



Climate Law Bulletin

The monthly climate update from the Environmental Defender's Office

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1. Climate change claims another leader

Kevin Rudd is the latest political leader to lose leadership because of a failure adequately respond to climate change, following Howard and Turnbull. Many see Julia Gillard's recent appointment as confirmation that principled action is required.

In May Labor's primary vote fell eight points from 43 per cent to 35 per cent after the Government announced it would shelve the emissions trading scheme. Exit polls from the 2007 election showed climate change was among the top two issues for voters in the election that saw John Howard lose the prime ministership. Australian voters want concrete action to reduce emissions, and will be watching closely to see what stance Prime Minister Gillard takes.

Galaxy recently undertook a poll of 1,600 people in four marginal electorates in Queensland that will be pivotal in deciding the outcome of the next federal election - Brisbane, Ryan, Petrie and Bowman.

The poll showed that Labor has lost its election-winning lead, and now holds 48.5 per cent support (on a two party-preferred basis which is down from 51.7 per cent at the last election). The Greens have been the main beneficiary of the Labor decline with 15% support, up from 7.8 per cent at the last election.

Support for an emissions trading scheme remains extremely strong - 70 per cent of respondents across the 4 electorates are in favour of introducing an ETS. Amongst ALP supporters, that percentage increases to 86 per cent (and even among Liberal

supporters remains above 50 per cent).

More than half of the respondents believe that the Rudd Government should implement an emissions trading scheme immediately – including 60 per cent of ALP supporters.

64 per cent of all respondents identified the issue of introducing an emissions trading scheme as an influence on their vote at the next federal election.

The polling demonstrates that there is very strong support for an emissions trading scheme to cut Australia's carbon pollution; that the Government has lost support as a result of delaying the scheme; and that both major parties should commit to the immediate implementation of an emissions trading scheme.

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National Update

Law

2. Changes made to RET approved by Senate



The Renewable Energy (Electricity) Amendment Act 2010 (the Amendment Act) was passed by the Federal Parliament on 24 June 2010, and will make a number of significant changes to the legislative framework of the Renewable Energy Target (RET) which, for the most part, takes effect from 1 January 2011.

The RET is designed to ensure 20 per cent of Australia's electricity comes from renewable energy sources by 2020. From next year, the RET scheme will split into two, creating two markets - one for small-scale technologies and another for large-scale industry. This involves the creation of separate small-scale and large-scale obligations for liable entities and two new categories of renewable energy certificates.

The RET includes support to off-grid connections in regional Australia, increasing the flexibility in managing support for solar photovoltaic (PV) systems, providing a mechanism to limit liability for electricity users and enhancing protection for Australia's trade-exposed industries.

The renewable energy business sector is already responding to the stability promised by the RET:

AGL Energy Limited (AGL) plans to fast track its Macarthur wind farm project following changes to the Renewable Energy Target (RET) scheme approved by the Senate on Wednesday. The Government's changes provide greater investment certainty for the renewable industry, AGL said in a statement on Thursday.

<http://news.smh.com.au/breaking-news-business/renewable-energy-changes-welcome-agl-20100624-z0p2.html>

The Clean Energy Council called them 'welcome reforms' that would unlock more than \$20 billion in investment in major generation projects while creating a stable growth path for household scale technologies like solar hot water and solar PV panels.

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

The Environmental Defender's Office Ltd has successfully defeated part of an application to strike out its clients' case against Macquarie Generation for disposing of waste by way of the emission of carbon dioxide. The EDO is acting on behalf of members of Rising Tide, a grass roots non-profit community group. The EDO commenced civil enforcement proceedings against Macquarie Generation on behalf of Mr Peter Gray and Ms Naomi Hodgson in August last year. Mr Gray and Ms Hodgson argue that as Macquarie Generation is not expressly authorised to emit carbon dioxide into the atmosphere under its environment protection licence (a licence which authorises and regulates pollution), its emission of carbon dioxide is unlawful. More background information on the case can be found at:

http://www.edo.org.au/edonsw/site/casework_key.php#gray

In its strike out application, Macquarie Generation argued that even if its environment protection licence does not expressly authorise the emission of carbon dioxide, its authority to emit carbon dioxide should be implied on the basis that the production of carbon dioxide is a necessary part of generating electricity.

Justice Pain of the New South Wales Land and Environment Court found that the applicants' argument that Macquarie Generation is not authorised to emit any carbon dioxide at all is "unlikely to succeed" and dismissed that part of their case.

Justice Pain did not dismiss the applicants' secondary argument. This was that even if Macquarie Generation has an implied authority to emit some amount of carbon dioxide in generating electricity, that authority is limited to an amount which has reasonable regard and care for people and the environment. Therefore, the applicants' case as to whether Macquarie Generation is authorised to emit unlimited levels of carbon dioxide can now proceed to trial.

A copy of the full judgment is attached.

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

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

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4. *Alanvale Pty Ltd & Anor v Southern Rural Water & Ors [2010] VCAT 480 (21 April 2010)*



The uncertainty of the effects of climate change upon water sources was at the heart of this case. The Victorian Civil and Administrative Tribunal considered the sustainability of ground water given the increased rainfall variability that is a likely impact of climate change. Alanvale Pty Ltd sought review of a decision by the water authority not to grant licences for the extraction of groundwater to irrigate two agricultural properties.

The authority gave several reasons for its refusal, including increased ground water salinity due to the bores, future decreased rainfall levels due to climate change, and the impact of decreasing the aquifer on the rest of the region's water levels, causing shallow bores, and thus requiring bore deepening. The applicants, on the other hand, argued that the water authority was being too conservative and 'unfair' in their decision and that there is sufficient capacity within the area for increased water extraction, without detrimental impact.

The Tribunal agreed with the water authority and applied the precautionary principle. It agreed that climate change increases the uncertainty of existing and future rainfall levels. The Tribunal had regard to: the water balance in the area; the impact of increasing numbers of tree plantations on the area's water demands; the groundwater and surface water interactions from the ground to and from rivers and wetlands; coastal intrusions causing outflow of groundwater to the ocean; the long-term sustainability of water and, significantly, climate change, the precautionary principle and climate variability. They concluded that given the available water resources and sustainable limitations due to climate change, strategic and holistic decision-making means that granting the licences would be outside the overall objectives of the Water Act 1989 (Vic).

To read this article in full, please visit:

http://blogs.unimelb.edu.au/peel_climatechange/2010/05/21/alanvale-pty-ltd-anor-v-southern-rural-water-ors2010-vcac-480-21-april-2010/

To view the judgement, please visit

<http://www.austlii.edu.au/au/cases/vic/VCAT/2010/480.html>

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Policy

5. Coastal Protection Act and Other Legislation Amendment Bill

More and more landholders in coastal areas are becoming concerned about the impacts of rising seas and associated coastal erosion on their properties. There have already been a number of highly publicised disputes between landholders who wish to take steps to protect their properties and local councils who are refusing permission on policy grounds. The NSW Government has recently introduced a Bill to address this issue.

The Coastal Protection and Other Legislation Amendment Bill 2010 is currently before the NSW Parliament and seeks to amend the Coastal Protection Act 1979 in the following ways:

Allowing landholders to place sandbags & sand on beaches to protect their properties from imminent erosion threat upon receiving a certificate from Council or a DECCW officer.

Making consent for long term protection works such as sea walls conditional upon landholders agreeing to maintain the works and manage off-site erosion impacts.

Establishing a new body, the 'NSW Coastal Panel' to advise the Minister on coastal issues and, when requested, review coastal zone management plans.

The levying of a new coastal protection service charge on landholders who have undertaken long term protection works.

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6. Report on climate change risks to Indigenous communities



A new report from the Department of Climate Change and Energy Efficiency finds that Indigenous peoples in the tropical north are at greater risk from climate change than most other communities in Australia.

It explores the impacts of climate change on the health, environment, infrastructure, education and employment of Indigenous peoples.

Climate change impacts include increasing atmospheric carbon dioxide levels that will alter plant growth; increasing temperatures that will affect human and natural systems; rising sea levels that pose threats to low-lying settlements and estuarine ecosystems; and ocean acidification that will endanger coral reefs and affect marine food chains.

To obtain a copy of the report, please call 1300 130 606.

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7. New CO2 offset program unveiled

The Fed Government will kick off a new carbon neutral program to support the voluntary carbon market, with the demise of the Greenhouse Friendly (GF) program on 1 July. Australia's ratification of the Kyoto Protocol (KP) in 2007 signalled the death of the GF program, begun in 2001 to certify carbon neutral products and services and to regulate Australia's voluntary carbon offset credit market.

The KP does not recognise voluntary emissions cuts by individuals and business, so

carbon credits earned under GF would not go towards meeting Australia's KP emissions reduction target. After intense lobbying by carbon offset providers, the Government agreed to include in its proposed carbon pollution reduction scheme (CPRS) the ability for individuals and businesses, including those liable under the CPRS, to voluntarily surrender purchased carbon offsets and have them counted as additional to Australia's KP target. But the stalling of the CPRS created a new headache for the Government because the National Carbon Offset Scheme (NCOS) methodologies used to determine the eligibility of various carbon offsets were linked to the design of the CPRS. The CPRS would have provided for emissions permits to be created from forestry carbon offsets from 2011 and agricultural offsets from 2015.

The stalling of the CPRS had driven a decline in the carbon offset market, especially in forestry offsets. Businesses could, however, still use the NCOS to claim carbon neutrality.

This article was sourced from Carbon Extra No 85.

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8. Tony Abbott's climate change policy

Opposition Leader Tony Abbott has placed a \$1 billion emissions reduction fund at the heart of the Coalition's new \$3.2b climate change policy. Mr Abbott said the Coalition would use the fund and its policy to invest in direct measures to help the public, industry and farmers cut emissions.

Those measures would include planting 20 million trees, a \$1,000 solar panel rebate and soil carbon storage.

He plans to fight a climate change election using land management and energy efficiency measures to slash greenhouse gas emissions instead of an emissions trading scheme or a carbon tax.

Mr Abbott also said he would welcome a debate on the use of nuclear energy, although he did not think it was a short-term option.

"The Coalition will not be going to the election with a new tax, whether it's a stealth tax, the emissions trading scheme, whether it's an upfront and straightforward tax like a carbon tax," he said. "We'll have a strong and effective climate change policy, we'll have it early in the new year".

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International update

Law

9. What happened at Copenhagen? By Robert Ghanem

I attended the Copenhagen climate change conference on behalf of the EDO to monitor the progress of the international climate change negotiations, to assess the implications

of the summit for the development of climate law in Australia, and to provide legal assistance to Australian NGOs. Over 45,000 people attended, representing a broad spectrum of interests. The NGO groups included ENGOs (environment groups), RINGOs (research and academia), BINGOs (business and industry) and YOUNGOs (youth groups such as the AYCC). It was an amazing and somewhat surreal experience being in the midst of the negotiations and observing the melee first hand.

In short, Copenhagen was a meeting of widely divergent negotiating factions trying to reach a convergent position. These factions included the European Union, the G77 (developing world), the Alliance of Small Island States (AOSIS), BASIC (Brazil, South Africa, India and China) the Umbrella Group (developed countries particularly dependent on fossil fuels) and OPEC. This polarisation, coupled with the requirement that all decisions made under the United Nations Framework Convention on Climate Change (UNFCCC) are to be consensual, had a large part to play in ensuring that no agreement was reached at Copenhagen.

Under the Bali Action Plan negotiated in 2007, a global climate change outcome was to be agreed upon in Copenhagen to resolve issues such as the continuation of the Kyoto Protocol, obligations for large emitters in the developing world (such as China and India), legally-binding obligations for the USA and the provision of appropriate financing for the developing world to help it adapt to the effects of climate change and to mitigate its own emissions with support from developed countries. Despite the clear timeline at Bali, no final agreed outcome was reached at Copenhagen (even though over 110 heads of state attended). As a result, the negotiations have been extended for another year.

What we did get however, was a political agreement - the Copenhagen Accord. This Accord exists outside the UN framework and is essentially the expression of political will by a number of countries (now approaching 100) to address the climate change problem in a timely manner. It was not agreed to by all parties and was merely 'noted' by the Conference. It therefore has no legal status at international law.

The key elements of the Accord include:

- A recognition of the need to limit temperature increase to 2 degrees above pre-industrial levels;
 - A recognition that emissions are to peak as soon as possible
 - Allowing developed (Annex 1) countries to identify their 2020 emissions reduction commitments;
 - Allowing developing countries to identify domestic mitigation actions they wish to undertake by 2020;
 - A Commitment to US\$30bn funding over next 3 years to support mitigation and adaptation action in the developing world;
 - A Commitment for developed countries to jointly mobilise US\$100bn per year by 2020 for mitigation action;
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- A call for the Accord to be reviewed by 2015

Despite its grand aspirations, the Accord is missing a lot of detail. For example, there is no mention of a global Annex 1 emissions target for 2020 and 2050, what year global emissions should peak and which countries are to provide financing assistance for the developing world and in what share. These are critical elements of any global agreement.

These missing details mean that the Accord can only ever act as a guiding document. It's appropriate characterisation may be that it is simply a reiteration of the goals that countries have already committed to under the UNFCCC, with some interim details of a future agreement included (such as financing).

However, despite the fact that it is not legally-binding, the Accord may have some positive impacts. It may provide further impetus for countries to reach a global legally binding treaty without further delay. Second, there may be political consequences for countries who do not comply with their obligations under the Accord. Lastly, the global public is aware of the Accord and may push their constituent governments to comply with the Accord.

The next round of negotiations heads to Cancun, Mexico in November 2010 where countries will attempt to make further progress towards a legally binding, global agreement on climate change. It is still patently unclear what international climate change regime will exist post 2012. However, the extent to which the Copenhagen Accord will assist, or thwart, future UNFCCC negotiations remains to be seen.

Despite the lack of an outcome at Copenhagen, the EDO will continue to analyse the development of climate law in Australia and provide advice to government and NGOs on how to establish an effective legal and regulatory framework on climate change.

Robert Ghanem is a Policy Officer at EDO NSW with a BSc/BLaws (Hons), MEnvSciLaw, from the University of Sydney.

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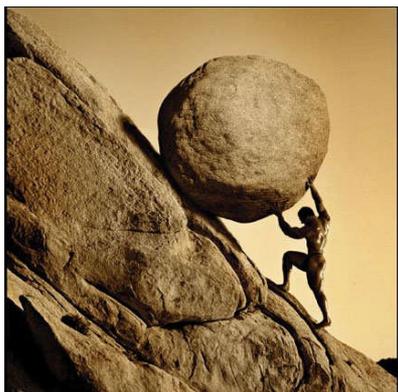
10. New Zealand's new ETS begins operation

New Zealanders are bracing for higher electricity and fuel prices with the introduction of an emissions trading scheme (ETS). From 1 July 2010, New Zealanders will pay around three cents a litre more for fuel. Electricity bills are set to increase by up to 5 per cent as companies pass on the costs of buying carbon credits to consumers. Environment Minister Dr Nick Smith says New Zealand had to act because its greenhouse gas emissions have increased by 25 per cent over the past 20 years. "It's actually about New Zealand starting the path, starting the change to a less carbon intensive economy," he said.

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Policy

11. Barack Obama calls for comprehensive energy legislation



In the U.S. President Barack Obama's first national address from the Oval Office, he said the Gulf of Mexico oil spill provided a chance to break the U.S. dependence on fossil fuels and find new ways to power factories, automobiles and electric utilities so they emit fewer global-warming pollutants.

But the call for comprehensive energy legislation failed to sway a hesitant Congress recently, with hopes for approval before November elections

fading fast. Senators John Kerry and Joseph Lieberman has this to say: “This could be a historic leadership moment. President Obama used his first-ever Oval Office address to call for the passage of comprehensive energy and climate legislation. There can be no doubt that the President is rolling up his sleeves ... This isn't a time for band-aids.”

However Senator Lamar Alexander offered: “The president should spend more time focusing on cleaning up and containing the oil spill and less time trying to pass a national energy tax that will drive jobs overseas looking for cheap energy. After that, Congress can enact legislation to help electrify half our cars and trucks, which is the single best way to reduce our dependence on oil.”

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12. The United Kingdom government's new climate change policy

The UK Government seems committed to offshore power and to distributed generation. It has committed to 'the establishment of an emissions performance standard that will prevent new coal fired powers stations being built unless they are equipped with sufficient CCS to meet the performance standard.' Commentators suggest the promised coal policy is stronger than that of the former Labour government. The approach to renewables is similar to that of Labour – though, in the UK, renewables is all about delivery, not policy. However, the approach on nuclear power looks like a recipe for muddle and delay.

The Tories' junior partner in government, the Liberal Democrats, are fully committed to a “smart decentralised grid” in a “zero-carbon Britain.” Their webpage on Energy and Climate Change is unequivocal about nuclear power: “More nuclear power will soak up subsidy, centralise energy production and hinder development of Britain's vast renewable resources. Nuclear has a dirty legacy and increases global security risks. We oppose construction of further nuclear power stations.”

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13. UNFCCC has a new Executive Secretary



The United Nations Framework Convention on Climate Change (UNFCCC) has appointed Ms. Christiana Figueres of the Republic of Costa Rica as its new Executive Secretary. She will take up her functions on 8 July 2010.

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14. Bonn Climate Change Talks

The UNFCCC held its first substantive negotiation session since Copenhagen from May 31 – June 11 in Bonn, Germany. EDO International Programs Director, Amelia Thorpe, attended the Bonn meetings as Legal Adviser to the Republic of Nauru.

Emission reductions and the flexibility mechanisms, particularly land-use, land-use change and forestry (LULUCF) were key issues during the talks, including the underlying assumptions on the use of the flexibility mechanisms and their relation to emissions reduction pledges. Despite obtaining widespread support from Parties including Australia, a proposal from the Alliance of Small Island States (AOSIS) for a technical paper on limiting global warming to 1.5 degrees was blocked by Saudi Arabia, causing high emotions toward the end of negotiations. Parties will attempt to progress these and other contentious issues - including land measurement, reporting and verification (MRV), legal form, climate finance and carbon capture and storage (CCS) - at meetings in August (Germany) and October (China) before the next meeting of Ministers in Cancun, Mexico at the end of this year.

A summary of the meetings can be found here: www.iisd.ca/climate/sb30/

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Media, reports and other news

15. Disputed isle in Bay of Bengal disappears into sea



For nearly 30 years, India and Bangladesh have argued over control of a tiny rock island in the Bay of Bengal. Now rising sea levels have resolved the dispute for them: the island's gone. New Moore Island in the Sunderbans has been completely submerged, said oceanographer Sugata Hazra, a professor at Jadavpur University in Calcutta. Its disappearance has been confirmed by satellite imagery and sea patrols, he said.

Another nearby island, Lohachara, was submerged in 1996, forcing its inhabitants to move to the mainland, while almost half the land of Ghoramara island was underwater. At least 10 other islands in the area are at risk as well.

Bangladesh, a low-lying delta nation of 150 million people, is one of the countries worst-affected by global warming. Officials estimate 18 percent of Bangladesh's coastal area will be under water and 20 million people will be displaced if sea levels rise 1 meter (3.3 feet) by 2050 as projected by some climate models.

India and Bangladesh both claimed the empty New Moore Island, which is about 3.5 kilometers (2 miles) long and 3 kilometers (1.5 miles) wide. Bangladesh referred to the island as South Talpatti.

There were no permanent structures on New Moore, but India sent some paramilitary soldiers to its rocky shores in 1981 to hoist its national flag.

The demarcation of the maritime boundary — and who controls the remaining islands — remains an open issue.

To read the full text of this article by Associated Press Writer Nirmala George, please visit:

<http://abcnews.go.com/Technology/wireStory?id=10188225>

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16. Health First Environment Second



The environment ranks second only to health as a long-term priority for NSW residents, according to a recent survey.

Health was nominated by more than one-third of people as the most critical issue for State Government action in the next decade, followed by the environment (22 per cent).

Long-term water management, which had been a big issue in previous surveys, has declined in importance to 17 per cent, probably because of the easing of drought conditions.

For the full text of this article, please visit:

<http://www.smh.com.au/environment/health-first-environment-second-20100323-qu45.html>

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17. Conserving the Planet—Without Hurting Low-Income Families

Increasing household energy efficiency reduces greenhouse gas emissions. Energy-efficiency programs are now widespread, but they are often designed in a way that excludes low-income households.

All families pay energy surcharges used to fund such programs, but low-income families lack money to buy the appliances and insulation that programs subsidise. Because they don't own the homes being upgraded, tenants are often reluctant to invest in energy efficiency. Landlords lack incentives to make upgrades because they usually don't pay the energy bills—those costs are deferred to the tenant.

As a result, low-income people can end up subsidising programs for the wealthy, and programs miss a critical opportunity to upgrade inefficient old appliances and drafty

homes of low-income families.

The solution is to provide effective programs that specifically address the needs of low-income households.

The University of Victoria Environmental Law Clinic has just issued a report reviewing the major programs that assist the poor to upgrade their energy efficiency. To read the full report, please visit:

<http://www.elc.uvic.ca/press/documents/Conserving-planet-without-hurting-low-income-families-April2010-FINAL.pdf>

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18. Business Recycling made easy



Planet Ark is putting recycling within reach of small and medium businesses.

The launch of its new online directory, BusinessRecycling.com.au, is set to revolutionise the way that businesses manage their waste by promoting cost saving and environmentally responsible alternatives.

Established by Planet Ark in association with the Department of Environment Climate Change and Water NSW and Pitney Bowes, BusinessRecycling contains Australia wide listings of re-use and recycling collection and drop-off locations for more than 100 different materials in one easy to access site.

The website, supported by a Hotline (1300 763 768), is designed to make it easy for businesses, especially small and medium sized businesses, to find recycling services in their area.

Modelled on Planet Ark's hugely successful RecyclingNearYou.com.au, which provides recycling information and drop-off location listings for a wide variety of household items, BusinessRecycling is designed for the small to medium business operator who is seeking recycling services.

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19. 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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20. Calls for EDO Coastal Law and Climate Change Workshops

The Environmental Defender's Office (EDO) has an active Education Program aimed at helping the community to understand and participate in environmental decision-making. The EDO is seeking expressions of interest from community groups who are interested in attending a FREE workshop on coastal law and climate change presented by the EDO. For more information, 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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