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Discharging directors' duties relating to climate risks – some practical applications
A CPD roundtable with Noel Hutley SC and colleagues

10 December 2020

Summary of Conclusions

Leaders from the Australian legal profession, business sector and superannuation industry met on 10 December 2020 for a special legal roundtable on discharging directors' duties relating to climate risks, convened by the Centre for Policy Development (CPD).

CPD convened the roundtable to consider the latest legal and practical developments on climate risks, building on the landmark 2016 legal opinion on directors' duties and climate change by Noel Hutley SC and Sebastian Hartford Davis. That opinion concluded that Australian company directors who do not properly manage climate risks could be held liable for breaching their legal duty of due care and diligence. A supplementary 2019 opinion highlighted significant interventions by APRA, ASIC and the Reserve Bank and emphasised that the bar for corporates and investors with respect to identifying, disclosing and managing climate risks was rising rapidly.

Since 2019, policy, regulatory and corporate responses to climate change have accelerated. Institutional investors and businesses are taking bolder steps to address climate risks. National governments are making ambitious decarbonisation commitments and integrating climate-aligned measures as key components of their COVID-19 recovery and rebuilding strategies. Scrutiny of how directors and trustees are managing climate-related risks and opportunities continues to grow. Legal risks and consequences of inaction are accelerating in tandem with surging global momentum on climate. The focus now is on the *standard* of care and quality of disclosure: the gap between what is required or being promised and what is being done.

In this context, the roundtable explored critical challenges and flashpoints for directors and trustees seeking to meet their climate-related obligations. It also explored how business can help to support a more ambitious agenda on climate risks and net zero. The discussion was led by an expert legal panel including Noel Hutley SC (Fifth Floor St James' Hall), Sebastian Hartford Davis (Banco Chambers), Sarah Barker (MinterEllison) and Martijn Wilder (Pollination Group). It was moderated by CPD CEO Travers McLeod. Participants included a senior group of company directors, investors and experts, and leaders from the Business Council of Australia, Australian Institute of Company Directors, and the Australian Chamber of Commerce and Industry. The group considered three hypothetical scenarios, relating to: (i) 'greenwashing' and selective corporate disclosure of climate risks; (ii) effective governance of climate risks by superannuation funds; and (iii) competition law implications of industry-level collaborations on climate. The full agenda, participant list and scenarios are enclosed.

Below is a summary of conclusions from the roundtable prepared by the roundtable organisers. It does not constitute legal advice or necessarily reflect the position of any of the individuals or organisations present at the roundtable, which was conducted under the Chatham House Rule.

First, 'greenwashing' on climate creates clear legal risks. It can constitute misleading or deceptive conduct, including for organisations selectively disclosing their exposures or not taking credible steps to operationalise net zero commitments. Many large companies and institutions are now disclosing climate risks at a high level and employing climate scenario analysis to understand and report on their exposures. This is an important step for meeting market expectations and discharging directors'

responsibilities. However, care needs to be taken to ensure that climate-related targets and analysis are rigorous, underpinned by appropriate governance, strategy and action, and reflected in financial statements as required. Flawed or inaccurate disclosures may be regarded as misleading or deceptive, particularly those that rely on dated information or constitute incomplete or selective disclosure of findings. They may be actionable under the Corporations Act, the ASIC Act and Australian Consumer Law. Companies that make net zero commitments should expect close scrutiny of the structures and planning in place to achieve them. It is critical that directors ensure that the true position of the organisation is communicated, that climate-related disclosures, assumptions and commitments are underpinned by robust scenario planning and modelling, and that effective communication and governance is occurring internally, particularly across financial reporting and operations teams.

Second, superannuation funds can play a catalytic role in supporting the climate transition and should prepare for greater scrutiny of their climate-related governance and risk management.

Climate change presents financial risks with profound implications for large and long-term investors like superannuation funds. The standard of care for trustees – that of a prudent professional – requires proactive engagement on climate risks. Recent developments, including the REST settlement, have highlighted the need to mainstream climate risks as a core focus of governance and risk management, especially as the investment risks and opportunities related to climate become increasingly dynamic and complex. Trustee directors must ensure that facts and assumptions underpinning investment decisions are thoroughly tested, that inputs from management are sound, and that expert advice is considered where necessary. The sole purpose test does not prevent the consideration of climate risks as part of a superannuation strategy. To the contrary, it is a reason to focus on climate risks. Outsourcing of investment decisions to external managers and teams is unlikely to form a complete defence for trustee director mismanagement of climate risks in investment portfolios. As universal owners, superannuation funds have a major interest in supporting an economically and socially sustainable net zero transition. This includes ensuring that the beneficiaries and workforces their investments support are not left behind or forced to bear the costs of a disorderly transition.

Third, industry-level collaborations must consider the implications of competition law but, if properly managed, these issues should not impede collective action to address climate change.

There is growing enthusiasm to collaborate across sectors and supply chains to develop and roll out low-emissions technologies and to design and deliver industry-level net zero pathways. In some circumstances, coordination between competitors on climate, as on other issues, may constitute cartel conduct. Nevertheless, this should not be a major roadblock to industry collaboration and standard-setting on climate-related initiatives if appropriately managed. Competition law provides exemptions to relevant offences and prohibitions, including the ability of the ACCC to authorise conduct that would otherwise breach competition law provisions based on public benefit. The ACCC has granted such authorisations for environmentally and economically significant initiatives. There are other industry-initiated actions and collaborative standard-setting exercises that can be achieved without being at risk of breaching competition law or needing authorisation. Provided collaborative initiatives across industries and sectors are mindful of these provisions and proactively address them, competition law need not represent a major obstacle to collaboration on climate.

In general, while climate-related governance and disclosures have improved significantly, many companies and investors have been slow to move beyond compliance with bare minimum standards and to operationalise long-term climate commitments. There is significant appetite for further guidance and collaboration to support more consistent and effective climate-related governance and capability, and recognition of the need to broaden best practice and standard-setting across a wider range of companies and institutions, including SMEs. The roundtable discussion underlined the critical roles that business and finance have in managing and responding to climate risks and in supporting the transition of regions and communities impacted by the management of such risks.

Participant List

Noel Hutley SC	Senior Counsel, Fifth Floor St James' Hall
Sebastian Hartford Davis	Barrister, Banco Chambers
Sarah Barker	Partner & Head of Climate Risk Governance, MinterEllison
Martijn Wilder AM	Founding Partner, Pollination Group
Amir Ghandar	Accounting & Assurance Leader, Chartered Accountants Australia New Zealand
Angus Armour	CEO, Australian Institute of Company Directors
Bryan Horrigan	Dean, Faculty of Law, Monash University
Catherine Bolger	President, Australian Institute of Superannuation Trustees & Director, Professionals Australia & Director, State Super
Frank Jotzo	Professor, Crawford School of Public Policy & Director, Centre for Climate and Energy Policy, Australian National University
Gordon Cairns	Chair, Woolworths Limited & Non-Executive Director, Macquarie Group
Hugo Batten	Managing Director, Aurora Energy Research
Ian Silk	President, Australian Council of Superannuation Investors and CEO, AustralianSuper
Ilana Atlas AO	Non-Executive Director, ANZ & Chair, Coca Cola Amatil
James Pearson	CEO, Australian Chamber of Commerce & Industry
Lucy Thomas	Head of Investment Stewardship, NSW Treasury Corporation
Neil Smyth	General Counsel, Queensland Treasury Corporation
Patricia McKenzie	Non-Executive Director, AGL & Chair, NSW Ports & Chair, Sydney Desalination Plant
Richard Watson	Executive Director, WA Department of Treasury
Sam Mostyn AO	Chair, Citibank Australia & Non-Executive Director, Transurban & Non-Executive Director, Mirvac Group & Deputy Chair, CPD
Simon McKeon AO	Chair, Australian Industry Energy Transitions Initiative & Non-Executive Director, Rio Tinto & Non-Executive Director, National Australia Bank
Sophie Ismail	Legal & Industrial Officer, ACTU & Director, HESTA
Tim Reed	President, Business Council of Australia & Non-Executive Director, Transurban
Travers McLeod	CEO, CPD
Sam Hurley	Policy Director, CPD
Alice Martin	Senior Policy Advisor, CPD

Observers:

Nick Young	Monash University
Steven Wright	Senior Policy Advisor, Business Council of Australia
Laura Waterford	Associate, Pollination Group

Comments from participants

Tim Reed, President, Business Council of Australia

“The roundtable facilitated by CPD demonstrated that the bar continues to rise for directors on managing climate risk. Increased momentum around a net zero agenda must go beyond commitments or targets and translate into real action to support transitioning industries and communities. Developing strong climate-related capabilities for businesses of all sectors, shapes and sizes will be critical to achieving these outcomes.”

“This is a pivotal moment for shaping Australia’s response to climate change and a net zero agenda. Board-level duties are well understood, climate-related capabilities are growing and proactive business leadership will be essential. Ultimately, climate risk is an economic risk and requires a whole-of-economy response. To keep pace globally, Australia needs business, investors, communities and all levels of government to drive this agenda and ambition together.”

Angus Armour, CEO, Australian Institute of Company Directors

“The Hutley opinions underscore the need for directors to consider how climate change may impact their organisation. Directors across Australia are grappling with how they can provide effective oversight of this complex area of risk. There is clear momentum in the corporate sector towards more concrete climate commitments, with the topic now a mainstream item on boardroom agendas. The AICD looks forward to publishing guidance to assist directors in the middle of this year.”

Travers McLeod, CEO, Centre for Policy Development

“The duty of care for directors on climate risks is now clear. The conversation has shifted emphatically to the rising standard of care directors are required to discharge with respect to climate change. The focus is now on the gap between what needs to happen, or what is being promised, and what is being done. Many Australian firms have been stepping up their climate-related governance, disclosure and capabilities to meet this head on. But it is clear more is needed to keep pace, as surging momentum on net zero reshapes global markets and regulators, shareholders, customers and policymakers step up their scrutiny of corporate responses.”

“Wrestling with net zero is non-negotiable. Inevitably, this is becoming an irreducible focus for boards and directors, especially in large firms that are most exposed to risks and opportunities stemming from global decarbonisation. Directors must ensure net zero commitments are underpinned by proper information, governance processes, strategy and action.”

Sam Mostyn, Chair, Citibank Australia

“CPD’s work in this area over several years, including commissioning the influential legal opinions on climate and directors’ duties by Noel Hutley SC and Sebastian Hartford Davis, has provided real clarity on what is required and supported new coalitions for leadership and change. This discussion was a clear reminder of what boards need to do to manage climate risks. It is encouraging to see the shift in focus towards action and opportunity as these issues have become better understood.”

“As others have observed, we are at a critical moment on climate and the broader task of rebuilding from COVID. These challenges go hand in hand, and strong action from business – to support better risk management, better industry-wide responses and better policy – will be essential.”

Professor Bryan Horrigan, Executive Dean, Faculty of Law, Monash University

“The landmark 2016 and 2019 legal opinions by Noel Hutley SC and Sebastian Hartford Davis on the legal responsibilities of Australian company directors in managing and disclosing climate change risks have already contributed significantly to mass awareness-raising and acceptance of the legal position in the corporate, financial, and regulatory communities. In light of those opinions and the consensus they have generated, it is beyond question that managing climate change risks is a key boardroom responsibility, that directors who address climate change properly have the law’s protection, that directors who fail to do so risk legal liability, and that both regulatory expectations and the standard of care expected of directors on climate change matters are rising.”

“The December 2020 legal roundtable highlighted important scenarios where additional legal advice and guidance is needed. Following on from the discussion and needs identified by the coalition of business and industry experts at the roundtable, the third legal opinion by Noel Hutley SC and Sebastian Hartford Davis in April 2021 provides crucial legal insight and practical suggestions on how company directors can lawfully make commitments and disclosures about net zero emissions without falling prey to liability for ‘greenwashing’. Together, these three legal opinions are the touchstone for subsequent legal, business, and regulatory discussion, standard-setting, and practical action on climate change.”