, the CFI incorporates "integrity standards" which reflect internationally recognised requirements to ensure that abatements are real and verifiable. These include requirements for: additionality (of the abatement); permanence (of emissions reduction); avoidance of carbon leakage (increased emissions elsewhere); measurability and verifiability (of impact); and international consistency.

One of the most important criteria is "additionality" which requires that abatement must have

resulted from a project that is "additional" to normal business. This means that only people who start carbon abatement activities for the first time are rewarded – those early movers who are already undertaking carbon abatement will miss out. This is an inherent weakness of offsets schemes, and cannot be remedied without sacrificing the all-important requirement of additionality, which is vital to the scheme's integrity. ANEDO has recommended that the additionality test be strengthened to increase confidence in and effectiveness of the CFI. Meanwhile, early movers should be compensated by other payments or incentives.

The CFI also has an inherent requirement that carbon emission reductions be permanent. For the project to be eligible, the project must store carbon for 100 years. The CFI also contains provisions that will require notification of permanent carbon abatement activities on certificates of title. ANEDO is concerned that landowners will take credits and then try to back out of the scheme. ANEDO recommends that the permanence mechanisms should be strengthened. Further research and development should also be conducted into soil sequestration techniques, and carbon emission and storage measurements. The science behind many of the proposed offset activities is largely theoretical, and ANEDO is concerned that the many uncertainties around permanence and accuracy of measurements may undermine the CFI's effectiveness.

Overall, the scientific credibility of offset projects must be guaranteed, and the CFI must be able to keep up with the latest scientific developments.

To find out more about the ANEDO recommendations for the CFI, please click here. The Government plans to have the scheme in place by 1 July 2011.

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6. NSW State Election: What is Barry O'Farrell's climate change policy?

New Premier Barry O'Farrell has said he is not a climate change denier. However, his 100 day action plan does not outline his climate change policy at this time.

In his victory speech, Mr O'Farrell promised to oppose the Federal Government's climate change policies by "taking up the fight to Canberra on the threat posed to families' budgets and NSW jobs by Labor's carbon tax".

Mr O'Farrell has since reshuffled the environment and water portfolios. The Premier has positioned himself at the head of the powerful new Department of Premier and Cabinet which, for the first time, takes in the Department of Planning and Infrastructure to deliver him ''direct oversight'' of that crucial portfolio. A spokesman for Mr O'Farrell said the changes were to ''improve co-ordination and service delivery''. The decision to place Planning and Infrastructure within the Department of Premier and Cabinet was tied to the promised creation of Infrastructure NSW and would help address an infrastructure backlog.

The Department of Environment, Climate Change and Water ("DECCW") has been abolished and most of its functions have been transferred to a new Office of Environment and Heritage, as a division in the Department of Premier and Cabinet in the same cluster as Planning and Infrastructure. The new Minister for Environment and Heritage is the Honourable Robyn Mary Parker, who was elected to the Legislative Council in 2003. She is now the member for Maitland.

Premier O'Farrell declared that he intends to abolish Part 3A of the *Environmental Planning & Assessment Act 1979*. Part 3A, introduced in 2005, gives the Planning Minister the power to assess and decide a class of development known as 'major projects', a system that has caused considerable controversy over the past 5 years and put the State Government at odds with local councils and communities. Mr O'Farrell said the Government would no longer accept Part 3A applications and, when it next sits, his government would move to "wipe Part 3A from the legislative record".

To read this article, please click here.

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International update

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7. Case Update: *American Electric Power v. Connecticut*

The US Supreme Court is presently reviewing a major US tort law (public nuisance) case that will have extensive impacts upon future climate change litigation in the US. The US Supreme Court heard oral arguments in the *AEP v. Connecticut* case on April 19, 2011, and a ruling is expected by the end of June.

In this case, a coalition of State Attorneys General sued several electric power producers, seeking to compel them to cap and then reduce their carbon emissions. The coalition asked the judge to order reductions in the emissions of plants in 20 US States and sought to examine whether the electric utility industry may be held accountable for its alleged contributions to damages arising from climate change.

A federal judge initially threw out the case, but the 2nd U.S. Circuit Court of Appeals in New York said it could continue and found in favour of the coalition of States. The matter is now on appeal to the US Supreme Court. For a summary of the case thus far, and links to earlier judgements to date, please click here. To read an article discussing this case, please click here.

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8. Challenge to California's Climate Change Law

A Californian superior court recently suspended the operation of California's climate change law A.B. 32, which was passed in Sacramento in 2006. This is a particularly interesting case for Australian readers given recent developments of the frameworks for our own cap-and-trade policy to rein in greenhouse gas emissions.

The case was not brought by conservative oil interests but by small green groups who considered the law and the California Air Resources Board demanded too little of the polluters, not too much.

The case turned on whether a local polluter should simply pay for pollution or cut back on the

pollution itself. The argument was an economic one similar to the one being discussed in Australia right now – which works better, a market-based approach or a simple carbon tax?

Justice Goldsmith agreed with the argument that regulators from the California Air Resources Board were too enamoured of cap-and-trade policy, which issues allowances to the polluting sectors equal to a pre-set emissions cap and then allows companies to trade those allowances as needed.

The outcome is such that California's effort to curb global warming had been put on hold. But the California Air Resources Board has indicated that it intends to appeal the decision. Ann Carlson, a UCLA environmental law professor said: "This is a temporary stumble [*to the operation of the law*]. The court decision doesn't tell the air board it must adopt a carbon tax — only that it must analyse a tax as a potential alternative.

To visit the judgement, click here.

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9. Youth Sue the Government to Preserve the Future and Halt Climate Change

A coalition of groups concerned about climate change called Our Children's Trust have sued the US Government, arguing that key agencies had failed in their duty to protect the atmosphere as a public trust to be guarded for future generations. Lawsuits and administrative actions have been filed against the Federal Government and 50 States to ensure reduction of carbon emissions and prevent climate catastrophe.

Most of the individual plaintiffs in the suit, filed in a US District Court in San Francisco, are teenagers, a decision apparently made to underscore the intergenerational nature of the public trust that the atmosphere represents.

The legal actions rely on the long established legal principle of the Public Trust Doctrine that requires governments to protect and maintain certain shared resources fundamental for human health and survival.

"The public trust law in our country and around the world says that common resources like water and air are held in trust by the government for the people and for future generations," said Julia Olson, Our Children's Trust executive director. "Lawyers around the nation are providing legal assistance to young people to help them protect their future, since the government has abdicated that responsibility."

To read more about the Our Children's Trust cases, please click here.

Policy

10. South Africa to Introduce Carbon Tax at the Same Time as Australia

South Africa intends to introduce a carbon tax before the Durban Conference at the end of the year. The Government intends that the tax will be ready for the budget in February 2012 and it could be operational by July next year – the same start date as Australia's promised carbon price.

However, the South Africans are way out in front.

The South African Cabinet has already approved a draft policy of the tax and it has also approved South Africa's Copenhagen mitigation pledge to reduce the country's emissions by 34 percent by 2020 and 42 percent by 2025 from a business as usual reference level. The level at which the tax will be set is not determined yet, but there is speculation that it may begin at 75 South African Rand per tonne and rise to 200R per tonne (roughly, AUD10-28).

A tax on vehicle emissions has already been agreed by the South African Government last year.

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Media, reports and other news

11. EnviroDevelopment National Technical Standards

The Urban Development Institute of Australia launched its new EnviroDevelopment National Technical Standards on 29 March 2011. EnviroDevelopment is a scientifically based branding system designed to make it easier for purchasers to recognise and thereby select more environmentally sustainable homes and lifestyles which in turn helps to combat climate change.

Certified developments will have been carefully designed to protect the environment and use resources responsibly, whilst offering a range of benefits to homeowners, industry and government.

EnviroDevelopment is performance based and applicable to a diverse range of development types and situations. It covers the broad spectrum of environment and sustainability issues from the initial conceptual stages of development, with elements devoted to ecosystems, water, energy, waste, materials and community.

For more information on how the system works, click here.

The new National Standards have been developed to ensure consistency between States. All EnviroDevelopment applications will now be assessed under the National Standards, rather than the previous State-based standards.

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12. Is Climate Change or Natural Resource Depletion the Greatest Environmental Challenge Facing Australia?

Is climate change or natural resource degradation and depletion the greatest environmental challenge facing Australia? Initial analysis of the preliminary results of our Environmental Challenges survey tells us that climate change is of the greatest concern for the majority of the Australian environmental managers and researchers that have been surveyed to date.

However, concerns over allocation of water resources, land degradation, impacts to ecosystem services and loss of biodiversity were also prominent.

The survey is still open and you can have your say by participating in the ONLINE SURVEY

The survey should take around 10-15 minutes of your time.

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13. Invitation to Join the EDO's Scientific Expert Register

The EDO is seeking scientific and technical experts with 10 or more years experience in a range of fields to join our Expert Register. PhD students are also encouraged to apply.

The Expert Register is a list of scientific experts who are willing to assist the EDO with public interest environmental matters on a pro bono basis. A key aim of the service is to increase the public's capacity to participate effectively in the environmental planning and development assessment process.

The EDO is also seeking to develop relationships with research organisations and environmental consultancies interested in doing pro bono work.

If you would like more information on how to be involved in the scientific work of the EDO, and have expertise in climate science or a relevant environmental field, please contact the EDO on (02) 9262 6989.

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14. EDO's Coastal Law and Climate Change project

The EDO has been funded by the Federal Government through its Caring for Our Country program to produce a guide to coastal law and climate change. To order a free copy of *Caring for the Coast: A guide to environmental law for coastal communities in NSW*, please email education@edo.org.au with your details and we'll send you a copy.

If you would like the EDO to come to your area to present a workshop on coastal law and climate change, please contact our Education Director at education@edo.org.au, or call 9262 6989.

Requests from rural and regional groups in NSW will be given priority.

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