



Climate Law Bulletin

The monthly climate update from the Environmental Defender's Office

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1. The United Nations Climate Change Conference(COP 16) in Cancun



The United Nations Climate Change Conference took place in Cancun in December 2010. An eleventh hour agreement has buoyed many observers with hope that a global deal on climate change is forthcoming. Several important outcomes were attained in Cancun, an improvement on the Copenhagen summit of 2009. Whilst the agreement is neither binding nor complete, it has been widely viewed as an advancement of climate change negotiations. It bears mentioning that, of the 194 countries who participated in the

conference, 193 countries supported the agreement.

Whilst this constitutes an advancement, it is still only a small step forward.

Of immediate concern is the expiry of the Kyoto Protocol in 2012. No framework for a new Protocol was outlined at Cancun. The emissions reduction targets proposed in the new Cancun agreement will not do enough to limit warming to 2 degrees Celsius which is what Kyoto requires. But given the recent paucity of success at an international level, this agreement is encouraging. For the first time a UN decision mandates that all nations should immediately determine the year by which greenhouse gas emissions should peak and begin to fall. It states: "Parties should cooperate in achieving the peaking of global and national greenhouse gas emissions as soon as possible." It sets out that industrialised countries should reduce emissions by 25-40% below 1990 levels by 2020.

Many consider the cornerstone of the agreement, and the reason that developed and developing countries reached a quorum, was the establishment of a global climate fund. The Green Climate Fund will help developing countries adapt to climate change. It is expected to provide communities that are vulnerable to climate change with an important source of finance. The fund will help mobilise US\$100 billion a year by 2020 to support low pollution economic development, protect tropical forests and help the world's most vulnerable people build resilience to climate change impacts. However, detractors point out that the provenance of this vast sum has not yet been specified and will, of course, remain the subject of future negotiations.

Other notable elements of the agreement include:

- measures to improve transparency and verification of domestic efforts to reduce pollution, including a process for international review of countries' actions by technical experts;
 - a mechanism that will deliver economic opportunities for developing countries to reduce
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- emissions that result from deforestation;
- new rules to ensure that all countries will be able to see what others are doing to tackle climate change; and
- establishment of a mechanism that will help promulgate clean energy technology around the world.

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National Update

Law

2. EDO Case Update: *Printz v Glenelg Shire Council*

Printz applied to Glenelg Shire Council ('Council') to construct a two storey dwelling on low lying land subject to inundation. The land is in an area within a known wetland and part of the Surry River estuary. The south boundary of the land abuts the coastal dune separating Narrawong township from the coast. The Council did not grant a permit within the prescribed time and Printz applied to the Victorian Civil and Administrative Tribunal (VCAT). In refusing the permit, VCAT made a number of useful statements on how to approach coastal development so as to not compromise the future implementation of adaptation strategies designed to deal with climate change impacts.

VCAT noted that the policies contained in the Victorian Coastal Strategy call for caution in allowing development in coastal spaces, in part so that the future ability to apply adaptation strategies are not compromised and in part so that planning can respond to the best available and emerging science and monitoring about climate change impacts. In short, if development can be avoided in areas that are vulnerable, this is considered to be a more orderly planning outcome.

VCAT found that, in the circumstances, the proposed development would not result in an orderly planning outcome for the wider Narrawong community as it would occupy what is currently an effective buffer space with capacity to protect the town within the foreseeable planning timeframe.

EDO Victoria acted in this matter.

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3. EDO Case Update: Court to hear LNG hub challenge



Joseph Roe has brought two legal challenges in the Supreme Court of Western Australia to stop the WA Government and Woodside from clearing native vegetation on the site of the proposed Gas Hub site at James Price Point on the Kimberley Coast. The EDO WA is acting for Mr Roe in both cases.

The WA Government has approved the clearing of over 30ha of native vegetation in connection with the project even though the environmental assessment report for the site has not yet been published.

Both cases will be an important test of the powers of the WA Department of Environment and Conservation to grant clearing permits related to a project which is under assessment by the EPA. The cases have been listed for hearing on 31 January 2011.

For more information, [contact EDO WA](#)

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4. EDO Case Update: *Caroona Coal Action Group Inc v Coal Mines Australia Ltd and Anor [2010] NSWCA 353*

EDO NSW has been representing the Caroona Coal Action Group Inc in proceedings challenging an exploration licence and coal authorisation granted to Coal Mines Australia Pty Ltd by the Minister for Mineral Resources.

The case was unsuccessful in the Land and Environment Court. The Court found that the documentary evidence did not show that the *Mining Act 1992* was not complied with when the licence was renewed prior to its partial transfer to Coal Mines Australia. The Court also found that the legislative requirements for a licence transfer were met.

Caroona Coal Action Group appealed the decision to the NSW Court of Appeal, arguing that Chief Justice Preston was incorrect in his interpretation of the *Mining Act 1992* in relation to the procedure for transferring exploration licences.

The Court of Appeal has now dismissed the Caroona Coal appeal with costs.

The Court's primary finding was that the transfer of an exploration licence under Part 7 of the *Mining Act 1992* does not require a "transfer document". Rather, the agreement of the parties to the transfer is signified by the application made by the licence holder and the consent of the proposed transferee.

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Policy

5. Draft carbon farming laws



The Federal Government has released draft laws outlining how its carbon offset scheme will work for farmers, forest growers and landholders. Climate Change Minister Greg Combet released the proposed legislation and "methodology guidelines" for the scheme early this year.

Mr Combet said: "Potential participants in the scheme will be able to gauge how they might get involved and help to identify any gaps or unintended impacts of the legislation."

Carbon credits created under the scheme represent abatement of greenhouse gases. This can be achieved by reducing or avoiding emissions through capture and destruction of methane emissions from landfill or livestock manure.

Alternatively, credits can be earned by removing carbon from the atmosphere and storing it in soil or trees.

Further details on the carbon farming initiative are available at www.climatechange.gov.au/cfi

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6. Tough emissions standards for new coal-fired power stations

All new coal-fired power stations will be subject to tough emissions standards to ensure that future energy generation in Australia is cleaner and greener. The Federal Government's discussion paper, [A Cleaner Future for Power Stations](#), was the first step in delivering a national commitment to require all new coal-fired power stations to meet an emission standard by 2011 with reference to best practice coal-fired generation technology. All new coal fired power stations will also be required to be Carbon Capture and Storage Ready.

The EDO recently lodged a submission in response to the paper. To read the EDO's submission, please visit:

http://www.edo.org.au/policy/101224cleaner_future.pdf

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7. Combet's climate change policy outlined



Climate Change Minister Greg Combet gave a [speech](#) on Friday 17 December 2010 which outlined Australia's present climate change policy and climate change regulatory responses.

Mr Combet proposed that Australia adopt an emissions trading scheme with an initial fixed price for carbon until a more flexible scheme kicks in. The Minister's remarks seem to indicate a preference for cap-and-trade, not a baseline-and-credit, emissions trading scheme over a carbon tax.

In a later interview with David Mark on ABC's PM program, Greg Combet clarified this by stating: "A cap and trade emissions trading scheme places a limit on emissions and allows the market to set the carbon price. In this way, emissions trading provides certainty about the amount of emissions reduction but less certainty about carbon price: quantity versus price."

This mirrors the Rudd Government's shelved emission trading scheme. But this time the Greens are supporting the version which they say has been revised.

The Government's multi-party committee on climate change has agreed that industry competitiveness should underpin a carbon price mechanism. Mr Combet said it was too early for the Government to declare that legislation would be introduced into Parliament by the end of the year, despite assurances from the Greens that it would be. Greens senator Christine Milne said the Greens wanted to see a market-based mechanism to lower emissions moved through Parliament by the end of the year.

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International update

Law

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



The 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 Supreme Court will hear an appeal from electric utility companies that are fighting an effort by States to force cuts in power plant emissions.

The Court agreed to review a federal lawsuit by eight States, New York City and others, that accuse the power companies of being among the largest emitters of carbon dioxide in the world. The suit asked a federal judge to order reductions in the emissions of plants in 20 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 eight States. For a summary of the case thus far, and links to earlier judgements to date, please [click here](#).

The implications of the Court's decision will not only affect the utilities industry, but will likely have wide-reaching impacts on other economic sectors—including automakers, agricultural and manufacturing interests, extractive industries, and chemical companies—which may find themselves embroiled in future legal battles over their greenhouse gas emission outputs. That the Supreme Court has decided to review the lower court's decision may signal a potential reversal of the original decision and a victory for the electric utilities. They argue that the States lack standing to bring public nuisance lawsuits targeting power plants and that the alleged damages will not be rectified by targeting individual sources of greenhouse gases. They further argue that such common law tort actions are pre-empted by the U.S. Environmental Protection Agency's regulations under the *Clean Air Act*.

We will keep you abreast of any future developments in this important case.

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9. US Climate Change Litigation Set to Triple

Without federal legislation regulating greenhouse gas emissions, litigation is on the rise in the U.S. with the number of climate change lawsuit filings doubling between 2006 and 2007, and tripling from 2009 to 2010, according to a report from DB Climate Change Advisors (DBCCA).

The report, "[Growth of US Climate Change Litigation: Trends & Consequences](#)", finds that the largest increase in litigation has resulted from challenges to federal action, specifically industry challenges to proposed Environmental Protection Agency efforts to regulate greenhouse gas emissions, according to researchers.

From 2001 to date, 24 percent of total climate change-related cases were filed by environmental groups aiming to prevent or restrict the approval of coal-fired power plants, with about 37 States joining, or stating their intention to join, either side of the litigation.

DBCCA expects the number of climate change related court cases to continue growing for the foreseeable future.

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Policy

10. EDO attends the 10th Conference of Parties of the Convention on Biological Diversity



EDO Aboriginal Solicitor Neva Collings attended the 10th Conference of Parties of the Convention on Biological Diversity (CBD COP 10) from 18-29 October 2010 and participated through the International Indigenous Forum on Biodiversity.

The biodiversity talks tabled adaptation to climate change as a key challenge facing conservation and agriculture.

The CBD COP 10 has been hailed a success with the adoption of 2020 Aichi biodiversity targets, adoption of the Nagoya Protocol on Access and Benefit Sharing of the Genetic Resources, and adoption of the Code of Ethical Conduct to ensure the respect for the cultural and intellectual heritage of Indigenous peoples and local communities which will guide the development of local, regional and national codes of ethical conduct for interactions with Indigenous communities by governments and other stakeholders. The Nagoya Protocol is the first international treaty to recognize the Declaration on the Rights of Indigenous Peoples.

The weblink to the final plenary session can be found at:

<http://webcast.cop10.go.jp/player.asp?id=2921&type=ondemand>

Please also visit:

http://australia.to/2010/index.php?option=com_content&view=article&id=4787:biodiversity-conference-gives-cause-for-rejoicing&catid=135:idx&Itemid=268

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Media, reports and other news

11. Future impacts of climate change identified in new coastal maps



The Minister for Climate Change and Energy Efficiency, Greg Combet, has announced the release of new coastal maps which identify the long-term impacts of climate change on some coastal regions.

These maps will assist the community to understand potential risks to infrastructure and properties and to prepare for the climate change impacts of sea level rises. They will also provide useful initial information to decision makers to prepare for potential risks from rising sea levels in coastal areas.

Areas identified in the maps include the low-lying areas of Melbourne, Sydney, Perth, the Hunter and the Central Coast as well as south east Queensland.

The coastal maps are available at www.ozcoasts.org.au.

For more information and to view the media release, please see www.alp.org.au/federal-government/news/coastal-maps-help-australia-prepare-for-impacts-of/.

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12. Extreme floods and climate change

Is there any relationship between the massive Queensland floods and global warming? Scientific opinion seems to be that warmer sea surface temperatures due to climate change (and hence more water vapor in the air), as well as a very strong La Nina cycle with warmer waters off eastern and northern Australia, are both likely contributors to the record flooding.

The Fairfax press has [reported](#) that: "Australia has been known for more than 100 years as a land of droughts and flooding rains, but what climate change means is Australia becomes a land of more droughts and worse flooding rains," David Karoly, from Melbourne University's school of earth sciences, said. Professor Karoly stressed individual events could not be attributed to climate change, "but the wild extremes being experienced by the continent were in keeping with scientists' forecasts of more flooding associated with increased heavy rain and more droughts as a result of high temperatures and more evaporation".

Read more [here](#).

To read a related article by Professor Ian Lowe, click [here](#).

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



The Environmental Defender's Office (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 Environmental Defender's Office (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 as soon as they are printed.

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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