Corporate Climate Justice?

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Imagining a Different Future – Overcoming Barriers to Climate Justice,

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Outline

• ‘Conventional’ climate justice litigation – hold corporations to account
  – Lawsuits against “carbon majors”

• Corporations as agents for achieving safe climate future?
  – Company & securities law - a source of tools for driving clean energy business practices?
  – Climate change – a financial risk

• Not mutually exclusive strategies, indeed important links
Climate justice lawsuits against corporations

• Strong narrative - corporations as barrier to climate justice
  – e.g. producers of/investors in fossil fuels, major emitters, corporate funded climate denial campaigns and lobbying

• Lawsuits seeking climate justice for “victims” of climate change increasingly target corporations, particularly in energy sector

• Torts and human rights claims
  – allocate responsibility & seek redress (compensation) from corporations for their contribution to climate change impacts
Alaska, Philippines, California, New York...
## Corporate climate action - motivated by financial risk (& opportunity)?

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<thead>
<tr>
<th>Physical</th>
<th>Transition</th>
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<td>• Acute risks – event driven eg greater occurrence of severe weather events</td>
<td>• <em>Legal/policy</em> – compliance costs and potential litigation</td>
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<td>• Chronic risks - longer term shifts in climate patterns eg changes to rainfall, temperature and other factors</td>
<td>• <em>Technology</em> – existing tech. investments written off, new investments &amp; operational changes</td>
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<td>Leading to disruptions to operations, transportation, supply chains; damage to physical assets; and reduced resource availability.</td>
<td>• <em>Market/economic</em> – viability of business model?</td>
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<td>• <em>Reputational</em></td>
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<td>Leading to lost revenue, reduced value of operating assets and investments, ‘stranded’ assets, reduced co. value</td>
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Company and securities law tools

- Requirements for **disclosure** of material financial risks to business
- Engagement with corporate management through shareholder resolutions
- Enforcement of **directors’ duties/ liability** for failure to fulfill obligations
What *must* companies disclose?

- No specific climate risk requirements in Australia (yet)
- But captured by general disclosure requirements:
  - Annual report disclosures
    - financial statements (role of auditors)
    - directors’ report – s 299A(1)
- Key concepts: materiality and foreseeability
What *do* companies disclose?

- Australian companies: highly variable reporting on climate risk
- Review of 2015/16 reporting by small group of highly exposed companies – minimal substantive engagement
- Foerster, Peel, Osofsky & McDonnell (2017) 35(3) *Company and Securities Law Journal*
Liability for misleading or inadequate disclosure? - Exxon Mobil

- Investigations by A-Gs in New York & other states
- SEC investigation
- Shareholder class action lawsuit

Shareholders sue CBA

- Climate change poses material financial risks to bank’s business that should have been disclosed to investors
- Proceedings discontinued after CBA acknowledged climate change as material financial risk & committed to climate scenario analysis
- Ruled out lending to Adani mine
Do director’s duties require consideration and management of climate risks?
Noel Hutley SC opinion, 2016

• Climate risks capable of posing foreseeable risks of harm to interests of Aust. companies
• Risks relevant to directors’ duties of care and due diligence (s180(1)) to the extent that they intersect with company interests
• Company directors can and in some cases should be considering impact of climate change on business - Failure to consider climate business risks could result in liability for breach of directors’ duties

“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 the company (including, perhaps, reputational harm)”
Next phase of (empirical) research

- Business culture & regulatory landscape rapidly shifting
  - TCFD Recommendations
  - Litigation trends
  - Proactive pursuit of opportunities
- How are companies responding to new understandings of CC as financial risk? Related obligations under company & securities law?

http://www.cdsb.net/blog/policy/382/what-next-climate-change-policy
Q&A