



Climate Law Bulletin

The bimonthly climate update from the Environmental Defender's Office

ISSUE 4 – NOVEMBER/DECEMBER 2009

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Copenhagen, Copenhagen, Copenhagen



This fourth edition of the EDO's Climate Law Bulletin coincides with the most important climate talks of the decade. The global climate deals secured in Copenhagen will have unprecedented implications for policy makers. Australia's Carbon Pollution Reduction Scheme (CPRS) has been voted down by the Federal Parliament ahead of the talks. The blueprint for the global climate change agreement to be struck in Copenhagen urges the world to cut greenhouse gas emissions by 50 per cent by 2050 from 1990 levels, with most of the reduction coming from rich countries. It is a figure that the G8 grouping of industrialised nations

agreed to in principle last year. Despite a push by poor countries, the Danish draft proposal has not outlined midterm emissions targets for developed countries. Australia's midterm target is a reduction of 5 per cent below 2000 levels by 2020. That would increase to 15 per cent (at best 25%) if a Copenhagen deal is struck.

As in Australia and around the world, climate change sceptics will make it hard for policy makers to deliver effective binding agreements. Climate change sceptics recently pointed to hundreds of leaked private emails allegedly exchanged between some of the world's leading climate scientists during the past 13 years. Climate change sceptics who have studied the emails allege they provide "smoking gun" evidence that some of the climatologists colluded in manipulating data to support the widely held view that climate change is real, and is being largely caused by the actions of mankind. But it's not only the sceptics who are repudiating the science, most nations are doing the same, including the major emitters who keep insisting warming can be limited to 2°C above the pre-industrial average.

Nevertheless, the Australian Government has been active in advancing discussions on the appropriate legal structure for the post-2012 international climate change agreement. It has hosted a number of international seminars on this issue and has put forward a series of formal submissions in the UN negotiations.

Australia has outlined two potential models for a post 2012 agreement:

- an amended Kyoto Protocol and new treaty under the United Nations Framework Convention on Climate Change (UNFCCC); or
- a single new treaty under the UNFCCC which unifies the commitments of all parties. On 4 June 2009, the Australian Government submitted to the UNFCCC a draft proposal for such a new agreement.

Either way Australia's commitments would probably be registered in a National Schedule. Climate Change Minister Penny Wong has indicated she thinks this is the best way to present flexibility and the right measure of certainty.

Of course, given the recent political developments in Australia, it's worth keeping in mind that the new Federal Opposition leader, Tony Abbott plans to fight a climate change election using land management and energy efficiency measures to slash greenhouse emissions instead of an emissions trading scheme or a carbon tax.

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National Update

Law

1. Passage of the amended CPRS voted down

Following the recent leadership dispute within the Liberal party, the final amended version of the Federal Government's proposed Carbon Pollution Reduction Scheme (CPRS) was voted down 41 votes to 31 votes on 2 December 2009. The key elements of the finalised package included:

- Emissions-Intensive Trade-Exposed Industries: the 1.3% Carbon Productivity Contribution has been retained to "ensure all industries reduce their emissions permanently" and a Global Recession Buffer will be provided at the following assistance rates:
 - i) industries eligible for 60% assistance with a 10% buffer; and
 - ii) industries eligible for 90% assistance with a 5% buffer;
- Coal Sector: \$1.5 billion in transitional assistance will be provided to the coal sector over five years, \$270 million will be provided to the Coal Mine Abatement Fund to "assist gassy coal mines [to] reduce emissions", and the current Council of Australian Governments Renewable Energy Target (RET) review process will "consider whether new waste coal mine gas projects should be eligible";
- Voluntary Action: the CPRS will be amended to "ensure that all existing and future purchases of GreenPower will be counted, and allow Australia to go beyond [its] 2020 national targets";
- Electricity Sector Adjustment Scheme (ESAS): assistance under the ESAS will be increased by \$4 billion to a total value of permits of \$7.3 billion and three new



measures - a Low Emissions Transition Incentive, an Energy Security Assurance Mechanism and deferred payment arrangements - will be introduced to "maintain energy security and drive the transition to a low pollution future";

- Electricity Prices: a Transitional Electricity Cost Assistance Program of \$1.1 billion to "assist medium and large manufacturing and mining businesses with CPRS-related increases in electricity prices in the early years of the Scheme"; and
- Agriculture: agricultural emissions will be "excluded from the CPRS and offsets for agricultural emissions abatement will be included".

For more information, visit: <http://www.climatechange.gov.au/government/initiatives/cprs/cprs-progress/legislation.aspx>

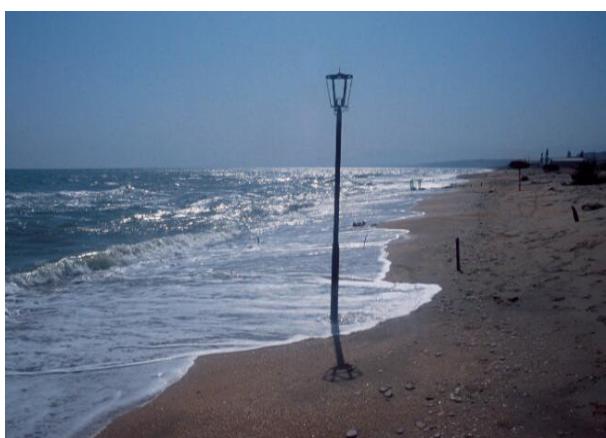


2. Climate change litigation

The most recent climate litigation in Australia has explored the avenue of seeking to regulate carbon dioxide as a pollutant. The NSW Land and Environment Court has recently heard preliminary arguments involving a motion to dismiss the application and is expected to make a decision soon as to whether the case can proceed. The case is against Macquarie Generation, operators of the State's largest power station at Bayswater in the NSW Hunter Valley. Environmental activists Pete Gray and Naomi Hodgson are alleging Macquarie Generation wilfully or negligently disposes of waste at the Bayswater Power Station in the Hunter Valley in NSW, in a manner that harms or is likely to harm the environment. The power station operates under a pollution licence under NSW laws.¹ The applicants are seeking to have carbon dioxide regulated as a waste product under that licence.



3. Myers v South Gippsland SC - Planning Law and Climate Change in Victoria



This case involved an application to subdivide a lot into two. The Victorian Civil and Administrative Tribunal issued an interim decision requiring that a coastal hazard vulnerability assessment be undertaken prior to a decision being made. The decision in this case follows on from a submission made as a result of that assessment. The case is of particular interest as it deals with balancing the vulnerability of the land to sea level rise with expectations about an individual development that would otherwise be consistent with the applicable zoning and other planning controls.

To view a summary of this case, please visit:

¹ Under the *Protection of the Environment Operations Act 1997* (NSW).

4. Protective cost orders in public interest litigation

Recently, the EDO has twice applied for protective cost orders in the NSW Land and Environment Court. The first, successfully, on behalf of the Blue Mountains Conservation Society² in its case against Delta Electricity under the *Protection of the Environment Operations Act 1997*, for causing water pollution. Water quality testing results from upstream and downstream of a discharge point from Wallerawang Power Station, as well as from the discharge point itself indicate that the power station is introducing salts and metals into a river which runs into Sydney's drinking water supply. The enforcement authorities have been advised of the results but have so far not responded.

On 9 September the EDO successfully obtained a 'protective costs order' (PCO) in the amount of \$20 000. The PCO caps the costs payable on a party/party basis in the proceedings. The client could not afford to continue with the proceedings unless its liability was limited.

Under rule 42.4 of the *Uniform Civil Procedure Rules 2005* the court has the discretion to limit the costs payable on a party/party basis at any stage in the proceedings. Justice Pain made the order on the basis that the case was brought in the public interest, was likely to raise novel questions of law and that the applicant could not continue unless an order capping costs was made.

For the judgement, please visit:

http://www.edo.org.au/edonsw/site/pdf/casesum/bmcs_v_delta_judgment_cost_orders09_0909.pdf

A similar argument was unsuccessful in another case on behalf of Caroona Coal Action Group which is challenging the validity of the exploration licence and an earlier coal authorisation issued to Coal Mines Australia to undertake exploration activities in the Caroona district³.

Caroona Coal is an incorporated association whose members constitute the majority of landholders affected by the coal exploration and proposed mining on the Liverpool plains.

Caroona Coal filed an Amended Notice of Motion seeking a maximum costs order of \$34,000. The motion was sought on the basis of the public interest nature of the proceedings based on the criteria set out by the Court of Appeal in *Minister for Planning v Walker (No 2)* [2008] NSWCA 334.

Chief Justice Preston found that a maximum costs order was not necessary to facilitate access to justice for the Caroona Coal Action Group. In so doing he highlighted the critical question in determining any application for a maximum costs order is whether access to justice will be promoted or impeded by the making or not making of such an order. It was considered that other factors such as whether the applicant stands to benefit from a

² Blue Mountains Conservation Society Inc. v Delta Electricity [2009] NSWLEC 150

³ Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources [2009] NSWLEC 165

successful outcome or whether the proceedings are public in nature are relevant in answering the critical question, but are not 'ends in themselves'.

The Court decided that the making of directions was a more appropriate means of achieving the overriding purpose than making a maximum costs order. The Court declined to rule on the question of whether the proceedings were to be characterised as being in the public interest. However, the Court also reserved its right to make a maximum costs order at a later stage of the proceedings 'if circumstances change'.

Judgment in this case is currently reserved.

These cases are likely to have implications for future climate change litigation, particularly that which is brought in the public interest.

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Policy

1. Sea Level Rise Policy Statement



The NSW Government has finalised the Policy Statement on Sea Level Rise following extensive consultation. Download a copy of the [Policy Statement](#)

The Policy Statement specifies sea level planning benchmarks for the NSW coastline. These benchmarks are an increase above 1990 mean sea levels of 40 centimetres by 2050 and 90 centimetres by 2100. Councils must use the Benchmarks when undertaking coastal and flood hazard assessments in accordance with DECCW's *Coastline Management* and *Floodplain Development Manuals*. Local environmental plans must give effect to these manuals.

Consequently, it is a statutory requirement that development must comply with the Benchmarks. Finally, the Policy confirms that the Government accepts no liability either under common law or statute to reduce the impacts of sea level rise.

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2. Managing our coastal zone in a changing climate



The House of Representatives Climate Change, Water, Environment and the Arts Committee has just released its inquiry report, *Managing our Coastal Zone in a Changing Climate: The Time to Act is Now*. The Committee has adopted as a key recommendation the establishment of a national coordinated approach to sea level rise and coastal impacts, which is consistent with ANEDO's submission. The full report can be accessed here:

<http://www.aph.gov.au/House/committee/ccwea/coastalzone/report.htm>

For related media coverage, please visit:

<http://www.smh.com.au/environment/make-evacuation-plans-20091026-hgpe.html>



3. Green Loans



Green Loans is a new Australian Government initiative to help Australians tackle climate change. The Green Loans Program assists Australian families to install solar, water saving, and energy efficient products. ANZ and Westpac are both supporting the Federal Government's green loans program, a five year scheme to provide \$10,000 loans to householders to improve their energy and water efficiency. So far over two hundred loans have been issued.



4. NSW commits to a gross feed-in tariff for all renewable energies

The NSW Government has recently announced the Solar Bonus Scheme which is set to commence on 1 January 2010.

The Solar Bonus Scheme will credit participating customers with a "gross" feed-in tariff rate of 60 cents per kilowatt hour for all the electricity that their eligible solar photovoltaic (PV) system or wind turbine generates. The Scheme will operate for seven years.

The gross feed-in tariff approach was adopted over the net feed-in tariff approach which means that participants in the Scheme will be paid for each kilowatt hour of energy they produce rather than just the surplus about of electricity they actually feed back into the grid.

To be eligible to participate in the Scheme participants must have a Solar PV system or wind turbine up to 10 kilowatts in size.

To find out more about the Scheme, visit

<http://www.industry.nsw.gov.au/energy/sustainable/renewable/solar/solar-scheme>



5. Tony Abbott's tax-free plan

The new leader of the Liberal Party Tony Abbott 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.

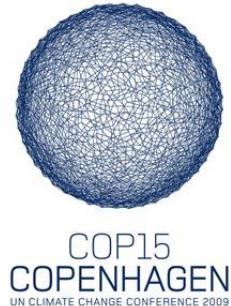
"The Coalition will not be going to the election with a new tax, whether it's a stealth tax, the emissions trading scheme, whether it's an upfront and straightforward tax like a carbon tax," he said. "We'll have a strong and effective climate change policy, we'll have it early in the new year".



International update

Law

1. The big and the little picture at Copenhagen



Representatives from the Pacific Island communities most threatened by rising sea levels have travelled to the Copenhagen UN summit currently in progress, together with Australian human rights advocates, to ensure that the human face of climate change is not forgotten. "For too long the climate change discussion has been an elitist debate between scientists, politicians, economists and environmentalists", explained Phil Glendenning, director of the Edmund Rice Centre, and a member of the Pacific Calling Partnership (PCP) delegation. "Our humanity is at stake and this elitism cannot be allowed to continue. What the climate crisis demands is the best our humanity has to offer - to each other and the planet," Mr Glendenning said.



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2. China, Russia and the United States announce emissions reduction targets

The US President Barack Obama pledged the United States will reduce emissions "in the range of" 17 per cent below 2005 levels in the coming decade. China, in return, said it would reduce its carbon intensity 40 to 45 per cent below 2005 levels over the same period of time. China's economy is still growing and is mostly fuelled by polluting coal, says the BBC's Quentin Sommerville in Beijing. Russia has pledged (during an EU-Russia summit in Stockholm) that it is ready to slash its greenhouse gas emissions by as much as 25 percent, if other countries do the same.



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3. US moves closer to Emissions Trading

The United States has released the *Clean Energy Jobs and American Power Act* which is a discussion draft of a trading scheme very similar to Australia's proposed Carbon Pollution Reduction Scheme. It calls for the US to cut emissions by 20% by 2020 compared with 2005 levels and follows the passage of the Waxman-Markey Bill which committed the US to reduce carbon pollution through a cap and trade system.

For more information, visit

<http://www.climatechange.gov.au/~media/Files/minister/wong/2009/media-releases/October/mr20091001a.ashx>



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4. US climate case law



In the Courts the impacts of climate change have been discussed in the following cases since the last issue:

The case of *Kivalina v Exxon Mobil*⁴ has been dismissed in the first instance. The Inuit community of Kivalina commenced a public nuisance action against nine oil companies, fourteen power companies, and a coal company for their

contributions to global warming. The villagers have to be relocated and are seeking compensation for their suffering caused by the melting arctic ice. This case has been dismissed much as *Connecticut v American Electric Power Company Inc*⁵ was in the first instance. In both cases the judge found that the issue was a political question for Congress, not the judiciary. It is expected the villagers will appeal. At this point they have been found to lack standing.

In *United States v. DeChristopher* a federal court held that an individual will not be allowed to present the “necessity defence” in a criminal proceeding. The individual was indicted for submitting several bids for oil and gas drilling leases on federal land that he did not intend to pay for. He argued that he did so to prevent the leases from being used in a way that would worsen the effects of climate change. The Utah court held that the Government’s motion in limine (at the outset) to prevent the individual from using the defence, because the individual did not meet the criteria for allowing such a defence.

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Policy

1. Barcelona Climate Change Talks

This was the final round of negotiations under both ad hoc working groups (AWGs) before the fifteenth Conference of the Parties (COP 15) in Copenhagen, Denmark, from 7-18 December 2009.

The main objective of the Barcelona session was to continue streamlining text, and to identify key issues and provide clear options for ministers to choose from in Copenhagen. The AWGs focused on the key elements of the Bali Action Plan (BAP), namely: adaptation, finance, technology, mitigation, capacity building and a shared vision for long-term cooperative action. It began addressing these issues based on several non-papers developed three weeks earlier in Bangkok.

In summary these are:

⁴ *Kivalina v ExxonMobil Corp.*, No. 08-1138 (N.D. Cal. 26 February 2008).

⁵ *Connecticut et al v American Electric Power Company Inc et al* (2004) No. 04-CV-05669 (US District Court for Southern District of New York, 15 September 2005).

- * The volume of financing and how it will be raised and spent to assist developing countries mitigate and adapt to climate change
- * Mitigation targets for developed countries are far lower than the 25% - 40% below 1990 levels by 2020, required to have a good chance at avoiding dangerous climate change
- * Will the Kyoto Protocol continue or will it be replaced by a new treaty?

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2. No agreement at Bangkok climate talks



The United Nations climate talks in Bangkok failed to deliver consensus between the world's developed and developing nations. The gathering of more than 190 nations in early October was hoped to deliver the foundations for a new global climate agreement to be negotiated in Copenhagen in December. Instead the world's two biggest polluters, the United States and China, are deadlocked with the United States calling for the existing Kyoto Protocol to be abandoned, and a new treaty to be discussed. China disagrees. One of the significant stalling points is finance. Developed countries, including Australia, are yet to commit to clean technology to assist the poorer countries adapt to climate change.

The text of this article was sourced from www.abc.net.au

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3. Commonwealth Heads of Government Meeting (CHOGM)



The climate change declaration made by world leaders at the recent Commonwealth Heads of Government Meeting (CHOGM) in Trinidad and Tobago maintains there is still room for a legally binding agreement to be reached at Copenhagen, international aid agency Oxfam said. Oxfam Australia's Climate Change spokeswoman Kelly Dent said it was encouraging that the last significant meeting of world leaders before Copenhagen

acknowledged the need for a legally binding document to tackle the undisputed threat climate change poses to the world. However, the CHOGM declaration has fallen short by only pointing the way to an operationally binding agreement in Copenhagen, with a legally binding agreement to be finalised in 2010.

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4. Canada not doing enough to tackle climate change

Several leading Canadian scientific organisations have demanded that Canada be expelled from the Commonwealth for not doing enough to fight global warming. In 2006 the new Canadian Government announced it was abandoning its targets to cut greenhouse gases under the Kyoto Protocol. No other country that had ratified the treaty has done this.

Canada was meant to have cut emissions by 6% between 1990 and 2012. Instead emissions have already risen by 26%.

To view an article discussing Canada, the petro-state, please visit:

<http://www.guardian.co.uk/commentisfree/cif-green/2009/nov/30/canada-tar-sands-copenhagen-climate-deal>

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Media, reports and other news

1. New temperature projections



The Earth's temperature is continuing to rise, the Greenland and the Antarctic ice sheets are losing mass at an increasing rate and global warming could reach as high as 7 degrees by the turn of the century if greenhouse gases grow unabated, a review of climate science over the past three years has found.

A temperature rise on this scale would wipe out much of the agriculture in the Murray-Darling Basin, cause thousands of heat-related deaths and bring sea level rises that would dislocate coastal cities of Australia and Asia.

Just weeks before the Copenhagen climate conference, 26 scientists from eight countries published the most up-to-date review of climate data since the UN's peak scientific body, the Intergovernmental Panel on Climate Change published its report in 2007.

For the full text of this article, please visit:

<http://www.theage.com.au/environment/planet-approaching-point-of-no-return-experts-warn-20091124-jhes.html>

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2. Algal bio-fuel



In late November, the Queensland Premier Anna Bligh officially opened a world-leading algal bio-fuel research and development facility at Townsville's James Cook University. The University believes that research in this field could hold the key to rapid reductions in carbon emissions from coal-fired power stations.

Ms Bligh said the revolutionary algal carbon capture and storage (BIO-CCS) technology is already proving successful in trials and will soon be rolled out at three coal-fired power

stations, including Tarong Power Station near Kingaroy.

"This technology has the potential to revolutionise carbon capture in Queensland and around the world," Ms Bligh said.

"The facility is doing important work, using algae as a carbon-capture method, which will add to our options in dealing with Co2 emissions.

"Essentially, the algae eats the Co2 and excretes biofuel and stockfeed - so the Co2 is captured and turned into something we can use.

"As our state continues to grow and coal remains a key export, it is essential we come up with new ways to manage the impact of that growth on our environment.

http://www.dme.qld.gov.au/media_centre.cfm?item=813.00

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3. EDO Report - Climate change and the legal framework for biodiversity protection in Australia: A legal and scientific analysis

Climate change has profound implications for biodiversity conservation in Australia. It will require us to re-evaluate our current approach to conservation, which will involve consideration of ethical questions such as what to protect and why. It will require dynamic and responsive tools, and overarching approaches. The EDO has recently released a paper, titled 'Climate change and the legal framework for biodiversity protection in Australia: A legal and scientific analysis', analysing the current legal regime at a Federal level in Australia and its adequacy to protect biodiversity under climate change. The paper was prepared with the assistance of a number of legal and scientific experts who provided written feedback on a draft discussion paper, and attended a one-day roundtable.

The first part of the paper outlines the predicted impacts of climate change on biodiversity and identifies general scientific principles for the protection of biodiversity under climate change. The second part of the paper describes and analyses a range of legislative tools in terms of their efficacy in protecting biodiversity currently, as well as how adaptive and applicable they will continue to be in the future, in light of climate change. The paper also provides a set of recommendations for legislative and policy reform necessary for the conservation of biodiversity under climate change.

It can be accessed at

http://www.edo.org.au/edonsw/site/pdf/pubs/090724cth_discussion_paper.pdf A similar paper examining the situation in NSW has also been published and is available at
http://www.edo.org.au/edonsw/site/pdf/pubs/090724nsw_discussion_paper.pdf

The paper can also be accessed at

<http://www.aph.gov.au/library/pubs/BN/eco/EmissionsTrading.htm>

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4. 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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5. Calls for EDO 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 climate action groups or similar who are interested in attending a FREE climate workshop presented by the EDO. The workshop may cover the following climate law issues: the Federal Government's Carbon Pollution Reduction Scheme (CPRS), campaigning and the law, climate litigation in Australia and international climate law and negotiations. 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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