



# Climate Law Bulletin

The monthly climate update from the Environmental Defender's Office

## Issue 7 – OCTOBER/NOVEMBER 2010

[1. Update on the Coastal Protection Act and Other Legislation Amendment Bill](#)

### National update

#### Law

[2. EDO Case Update: \*Ned Haughton v Minister for Planning and Macquarie Generation\*; \*Ned Haughton v Minister for Planning and Delta Electricity\*](#)

[3. EDO Case Update: \*Delta Electricity v Blue Mountains Conservation Society Inc \(security for costs\)\*](#)

[4. Victorian Climate Change Act](#)

[5. Australian Capital Territory Climate Change Bill](#)

#### Policy

[6. EDO Discussion Paper: Marine biodiversity and Climate Change](#)

[7. Australia's new political paradigm and the Climate Change Committee](#)

[8. Combet re-commits to carbon price](#)

### International update

#### Law

[9. Industrialised nations 'face claims'](#)

[10. USA climate change regulation – an update](#)

#### Policy



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](mailto:edonsw@edo.org.au)  
W [www.nsw.edo.org.au](http://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](mailto:edonr@edo.org.au)

[11. United Nations Framework on Climate Change talks in Tianjin](#)

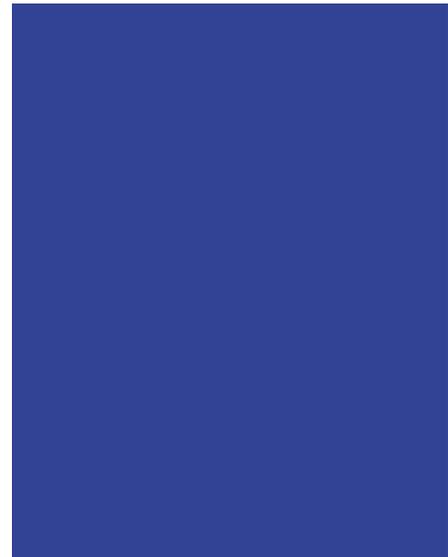
### Media, reports and other news

[12. WWF: Australia ranked among most unsustainable countries](#)

[13. The National Greenhouse and Energy Reporting \(NGER\) Audit Determination Handbook](#)

[14. Invitation to join the EDO's Scientific Expert Register](#)

[15. EDO's Coastal Law and Climate Change project](#)



---

## 1. Update on the Coastal Protection Act and Other Legislation Amendment Bill



Since the last EDO Climate Law Bulletin the above Bill was amended and a new version introduced into NSW Parliament on 22 September entitled the *Coastal Protection Act and Other Legislation Amendment Bill (No 2)*. The Bill passed through Parliament with 16 Greens amendments on 21 October 2010. The Bill will commence by proclamation in the near future.

The object of the Bill is to amend the *Coastal Protection Act*. It proposes to:

- Clarify what landowners can do to protect their properties from coastal erosion and sea level rise, including during emergencies;
- Strengthen existing requirements for Coastal Zone Management Plans;
- Create an expert NSW Coastal Panel to advise on coastal management and approve temporary or permanent coastal protection works in some circumstances; and
- Provide additional protection for councils dealing with coastal erosion issues.

These key changes are summarised briefly below:

### **Emergency coastal protection works**

- Landholders within 12 coastal erosion hotspots<sup>1</sup> around NSW whose homes are at imminent risk<sup>2</sup> from coastal erosion will be able to use sand bags or sand to protect their

---

<sup>1</sup> The hotspots have not yet been finalised but according to the draft Ministerial requirements they will be: Belongil Beach, Byron Bay; Basin Bay/Beach, Mona Vale; Bilgola Beach, Bilgola; Brooms Head, north of the outlet from Cakora Lagoon; Collaroy Beach, Collaroy; Hargraves Beach, Norville; Narrabeen Beach, Narrabeen; North Entrance Beach, The Entrance (North); Mollymook Beach,

homes from erosion for up to 12 months.<sup>3</sup> These works may only be placed once for each landholder and have to comply with gazetted Ministerial requirements;

- Landholders will have to obtain a certificate from the local council or an authorised officer before placing such works;
- Works will have to be maintained in accordance with requirements in guidelines and Coastal Zone Management Plans;
- Council can order removal of works if they are increasing erosion, limiting public access to beaches or constituting a threat to public safety;

### **Long Term Coastal Protection Works**

- Landowners wanting to build long term coastal protection works such as sea walls and groynes to protect their properties will need to apply for a development approval under the *Environmental Planning and Assessment Act 1979*;
- The consent authority will be the local council or, where there is no Coastal Zone Management Plan in place, the NSW Coastal Panel;
- The consent authority must not grant consent to long term protection works unless it is satisfied that the works will not unreasonably limit public access to or use of a beach or headland and the works do not pose a threat to public safety;
- The consent authority can only grant consent if it is satisfied that, through conditions of consent, satisfactory arrangements have been made over the life of the works for the maintenance of the works and the restoration of the beach if increased erosion is caused by the presence of the works;
- Councils will be able to levy an annual charge on relevant landowners to secure adequate funding for restoring and maintaining the long term works. Future owners must also pay the charge. The council will be responsible for maintaining the works.

### **Coastal Zone Management Plans**

- Coastal Zone Management Plans (CZMPs) must now also address the impacts of climate change and coastal hazards and make arrangements relating to long-term protection works in addition to protecting and preserving beach environments;
- Councils must review existing plans and make new plans within 12 months if directed to by the Minister;
- The Minister can amend and make new plans where councils fail to make a plan within 12 months of being directed to;
- Councils must now explicitly consider the provisions of CZMPs under section 79C of the *Environmental Planning and Assessment Act* when assessing development applications.

### **The NSW Coastal Panel**

- The Bill proposes the establishment of a new body called the NSW Coastal Panel. The Coastal Panel is to be made up of seven members with expertise in coastal planning,

---

Mollymook; Pearl Beach, Pearl Beach; Wamberal Beach, Wamberal; Wooli Beach, Wooli

<sup>2</sup> As for a definition of 'imminent risk', none is provided in the bill so it will depend on the ordinary meaning of the words.

<sup>3</sup> 1 The Coastal Erosion Hotspots are listed in the Draft Minister's Requirements under the *Coastal Protection Act 1979* (NSW) available at:[www.environment.nsw.gov.au/resources/water/coasts/10706minqrcoastalprotact.pdf](http://www.environment.nsw.gov.au/resources/water/coasts/10706minqrcoastalprotact.pdf)

- engineering, coastal geomorphology or coastal environmental management;
- The NSW Coastal Panel will be responsible for providing advice to the Minister on Coastal Zone Management Plans, approving long term coastal protection works in some cases and providing advice and assistance to local councils in relation to coastal management issues.

### **Strengthening of the good faith defence**

The Bill proposes to further protect councils from potential liability for actions or failures to act in relation to coastal erosion, failure to upgrade flood or coastal protection works to accommodate climate change or for issuing an order to remove illegal structures.

[Back to index](#)

## **National Update**

### **Law**

#### **2. EDO Case Update: *Ned Haughton v Minister for Planning and Macquarie Generation*; *Ned Haughton v Minister for Planning and Delta Electricity***



For 3 days during September 2010, Justice Malcolm Craig of the NSW Land and Environment Court heard Ned Haughton's legal challenge to the concept plan approvals for the Bayswater B and Mount Piper power stations. Mr Haughton argued that the Minister for Planning failed to consider the impacts of the projects on climate change and also failed to consider the principles of Ecologically Sustainable Development (ESD) in granting the concept plan approvals. He also argued that the Minister's decision to approve the projects was illogical, having regard to a number of factors, including whether or not the projects were needed or justified.

The projects have been considered as 'critical infrastructure' projects and therefore raise an important question of law to be dealt with in the proceedings. Mr Haughton relied on the recent High Court decision of *Kirk v Industrial Relations Commission (2010) 239 CLR 531*, to argue that the Court is not prevented from hearing the cases by operation of the privative clause in section 75T of the Environmental Planning and Assessment Act 1979 (NSW). Section 75T currently states that the legality of approvals of critical infrastructure projects cannot be challenged in the Court, without the Minister for Planning's permission.

Justice Craig heard submissions and evidence from Counsel acting for Ned Haughton, the Minister for Planning, Delta Electricity and Macquarie Generation. Justice Craig has reserved his judgment on whether or not the concept plan approvals were validly granted. We will keep you updated with any new developments. Thanks to Ms Christine Adamson SC, Dr Sarah Pritchard and Ms Chloe Burnett for their hard work and for providing such wonderful assistance to the EDO throughout this matter.

[Back to index](#)

#### **3. EDO Case Update: *Delta Electricity v Blue Mountains Conservation Society Inc (security for costs)* [2010] NSWCA 264**

The EDO represented the Blue Mountains Conservation Society (BMCS) in this matter. Reported

---

as a “landmark court case”, the decision has cleared the way for BMCS to commence civil enforcement proceedings in the NSW Land and Environment Court against Delta Electricity under the *Protection of the Environment Operations Act 1997*, for causing water pollution by allegedly releasing toxic water into the Sydney catchment near Lithgow.

The Land and Environment Court recently ruled that costs for the Blue Mountains Conservation Society be capped at \$20,000 – the first time a green group in NSW has been able to guard itself against rising court costs while running a public interest case against a State-owned corporation.

This means that Blue Mountains Conservation Society can continue its water pollution case against Delta in the Land and Environment Court and, if it is unsuccessful, the maximum amount that may be recovered by Delta stands at \$20,000.

The case concerns discharges from Delta's Wallerawang coal-fired power station, which have allegedly been finding their way into the Coxs River drinking water catchment and killing aquatic life. For several years, researchers from the Streamwatch organisation and the University of Western Sydney have been finding traces of arsenic, copper and boron, along with very high levels of salt, in waterways near the power plant.

To view the judgement, please visit:

<http://www.lawlink.nsw.gov.au/scjudgments/2010nswca.nsf/09da2a0a2a27441dca2570e6001e144d/4bd9bfcc7cd1aeb4ca2577ba00097904?OpenDocument>

[Back to index](#)

#### 4. Victorian Climate Change Act



The *Climate Change Act 2010* (Vic) was assented to on 14 September 2010. The Act creates a new framework to help Victoria respond to the challenges of climate change independently from the Commonwealth Government. Principally, it establishes a State-wide greenhouse gas emissions reduction target of 20% below 2000 levels by 2020. It also provides statutory recognition of a new class of proprietary rights for forestry and soil carbon sequestration, and requires certain decision-makers to have regard to climate change when making administrative decisions under certain pieces of legislation.

Companies which contribute to the emission of greenhouse gases in Victoria will be subject to regulation and must meet thresholds and set standards.

[Back to index](#)

#### 5. Australian Capital Territory Climate Change Bill

The *Climate Change and Greenhouse Gas Reduction Bill 2010* (ACT) was introduced into the Australian Capital Territory's Parliament on 26 August 2010. The Bill proposes the establishment of a principal target of Territory-wide carbon neutrality by 30 June 2060 with two interim targets of a 40% reduction from 1990 emissions by 30 June 2020, and an 80% reduction by 30 June 2050. The Bill also proposes that per-capita emissions should peak by 30 June 2013.

The Bill would grant the Minister the authority to promote action to meet the target and to develop, adopt and promote policies and programs relating to climate change. The Bill would also

---

establish the Climate Change Council to advise the Minister for the Environment Climate Change and Water on matters relating to mitigation and adaptation to climate change.

Source: Emissions Trading and New Energy — Australia Law Guide, paragraph 2-230, October update, 2010.

[Back to index](#)

## Policy

### 6. EDO Discussion Paper: Marine Biodiversity and Climate Change



The EDO has prepared a third Discussion Paper in our series of biodiversity and Climate Change Discussion Papers. The new paper contemplates the legal framework for the protection and conservation of marine biodiversity in Australia: Are our laws ‘climate ready’?

Knowledge about the future impacts of climate change on our marine ecosystems is growing. Sea level rise, temperature changes and ocean acidification are just some of the physical impacts that are predicted to affect marine biodiversity.

Changes that can be attributed to climate change are already being observed, including coral bleaching and reduced coral growth, and altered breeding patterns of species such as turtles and penguins.

In addition to mitigating climate change to reduce the magnitude of its future impacts, facilitating the resilience of marine species and ecosystems is also critical to ensure that marine biodiversity is conserved and protected from the impacts of climate change to the greatest extent possible.

Our latest paper contributes to the debate on how best to promote adaptation for the protection and conservation of marine biodiversity in the climate change context. It contains an overview of the current state of knowledge about the predicted impacts of climate change on marine biodiversity in Australia.

The paper provides an overview of existing laws that apply both directly and indirectly to marine biodiversity, with a focus on both Commonwealth and NSW legislation. It therefore explores laws relating to, for example, marine protected areas, protection of marine species, marine pollution and sea dumping, offshore mining and fisheries management.

We assess whether these existing laws are adequate for protecting and conserving marine biodiversity in the context of responding and adapting to the impacts of climate change, and whether these existing laws will be able to accommodate necessary strategies to build resilience and promote adaptation. The report makes various recommendations for legislative reform considered necessary to build resilience and facilitate adaptation to climate change for marine biodiversity.

The Discussion Paper will be available shortly on the EDO website. The first two Discussion Papers were published in 2009:

---

- Climate change and the legal framework for biodiversity protection in Australia: a legal and scientific analysis
- Climate change and the legal framework for biodiversity protection in NSW: a legal and scientific analysis

Our two previous papers are available at: <http://www.edo.org.au/edonsw/site/publications.php>

[Back to index](#)

## 7. Australia's New Political Paradigm and the Climate Change Committee



Labor, the Independents and the Greens have come together to form a Federal government and already it seems there will likely be a strong discourse on climate change policy at the federal level. Support has even come from big business amidst constant reiterations of optimism by the Greens. The current view is that policy will shift towards putting some form of tax on carbon emissions rather than an emissions trading scheme. The new Multi-Party Climate Change Committee is to be comprised of experts,

members from both sides of Parliament, the Greens and Independents. Members will explore options for the introduction of a carbon price necessary to reduce carbon pollution by 2020. It will report to Cabinet, through the Minister for Climate Change and Energy Efficiency, Greg Combet, with a range of possible policy positions informed by discussions with independent experts, the public and industry.

The Committee will also play a role in establishing community consensus for action on climate change. With the Senate change commencing on 1 July 2011 that will see control by the Greens, it is likely that some form of climate change policy will be up for debate sometime in the near future. Reports indicate that the Federal Government intends to introduce a Bill for a price on carbon late in 2011.

[Back to index](#)

## 8. Combet Re-commits to Carbon Price

In Hansard on September 29, Climate Change Minister Greg Combet reaffirmed the Federal Government's commitment to a carbon price, stating 'a carbon price is a key economic reform that is in this nation's interests'.

However, the establishment of a multi-party climate change committee to examine ways of putting a price on carbon is by no means definitive that a carbon price is inevitable. The Greens, who prefer a carbon price over the Government's defeated emissions trading scheme, have urged Labor to bury its carbon pollution reduction scheme.

However, Combet has hinted the Gillard Government is not particularly keen on a carbon tax.

[Back to index](#)

## International update

---

## Law

### 9. Industrialised Nations 'Face Claims'



A new study says climate-change-vulnerable countries could sue Australia and other industrialised nations for action on climate change. The study was published by the Foundation for International Environmental Law and Development (FIELD).

"A large part of the relevant legal literature suggests the main polluting nations can be held responsible under international law for the harmful effects of their greenhouse gas emissions," says the paper's author, lawyer Christoph Schwarte.

"As a result, affected countries may have a substantive right to demand the cessation of a certain amount of emissions. In selected cases they also have the procedural means to pursue inter-state litigation in an international judicial forum such as the International Court of Justice in The Hague."

The FIELD study does not advocate a particular avenue for legal action. Instead, it reviews the existing literature on inter-state lawsuits. It concludes that "a credible case for a legal wrong can be made" by vulnerable nations under the so-called "no harm rule." That is a principle in international environmental law that holds that countries are obligated not to cause or allow environmental harm outside their borders.

Click here to access the [document](#).

[Back to index](#)

### 10. USA Climate Change Regulation – An Update

It is widely anticipated that Republicans will take control of the House of Representatives in early November. This means that Congress will unlikely be sympathetic to climate change legislation before 2013 at the earliest although the *Renewable Electricity Promotion Bill* still has a real chance of passage. This Bill requires that 15% of the country's electricity comes from renewable sources by 2021.

Otherwise, proponents of climate regulation now have to pin their hopes on the U.S. Environmental Protection Agency (EPA) which in 2007 was given authority to regulate greenhouse gas (GHG) emissions under the *Clean Air Act*. In January 2009 the EPA began a vigorous program of issuing GHG regulations, including in relation to cars and light trucks and stationary sources (like a power plant or factory). The EPA is moving forward with more vigorous regulation of conventional air pollutants. It has issued several notices requiring reductions in air pollutants from power plants. The rules, while not directed at GHGs, will affect and possibly lead to the closure of some facilities that are also major GHG emitters. Most EPA actions on GHG are currently being challenged by industry.

In addition to the challenges to EPA rulemakings, a considerable volume of litigation has been brought against proposed energy projects and other initiatives. The Sierra Club is leading a

---

concerted effort by the U.S. environmental community to fight every proposed coal-fired power plant. Four lawsuits have been filed in federal courts claiming that GHGs are a common law public nuisance. All four were dismissed at the trial court level on the ground that they pose political questions that are more appropriate for the executive and legislative branches. One appeal was dropped but the other three are pending on appeal.

For the full text of this article, please visit:

[http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file\\_id=55645](http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=55645)

[Back to index](#)

## Policy

### 11. United Nations Framework Convention on Climate Change Talks in Tianjin



Negotiations on the United Nations Framework Convention on Climate Change (UNFCCC) took place in Tianjin, China in early October. Negotiators from all 194 Parties to the UNFCCC were in attendance. This was the last major meeting before important year-end talks in Cancun. The set agenda aimed to iron out technical issues and overcome differences between developed and developing nations. The Climate Action Network Australia attended the talks and reported that progress at the talks was “modest but uneven”. Most Parties to the

UNFCCC agree that we can slow climate change in the short term by saving tropical rainforests and reducing greenhouse gas emissions from deforestation and forest degradation (REDD). They don’t, however, agree on how to finance that reduction in a fair and equitable way. There will be several rounds of meetings between now and Cancun to try and pull together a substantial outcome from the COP, with a clear work plan for next year to finalise the matters where agreement has not yet been possible.

[Back to index](#)

## Media, reports and other news

### 12. WWF: Australia Ranked Among Most Unsustainable Countries



The 2010 edition of the Living Planet Report presents new analysis on the health of the planet. According to the Report, at this point in time we are using 50% more natural resources than the Earth can sustain. As these resources can no longer be sourced from within national boundaries, they are increasingly being sought from other parts of the world. The effects are clearly visible in the *Living Planet Indices* for the tropical world and for the world’s poorer countries — both of these areas have experienced a decline in natural resources by 60 percent

since 1970.

---

Australia has been ranked in the top 10 most unsustainable countries on the planet. The study, commissioned by WWF, measures the demands placed on the planet's natural resources by humanity. The report looked at the ecological footprint of individuals which is a reflection of how much food, drink, energy, transport, electronic products, living space, and space to dispose of wastes, particularly carbon dioxide from burning fossil fuels we require to live our lives. Australia ranked eighth in the study. The average Australian requires nearly seven hectares to continue their present lifestyle.

[Back to index](#)

### **13. The National Greenhouse and Energy Reporting (NGER) Audit Determination Handbook**

A practical handbook for registered greenhouse and energy auditors has been released by the Federal Department of Climate Change and Energy Efficiency. The National Greenhouse and Energy Reporting (NGER) Audit Determination Handbook specifies the procedures auditors must follow under the NGER audit framework.

The *National Greenhouse and Energy Reporting Act 2007* introduced a national framework for reporting and disseminating information about greenhouse gas emissions, greenhouse gas projects, and the energy use and energy production of corporations.

Corporations that meet an NGER threshold must report their greenhouse gas emissions, energy production, energy consumption and other information specified under NGER legislation. A controlling corporation must register and report under NGER legislation if:

- the corporate group emits 50 kt or more of carbon dioxide equivalent (CO<sub>2</sub>-e) of greenhouse gases or produces or consumes 200 TJ of energy each year (corporate threshold), or
- the controlling corporation or another member of the corporation's group has operational control of a facility that emits 25 kt or more of CO<sub>2</sub>-e or produces or consumes 100 TJ of energy each year (facility threshold).

The handbook, as well as more information on auditor requirements and registered corporations, is available on the Department of Climate Change and Energy Efficiency's [website](#).

[Back to index](#)

### **14. 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.

[Back to index](#)

### **15. 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](mailto: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](mailto:education@edo.org.au), or call 9262 6989.

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

[Back to index](#)

---