

## CLIMATE CHANGE ROUND TABLE

Sydney – 21 November 2019

*Below is the text of remarks delivered by The Hon Mr Kenneth Hayne AC QC at the Centre for Policy Development's Business Roundtable on Climate and Sustainability on 21 November 2019 in Sydney. Mr Hayne has agreed to make these remarks publicly available. Further information about the roundtable can be found here:*  
<https://cpd.org.au/2019/12/climate-roundtable/>.

Previous speakers have emphasised the need for system-wide response. Systemic response is essential. But for the moment, I want to stand the issue on its head and look at it from the individual entity's point of view.

Three things are clear.

First, I think the relevant law is clear.

Directors must act in the best interests of the company. "Best interests" is not one-dimensional – it is not determined *only* by share price movement or "total shareholder return" over a period.

"Best interests" does not present a binary choice between the interests of shareholders and the interests of others (whether customers, employees or society more generally).

The longer the period of reference, the more the interests of all affected by a company's actions will converge in pursuit of the long-term financial advantage of the enterprise.

Second, international opinion is also clear.

International opinion is now firmly behind the need for all entities with public debt or equity to respond to climate change issues in their Governance, their Strategy, their Risk Management and their Metrics and Targets and, importantly, to record their responses to the issues in their financial reports. The work of the Bank of England and the FSB's Taskforce on Climate-related Financial Disclosures both forms and reflects that opinion.

Third, the position of Australian regulators is clear.

ASIC, APRA and the Reserve Bank have all recently made plain the significance each of those bodies attaches to climate-related issues.

The inevitable consequence of the three points I have made about the law, international opinion and domestic regulators is that, in Australia, a director acting in the best interests of the company must take account of, and the board must report publicly on, climate-related risks and issues relevant to the entity.

As the 2019 TCFD Status Report shows, the speed at which changes are needed to limit the rise in the global average temperature obliges more companies to consider the potential impact of climate change and disclose their material findings than are now doing so. The entities, and their boards must ask at least two questions:

- What is the potential financial impact of climate-related issues?
- What is now, and what will be, our strategic response?

All this being so, what is the issue? Directors have their duties; there are clear statements of what those duties require; regulators have said plainly that they expect the duties to be performed. What is there left to debate?

I wonder whether there may be two related points to consider – learned helplessness and entrenched short-termism.

The issue, of course, is global. What we are now considering is individual response by entities and by their directors (separately and collectively).

A response often seen in Australian political discourse is that “The issue is large; Australia is comparatively small; nothing we do will affect the outcome if the big emitters do not act.” That is, the response is “We can do nothing that will help”. By making that response, we are persuading ourselves that we are helpless.

Boards will reinforce that sense of helplessness if they put climate risk into a bucket marked “non-financial risks”. And boards might think that they can do that if they see the risk as not being immediately realised in the next financial period. But as recent events in the financial

services industry should have shown, the notion of “non-financial” risks can be very misleading. The distinction between financial and non-financial risk to the entity is anything but clear. Conduct and regulatory risk were seen by some financial services entities as non-financial risks less important than other risks to the financial performance of the entity. But the realisation of conduct and regulatory risks has had large and continuing effects on, not only the reputation of the entities, but also their profitability.

Helplessness is then coupled with short-termism. At the national level short-termism is expressed as: “Doing something now will have adverse effects on employment in some part or parts of the country. That would be bad for the national economy. Therefore, we will do nothing.”

Both learned helplessness and short-termism yield a result that fits comfortably with those who still see climate-change as a matter of belief or ideology. Framing the most recent debates provoked by the bushfire emergencies as part of the “culture wars” reinforces the notion that climate science is a matter of belief, not scientific observation and extrapolation. No less importantly, because the debate remains framed as a debate about belief, learned helplessness and short-termism can be translated into the nativist-populist terms that now have such currency in many political systems.

But neither helplessness (whether that is learned or real) nor short-termism provides any answer to the director’s duty to act in the

best interests of the company. Indeed, each points plainly towards the need for boards

- to recognise both the nature and extent of climate-related risks and the speed with which change will have to be made;
- to develop strategic plans in response; and
- to report to shareholders and the wider market about what they have done, are doing and will do in response.

I say that any sense of helplessness points to those results because the choice for a board is between responding or having a response thrust upon the company. And boards simply cannot confine their attention to the short-term. As I have said, entities which did not look beyond short-term profit have recently suffered very large financial and non-financial losses.

Learned helplessness and short-termism may explain how our political debates are being framed. If they do, we must be careful that the framing of the political debates does not distract from what is clear: that directors have a duty to respond to climate-related risks and that the continuing work of TCFD shows directors what they should do.