

GLOBAL WARMING, CLIMATE CHANGE AND THE COURTS

Justice Peter Biscoe
Land and Environment Court of New South Wales

Speech at Pittwater High School Solar Panel Project Luncheon

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1. Pittwater High School intends to create history by becoming the first school in Australia to be powered entirely by renewable energy from the sun's rays. Its project to achieve that object is to transform the roof of the school into a solar power station through some 1,000 solar panels. The project is called the Pittwater High School Solar Panel Project.
2. In undertaking this project, Pittwater High School and its community supporters have taken an active stand on the issue of global warming and climate change. They consider that the project will contribute to an ecologically sustainable future for the school's present and future students.
3. The project is an outstanding example of practical steps which can be taken to reduce reliance on fossil fuels. This is important because fossil fuels are not a sustainable resource and because burning of fossil fuels releases carbon dioxide, which most scientists consider is contributing to global warming.
4. "Global warming" refers to a well documented rise in global temperatures that has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Most scientists, including the United Nations Intergovernmental Panel on Climate Change, believe the two trends are related. This is because when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and preventing heat from the sun's rays escaping back into space.
5. The "greenhouse effect" is the name given to the natural build up of greenhouse gases in the lower atmosphere that prevent heat from the

sun's rays from escaping back into space. When the balance of greenhouse gases is disrupted, more heat is trapped and the earth gradually heats up. Such disruption has been caused, according to most scientific opinion, by the increase of human induced greenhouse gases in the atmosphere. The most important of the human induced greenhouse gases is carbon dioxide, through the burning of fossil fuels and land clearing.

6. Global warming presents climate change risks that threaten the survival of the human race and other species. They include risks of sea level rises, increases in the severity and frequency of storms, and coastal flooding. Those risks are particularly sobering for those who live along the Australian coastline. Pittwater residents are in that category.
7. Climate change and the risks it presents have been increasingly under public scrutiny for some years. No doubt that is because of growing scientific support for the existence and risks of climate change and its human induced causes. Ecologically sustainable development requires consideration of the risks presented by climate change and human induced causes. In many parts of the world legislatures and governments have started to respond to the risks.
8. In recent years, climate change cases, and other cases concerning ecologically sustainable development, have started to come before the courts. Some have concerned coastal developments and are, therefore, of particular significance for residents and developers in areas such as Pittwater.
9. For example, suppose that a developer wishes to develop, say, a retirement village or an apartment block next to the sea. Legislation requires approval to be obtained from a consent authority such as the local council or, in some cases, the Minister for Planning. Legal questions arise. Is the council or the Minister legally obliged to consider the risk of coastal flooding from climate change before giving approval? Will approval of the

development be legally void if they fail to do so? These are some of the questions that the courts have had to confront in recent years.

10. Such questions arose in a recent case in the Land and Environment Court, *Walker v Minister for Planning* [2007] NSWLEC 741. The case concerned the proposed development of a retirement village at Sandon Point, on the coastal plain just north of Wollongong. In 2006 the developers obtained concept plan approval for the development from the Minister for Planning under the provisions of the *Environmental Planning and Assessment Act 1979*. A concerned person, Ms Walker, with legal assistance from the Environmental Defender's Office, challenged the validity of the Minister's approval on a number of grounds. One of the grounds succeeded in the Land and Environment Court. The Court held that the Minister was obliged to consider whether the risk of coastal flooding from climate change was relevant to this flood constrained coastal plain project and, if so, to take it into consideration when deciding whether to approve the concept plan. As the Minister had not done so, the Minister's approval was declared to be legally invalid. That did not necessarily mean that the development could not go ahead. It meant that if the Minister was to give a valid concept plan approval for this development, then the Minister had to take into consideration climate change flood risk.

11. There was an appeal to the Court of Appeal. The appeal was decided two months ago: *Minister for Planning v Walker* [2008] NSWCA 224. The Court of Appeal had not previously had to consider a case concerning ecologically sustainable development, or climate change in particular. The Court of Appeal disagreed with the decision of the Land and Environment Court. They did not think that the Minister was obliged to consider the principles of ecologically sustainable development, including climate change flood risk, when he gave concept plan approval for the coastal development in 2006. Nevertheless, a majority in the Court of Appeal said five things which recognised ecologically sustainable development and climate change risk as legal considerations and which went quite close to supporting the essential approach of the Land and Environment Court.

First, they said that in future the principles of ecologically sustainable development were likely to come to be seen as so plainly an element of the public interest, that failure by the Minister to consider those principles would be capable of invalidating the Minister's decisions. This seems to suggest that the principle of ecologically sustainable development is evolving to a point where, in the future, it would be a mandatory legal consideration in such decisions. It suggests that if the Minister gave concept plan approval for the Sandon Point development in, perhaps, 2009 rather than in 2006, the approval would likely be invalid if the Minister did not consider the effect of climate change flood risk.

Second, they agreed that the Minister had in fact failed to consider the principles of ecologically sustainable development by not considering the effect of climate change flood risk.

Third, they said they were surprised and disturbed that the Department of Planning's report to the Minister on the Sandon Point development did not address climate change flood risk and that the Minister did not postpone his decision until he had a report that did so.

Fourth, since climate change flood risk was not addressed by the Minister in giving his approval for the concept plan, they said that it would need to be addressed when subsequent development approval was sought.

Fifth, they said that approval of the concept plan did not resolve those matters in favour of the development and would carry no weight when the consent authority later had to consider whether approval should be given to a development application.

12. Ms Walker, the concerned person who brought those proceedings, is not satisfied with the decision of the Court of Appeal. Again with legal assistance from the Environmental Defender's Office, she is at the moment seeking special leave to appeal to the High Court of Australia, the nation's

highest court. If leave is granted, it will be the first occasion that the High Court has had to consider the issue of climate change.

13. The case is an example of what is happening in the courts on the subject of ecologically sustainable development, including climate change.
14. Pittwater High's solar panel project is a good example of what is happening in the community on that subject. Pittwater High's stand on the issue of global warming and climate change through this solar school project is particularly significant because it will establish a precedent and is likely to encourage similar projects elsewhere, for the good of the planet.