

THE CENTRE FOR POLICY DEVELOPMENT
AND
THE FUTURE BUSINESS COUNCIL

“Climate Change and Directors’ Duties”

MEMORANDUM OF OPINION

7 October 2016

MINTER ELLISON, Solicitors
of: Level 23, Rialto Towers
525 Collins Street, MELBOURNE 3000

Mr Noel Hutley SC

and

Mr Sebastian Hartford-Davis

Memorandum of Opinion

1. We are asked to provide our opinion on the extent to which the law permits or requires Australian company directors to respond to “climate change risks”. We provide this memorandum specifically for the purposes of the business roundtable to be hosted by the Centre for Policy Development and the Future Business Council on 21 October 2016 in Melbourne. We should not be understood as providing legal advice tailored to any particular individual director, company, sector or circumstance.
2. There are many legal and equitable principles, and legislative provisions, that regulate directors, which might have been relevant to this topic. For practical reasons, it was necessary to confine the scope of this memorandum in a way that would be constructive for the purpose of the roundtable. Accordingly, in this memorandum we discuss only the “duty of care and diligence” imposed upon company directors by s 180(1) of the *Corporations Act 2001* (Cth) (“**the Act**”). The duty of care and diligence is one of the primary duties of a director, both at general law and under the Act, and it can be expected to feature in any future climate-related litigation against company directors.
3. For the reasons that follow, our opinion is that, as a matter of Australian law:
 - 3.1 “Climate change risks” (as defined below) are capable of representing, risks of harm to the interests of Australian companies, which would be regarded by a Court as being foreseeable at the present time.
 - 3.2 “Climate change risks” may be relevant to a director’s duty of care and diligence to the extent that those risks intersect with the interests of the company, for example in so far as they present corporate opportunity or foreseeable risks to the company or its business model.
 - 3.3 For the avoidance of doubt, company directors are certainly not legally prohibited from taking into account climate change and related economic, environmental and social sustainability risks, where those risks are, or may be, material to the interests of the company.

- 3.4 To the contrary, company directors certainly *can*, and in some cases *should* be considering the impact on their business of “climate change risks”.
- 3.5 It is conceivable that directors who fail to consider “climate change risks” now could be found liable for breaching their duty of care and diligence in the future.
4. Directors who do turn their minds to the impact of “climate change risks” on their business will need to form their own assessment and make their own decisions as to what action, if any, is to be taken. This is likely to include obtaining and relying upon information and advice provided by employees or experts.¹ Directors who are proactive in this regard, even if they decide on a properly informed and advised basis not to act, may have the protection of a statutory defence known as the “business judgment rule,” under s 180(2) of the Act.
5. Finally, whether or not they decide to act, directors who perceive that climate change does present risks to their business should also consider the adequacy of the disclosure of those risks within the company’s reporting frameworks.

Introductory Concepts

6. It is necessary to introduce four key definitional and legal concepts.
7. First, the expression “climate change risks” is used here to denote: first, the *physical risks* associated with rising aggregate global temperatures; and, second, the *transition risks* associated with developments that may (or may not) occur in the process of adjusting towards a lower-carbon economy. These categories of risk each give rise to tertiary risks, stemming from litigation including (relevantly for present purposes) liability for breach of directors’ duties. These categories are elaborated below.
8. Second, it is important to appreciate that the duty of care and diligence has *subjective* and *objective* features. The duty is imposed by s 180(1) of the Act, which provides as follows:

¹ *Corporations Act 2001* (Cth), s 189.

A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

(a) were a director or officer of a corporation in the corporation's circumstances; and

(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer. (our underlining)

9. The double-underlined words establish that the conduct of the director in question will be evaluated against an objective standard, namely what a reasonable person would have done in the subjective circumstances faced by that director, in that company.² Although the director's conduct is measured against that objective standard, the underlined words show that the statute also requires consideration of a range of individual factors, such as the size and nature of the company's business, and the director's individual position, skill and responsibilities, and all of the circumstances facing the director at the time.³
10. Third, it is essential to appreciate that a director's duty of care and diligence is owed *to the company*, meaning the corporate entity itself.⁴ That is important because it dictates the perspective from which directors must assess risks, including climate change risks. In some cases, the interest of the company will intersect with the interests of shareholders, employees and even creditors⁵ of the company and, accordingly, it will be appropriate and proper for a director to take those matters into account. Likewise, the interests of the company can include the physical environment in which it operates, and the regulatory regime in which it moves. In 1987, J.D. Heydon (later a Justice of the High Court of Australia) said:

² See generally *ASIC v Adler (No 1)* (2002) 168 FLR 253 at [372](4) per Santow J; *ASIC v Rich* (2009) 75 ACSR 1 at 623 [7242] per Austin J.

³ Other factors include; the type of company, the provisions of the company's constitution, the composition of the board of directors, the function that the director is performing, the experience or skills of the director, the terms on which he or she has undertaken to act as a director, the manner in which the responsibility for the business of the company is distributed between its directors and employees, and all the circumstances of the specific case in question: *ASIC v Maxwell* (2006) 59 ACSR 373 at 397 [100] per Brereton J.

⁴ *Vrisakis v ASC* (1993) 9 WAR 395 at 450 per Ipp J; see authorities collected in *ASIC v Cassimatis (No 8)* [2016] FCA 1023 at [467] per Edelman J.

“Our law perhaps goes less far than American in permitting consideration of such abstract matters as the national economic interest, the wishes of the government or the advancement of the environment. But if those matters had a link with the interests of the company they could be considered.”⁶

11. It follows that climate change risks can and should be considered by company directors, to the extent that those risks intersect with the interests of the company. This could occur in a number of ways, ranging from the emergence of a corporate opportunity to the perception of a foreseeable risk of harm. We have been asked to approach the topic from the perspective of risk, which is more likely to be the focus of litigation against a director, and elaborate the nature of these risks below. By way of example, however, physical risks could include (to take a recent example) power outages stemming from damage to energy infrastructure from extreme weather events. Transition risks, which are perhaps less well understood, might include loss of access to key inputs or outputs (such as water or waste disposal), the potential for alterations in the (currently supportive) regulatory environment, and reputational damage flowing from changing societal attitudes.
12. Fourth, it is important to emphasise relevant aspects of the reporting framework erected by the Act. Listed reporting companies are required to prepare and lodge a “financial report and a directors’ report” each financial year (s 292(2)).⁷ If the company’s operations are subject to any particular and significant environmental regulation, the directors’ report is required to give details of the company’s performance in relation to that regulation (s 299(1)(f)). The ASX Listing Rules require companies to include within their annual report a “corporate governance statement,” disclosing the extent to which the company has followed recommendations set by the ASX Corporate Governance Council during the reporting period.⁸ Importantly for present purposes, the ASX has issued a Guidance Note recommending that a *“listed entity should disclose whether it has any material exposure to economic, environmental and social sustainability risks*

⁶ Justice Hayne has written an important paper on this topic: K.M. Hayne, “Directors’ Duties and a Company’s Creditors” (2014) 38(2) Melbourne University Law Review 795.

⁷ J.D. Heydon, “Directors’ Duties and the Company’s Interests” in P.D. Finn (ed), *Equity and Commercial Relationships* (Lawbook, 1987), p.136.

⁸ *Corporations Act 2001* (Cth), s 292(1).

⁹ ASX Listing Rules, rule 4.10.3; available online at <http://www.asx.com.au/regulation/rules/asx-listing-rules.htm>.

and, if it does, how it manages or intends to manage those risks”.⁹ If the company does not include such a disclosure, then the ASX Listing Rules require the company to “state its reasons for not following the recommendation and what (if any) alternative governance practices it adopted in lieu of the recommendation during that period.” The Listing Rules have statutory recognition, and the Court has jurisdiction to make orders about compliance with them.¹⁰ It is also worth bearing in mind that annual reports constitute and contain representations, which will often become the focus of allegations of misleading and deceptive conduct in company litigation. It is well established that non-disclosure of material information can, depending on the circumstances, constitute misleading and deceptive conduct.¹¹

13. We have observed significant variation in the approach of Australian companies to the disclosure of climate change and other sustainability risks within annual reports. This includes variation between companies operating in the same sector, despite (one would have thought) objective similarity in the risk exposure within that sector. Australia's four major banks, for example, have taken different approaches to carbon risk disclosure.¹²

The Foreseeability of Climate Change Risks

14. Having introduced those concepts, we now seek to explain our opinion that the different categories of “climate change risks” would be regarded by a Court as being “foreseeable” at the present point of time. Legally, this is important because the degree of care and diligence required of a director in any given context will depend upon the “nature and extent of the foreseeable risk of harm to the company that would otherwise arise”.¹³ Whilst it is not necessary for a plaintiff to prove any actual

⁹ ASX Guidance Note 9, “Disclosure of Corporate Governance Practices” (July 2014), p. 5.

¹⁰ The ASX Listing Rules have statutory recognition in the *Securities Industry Act 1980* (Cth), ss 14 and 42; and the *Corporations Act 2001* (Cth), ss 1101B and 793C; see *AI Insurances Ltd v Pioneer Concrete Services Ltd (No 2)* (1986) 10 ACLR 801 at 806 per Street CJ, stating that the provisions of the *Securities Industry Act* conferred upon the court “jurisdiction to underwrite the binding nature of the stock exchange rules.”

¹¹ See generally *Demagogue Pty Ltd v Ramensky & Anor* (1992) 39 FCR 31 at 32 and 41; and *Rafferty v Madgwicks* (2012) 287 ALR 437 at [277]-[278].

¹² See Australian Council of Superannuation Investors, “Submission to Inquiry of the Australian Senate Economics Legislation Committee into Carbon Risk Disclosure” (April 2016), p. 8.

¹³ *Vrisakis v ASC* (1993) 9 WAR 395 at 449-450 per Ipp J; *Vines v ASIC* (2007) 73 NSWLR 451 at 603 [814] per Ipp JA; *ASIC v Doyle* (2001) 38 ACSR 606 at 641.

loss to the company as a result of the materialisation of these risks,¹⁴ still it is necessary for a plaintiff to prove that the directors' conduct involved or took place against a background of foreseeable risk. A risk is "foreseeable" if it is not "far-fetched or fanciful".¹⁵ The cases confirm that *foreseeability* in this sense is different from *probability*: a risk that is quite unlikely to occur may nevertheless be foreseeable.

Physical Risks

15. It is now well understood that climate change will result in a greater frequency and severity of weather events, including flooding and rising sea levels, which have the capacity to damage property and disrupt trade. These risks are global, albeit they will be felt in different ways in different localities. While it may not be possible, at least presently, to prove that a given weather event is attributable to a given source of greenhouse gas emissions, nor even to prove that a given weather event is attributable to (or more severe because of) human-induced climate change, directors can and should have evidence of forward planning to deal with an overall increase in frequency and severity of weather events and flooding.
16. The Garnaut Review found that Australia is particularly exposed to the physical risks of climate change; as an already hot and dry country, in a region containing developing economies in weaker positions to adapt to climate change, and with terms of trade that would be damaged more than those of any other developed country.¹⁶ The CSIRO and the Bureau of Meteorology have observed an increase in average surface air temperature in Australia of 0.9°C since 1910.¹⁷ This has been linked to increasingly frequent and intense heatwaves, and changing rainfall patterns observed in recent years.¹⁸ Incidentally, the month of August 2016 was the sixteenth straight month in which record mean temperatures were set, globally.¹⁹

¹⁴ *ASIC v Rich* (2009) 75 ACSR 1 at 611-612 [7193] per Austin J.

¹⁵ *Council of the Shire of Wyong v Shirt* (1980) 146 CLR 40 at 47-48 per Mason J; *ASIC v Rich* (2009) 75 ACSR 1 at 621 [7231] per Austin J.

¹⁶ Ross Garnaut, *The Garnaut Climate Change Review: Final Report* (2008, Cambridge University Press), p. xix.

¹⁷ CSIRO and Bureau of Meteorology 2015, *Climate Change in Australia: Information for Australia's Natural Resource Management Regions: Technical Report* (2015), p.6.

¹⁸ See The Climate Institute, "Australia's Financial System and Climate Risk: Discussion Paper" (July, 2015), p. 1.

¹⁹ National Oceanic and Atmospheric Administration, "Global Analysis – August 2016", accessed online at <http://www.ncdc.noaa.gov/sotc/global/201608> on 28 September 2016.

17. Modelling undertaken as part of the Garnaut Review in 2008 suggested that, if we experience temperature increases in Australia beyond 2°C, it is possible that the following impacts might be felt in Australia:
 - 17.1 the large majority of agricultural production in the Murray Darling Basin will cease;
 - 17.2 catastrophic destruction of the Great Barrier Reef, with correlative impact on tourism;
 - 17.3 a significant increase in the cost of supplying urban water;
 - 17.4 a significant increase in health-related deaths, and increased incidence of vector-borne disease; and
 - 17.5 major dislocation in coastal megacities of south Asia, south-east Asia and China, and displacement of people in islands adjacent to Australia.²⁰
18. The gravity of these risks is readily apparent. Their capacity to impact the interests of a given company is a matter that falls to be assessed on a case by case basis.
19. Unlike the United States, we do not yet speak in Australia in terms of "climate change litigation". Even so, the physical risks of climate change do generate litigation. For example, the 2011 flooding in Queensland (which many in the media associate with climate change) caused widespread loss and has generated class action litigation. This might be called a "climate change case", or the manifestation of a "climate change risk", but the litigation is focused on the alleged professional negligence of flood engineers, who failed to ensure sufficient flood storage capacity in Lake Somerset and Lake Wivenhoe dams.²¹ The case is *not* being run against whichever person caused the emissions, which arguably caused the stronger La Nina patterns, which arguably intensified the monsoon rains, which then caused the flooding. Merely to state the necessary links in the chain of causation shows the difficulties that would face the plaintiffs in such a case. Perhaps, one day, the

²⁰ See Climate Works Australia, "Pathways to Deep Decarbonisation in 2050: How Australia can Prosper in a Low Carbon World" (Initial Project Report, 2014), p.8.

science will advance sufficiently to permit a claim of this nature. In the meantime, however, cases are likely to be fought along more familiar lines: negligence for failing to foresee, adapt or mitigate certain *effects* of climate change.

20. It is in respect of these risks that directors should be vigilant. It is true that the causality of weather events is inexact, and the policy shifts in recent years concerning climate change regulation make the future difficult to predict. These matters can tend to distract attention from the ways in which physical and transition risks actually come home to roost for an individual company and its board. If the country is to experience more frequent and more severe storms, for example, of the type that might cause flooding or power outages, then directors of companies exposed to such risks should be considering them regardless of whether or not they are perceived to be brought about by climate change, and regardless of the regulatory outlook. In this sense, “climate change” has the capacity to be a distracting label. The question is really whether there is foreseeable risk to the interests of a company.
21. Insurance is an obvious example of a business that must confront the physical risks of climate change. The Governor of the Bank of England has recently observed that insurers are “on the front line”²² in this regard. There is evidence that weather related payouts have dramatically increased in recent years,²³ and that the industry is taking climate change very seriously. In our opinion, a director of an insurance company would have a duty to consider the impact of increased incidents of extreme weather events upon the business of the company, and to ensure that this was being addressed at a granular level by updating models and adjusting coverage prudently. We have no doubt that many insurers are already doing so.
22. Another prominent example is the energy sector. At the time of finalizing this opinion, multiple weather events (including destructive wind gusts, severe thunder

²¹ *Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority trading as Seqwater*. - The third amended statement of claim can be viewed at: <http://www.imf.com.au/docs/default-source/site-documents/third-amended-statement-of-claim.pdf?sfvrsn=4>.

²² Mark Carney, “Resolving the Climate Paradox”, Arthur Burns Memorial Lecture, Berlin, 22 September 2016, p. 2, accessed online at <http://www.bankofengland.co.uk/publications/Documents/speeches/2016/speech923.pdf> on 6 October 2016.

²³ See Bank of England Prudential Regulation Authority, “The impact of climate change on the UK insurance sector” (September 2015), p.5 [1.10].

storms, and 80,000 lightning strikes) had caused power outages across the entire State of South Australia. Directors may have a duty to assess the ability of their company to deal with increasing incidences of such events, particularly companies whose operations depend significantly on energy transmission. Failure to do so may lead to exposure to shareholders and to others who suffer loss as a result of outages, for example.

23. A final example concerns planning or other regulatory approvals involving environmental decision-making. It is established in Australian law that greenhouse gas emissions and climate change can be relevant to environmental decision-making,²⁴ subject always to the provisions of the statute authorizing the approval. This is capable of affecting a range of companies, from those seeking approvals for residential developments to those seeking approvals for mining operations. A recent example is the Alpha Coal Project in the Galilee Basin, in Queensland.²⁵ An objection was made to the mining lease and environmental authority granted in respect of that Project, on the basis that environmentally harmful emissions (termed “**scope 3 emissions**”) would result from the transportation and burning of the coal after it was removed from the proposed mine. Litigation ensued, and the challenge to the approvals was ultimately rejected. This is a positive outcome for the company. But the approvals were a threshold requirement for doing business, and it was plainly foreseeable that the approvals might be declined, or significantly delayed – perhaps on environmental grounds. This is something that a director is likely to have a duty to consider.
24. Incidentally, the scope 3 emissions were found by the Land Court in the Alpha Mine case to be “*real and of concern*”. The challenge to the lease and authority was rejected, principally because the evidence in the case established that thermal coal “*was plentiful and cheaply available*”, such that the power stations “*would burn the same amount of thermal coal and produce the same amount of greenhouse gases whether or not the proposed Alpha Mine proceeded.*”²⁶ It followed that, if the mine

²⁴ See the summary in *Walker v Minister for Planning* [2007] NSWLEC 741 at [69]-[119] per Biscoe J; and, on appeal, *Minister for Planning v Walker* [2008] NSWCA 224 at [43]-[44] and [55]-[56] per Hodgson JA, with whom Campbell JA at [65] and Bell JA at [66] agreed.

²⁵ *Coast and Country Association of Queensland Inc v Smith & Ors* [2016] QCA 242.

²⁶ *Coast and Country Association of Queensland Inc v Smith & Ors* [2016] QCA 242 at [18] per Fraser JA, summarising the findings of the Land Court.

did proceed, it would not increase the amount of global greenhouse gases or any environmental impact resulting from those gases.²⁷ Whatever else one might think about this decision, which should be assessed against the particular legislative framework it involved, it does illustrate that climate change is a collective action problem.

Transition Risks

25. Transition risks constitute the indirect financial risks that might arise from a transition (which may not occur, or may occur in unpredictable ways) to a lower-carbon economy. Changes in regulatory policy, technological innovation (e.g. advances in energy storage or efficiency), social adaptation (including changing consumer preferences) and physical risks might each contribute to events or circumstances requiring reassessment of the value of assets, costs and opportunities. In these ways, climate change can present foreseeable risks to businesses.
26. At the moment, the regulatory environment in Australia would appear to be insufficient to meet the commitments made at the Paris climate change conference in December 2015.²⁸ The “core” of the Federal Government’s present approach is the “Emissions Reduction Fund”, which involves funding (either crediting or purchasing) to incentivise emissions reduction, and establishes a “Safeguard Mechanism” administered by the Clean Energy Regulator, which requires certain facilities to stay below specified baseline emissions.²⁹ The “Safeguard Mechanism” commenced on 1 July 2016, and derives legislative support from the *National Greenhouse and Energy Reporting Act 2007* (Cth). That Act imposes reporting

²⁷ *Coast and Country Association of Queensland Inc v Smith & Ors* [2016] QCA 242 at [45] per Fraser JA, summarising the findings of the Land Court. The Court of Appeal dismissed the appeal, essentially on the basis that these findings were available on the evidence and not amenable to judicial review: see [20], [42]-[45] and [48]-[49] per Fraser JA, with whom Margaret McMurdo P at [1] and Morrison JA at [51] agreed.

²⁸ United Nations Framework Convention on Climate Change (UNFCCC), Twenty-first session of the Conference of Parties, Paris, France, 30 November to 11 December 2015. See, further, UNFCCC, Report of the Conference of the Parties on its twenty-first session, 29 January 2016, accessed online at <http://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf> on 6 October 2016 (hereafter, “Paris Agreement”).

²⁹ Australia’s main emissions reduction policies are summarised in Climate Change Authority, “Towards a Climate Policy Toolkit: Special Review on Australia’s Climate Goals and Policies” (August, 2016), Table 4 on p.45-47.

obligations on certain emitters, though it does impose sanctions for failure to discharge those reporting obligations (including on CEOs).³⁰

27. The Paris Agreement will enter into force on 4 November 2016.³¹ Mark Carney, Governor of the Bank of England and Chair of the Financial Stability Board, has stated that this Agreement “brings forward the horizon” and “greatly increases transition risks as well as opportunities”.³² The Agreement involves a resolution by all parties to hold the increase in the global average temperature to “well below 2°C above pre-industrial levels”.³³ This creates the prospect of a future increase in efforts to curb emissions. It is obvious that, if the emission reduction targets are going to be achieved, there will be a major process of transition, presenting risks (as well as opportunities) to businesses. Further and more ambitious targets are likely to be set as part of the Paris Agreement’s ratcheting and review mechanisms.
28. As part of the Paris Agreement, the Australian government committed to reducing emissions by 26-28% below 2005 levels by 2030, and has acknowledged that this will involve “real economic effort” including halving our emissions per person, and reducing by two-thirds “the emissions intensity of our economy”.³⁴ In August 2016, the Commonwealth Government’s Climate Change Authority published a Special Review³⁵ on current and future regulation. The Authority concluded that, to meet Australia’s emissions reduction goals, emissions will need to decline more steeply in coming years than they have in the past.³⁶ Key new measures were proposed, including an “emissions intensity scheme” specifically to reduce electricity sector emissions. The Commonwealth Government has indicated that it will take stock of its climate change policies in 2017. A change in the regulatory environment is certainly foreseeable, and probably inevitable.

³⁰ See NGER, “Complying with NGER”, July 2016, accessed online at <http://www.cleanenergyregulator.gov.au/NGER/Reporting-cycle/Complying-with-NGER> on 6 October 2016.

³¹ UNFCCC, “Paris Agreement – Status of Ratification”, accessed online at http://unfccc.int/paris_agreement/items/9444.php on 6 October 2016.

³² Mark Carney, “Resolving the Climate Paradox”, Arthur Burns Memorial Lecture, Berlin, 22 September 2016, p. 2.

³³ Paris Agreement, Article 2(1)(a).

³⁴ Department of Environment, “Plan for a Cleaner Environment” (Commonwealth of Australia, 2015), p. 5.

³⁵ Climate Change Authority, “Towards a Climate Policy Toolkit: Special Review on Australia’s Climate Goals and Policies” (August, 2016).

³⁶ *ibid*, p.49.

29. The prospect of regulatory change presents clear and potent risks for energy-intensive businesses, both producers and transmitters, and those industries that consume a large amount of energy in the conduct of their operations. That is because the effort to reduce Australia's emissions will necessarily focus on the energy sector. The energy sector dominates Australia's emissions profile, comprising 77% of national emissions in 2014.³⁷ The International Monetary Fund has stated recently that, if the Paris Agreement is to be successfully implemented, it will likely to require "a radical transformation of the global energy system over coming decades".³⁸ The International Energy Agency has proposed four energy policies to "keep the 2°C target alive", one of which would involve the global use subcritical coal-fired power plants being one-quarter lower than would otherwise be expected in 2020.³⁹ It has been suggested in the media that nearly 10% of those generators are in Australia,⁴⁰ where 89% of the total fleet of coal-fired power stations are subcritical. So far, all that has been proposed is an emissions intensity scheme, which involves setting an emissions intensity baseline for each industry (eg. in terms of tonnes of carbon dioxide per megawatt hour of electricity produced) and requiring liable firms to pay a cost for emissions above their target emissions intensity. The impact of such a scheme is something that directors of impacted businesses will have a duty to consider.
30. A related risk is the prospect for regulatory change in jurisdictions that are major trading partners. The resource extraction industry has obvious exposure in this regard: 97% of metallurgical coal, 71% of thermal coal and 50% of gas extracted annually in Australia is exported – coal exports alone represent 11.9% of total goods and services trading.⁴¹ It follows that the sector, indeed the entire Australian economy, is exposed to fluctuations in international demand for these commodities,

³⁷ Climate Change Authority, "Towards a Climate Policy Toolkit: Special Review on Australia's Climate Goals and Policies" (August, 2016), p.42.

³⁸ International Monetary Fund, "Climate, Environment and the IMF: Factsheet" (March, 2016), p.1.

³⁹ International Energy Agency, "Redrawing the Energy-Climate Map: World Energy Outlook Special Report" (June, 2013), p.10.

⁴⁰ Lucy Cormack, "Australia's subcritical coal-fired power stations proving risky for investors", 27 March 2015, accessed online at <http://www.smh.com.au/environment/australias-subcritical-coalfired-power-stations-proving-risky-for-investors-20150326-1m8j7t.html> on 14 August 2016.

⁴¹ Australian Government Department of Foreign Affairs and Trade, "Australia's top 25 exports, goods and services, 2014-15" (2016).

as well as changes in markets and policies. The Paris Agreement, which is expected to lead to a reduction in the demand for fossil fuels, was signed by Australia's major trading partners for coal and LNG exports (Japan, China, India, Korea and Taiwan). This presents clear financial risks, and we note that Woodside Petroleum Ltd, in its "Sustainable Development Report 2015" (approved by the board of directors on 18 March 2016) has disclosed that it regards itself as *"exposed to the economic risks and opportunities of an accelerated transition by countries to being lower carbon emitters, uncertainty surrounding future regulatory and policy frameworks, and increasing social pressure for action on climate change"* (emphasis added) (p.20).

31. As the underlined words recognize, there are also risks presented by the possibility of shifts in investor or consumer behaviour and preferences, including due to potential reputational damage associated with poor sustainability practices. In a recent case, Edelman J of the Federal Court of Australia suggested that reputational damage might constitute harm to the interests of a company, relevantly for the duty of care and diligence.⁴² Surveys and studies of consumer purchasing intentions and behaviour point to growing preferences for sustainability-conscious brands and products.⁴³ The same is true of institutional investors. Globally, sustainability-motivated divestment commitments by institutional investors have accelerated rapidly, with total commitments rising from US\$50 billion of managed assets in 2014 to US\$3.5 trillion at the end of 2015.⁴⁴ In 2015, Norway's sovereign wealth fund divested most of its holdings in coal mining companies, and BlackRock Investment Institute has just announced that investors "can no longer ignore climate change."⁴⁵ At the extreme, these trends raise the prospect of investor, customer and community abandonment of companies that fail to mitigate exposures to climate change risks. They also raise the prospect of increased political momentum and accelerated regulatory transition. This is something that directors of consumer and investor-facing businesses whose operations are carbon intensive may have a duty to consider.

⁴² *ASIC v Cassimatis (No 8)* [2016] FCA 1023 at [481]-[483] per Edelman J.

⁴³ Neilson, "The Sustainability Imperative", 10 December 2015, accessed online at <<http://www.nielsen.com/au/en/insights/reports/2015/the-sustainability-imperative.html>> on 6 October 2016.

⁴⁴ 350.org, "2015 Annual Report" (2015), Fossil Fuel Divestment + Reinvestment, accessed online at <https://350.org/2015-annual-report/> on 5 October 2016.

32. An important subset of climate change literature concerns “stranded assets”. In the longer term, some scientists think that, if the Paris Agreement is to be achieved, only 20% of the Earth’s known fossil fuel reserves can be burned before 2050.⁴⁶ This may mean that significant reserves of fossil fuels will need to be transferred from the asset to the liability side of a company’s balance sheet. We were briefed with an investment report from Schroder’s, suggesting that the majority of assets for listed fossil fuel companies could not be burnt, and should be recognized as a liabilities (ie “stranded assets”).⁴⁷ There is research suggesting that Australia faces acute risks in this regard.⁴⁸ This is something that directors of funds management and investment businesses, as well as companies owning such assets, may have a duty to consider.
33. These examples are not exhaustive and are, necessarily, both highly generalized and abstract. Nevertheless, they are useful because they illustrate that the physical and transition risks associated with climate change are widely publicized, thoroughly researched and profound in the gravity of their consequences. As noted above, the legal test for whether a risk is “foreseeable” requires only that it not be “farfetched or fanciful”. In our opinion, the risks we have outlined above would not be regarded by a Court as “farfetched or fanciful”.
34. It would be difficult for a director to escape liability for a foreseeable risk of harm to the company on the basis that he or she did not believe in the reality of climate change, or indeed that climate change is human-induced. The Court will ask whether the director *should have known* of the danger.⁴⁹ This would involve an assessment the conduct of the individual against the standard of a reasonable person, by reference to the prevailing state of knowledge as publicized at the time. The law has often had to deal with liability for negligence in the context of rapidly developing science. At one time, for example, knowledge was such that an employee could be exposed to asbestos without negligence,⁵⁰ or a patient could be

⁴⁵ BlackRock, “Adapting Portfolios to Climate Change” (September 2016).

⁴⁶ The Climate Institute, “Australia’s Financial System and Climate Risk: Discussion Paper” (July, 2015), p.4.

⁴⁷ Schrodgers, “Responding to Climate Change Risk in Portfolio Management” (February, 2015), p.1.

⁴⁸ Carbon Tracker, “The \$2 trillion stranded assets danger zone: How fossil fuel firms risk destroying investor returns” (2015), available at: www.carbontracker.org/report/stranded-assets-danger-zone/.

⁴⁹ *ASIC v Rich* (2009) 75 ACSR 1 at 622 [7237] per Austin J

⁵⁰ Eg *Western Australia v Watson* [1990] WAR 248.

infected with HIV through an unsafe intravenous blood transfusions.⁵¹ At a certain point, however, ignorant defendants became liable for those risks on the basis that a reasonable person would have known if them. When it comes to climate change, the science has been ventilated with sufficient publicity to deduce that this point has already passed.

What does the duty require?

35. We cannot offer any guidance in the abstract on the circumstances of a particular director or company, or even sector. However, at a general level, our opinion is that directors are well advised at least to *consider* the possible effect of “climate change risks” on their business.
36. The duty of care and diligence obliges a director to *obtain* knowledge, sufficiently to place themselves in a position to guide and monitor the management of the company.⁵² This has been described as a “*core, irreducible requirement*”.⁵³ Directors must become familiar with the fundamentals of the business in which the company is engaged, and are under a continuing obligation to keep informed about its activities and “*the effect that a changing economy may have on [its] business*.”⁵⁴ As the NSW Court of Appeal has said, a director cannot “*safely proceed on the basis that ignorance and a failure to inquire are a protection against liability for negligence*.”⁵⁵
37. Accordingly, directors should consider and, if it seems appropriate, take steps to inform themselves about climate-related risks to their business, when and how those risks might materialize, whether they will impact the business adversely or favorably, whether there is anything to be done to alter the risk, and otherwise to consider how the consequences of the risk can be met. In complex situations requiring specialist knowledge, a director is permitted to and should seek out expert or professional advice pursuant to s 189 of the Act.⁵⁶

⁵¹ Eg *H v The Royal Alexandra Hospital for Children* (1990) Aust Torts Reports 81-000.

⁵² *Daniels v Anderson* (1995) 37 NSWLR 438 at 495-505 per Clarke JA and Sheller JA.

⁵³ *ASIC v Healey* (2011) 196 FCR 291 at 298 [16] per Middleton J.

⁵⁴ *AWA Ltd v Daniels (t/a Deloitte Haskins & Sells)* (1992) 7 ACSR 759 at 864, Rogers CJ at CL; see also *Trilogy Funds Management Ltd v Sullivan (No 2)* (2015) 331 ALR 185 at [203] per Wigney J.

⁵⁵ *Daniels v Anderson* (1995) 37 NSWLR 438 at 502 per Clarke and Sheller JJA.

⁵⁶ See also *AWA Ltd v Daniels* (1992) 7 ACSR 759 at 865 per Rogers CJ at CL.

38. In some cases, the duty of care and diligence will require a director to go further than merely to consider the risks. Some further action may be required. This is not to say, for example, that all coal mining companies should immediately desist from their activities (though we note a recent prediction that the entire coal industry would not survive an effective implementation of the Paris Agreement).⁵⁷ In determining whether the duty of care and diligence has been breached, the Court will engage in an exercise (which is, in effect, expected of a reasonable director) of balancing the foreseeable risk of harm to the company against the potential benefits that might accrue to the company from the activity or conduct in question.⁵⁸ The Court's balancing exercise will involve consideration of factors such as the magnitude of the risk, the degree of probability of its occurrence, the expense, difficulty and inconvenience of taking alleviating action, and any other conflicting responsibilities which the director may have.⁵⁹ That exercise will be done by reference to the facts as established by evidence.
39. Directors who conduct the balancing exercise themselves, and who act (or decline to act) based upon a rational and informed assessment of the company's best interests, may then have the protection of the "business judgment rule".⁶⁰ This statutory defence protects management decisions, provided certain preconditions are satisfied. One precondition is that the director or officer must have informed themselves about the subject-matter of the judgment, to the extent they reasonably believe to be appropriate. Other preconditions are that the director: is acting in good faith and for a proper purpose, has no material personal interest in the subject matter of the judgment, and rationally believes "that the judgment is in the best interests of the corporation."
40. If these preconditions are satisfied, then the director will be protected in respect of "any decision to take or not take action in respect of a matter relevant to the

⁵⁷ Grant King, former CEO of Origin Energy, has said that the emissions targets agreed by Australia in Paris will "necessarily lead to the end of coal fired energy generation" in Australia: see Crawford Australian Leadership Forum, 22 June 2016, accessed online at <http://www.anu.edu.au/news/all-news/does-paris-spell-the-end-of-coal-power-in-australia> on 5 October 2016.

⁵⁸ *Vrisakis v ASC* (1993) 9 WAR 395 at 449-450 per Ipp J; *ASIC v Rich* (2009) 75 ACSR 1 at 612 [7193] per Austin J.

⁵⁹ *ASIC v Vines* (2005) 55 ACSR 617 at 859 [1070] per Austin J, applying the test stated for the law of negligence by Mason J in *Council of the Shire of Wyong v Shirt* (1980) 146 CLR 40 at 46-48.

⁶⁰ A "business judgment" is "any decision to take or not take action in respect of a matter relevant to the business operations of the corporation": s 180(3) of the *Corporations Act 2001* (Cth).

business operations of the corporation” (s 180(3)). The underlined words show that the defence is capable of protecting a decision to do nothing about climate change. The drafting is also broad enough to protect a decision actively to campaign against climate regulation, which would be beneficial for the environment but harmful for the “interests of the company”. The defence has been applied to a decision to initiate a takeover bid and make a related market announcement,⁶¹ and also to the implementation of a particular business plan approved by the board of directors.⁶² The defence will cover major strategic decisions, and also background decisions taken for example in planning, budgeting and forecasting.⁶³

41. However, the defence will not protect directors who are uninformed, who make no conscious decision, or who exercise no judgment.⁶⁴ The director bears the onus of proof in relation to the defence.⁶⁵ It is important to note that proceedings may be commenced within 6 years of an alleged contravention.⁶⁶

Disclosure Frameworks

42. Regardless of whether any action is taken, directors who determine that climate change does pose risks to their business should also consider the degree to which those risks are disclosed by the company. In effect, as we have explained at [12] above, this is required by the ASX Listing Rules.
43. An aspect of the duty of care and diligence is that directors are required to be diligent and careful in their consideration of the resolution to approve the company’s accounts and reports.⁶⁷ The Act requires a director to declare that, in the directors’ opinion, the financial statements and notes give a true and fair view of the financial position and performance of the company.⁶⁸ As noted above, such declarations are often the focus of misleading and deceptive conduct cases. The directors’ report is also required to contain information that shareholders would reasonably require, for

⁶¹ *ASIC v Mariner Corporation Ltd* (2015) 106 ACSR 343.

⁶² *ASIC v Rich* (2009) 75 ACSR 1.

⁶³ *ASIC v Rich* (2009) 75 ACSR 1 at 634 [7280] per Austin J.

⁶⁴ *ASIC v Rich* (2009) 75 ACSR 1 at 633 [7277] per Austin J.

⁶⁵ *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364 at [197] per Keane CJ.

⁶⁶ *Corporations Act 2001* (Cth), s 1317K.

⁶⁷ *ASIC v Healey* (2011) 196 FCR 291 at 336 [188](a) per Middleton J.

⁶⁸ *Corporations Act 2001* (Cth), ss 295(4) and 297.

example, to make an informed assessment of the business strategies and prospects of the business for future financial years, including on company performance in relation to environmental regulation.⁶⁹

44. Risk disclosure is an important aspect of this framework. The ASX Corporate Governance Council's 2014 recommendation is that companies should disclose "*material exposure to economic, environmental and social sustainability risks*" and how the company manage or intend to manage such risks. The Guideline defines "environmental sustainability" as "*the ability of a listed entity to continue operating in a manner that does not compromise the health of the ecosystems in which it operates over the long term.*" Economic sustainability is defined as the ability "*to continue operating at a particular level of economic production over the long term*". Social sustainability is defined as the ability "*to continue operating in a manner that meets accepted social norms and needs over the long term*". Material exposure is defined as "*a real possibility that the risk in question could substantively impact the listed entity's ability to create or preserve value for security holders over the short, medium or long term*".⁷⁰
45. The failure of climate change mitigation and adaption is perceived today (by a group of 750 experts and decision-makers in the World Economic Forum's multi-stakeholder communities) as the most impactful global risk to face the world over a 10-year time horizon.⁷¹ Despite this, there is significant variation in the approach adopted by ASX-listed Australian companies towards disclosure of "climate change risks".⁷²
46. The 2015 annual reports of prominent Australian companies reveal a range of disclosure practices. At one end of the scale were companies including Woodside Petroleum Ltd, Rio Tinto, and BHP Billiton Limited. Woodside disclosed that they are "*modelling the impact of climate change action on our business*", and that failure "*to manage this risk has the potential to increase costs, delay future projects, and*

⁶⁹ Corporations Act 2001 (Cth), ss 299A and 299(1)(f).

⁷⁰ ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (3rd edition, 2014), pp.30, 37-38, accessed online at <http://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf> on 6 October 2016.

⁷¹ World Economic Forum, *The Global Risks Report 2016* (11th ed), [3.51].

lead to poor investment decisions.”⁷³ The Chairman of Rio Tinto, in his letter to shareholders, said: “we are building climate change related metrics into our planning, risk and investment decisions.” A section of Rio Tinto’s 2015 annual report entitled “Sustainable Development” states that “[c]arbon policy and regulation have the potential to affect our businesses in the short and long term” (p.26). BHP Billiton’s 2015 Annual Report uses the term “climate change” 78 times, including a statement in the Chairman’s letter (p.3) that responding to climate change “remains a priority governance and strategic issue for BHP Billiton in the context of the transformational changes now underway in the global energy market”. The section of BHP’s report dealing with risk (p.34) contains a statement that the “physical and non-physical impacts of climate change may affect our operations, productivity and the markets in which we sell our products.” This is said to include “acute and chronic changes in weather” and “policy and regulatory change”.

47. At the other end of the scale, there were many prominent Australian companies, operating within the manufacturing, transport, and agricultural sectors, which did not disclose the same degree (or any) exposure to climate change risk, or disclosed a scale or type of risks that were inconsistent with those of other companies operating within similar environments. There is little utility in us naming those companies here. They included major emitters (e.g. coal mining companies), companies dependent upon major emitters (e.g. airlines), and companies with lending exposure to major emitters (i.e. banks).
48. KPMG conducted a review of ASX listed companies’ reporting practices in relation to sustainability risks, and concluded that there was “considerable room for improvement”.⁷⁴ Two key issues were: (a) significant differences in the interpretation of what constituted a material risk, even amongst companies with similar operating profiles within the same sector; and (b) inadequate disclosure of information supporting the risk assessment process. KPMG’s view was that the best disclosures were those that identified:

⁷² See KPMG, “Adoption of Third Edition Corporate Governance Principles and Recommendations: Analysis of disclosures for financial years between 1 January 2015 and 31 December 2015” (2016).

⁷³ Annual Report of Woodside Petroleum Ltd (2015), p. 21.

⁷⁴ KPMG, “Adoption of Third Edition Corporate Governance Principles and Recommendations: Analysis of disclosures for financial years between 1 January 2015 and 31 December 2015” (2016), p. 7.

- 48.1 whether the entity had exposure to the risk;
 - 48.2 if the entity did not have a material exposure, why management believed this to be the case; and
 - 48.3 if the entity did have a material exposure, providing information (or reference to information) explaining how the risk is managed.
49. No doubt, internal processes and cultures for assessing, disclosing and responding to climate and other sustainability risks are still in an early stage of development. However, there are prominent examples (including those cited above) of what level of reporting is possible, which might serve as benchmarks for what is desirable (or even legally necessary) in the future.
50. Climate risk disclosure is the subject of increasing litigation in the United States. Peabody Coal was pursued in the Courts for stating that it could not estimate the impact of climate change on its business, when it had been conducting sophisticated internal modeling that it had not disclosed.⁷⁵ A recent high profile target is ExxonMobil. Evidence has emerged that the company understood the risks of climate change since the 1970s, but did not disclose those risks and indeed actively campaigned to undermine the scientific consensus. There is speculation of a pending lawsuit.⁷⁶ Sometimes, though not always, trends such as this in the American litigation market can influence litigation in Australia.

⁷⁵ Attorney-General of the State of New York Environmental and Investor Protection Bureaus, *In the Matter of Investigation of Peabody Energy Corporation*, Assurance 15-242.

⁷⁶ Paul Barrett and Matthew Philips, "Can ExxonMobil be Found Liable for Misleading the Public on Climate Change" accessed online at <http://www.bloomberg.com/news/articles/2016-09-07/will-exxonmobil-have-to-pay-for-misleading-the-public-on-climate-change> on 1 October 2016.

Conclusion

51. There is certainly no legal obstacle to Australian directors taking into account climate changes and other sustainability risks, where those risks are, or may be, material to the interests of the company. The ASX Listing Rules arguably mandate this. Further, the duty of care and diligence is capable of requiring company directors to consider and disclose their exposure to physical, transition and liability risks associated with climate change. It is likely to be only a matter of time before we see litigation against a director who has failed to perceive, disclose or take steps in relation to a foreseeable climate-related risk that can be demonstrated to have caused harm to a company (including, perhaps, reputational harm).
52. To consider climate change risks actively, and disclose them properly, will reduce exposure to liability, and maximize the potential for activating the “business judgment” rule. There is also research suggesting that stock price performance is positively influenced by good sustainability practices.⁷⁷ Whether or not that be so, there is little downside and much potential upside for directors in properly considering and disclosing climate change risks.

7 October 2016

Noel Hutley

5 St James Hall

Sebastian Hartford Davis

Banco Chambers

⁷⁷ The research is summarised in CDP and Climate Disclosure Standards Board, “Joint Submission to the Economics References Committee’s Inquiry into Carbon Risk Disclosure”, 31 March 2016, p. 10.

Conclusion

51. There is certainly no legal obstacle to Australian directors taking into account climate changes and other sustainability risks, where those risks are, or may be, material to the interests of the company. The ASX Listing Rules arguably mandate this. Further, the duty of care and diligence is capable of requiring company directors to consider and disclose their exposure to physical, transition and liability risks associated with climate change. It is likely to be only a matter of time before we see litigation against a director who has failed to perceive, disclose or take steps in relation to a foreseeable climate-related risk that can be demonstrated to have caused harm to a company (including, perhaps, reputational harm).
52. To consider climate change risks actively, and disclose them properly, will reduce exposure to liability, and maximize the potential for activating the “business judgment” rule. There is also research suggesting that stock price performance is positively influenced by good sustainability practices.⁷⁷ Whether or not that be so, there is little downside and much potential upside for directors in properly considering and disclosing climate change risks.

7 October 2016



Noel Hutley

5 St James Hall



Sebastian Hartford Davis

Banco Chambers

⁷⁷ The research is summarised in CDP and Climate Disclosure Standards Board, “Joint Submission to the Economics References Committee’s Inquiry into Carbon Risk Disclosure”, 31 March 2016, p. 10.