



# Climate Law Bulletin

The bimonthly climate update from the Environmental Defender's Office

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[Recent trends in climate litigation](#)

## National update

### Law

[Senate rejects CPRS](#)

[Passage of RET legislation secured](#)

[First reporting period under the National Greenhouse and Energy Reporting Act 2007](#)

[Crown Lands Amendment \(Special Purpose Leases\) Bill 2009 \(NSW\)](#)

### Policy

[CPRS: Stakeholder views on voluntary actions](#)

[Federal Solar Credits Scheme commences](#)

[Transitional assistance under the CPRS](#)

[LivingGreener.gov.au](#)

[New audit measures for Homeowner Insulation Program](#)

[Public consultation on the Greenhouse and Energy Audit Framework](#)

[Financial assistance for farmers adapting to climate change](#)

[Australian Solar Institute's solar energy grants program](#)

[Release of Australia's Biodiversity and Climate Change: a strategic assessment of the vulnerability of Australia's biodiversity to climate change](#)

[Launch of the National Coastal Landform and Stability Mapping Tool](#)

[Funding for NSW Communities to combat climate change](#)

[NSW Government Farmer Carbon Calculator](#)

## International update

### Law

[Update on the road to Copenhagen](#)



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[Australia proposes new 'flexible' design for global climate agreement](#)

[Japan announces revised emissions reduction targets](#)

[New Zealand announces 2020 targets](#)

[US announces new auto fuel economy standards](#)

[US climate case law](#)

## **Policy**

[Engaging our Pacific Neighbours on Climate Change: Australia's approach](#)

[Australia and Indonesia joint submission on REDD](#)

[India Forests announcement](#)

[G20 climate finance talks](#)

[Climate Funds Update website](#)

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

[Real GHG reductions through complementary measures](#)

[Youth Decide](#)

[Climate Camp](#)

[EDO Report - Climate change and the legal framework for biodiversity protection in Australia: a legal and scientific analysis](#)

[CoS research finds Australian cities could halve emissions by 2030](#)

[CSIRO Home Energy Saving Handbook](#)

[Henry Tax Review](#)

[UN World Economic and Social Survey 2009](#)

[Parliamentary Library publication: Emissions trading – has it worked?](#)

[New fuel efficient cars to be released](#)

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

[Calls for EDO Climate Change Workshops](#)

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## **Recent trends in climate litigation**

This third edition of the EDO's Climate Law Bulletin comes only a few days after a major climate case law decision in the US that will undoubtedly have broader implications for climate litigation internationally. In the meantime, back in Australia, the Minister for Climate Change, Penny Wong, has proposed a new legal framework design for the global climate deal to be secured in Copenhagen in December this year, where parties decide upon their own targets and commitments, and the mechanisms to be adopted to achieve these goals. Whilst binding commitments and the sentiments of international law are beset by uncertainty, recent movements in climate litigation have provided some hope that the regulation of activities and air pollution necessary to adequately and realistically address the impacts of climate change may be achieved in the courts.

The case of *Connecticut v American Electric Power Company Inc*<sup>1</sup> began in 2004, when twelve plaintiffs, including eight US states, the City of New York and three non-profit land trusts filed a public nuisance lawsuit against the five largest emitters of greenhouse gases in America. The plaintiffs argued that greenhouse gas emissions from the plants were a public nuisance and would cause irreparable harm to property and the public health. The defendants, including American Electric Power Company Inc, Southern Co, Xcel Energy Inc, Cinergy Corporation and the Tennessee Valley Authority public power system, operate fossil fuel-fired power plants in 22 US states.

The case was dismissed by a District Court judge in 2005, who found that the issue was a political question for Congress, not the judiciary. The defendants had argued that allowing a court to make an order regarding emissions reductions would interfere with the President's actions to negotiate reductions with other countries in the international arena.

In this most recent decision, the US Court of Appeals Second Circuit found that the District Court had erred in dismissing the complaints and remanded the case for further proceedings. This is a significant decision for a number of reasons and creates an important precedent for climate litigation not only in the US, but for legal developments around the world.

Most notably the Court held that public nuisance law could be used to bring an action against power generating companies for harm resulting from global warming. The US has seen a number of public nuisance cases that have sought redress for the impacts of climate change, and to date, none have succeeded. In *Kivalina v Exxon Mobil*<sup>2</sup>, the Inuit community of Kivalina have commenced a public nuisance action against nine oil companies, fourteen power companies, and a coal company for compensation for suffering caused by melting arctic ice. This case is yet to be heard.

In *Comer v Murphy Oil*<sup>3</sup>, 13 individuals harmed by Hurricane Katrina sued nine oil companies, 31 coal companies and four chemical companies for negligence, claiming they had significantly contributed to the emission of greenhouse gases, knowing these emissions would harm public health and private and public property interests. Similarly to the original Connecticut proceedings, the District Court found that the plaintiffs' claims were non-justiciable and that they lacked standing to bring the action. The case was dismissed.

Apart from these cases, climate litigation in the US has been largely concerned with challenges to permits for coal-fired power plants.<sup>4</sup> One of the most notable decisions to date, however, was a challenge brought by 12 states and various other entities against the US Environmental Protection Agency (EPA), where the plaintiffs sought to have carbon dioxide regulated as a pollutant under the *Clean Air Act* (CCA).<sup>5</sup> In April 2009, following the decision of the Supreme Court for the plaintiffs, the EPA made a formal declaration that carbon dioxide and five other heat trapping gases are pollutants that endanger public health,

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<sup>1</sup> *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).

<sup>2</sup> *Kivalina v ExxonMobil Corp.*, No. 08-1138 (N.D. Cal. 26 February 2008).

<sup>3</sup> *Comer v Murphy Oil*, No. 1:05-CV-436-LG-RHW (30 August 2007).

<sup>4</sup> See for example, *Franklin County Power of Illinois LLC v Sierra Club* (US Sup. Ct, 29 June 2009); *Longleaf Energy Associates LLC v Friends of the Chattahoochee* (Ga. Ct. App., 7 July 2009); *Appalachian Voices v State Air Pollution Control Board* (Vir. Cir. Ct., 10 August 2009).

<sup>5</sup> *Massachusetts v EPA*, 549 U.S. 497, 524 (2007).

making way for their regulation under the CCA.<sup>6</sup>

The most recent climate litigation in Australia has also explored this avenue of seeking to regulate carbon dioxide as a pollutant. Environmental activists Pete Gray and Naomi Hodgson have commenced proceedings against Macquarie Generation for wilfully or negligently disposing 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.<sup>7</sup> The plaintiffs are seeking to have carbon dioxide regulated as a waste product under that licence.

Until the Bayswater case, the more recent climate change cases in Australia have focussed largely upon challenges to development approvals in sensitive coastal areas where the impacts of climate change are expected to be most severe. The decision of *Walker v Minister for Planning and Ors*<sup>8</sup> in the NSW Land and Environment Court made some headway when Justice Biscoe held that a residential and aged care facility concept plan approved by the Minister for Planning was invalid as the Minister had failed to consider whether climate change may exacerbate the existing flood-potential of the site. The decision was overturned in the Court of Appeal, where it was held that whilst the law required the Minister to consider the public interest,<sup>9</sup> a failure to consider climate change did not invalidate the approval in this case. Positively, discussion from the bench in the appeal case suggested that it was only a matter of time before ecologically sustainable development (ESD), and by implication climate change, would plainly be seen as an element of the public interest that the Minister is bound to consider in most, if not all decisions.

In *Aldous v Greater Taree City Council*,<sup>10</sup> addressing the same issue, Biscoe J commented that the inclusion of ESD in the public interest is a question of timing. The Court of Appeal did not discount the inclusion of ESD in the public interest. It was held that the Council had a mandatory obligation to consider the public interest in terms of climate change impacts, however it had not been established that Council had failed to do so.

The Victorian Civil and Administrative Tribunal (VCAT) took a similar approach in *Gippsland Coastal Board v South Gippsland Shire Council*.<sup>11</sup> VCAT ruled that predicted sea level rise as a result of climate change must be adequately considered by a decision-maker where an approval relates to a housing development on coastal flood-prone grazing land.

The South Australian Supreme Court case of *Northcape Properties Pty Ltd v District Council of Yorke Peninsula*<sup>12</sup> took the consideration of climate change in development approvals a step further, finding that climate change was a sufficient reason to refuse a coastal development application. The refusal was based on expert evidence demonstrating that over the next 100 years the coast would shift 35 to 40 metres inland, making it highly probable the

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<sup>6</sup> 'EPA clears way for greenhouse gas rules' (17 April 2009) *New York Times*, available at <http://www.nytimes.com/2009/04/18/science/earth/18endanger.html>.

<sup>7</sup> Under the *Protection of the Environment Operations Act 1997* (NSW).

<sup>8</sup> [2007] NSWLEC 741.

<sup>9</sup> Under the *Environmental Planning and Assessment Act 1979* (NSW), section 79C(1)(e).

<sup>10</sup> [2009] NSWLEC 17.

<sup>11</sup> [2008] VCAT 1545.

<sup>12</sup> [2008] SASC 57.

development would suffer damage due to coastal erosion.

These cases demonstrate an increasing willingness of the courts to be (though if only to a limited extent) active where decisions require a determination regarding climate change. The lack of binding commitments being made at the international level have forced environmental lawyers across all jurisdictions to consider innovative and untested legal arguments to address the impacts of climate change in the courts. Climate litigation is a growing trend. Future cases will be likely to focus on the havoc caused by and damage resulting from extreme weather events predicted as a flow on effect from atmospheric climate change. Areas of law such as human rights, trade practices and corporations law are yet to be fully explored as avenues for climate change actions.

*By Kirsty Ruddock and Heidi Evans*

## National Update

### Law

#### 1. Senate rejects CPRS



On Thursday 13 August, the Senate voted against the Australian Government's package of 11 bills that sought to introduce the Carbon Pollution Reduction Scheme (CPRS) from 2011. The Opposition, the Greens, and the independents all chose to defeat the bills' passage through the Upper House. The Greens commented that the Government's 2020 emissions reduction targets were too weak and inappropriate. This decision has forced the Government to reconsider the CPRS package and negotiate with the Opposition to secure agreement on Australia's legislative approach to addressing climate change. The Government must now wait three months before it can reintroduce the legislation. If the scheme is rejected a second time, a dissolution of both houses of parliament will be triggered and an early election will be called.

For more information, visit <http://www.smh.com.au/environment/global-warming/senate-kills-emissions-trading-scheme-bills-20090813-eiyc.html>

#### 2. Passage of RET legislation secured



Whilst the CPRS package was rejected by the Senate, the Australian Government has secured agreement to pass the Renewable Energy Target (RET) legislation, effectively severing the link between the CPRS and the RET until agreement on the former can be reached. The RET legislation includes the *Renewable Energy (Electricity) Amendment Bill 2009* and the *Renewable Energy (Electricity) (Charge) Amendment Bill 2009*. The new legislation ensures that by 2020, 20 percent of Australia's electricity will come from renewable sources. This will mean that in ten years time, the amount of electricity coming from sources like solar, wind and geothermal will be around the same as all of Australia's current household electricity use.

For more information, visit

<http://www.environment.gov.au/minister/wong/2009/mr20090819.html>

### **3. First reporting period under the National Greenhouse and Energy Reporting Act 2007**

Australian businesses required to report under the *National Greenhouse and Energy Reporting Act 2007* (NGER Act) had until 31 August to register for the first reporting period under the Act. The first reporting period is from 1 July 2008 until 30 June 2009. The NGER Act sets thresholds for greenhouse gas emissions and energy use and production to determine which businesses are required to report. This is the first time the Australian Industry will be measuring and reporting on its greenhouse gas emissions and energy use and production, with the data being made publicly available.

For more information, visit <http://www.climatechange.gov.au/reporting/>

### **4. Crown Lands Amendment (Special Purpose Leases) Bill 2009 (NSW)**

This Bill is awaiting 'Agreed in Principle' Debate in NSW Parliament. The purpose of the Bill is to amend the *Crown Lands Act 1989* in relation to the granting of special purpose leases in the Eastern and Central divisions of NSW. Special purpose leases are able to coexist with certain other tenures to allow for the establishment of renewable energy generators (such as wind farms) over land that is leased for other purposes (such as grazing). While most of the land may remain available for such other purposes, any particular part of it (other than the site of a dwelling-house or other significant improvement) could become the site of a renewable energy generator. However, in the case of land that is already the subject of some other tenure, it is only possible to grant a special purpose lease with the consent of the holder of that tenure.

For more information and to view the Bill, visit

<http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/0/F8C06536F4351F03CA25763A00199536?Open&shownotes>

## **Policy**

### **1. CPRS: Stakeholder views on voluntary actions**

The Federal Department of Climate Change has released a report on stakeholder views from public workshops held in June 2009, titled 'Voluntary action under the Carbon Pollution Reduction Scheme framework'. The report outlines the programs designed to assist households, including the Energy Efficient Homes Package, the Green Loans Program, the Solar Credits Scheme (see below) and the Australian Carbon Trust. Under the proposed CPRS the Minister can take a number of factors into account when setting future emissions caps for the CPRS. One such factor is the extent of actions voluntarily taken to reduce Australia's greenhouse gas emissions, as outlined in the Explanatory Memorandum to the legislation. Whilst the report details issues raised by forum participants, it does not provide for further commitments by the Government regarding voluntary actions. Currently, additional purchases of GreenPower, above 2009 levels, are the only form of voluntary action that will be included in the reduction of emissions caps under the CPRS.

The report can be accessed at

<http://www.climatechange.gov.au/emissionstrading/householdassistance/pubs/actions-workshopsreport.pdf>

## 2. Federal Solar Credits Scheme commences

Solar credits were introduced by the Renewable Energy Target (RET) legislative scheme passed by Parliament on 20 August and are a measure introduced by the Australian Government to reduce the cost of installing solar panels for households and businesses. Under the RET, electricity providers are required to purchase Renewable Energy Certificates (RECs). Where electricity comes from solar panels, the household or business owning the solar panels will receive as much as five times the number of RECs for each megawatt-hour of solar energy produced. This will effectively reduce the cost of switching to solar energy for homes, businesses and community groups. Solar credits are available to eligible small-scale renewable energy systems, including rooftop solar panels and small-scale wind and micro hydro systems. The scheme will be back-dated to include eligible systems installed from 9 June 2009. Solar credits are most likely to result in panel suppliers discounting the cost of the system for purchasers.

Applications for Solar Credits can be made to the Office of the Renewable Energy Regulator. For more information, visit

[http://www.climatechange.gov.au/renewabletarget/publications/pubs/faq\\_solar\\_credits.pdf](http://www.climatechange.gov.au/renewabletarget/publications/pubs/faq_solar_credits.pdf)

## 3. Transitional assistance under the CPRS



The Australian Government has announced funding as part of two separate programs that seek to allow industry a smooth transition to the anticipated Carbon Pollution Reduction Scheme (CPRS). The first of these initiatives is aimed at entities adversely affected by the forced transition from the NSW Greenhouse Gas Reduction Scheme (GGAS) to the CPRS. A total of \$130 million is being offered by the Government. The NSW scheme will become obsolete upon the

commencement of the CPRS. Affected entities potentially include waste coal mine gas, landfill gas and avoided methane generators, and holders of unused NSW Greenhouse Gas Abatement Certificates (NGACs). As waste coal mine gas generators have been accounted for under a separate initiative (see directly below), the \$130 million will go towards assisting landfill gas and avoided methane generators and holders of unused NGACs.

To assist waste coal mine gas generating entities adversely affected by the transition to the CPRS, the Australian Government has opted to amend the Renewable Energy Target (RET), increasing the target to allow existing waste coal mine gas projects to generate Renewable Energy Certificates (RECs). The Government has confirmed that the amendment does not allow for a single mega-watt hour of renewable energy to be replaced by waste coal mine gas generation. The amendment will increase the annual targets for the years 2011 to 2020 inclusive and will be available to waste coal mine gas-fuelled power stations currently in operation. Annual limits will be placed on these power stations' ability to create RECs based on their 2008 output levels. This will place a total cap on the amount of RECs that can be created by waste coal mine gas generators.

For more information on the two assistance initiatives, visit

<http://www.environment.gov.au/minister/wong/2009/mr20090817.html> and

<http://www.environment.gov.au/minister/wong/2009/mr20090902.html>

#### 4. LivingGreener.gov.au



A new web-based initiative, called LivingGreener.gov.au has been launched by the Australian Government, seeking to provide households with practical information and tools on how households can live more sustainably, save money and help the environment. Upon announcing the initiative, Minister for the Environment, Peter Garrett commented that ten percent of Australia's greenhouse gas emissions come from households and emphasised the need for every Australian to make a difference through simple, cost-effective,

everyday actions. The website also provides information about Government programs and financial assistance offered to households to encourage energy efficiency.

For more information, go to [www.livinggreener.gov.au](http://www.livinggreener.gov.au)

#### 5. New audit measures for Homeowner Insulation Program



In response to reports of misconduct in connection with the Australian Government's Homeowner Insulation Program, the Government has announced various new enforcement measures, seeking to ensure the program is effectively deployed and eligible households receive their entitlements.

The Program offers up to \$1,600 for owner-occupiers, renters or landlords for ceiling insulation.

New enforcement measures include:

- A ban on quoting without a physical site inspection, except in remote areas
- Publication of a market-based pricing guide, with automatic scrutiny of installers charging above the upper limit
- Extra field auditors, boosting roof inspections to 600 a week
- Extra desk-top auditors to scrutinise claims.

For more information on the Program, visit

<http://www.environment.gov.au/energyefficiency/insulation/homeowners/index.html>

#### 6. Consultation on draft legislation to establish a Greenhouse and Energy Audit Framework

Exposure drafts of the *National Greenhouse and Energy Reporting Amendment Regulations 2009* and the *National Greenhouse and Energy Reporting (Audit) Determination 2009* have been made available for public comment. This subordinate legislation will establish a greenhouse and energy audit framework for verification and assurance of reports provided under the *National Greenhouse and Energy Reporting Act 2007* and for the Carbon Pollution Reduction Scheme (CPRS).

For more information, visit <http://www.climatechange.gov.au/reporting/consultation.html>

## 7. Financial assistance for farmers adapting to climate change



A second round of funding has been announced under the FarmReady Industry Grants, an Australian Government initiative supporting projects to assist farmers to adapt to climate change, mitigate its effects and encourage the best management techniques. Under the latest round of funding, primary producers, primary industries and natural resource management groups can apply for grants of up to \$80,000 a year. A

total of \$6.3 million was allocated to 46 projects under the first round, including for forest-based industries, grains, cherries, turf, dairy, horticulture, pastures, macadamias, rice, abalone and aquaculture.

For more information, visit [http://www.daff.gov.au/climatechange/australias-farming-future/farmready/farmready\\_industry\\_grants2](http://www.daff.gov.au/climatechange/australias-farming-future/farmready/farmready_industry_grants2)

## 8. Australian Solar Institute's solar energy grants program



The Australian Solar Institute (ASI) was established as a key component of the Australian Government's Clean Energy Initiative and was allocated \$100 million for the period 2008 to 2012. The Institute was established to advance the development of solar technology in Australia, driving research that will have a major impact on the efficiency and cost effectiveness of solar

innovation. The competitive grants program is a primary function of the Institute and is now formally in operation. Applications for the first round of the grants program close 16 October 2009.

For more information visit

[http://ecogeneration.com.au/news/australian\\_solar\\_institute\\_grants\\_open/005027/](http://ecogeneration.com.au/news/australian_solar_institute_grants_open/005027/)

## 9. Australia's Biodiversity and Climate Change: a strategic assessment of the vulnerability of Australia's biodiversity to climate change

The Australian Government has released a report titled, 'Australia's Biodiversity and Climate Change: a strategic assessment of the vulnerability of Australia's biodiversity to climate change,' providing compelling evidence of the need to protect Australia's natural environment for future generations, from climate change and other environmental stresses.

The report was commissioned by the Government to gain a better understanding of the potential impacts on biodiversity from climate change and found that Australia's biodiversity is at risk from even moderate climate change. The report also provided details of the specific unique composition of Australia's flora and fauna and noted that there are many species that are vulnerable to the impacts of climate change.

For more information, visit

[http://www.climatechange.gov.au/impacts/biodiversity\\_vulnerability.html](http://www.climatechange.gov.au/impacts/biodiversity_vulnerability.html)

## 10. Launch of the National Coastal Landform and Stability Mapping Tool



The National Coastal Landform and Stability Mapping Tool has been developed by the Australian Government to identify areas on the coastline that are vulnerable to erosion under a changing climate. The Tool maps coastal landform types around the continent for the first time, demonstrating 'hard' and 'soft' coastline areas. Soft coastlines are vulnerable to erosion by the sea, a phenomenon likely to increase under climate change as sea level rise accelerates and storms

causing coastal flooding become more frequent and/or intense. Australia is particularly vulnerable to the impacts of climate change along the shoreline, primarily due to the large proportion of our population living very close to the coast.

For more information on the Mapping Tool, visit

<http://www.climatechange.gov.au/minister/combet/media/mr04082009.html>

## 11. Funding for NSW Communities to combat climate change

The NSW Government has announced it will provide \$5.9 million for investment in water and energy upgrades for 247 community organisations, including pre-schools, sporting clubs, retirement villages and charities. The aim of the funding is to reduce emissions by increasing the efficiency and quality of existing energy and water systems in these community organisations.

For more information, visit <http://more.nsw.gov.au/news/59-million-nsw-communities-combat-climate-change>

## 12. NSW Government Farmer Carbon Calculator

An online tool to assist farmers to measure the carbon emissions from their individual operations has recently been established by the NSW Government. The FarmGAS calculator was launched by the Australian Farm Institute and allows farmers to assess their contribution to Australia's total emissions and employ techniques to reduce that contribution.

The FarmGAS calculator is available at

<http://farmgas.farminstitute.org.au/publicpages/AFIPublic.aspx?ReturnUrl=%2fdefault.aspx>

## International update

### Law

#### 1. Update on the road to Copenhagen



International climate talks held recently in Bonn, Germany, involved informal sessions of the two main negotiating tracks at the UNFCCC (UN Framework Convention on Climate Change) – the ad hoc working group on long term cooperative action and the ad hoc working group on further commitments under the Kyoto Protocol. There was little progress and there are concerns that the increasing number of

alternative fora for climate agreements (including the Major Economies Forum, the G8 Summit and the Group of Twenty) are detracting from the urgency of the UNFCCC talks. This has the potential to cause problems for many developing nations who are unable to access these alternative fora. Both the MEF and the G8 Summit secured agreement on distant 2050 targets, whereas the Copenhagen meeting will seek to secure targets for the period 2012 to 2020.

In the most recent international movements, representatives of the world's 17 biggest carbon polluters have participated in an intense two-day meeting at the US State Department to 'bridge differences' in the lead up to Copenhagen. The countries involved are all members of the Major Economies Forum on Energy and Climate, an initiative of US President Barack Obama established in March 2009. Participating countries are responsible for 80 percent of global greenhouse emissions and include the EU, France, Italy, Germany, Britain, the US, Australia, India, China and Canada.

For more information, visit <http://www.state.gov/r/pa/prs/ps/2009/sept/129190.htm>

The Climate Action Network Australia (CANA) has compiled seven comprehensive fact sheets providing information on the climate negotiations of the UNFCCC. The topics covered by the fact sheets include:

- What to look for, what to expect
- International finance for climate mitigation and adaptation
- Global adaptation to climate change
- Legal architecture
- Mitigation
- LULUCF and REDD
- International climate acronyms

All of the fact sheets can be accessed at [http://www.cana.net.au/index.php?site\\_var=62](http://www.cana.net.au/index.php?site_var=62)

## **2. Australia proposes new 'flexible' design for global climate agreement**

The Australian Government's Minister for Climate Change, Penny Wong, has put forward a new legal framework for the global climate agreement to be secured in Copenhagen in December. The proposed framework seeks to encourage developing nations to commit to a global agreement by providing a more flexible arrangement than the pre-existing Kyoto Protocol. Whilst Kyoto demanded parties' commitments to binding targets and emissions reductions, the framework proposed by the Australian Government would allow parties to include their mitigation commitments in legally-binding, 'national schedules', annexed to an overarching agreement. National schedules could include economy-wide targets, renewable energy targets, sectoral targets, energy intensity measures and technology standards, or a target to reduce deforestation, depending on the circumstances of each country.

There have been various criticisms of the Government's proposal, including its failure to address financing for developing countries and an over-emphasis on reaching an agreement at Copenhagen, rather than an agreement to mitigate climate change.

For more information on the schedule approach, see

<http://www.crikey.com.au/2009/09/21/crikey-clarifier-wongs-climate-change-compromise/>

### 3. Japan announces revised emissions reduction targets



A change in government in Japan has seen the country dramatically alter its climate policy and emissions reduction targets. Under the previous government, Japan was committed to an eight percent reduction in greenhouse emissions by 2020. The country had also blocked progress in many of the international negotiations, unwilling to take the leadership approach needed of developed nations.

Following a landslide election victory, incoming Prime Minister Yukio Hatoyama announced that Japan will commit to a midterm 25 percent cut from 1990 levels (conditional on 'all major economies' agreeing to further commitments) and introduce a 'Hatoyama initiative', to develop concrete plans for supporting developing countries to adapt to and mitigate the effects of climate change. This advancement in the negotiations has given hope that an agreement might be secured at Copenhagen in December.

For more information, visit <http://www.reuters.com/article/latestCrisis/idUSL8323945>

### 4. New Zealand announces 2020 targets

New Zealand announced its 2020 emissions reduction targets at the Bonn UNFCCC meeting in August. The NZ Government has committed to reductions of 10 to 20 percent on 1990 levels, however the 20 percent commitment is conditional on a number of actions and promises from other players. These conditions included a global agreement to limit warming to two degrees, that other developed countries adopt comparable targets, for advanced and major emitting developing countries to take action fully commensurate with their respective capabilities, for an effective set of rules for land use, land-use change and forestry (LULUCF) and for full recourse to a broad and efficient international carbon market. This extensive list of requirements was heavily criticised by parties during informal sessions of the working group on further commitments under the Kyoto Protocol.

### 5. US announces new auto fuel economy standards

On 15 September, the US announced details of its national auto fuel economy standards scheme, which will impose the first-ever greenhouse emissions limits on the nation's cars and trucks. The US EPA and the Transportation Department have jointly developed the scheme, which will take effect on vehicle model year 2012. Under the proposal, corporate average fuel economy (CAFE) standards will provide for a fleet-wide average of 35.5 miles per gallon by 2016. The carbon dioxide limit imposed by the scheme (applying to passenger cars, light duty trucks and medium-duty passenger vehicles), will average 250 grams per mile per vehicles in 2016. The scheme does, however, provide flexibility for car makers required to meet the new standards during the initial years of operation.

In May, President Obama announced a decision to blend the legal authority that the Supreme Court granted to the EPA to regulate greenhouse gas emissions (following the decision in 2007 in *Massachusetts v EPA*), with the Department of Transport's right to regulate fuel economy under the CAFE program. This decision has not affected the right granted to individual states to impose their own emissions standards under the *Clean Air Act*. California was allowed such a waiver by the EPA in June and thirteen other states have now moved to adopt California's standards.

For more information, visit

<http://www.biologicaldiversity.org/news/center/articles/2009/new-york-times-09-15-2009.html>

## 6. US climate case law

*Connecticut v American Electric Power Company Inc*



The US Court of Appeals for the Second Circuit recently handed down its judgment in a much anticipated decision. Twelve plaintiffs, including eight US states, the City of New York and three land trusts filed a lawsuit against the five largest emitters of greenhouse gases in the US in 2004. They sought an order from the court to reduce greenhouse gas emissions under the common law doctrine of public nuisance. A district court had dismissed the case as a political question in 2005, however the Second Circuit found in favour of the plaintiffs, not only on political question grounds but on every other issue the plaintiffs argued. The court held that the plaintiffs had standing to bring the suit and that their common law claims of public nuisance could not be displaced by Federal statutes (such as the US *Clean Air Act*) which to some extent already address the regulation of greenhouse gas emissions. The decision is seen as a significant victory for environmental groups seeking to limit emissions from coal-fired electricity stations through the courts. The case has been returned to the district court judge for further proceedings.

The decision can be accessed at [http://www.ca2.uscourts.gov/decisions/isysquery/f211ab11-8473-4ff4-ad02-21211fb646d0/1/doc/05-5104-cv\\_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/f211ab11-8473-4ff4-ad02-21211fb646d0/1/hilite/](http://www.ca2.uscourts.gov/decisions/isysquery/f211ab11-8473-4ff4-ad02-21211fb646d0/1/doc/05-5104-cv_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/f211ab11-8473-4ff4-ad02-21211fb646d0/1/hilite/)

*Sustainable Transportation Advocates of Santa Barbara v Santa Barbara County Association of Governments* (Cal. Sup. Ct., Santa Barbara Co 30 June, 2009)

In 2008, the Santa Barbara County Association of Governments approved an updated regional transportation plan, which included an Environmental Impact Review (EIR) under the *California Environmental Quality Act* (CEQA). Sustainable Transport Advocates filed an action alleging that the EIR was inadequate for various reasons, one of which was that it failed to discuss state-wide energy use patterns within the traffic impacts analysis, or the potential for 'induced traffic' that would occur from freeway expansion. The court ordered that the plan approval be suspended until sufficient detail regarding information on consumption and use patterns within the county, as well as information on the energy impacts of the plan and the potential for induced traffic resulting from freeway expansion, could be provided in the EIR.

*Southern Alliance for Clean Energy v Duke Energy Carolinas, Inc.* (W. D. N. C. 2 July, 2009)

This was a decision by a US federal court that the proper place in which to challenge plans for a power plant expansion in North Carolina by Duke Energy was through the administrative appeals process. In January 2008, the North Carolina Department of Environment and Natural Resources issued a permit to Duke Energy for construction of a new coal-fired boiler. Several environmental groups challenged the approval in a federal court, claiming that the permit approval was void as it had not considered whether the boiler expansion would meet the maximum achievable control technology (MCAT) under the US *Clean Air Act*. In May 2009, many of the same groups filed another challenge to the permit in the North Carolina Office of

Administrative Hearings. Duke Energy successfully argued that the federal court action should be dismissed. The court held that the issues raised and the relief sought made the administrative process the most appropriate avenue for the challenge.

*Longleaf Energy Associates LLC v Friends of the Chattahoochee* (Ga. Ct. App., 7 July, 2009)

In this case, the Georgia Court of Appeals reversed a decision by a lower court that had invalidated a permit for the construction of a 1,200-watt coal-fired power plant on the Chattahoochee River because it did not limit CO<sub>2</sub> emissions. The Court of Appeals held that the lower court had erred in its ruling in June 2008 that under the *Clean Air Act* (CAA), the Georgia Environmental Protection Division was required to include CO<sub>2</sub> emissions limitations in its approval process, finding that the process would compel the state agency to limit these emissions even though no provision of the CAA or state law or regulation actually controls or limits them.

*WildEarth Guardians v US Forest Service* (10<sup>th</sup> Cir. 24 July, 2009)



In this case, an environmental NGO commenced proceedings challenging the US Forest Service's approval of a plan to allow a coal company to vent methane gas from a mine in Colorado. WildEarth Guardians alleged that the approval violated the *National Environmental Policy Act* (NEPA) because it failed to analyse reasonable alternatives to methane venting, measures to mitigate the effects of methane venting, and the climate change impact of venting. The coal company sought to intervene in the case and this motion was denied by the court. Upon appeal, the decision was reversed and the coal company was permitted to intervene. The 10<sup>th</sup> Circuit held that the company had demonstrated that the outcome of the case could potentially impair its interests and that its interests were not adequately represented by the Forest Service in the action.

*North Slope Borough v Minerals Management Service* (9<sup>th</sup> Cir., 27 August, 2009)

The Ninth Circuit upheld a federal agency's decision not to prepare a supplemental environmental impact statement (EIS) for a proposed oil and gas lease sale on a tract of the outer continental shelf in the Beaufort Sea. The federal agency had considered the risks posed to polar bears as a result of the cumulative impacts of climate change in granting the lease, however had determined that this risk could be reasonably mitigated. The court upheld the lower court's decision, holding that the agency did not act arbitrarily in making this determination.

*Mirant Potomac River LLC v Environmental Protection Agency* (4<sup>th</sup> Cir. 12 August, 2009)

In this decision, the Fourth Circuit held that a power plant in Virginia may not use emissions trading to meet its obligations under a state implementation plan approved by the EPA as part of the Clean Air Interstate Rule (CAIR). The CAIR was issued by the EPA in March 2005 and sought to dramatically reduce air pollution that moves across state boundaries. The court held that the company could not use the emissions allowances because of non-attainment provisions in Virginia state air pollution regulations. While the CAIR allows emissions trading, Virginia state law does not allow such trading in certain specified areas. Because the plant was located in such an area, the court found a lack of jurisdiction to allow the plant to trade allowances and dismissed the lawsuit.

*Appalachian Voices v State Air Pollution Control Board* (Vir. Cir. Ct. 10 August, 2009)

In this case, a Virginia state court invalidated a permit for a coal-fired power plant that

Dominion Resources has been building for more than a year. The permit for the maximum achievable control technology (MACT) for the power plant was approved by the State Air Pollution Control Board with an 'escape hatch' clause, allowing federal limits on mercury emissions to be circumvented. The clause stated that if federal limits on mercury emissions 'are not achievable on a consistent basis under reasonably foreseeable conditions, then testing and evaluation shall be conducted to determine an appropriate adjusted maximum annual emissions limit.' The court rejected the clause, holding that the *Clean Air Act* allows for no such adjustment.

*Palm Beach Co. Environmental Coalition v Florida* (S. D. Florida, 27 July 2009)

An environmental NGO filed proceedings in a federal court challenging the construction of a natural gas pipeline for a proposed power plant. The group challenged the pipeline's construction on various grounds, including that it violated the *National Environmental Policy Act* (NEPA), the *Clean Air Act* (CAA) and other federal statutes. The defendants sought to have the claims dismissed on jurisdictional grounds, contending that the environmental group had failed to fulfil the 60 day notice requirements for citizen actions under the CAA and that the state was immune from actions under the Eleventh Amendment. The court dismissed the proceedings on these grounds.

## Policy

### 1. Engaging our Pacific Neighbours on Climate Change: Australia's approach



The Australian Government has released a key policy document to guide the interactions between Australia and Pacific Island nations in addressing climate change to 2015. The document was released at the Pacific Island Forum, held in Cairns in August, and it articulates principles to guide actions and decisions by the Australian Government, based on the Pacific region's stated priorities and Australia's capacity to assist.

Engaging our Pacific Neighbours on Climate Change: Australia's approach can be accessed at <http://www.climatechange.gov.au/international/pubs/dcc-climate-change-policy.pdf>

For more information on the Pacific Islands Forum, visit <http://www.pif2009.org.au/>

### 2. Australia and Indonesia joint submission on REDD

In the lead up to the Bonn UNFCCC meeting, Australia and Indonesia issued a joint submission regarding REDD (reducing emissions from deforestation and forest degradation) in developing countries. The two countries issued an earlier joint submission in December 2008, which demonstrated a new model of cooperation between developed and developing countries in negotiations, considered crucially important in securing an agreement on REDD at Copenhagen. The latest submission focuses on the necessary technical and institutional requirements to make REDD an effective mechanism under the UNFCCC. Australia has been assisting Indonesia's efforts on REDD by acquiring satellite data and building Indonesia's capacity in carbon measurement, accounting and reporting under the Indonesia – Australia Forest Carbon Partnership.

The joint submission can be accessed at <http://www.climatechange.gov.au/international/unfccc-submissions.html>

### 3. India Forests announcement



India has been reluctant to adopt binding commitments to reduce greenhouse gas emissions, with the Government highlighting the very low per capita emissions of the country (which stands at one tonne of carbon per year for the average Indian citizen). Despite this, India has made some progress in moving to address its carbon emissions, recently announcing that the Government will set up a \$US2.5 billion fund to manage its forests to absorb carbon, with annual funding of \$US1 billion to be provided.

For more information, visit

<http://www.google.com/hostednews/afp/article/ALeqM5gaeiPfuSBjSobd5t9NVnAsvHA2Q>

### 4. G20 climate finance talks

The G20 (Group of Twenty) Finance Ministers and Central Bank Governors was established to bring together industrialised and developing economies to discuss key issues in the global economy. More recently, the G20 has become a forum within which the availability and provision of climate finance has been discussed. As a background to the G20 Summit talks held in Pittsburgh in September, three climate finance papers were prepared (one of which was co-authored by Australia) and are now available at

<http://www.nytimes.com/cwire/2009/08/27/27climatewire-papers-for-the-pittsburgh-summit-poses-more-q-81580>

The most recent report, 'G20 low carbon competitiveness', prepared for the G20 Pittsburgh meeting by The Climate Institute and E3G, ranked Australia fifteenth out of the G20 countries in its 'capacity to be competitive and generate material prosperity to its residents in a carbon constrained world'. Three elements to assessing overall low carbon competitiveness were considered by the report: where countries are positioned now, the rate at which this is changing, and the scale of the challenge they face. European and East Asian countries were found to perform best in the ranking, led by France and Japan. Australia was one of the five worst performers, behind China, the US and Russia.

The report can be accessed at

[http://www.e3g.org/images/uploads/G20\\_Low\\_Carbon\\_Competitiveness\\_Report.pdf](http://www.e3g.org/images/uploads/G20_Low_Carbon_Competitiveness_Report.pdf)

### 5. Climate Funds Update website

The Overseas Development Institute (ODI) and the Hienrich Boll Foundation have developed a Climate Funds Update website, providing information on the growing number of international funding initiatives designed to help developing countries address the challenges of climate change. The website fully documents 18 international funding projects and provides an overview diagram of the international architecture of funds.

The website can be accessed at <http://www.climatefundsupdate.org>

## Media, reports and other news

### 1. Real GHG reductions through complementary measures

A number of environment groups have joined together in a new campaign which seeks to

have voluntary carbon actions that consumers, businesses and community organisations choose to make, be counted *in addition* to government mandated reductions under the Carbon Pollution Reduction Scheme (CPRS). The Total Environment Centre, CHOICE, World Wide Fund for Nature (WWF) Australia, the Australian Conservation Foundation (ACF), the Alternative Technology Association (ATA) and Environment Victoria, are finalising a briefing paper and have sent letters to the Prime Minister's Office regarding Phantom Renewable Energy Certificates (RECs) from solar under the Renewable Energy Target (RET) and voluntary action under the CPRS. The campaign is focussing on these issues in the current context of the lead up to Parliament again voting on the CPRS in November or early 2010.

For more information on the campaign, contact Ben Raue at TEC: [benr@tec.org.au](mailto:benr@tec.org.au)

## 2. Youth Decide



Youth Decide is Australia's first youth referendum on climate change and has been launched by the Australian Youth Climate Coalition (AYCC) and World Vision. The national campaign allowed 12 to 29 year olds to register to vote on what they believe to be the necessary action that must be taken in the challenges posed by climate change. Voting was done online between September 14 and 21, and the results revealed that an overwhelming 97.5 percent of young people voted for emissions targets stronger than those currently proposed by the Australian Government. The campaign also involved various activities seeking to promote the role of youth in choosing the planet they will inherit.

For more information on the campaign, visit <http://www.youthdecide.com.au>

## 3. Climate Camp



Climate Camp 2009 seeks to bring together students, workers, kids and parents in a peaceful protest against Australia's continuing reliance on fossil fuels and their excessive use. The NSW event for 2009 is being held at Helensburgh, south of Sydney, at Australia's oldest coal mine from 9 to 11 October and will involve workshops, entertainment, campaign activities and stalls. This year's Camp will focus on a set of key environmental issues related to coal mining that include water, climate justice, coal, climate change, alliances, transitions and activist skills.

For more information on Climate Camp 2009, visit <http://www.climatecamp.org.au/>

## 4. 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](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](http://www.edo.org.au/edonsw/site/pdf/pubs/090724nsw_discussion_paper.pdf)

## 5. CoS research finds Australian cities could halve emissions by 2030



*Sustainable Sydney*

A new study commissioned by the City of Sydney (CoS) has revealed that if Australian cities were to implement a plan similar to CoS's Sustainable Sydney 2030, which aims to make the Sydney council area carbon neutral by 2030, they could halve their greenhouse emissions over the next 20 years. The introduction of a targeted strategy to reduce carbon emissions in Australia's capital cities could potentially reduce emissions by 48 million tonnes in the year 2030 and result in a cumulative emissions reduction of 540 million tonnes. This reduction is approximately equivalent to the annual total emissions from the whole of Australia in 2008 across all sectors – energy, industry, waste and agriculture.

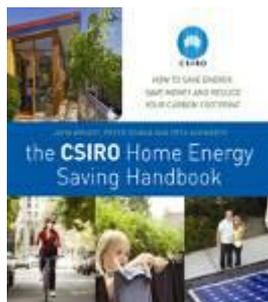
## 6. CSIRO Home Energy Saving Handbook

The CSIRO has released a publication targeted at households, explaining how changes to daily activities can reduce home and car energy use by as much as 50 percent. The Home Energy Saving Handbook – How to Save Energy, Save Money and Reduce Your Carbon Footprint provides useful and practical tips on changing small scale habits within households to reduce carbon emissions and energy consumption.

For more information on the book and how you can obtain a copy, visit

<http://www.csiro.au/resources/Energy-Saving-Handbook.html>

## 7. Henry Tax Review



The Henry Tax Review has published a report carried out by economists at La Trobe University, on a 'Conceptual Framework for the Reform of Taxes' which specifically considers roads and transport. The report found that the current fuel excise (at 38 cents per litre) is an inappropriate mechanism for targeting traffic congestion, local pollution, and noise damage, but that it should be increased and applied instead as a revenue-raising tax – rather than an attempt to correct negative externalities. By raising this revenue on petrol and

diesel fuels, it is suggested the use of hybrid and alternative fuel vehicles would increase.

The report is available at

[http://taxreview.treasury.gov.au/Content/html/commissioned\\_work/downloads/Clarke\\_and\\_Prentice.pdf](http://taxreview.treasury.gov.au/Content/html/commissioned_work/downloads/Clarke_and_Prentice.pdf)

### **8. UN World Economic and Social Survey 2009**

A new report released by the United Nations, the World Economic and Social Survey, has revealed that existing climate change funding of \$21 billion provided by developed nations is inadequate to address the rising costs of climate change. Required funding is now estimated at \$500 to \$600 billion a year, and it is developed countries that are expected to bear the costs. This will have severe implications for tax payers in Australia. The dramatic increase in estimated costs demonstrates the uncertain nature of the impacts of climate change.

For more information on the Survey and to access the report itself, visit

<http://www.un.org/esa/policy/wess/index.html>

### **9. Parliamentary Library publication: Emissions trading – has it worked?**

The Parliamentary Library has released a publication looking at emissions trading and its proposed implementation in Australia under the Carbon Pollution Reduction Scheme (CPRS). The paper examines the approaches taken in the US and in Europe and considers whether an emissions trading scheme is capable of effectively reducing greenhouse gas emissions.

The paper can be accessed at

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

### **10. New fuel efficient engines to be released**



Car manufacturers Ford and Holden have been investigating alternative options in car design to reduce carbon emissions. In Victoria, a joint project between the Brumby Labor Government, Melbourne University and several car manufacturers including Ford, has converted a normal car engine to hydrogen, resulting in almost zero carbon emissions from the vehicle. The EcoBoost engine is manufactured in

Geelong and can be used in Ford Falcon model vehicles that are already in circulation. Ford has invested \$230 million in the initiative.

In addition to this project, Holden has announced it will build an Australian-made, fuel efficient V6 engine for the Commodore car model. The engine has been designed to meet the needs of Australians who require a family-sized car but care about the environment and fuel consumption. The 3.0 litre V6 engine will be made in port Melbourne and will use Spark Ignition Direct Injection (SIDi) technology for the first time in Australia.

For more information on the Ford project, visit

<http://www.invest.vic.gov.au/240709FordAustralia230mgreenengineinitiative>, or for the Holden project visit <http://www.alp.org.au/media/0809/msiisr040.php>

### **11. 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.

## **12. 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](mailto:education@edo.org.au), or call 9262 6989. Requests from rural and regional groups in NSW will be given priority.