



# Climate Law Bulletin

The monthly climate update from the Environmental Defender's Office

## Issue 6 – AUGUST/SEPTEMBER 2010

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

The NSW Minister for Planning (Tony Kelly) has granted concept approval for two new coal or gas fired power stations - 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 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 challenging the Minister for Planning's approvals in two sets of Land and Environment Court 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 Land and Environment Court 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. Mr Haughton will argue that the Minister was required to do so as part of his duty to consider the public interest. Similarly, Mr Haughton will seek to establish that the Minister failed to consider the principles of ecologically sustainable development (ESD), particularly the precautionary principle and the principle of intergenerational

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equity, as he was also required to do as part of his duty to consider the public interest.

To support this argument, Mr Haughton will be relying on expert evidence from Professor Ian Lowe (President of the Australian Conservation Foundation) to establish that, at the time the approvals were granted, climate change and the principles of ESD were plainly a part of the public interest. It will also be argued that the Minister failed to exercise his duty to make inquiries into the application of the principles of ESD to the proposals and that the Minister misconceived the extent of his powers under the EP&A Act, by relying on advice from the NSW Director-General that it was not the role of the NSW Department of Planning to regulate greenhouse gas emissions.

Mr Haughton will also seek to rely on expert evidence from Chris Dunstan, Research Director at the Institute for Sustainable Futures, to support his arguments that the Minister could not be satisfied that two new coal-fired power stations in NSW are needed or justified and that in these circumstances, the Minister's approvals are illogical.

Importantly, Mr Haughton will also challenge a privative clause in the EP&A Act. Section 75T purports to prevent judicial review of breaches of the EP&A Act in respect of critical infrastructure projects, by requiring the Minister's approval to commence proceedings. Mr Haughton sought approval from the Minister to commence the cases and was refused. The Minister accordingly will rely on section 75T to argue that the cases should be dismissed. Mr Haughton will rely on the recent High Court decision of *Kirk v Industrial Relations Commission* [2010] HCA 1, to support his argument that section 75T of the EP&A Act cannot shield decisions affected by jurisdictional error from review by the Land and Environment Court.

If Mr Haughton is successful in his arguments on climate change and ESD, this will significantly improve the requirements for environmental assessment of major coal-fired power stations in NSW by requiring proponents to assess the contribution of particular projects to global emissions, and the impacts of those global emissions on NSW and Australia. It will also make it clearer that the Minister is required to consider ESD as part of the public interest.

The hearing is listed for 15, 16, 17 and 20 September 2010.

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## National Update

### Law

#### 2. EDO Case Update: *Peter Gray & Naomi Hodgson v Macquarie Generation*



This is an update to our last Climate Bulletin. This case highlights the problems with the way coal-fired power stations are currently regulated and challenges whether they ought to have the authority to emit unlimited levels of CO<sub>2</sub>.

The Applicants recently moved to amend their pleadings following Justice Pain's 22 March 2010 judgment on the respondent's motion to dismiss. The court has deferred

its decision in this regard.

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By way of refresher, on behalf of Peter Gray and Naomi Hodgson, the EDO has commenced Class 4 civil enforcement proceedings in the Land and Environment Court against Macquarie Generation. The proceedings seek a declaration that the State-owned company has been wilfully or negligently disposing of waste at their Bayswater Power Station by emitting carbon dioxide into the atmosphere in a manner that has harmed or is likely to harm the environment in contravention of section 115(1) of the *Protection of the Environment Operations Act 1997*.

Mr Gray and Ms Hodgson also seek an injunction requiring Macquarie Generation to immediately cease disposing of waste through the emission of carbon dioxide into the atmosphere.

To view Justice Pain's 22 March 2010 judgment please visit:

<http://www.lawlink.nsw.gov.au/lecjudgments/2010nswlec.nsf/61f584670edbfba2ca2570d40081f438/12885d4d65224df7ca2576e70022d082?OpenDocument>

We will update you on the outcome of the hearing in due course.

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### **3. New Commonwealth Energy Efficiency Laws make disclosure compulsory**

The *Building Energy Efficiency Disclosure Act 2010* (Cth) ("the Act") commenced on 1 July 2010. The Act places obligations on owners and landlords of large commercial office spaces to disclose energy efficiency information to purchasers and tenants. At its heart it aims to reduce carbon emissions by influencing market behaviour by :

- Enabling potential purchasers or lessees to consider energy efficiency as part of their decision making processes; and
- Helping to remove market barriers and promote energy efficient buildings.

To view the Act, please visit:

[http://www.austlii.edu.au/au/legis/cth/num\\_act/beeda2010349/](http://www.austlii.edu.au/au/legis/cth/num_act/beeda2010349/)

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### **4. WA's green households to cash in**



The Renewable Energy Feed-in Tariff Bill, a gross feed-in tariff scheme, was introduced into the West Australian Parliament recently.

The scheme would see WA households and businesses paid for any renewable energy they generate and would oblige transmission companies Western Power or Horizon Power to pay generators, including households, the cost of production, plus a rate of return yet to be worked out - but likely to be around the long-term bond rate (about 6 per cent at present) - for 20 years.

To find out more, please visit:

[http://www.clean.energy.wa.gov.au/pages/re\\_feed-in\\_tariff\\_FAQs.asp](http://www.clean.energy.wa.gov.au/pages/re_feed-in_tariff_FAQs.asp)

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**Policy**

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## 5. The National Carbon Offset Standard

The National Carbon Offset Standard (NCOS) came into effect on 1 July 2010. It is a certification standard that will provide consumers with confidence that businesses claiming to be “carbon neutral” have zero net emissions. The release of the NCOS provides greater certainty for the voluntary carbon market. Offsets which conform to its standards will now have enhanced commercial standing.

NCOS requires businesses to publically disclose information relating to greenhouse gas measurement, reduction offsetting and verification processes. This should mean a reduction in the proliferation of carbon neutral claims and carbon footprint calculation methodologies.

For more information, please visit:

<http://www.climatechange.gov.au/government/initiatives/~media/publications/carbon-accounting/revised-NCOS-standard-pdf.ashx>

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



The NSW Parliament is currently in recess. Parliament resumes for the next session on 31 August. A new Bill to amend the *Coastal Protection Act 1979* (NSW) was introduced into the NSW Parliament on Friday 11 June. The object of the Coastal Protection and Other Legislation Amendment Bill 2010 is to amend the *Coastal Protection Act* and other legislation to deal with coastal erosion and projected sea level rise.

The key changes proposed in the Bill are as follows:

- **Emergency coastal protection works**  
Landholders whose homes are at risk from coastal erosion and are located in coastal erosion hotspots<sup>1</sup> will be able to use sand bags or sand to protect their homes from erosion for up to six months.
- **Long Term Coastal Protection Works**  
Landowners can build long term coastal protection works<sup>2</sup> where satisfactory arrangements have been made for the restoration of the beach or adjacent land and the maintenance of those works. Landowners will need to gain a development approval prior to building long term coastal protection works.
- **The NSW Coastal Panel**  
The Bill proposes the establishment of a new body called the NSW Coastal Panel. The NSW Coastal Panel will be made up of seven members and will be responsible for commenting on coastal zone management plans and approving long term coastal protection works where a council does not have a coastal zone management plan in place.
- **Strengthening of the good faith defense**  
The Bill proposes to further protect councils from potential liability for actions or

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<sup>1</sup> 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/10706minrqrcostalprotact.pdf](http://www.environment.nsw.gov.au/resources/water/coasts/10706minrqrcostalprotact.pdf)

<sup>2</sup> Long term structures include things such as sea walls

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.

To access the Bill, please visit:

<http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/0/F6EA37399E3B2664CA25773D002191BC>

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## 7. NSW's ambitious new greenhouse targets

The NSW Government is developing a new plan to combat climate change and it says it can make deep cuts to greenhouse gas emissions even if a proposal to build two new coal-fired power plants goes ahead. The NSW Government is finalising a draft Climate Change Action Plan, which will replace the existing NSW Greenhouse Plan. The Premier, Kristina Keneally, has asked the Department of Environment, Climate Change and Water to report back to cabinet with the new plan by the end of the year.

Details of the new plan were reported on recently in the *Sydney Morning Herald*. The State's old greenhouse gas targets have been replaced by a far more ambitious agenda to cut emissions by at least 5 per cent by 2020, instead of just stabilising them by 2025.

This means the average carbon footprint of every person in NSW will have to be reduced by a hefty 27 per cent in the next 10 years, according to Federal Government estimates. The NSW Department of Environment, Climate Change and Water says the plan is realistic even if there is no national emissions trading scheme by 2013.

However, Greens NSW MP John Kaye says the ambitious plan is at odds with the NSW State Government's pro-coal vision. "Any plan to cut the State's greenhouse gas emission will be meaningless if two new coal-fired power stations are built," he said.

For more information about the plan, please visit:

<http://www.environment.nsw.gov.au/resources/climatechange/1111FINALGHOExecSummary.pdf>

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## 8. Victorian Premier's Office 10 point action plan on climate change



The Victorian Government is positioning Victoria through 10 new actions to reduce emissions; capitalise on new jobs, new technologies and new markets; and adapt to a changing climate.

The White Paper Implementation Plan to be released later this year will set out funding and details of the specific initiatives underpinning these actions.

A landmark Climate Change Bill will put into law many of the actions set out in Taking Action for Victoria's Future. No new power stations using conventional brown coal technology will be constructed in Victoria under the provisions of legislation just introduced to State Parliament.

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Some key actions include:

- Reducing greenhouse gas emissions in Victoria by at least 20% by 2020;
- Enabling the setting of a greenhouse gas trigger for large emitters;
- Reducing emissions from Victorian brown coal-fired generators by up to four million tonnes over the next four years;
- Prohibiting new approvals for conventional brown coal-fired power stations.

For more information, please visit:

<http://www.premier.vic.gov.au/climate-change/11198-taking-action-for-victorias-future-our-action-plan.html>

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## International update

### Law

#### 9. Climate case update: *State of North Carolina v. TVA*

A hugely important environmental law decision was handed down by the 4th U.S. Circuit Court of Appeals panel when it controversially reversed the trial court's finding that emissions from four Tennessee Valley Authority power plants (three in Tennessee, one in Alabama) constituted a public nuisance to residents of North Carolina. The case was followed closely by other American states worried that the reinvigorated tort of nuisance might trigger similar actions against them.

The Court said: "if allowed to stand, the injunction would encourage courts to use vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air." The Court went on to say that the result "would be a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike."

The panel spent several pages in its decision explaining why courts are not qualified to engage in the rulemaking that was in essence what the trial court's injunction really was. "While expressing the utmost respect for the obvious efforts the district court expended in this case, we doubt seriously that Congress thought that a judge holding a twelve-day bench trial could evaluate more than a mere fraction of the information that regulatory bodies can consider."

To link to the case, please visit: <http://pacer.ca4.uscourts.gov/opinion.pdf/091623.P.pdf>

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#### 10. Bulgaria suspended for breach of Kyoto Protocol

The developing market for greenhouse gas emissions trading continues to face numerous challenges. The way in which the market reacts to these issues will shape Emissions Trading in the years to come.

The latest crisis arose with the preliminary finding by the United Nations that Bulgaria was in non-compliance with the Kyoto Protocol. The United Nations also decided that as a result of its non-compliance, Bulgaria is to be suspended from trading emissions under the Protocol. This is significant and has only happened on one occasion previously with Greece being suspended for 7 months in 2008.

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Any country wishing to trade Kyoto units must meet the eligibility criteria in Article 17 of the Protocol. The requirements of Article 17 are lengthy and include an obligation to have a functioning registry system and also an audited national inventory. The UN had recommended changes to Bulgaria's processes as far back as 2007 after it found that Bulgaria's national recording verification system for emissions trading failed transparency and reliability tests. The country failed to adequately remedy the deficiencies.

The reporting and auditing system employed by a country is one of the central facets of carbon trading under the Protocol and underpins the entire trading system.

For more information, please visit:

[http://unfccc.int/files/kyoto\\_protocol/compliance/questions\\_of\\_implementation/application/pdf/update\\_to\\_informal\\_information\\_note\\_bgr\\_after\\_final\\_decision\\_20100629.pdf](http://unfccc.int/files/kyoto_protocol/compliance/questions_of_implementation/application/pdf/update_to_informal_information_note_bgr_after_final_decision_20100629.pdf)

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## Policy

### 11. Summary of the Bonn climate talks: 2-6 August 2010

Delegates met in Bonn, Germany, for the eleventh session of the Ad Hoc Working Group on Longterm Cooperative Action under the UN Framework Convention on Climate Change (AWG-LCA 11) and the thirteenth session of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP 13).

Over 1650 participants, including 1154 from parties, 457 from observer organisations and 42 from the media, attended the meeting. The AWG-LCA considered a text intended to facilitate negotiations in Cancún, Mexico, in December 2010. The text included a shared vision on long-term cooperation, mitigation, adaptation, finance, technology and capacity building. Parties proposed many new additions and options to the text.

The AWG-KP focused on the scale of emission reductions from Annex I parties to the Protocol. It also considered legal issues, including a possible gap between the Protocol's first commitment period (2008-2012) and subsequent commitment periods.

Delegates also addressed land use, land-use change and forestry (LULUCF), the flexibility mechanisms and the potential consequences of response measures of climate change. The AWG-KP closed with an agreement to forward a Chair's proposal for further discussion at its next session.

The texts that were developed in Bonn are expected to form the basis for negotiations in Tianjin, China, in October, where delegates will seek to narrow down options and produce outcomes to be considered in Cancún.

For detailed summaries of the meeting, please visit: <http://www.iisd.ca/climate/ccwg11/>

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### 12. Fiji's Climate Change Country Team

EDO Policy Officer, Richard Howarth, has recently returned from a year working in Fiji's Department of Environment to assist the Government throughout a number of the UNFCCC

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negotiations. In addition to this, Richard assisted in matching donors and local communities requiring funding for community-based climate change adaptation activities. Finally he re-established Fiji's Climate Change Country Team (CTTT), a national committee consisting of approximately 25 of Fiji's leading experts on climate change from the public and private sector, as well as academic institutions and the NGO community.

The CCCT aims to provide a forum for the transfer of information pertaining to climate change both to and from the government. It is hoped that this body will assist Fiji in making informed decisions relating to climate change, both on a domestic and international level.

To read related coverage, please visit:

[http://www.fijisun.com.fj/main\\_page/view.asp?id=38172](http://www.fijisun.com.fj/main_page/view.asp?id=38172)

[http://www.fijilive.com/news\\_new/index.php/news/show\\_news/25241](http://www.fijilive.com/news_new/index.php/news/show_news/25241)

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### **13. Small island nation leads push for biggest climate opportunity of 2010**



For the fourth year in a row, the small island state of Micronesia (FSM) has taken the lead to combat climate change by fighting to phase down the production and use of Hydrofluorocarbons under the Montreal Protocol ozone treaty. Phasing down these super greenhouse gases could lead to the mitigation of over 200 billion tonnes of CO<sub>2</sub>-equivalent by 2050, according to calculations by Dr Guus Velders of The Netherlands Environmental Assessment Agency.

To find out more, please visit: <http://www.fsmgov.org/press/pr062210.htm>

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## **Media, reports and other news**

### **14. Climate change whips up floods, fire and ice**

Climate change has been blamed for floods that have killed thousands and left millions homeless from Pakistan to North Korea, fires and a heatwave in Russia that have left 5000 dead and disrupted global food markets, and a severe tropical storm threatening Bermuda.

In Greenland, a giant ice island four times the size of Manhattan - about 225 square kilometres - has broken off the Petermann Glacier. It is the largest chunk of ice to calve in the Arctic since 1962.

Governments fear the devastation in Asia may stretch aid efforts as crops are destroyed amid soaring wheat prices, caused in part by Russia's decision to ban grain exports until December 31.

The weather drew comment from officials and activists at international climate change talks in Bonn. One US delegate said Russia's heatwave and the recent floods that have devastated Pakistan are "consistent with the kind of changes we would expect to see from climate change and they will only get worse unless we act quickly".

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But the environmental group Greenpeace said negotiators at the talks were not getting the message. "Russia is burning and Pakistan is drowning, yet they seem happy to continue as if they have all the time in the world," said the group's climate policy director Wendel Trio.

To read this article, please visit: <http://www.smh.com.au/environment/climate-change/climate-change-whips-up-floods-fire-and-ice-20100807-11pb9.html>

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### 15. Bio-E-Flex a new ethanol-based fuel developed to help cut emissions



A high ethanol blend fuel – consisting of up to 85% ethanol and 15% petrol – has been launched by Caltex Australia. Bio E-Flex, commonly known overseas as E85, is designed for use in Holden's VE Series II Commodore flex-fuel vehicles to be released later this year. These will be Australia's first locally produced passenger vehicles capable of using a high ethanol blend fuel.

"Bio E-Flex is part of our strategy to provide transport fuels beyond the traditional fuel mix, reflecting our commitment to addressing the issues of climate change and energy security," said Caltex Australia's Government Affairs & Media Manager Frank Topham.

Caltex will begin selling the fuel in Melbourne from September and will have Bio E-Flex available in more than 30 service stations in Melbourne, Sydney, Brisbane, Adelaide and Canberra by the end of October, increasing to 100 metropolitan and regional locations in 2011. Most new and many older cars, SUVs and light commercial vehicles can use E10 which is widely available.

For more information, please visit: <http://www.themotorreport.com.au/50660/caltex-announces-bio-e-flex-fuel-ahead-of-holden-ve-series-ii-commodore-launch>

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### 16. Nobel prize winner says Australia must put a price on carbon



Nobel prize-winning economist Professor Joseph Stiglitz said the Australian Government must make a carbon tax a priority in a wide-ranging speech recently.

Delivering the inaugural Crawford School Oration to a packed Llewellyn Hall, the 2001 Nobel Prize for Economics award winner said that a higher carbon price was inevitable.

"Putting a price on carbon now will give Australia a competitive advantage relative to countries like the United States that are delaying and not doing anything about it," said Professor Stiglitz.

He said the country should invest more heavily in developing new technology that is more environmentally friendly.

Watch Professor Stiglitz's full speech [online](#).

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## **17. 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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## **18. 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.

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