Governing the Energy Transition: The Role of Corporate Law Tools

Jacqueline Peel, Anita Foerster,** Brett McDonnell, and Hari M. Osofsky****

I. Introduction

In October 2018, the Intergovernmental Panel on Climate Change (IPCC) released its special report on the impacts of global warming of 1.5 °C above pre-industrial levels and related global greenhouse gas emission pathways. In its report, the IPCC warned that limiting global warming to 1.5°C requires 'rapid and far-reaching transitions in energy, land, urban and infrastructure … and industrial systems' that 'are unprecedented in terms of scale' and 'imply deep emissions reductions in all sectors.'[1] Two months later at the 24th Conference of the Parties (COP) under the United Nations Framework Climate Change Convention (UNFCCC) held in Katowice,

---

* Professor, Melbourne Law School, University of Melbourne; Associate Director, Centre for Resources, Energy and Environmental Law (corresponding author: j.peel@unimelb.edu.au). This research received funding support from the Australian Research Council pursuant to a Discovery Project grant on 'Devising a Legal Blueprint for Corporate Energy Transition,' (Peel, Osofsky and McDonnell, 2016–2019). The article draws on analysis in Hari M. Osofsky, Jacqueline Peel, Brett McDonnell & Anita Foerster, 'Energy Reinvestment' (2019) 94 *Indiana L.J.* 635. This article was originally presented at the *Energy Transitions* workshop convened by UNSW on 5-6 February 2019. We are grateful for feedback and comments provided by convenors and participants of the workshop, and particularly to Louis Kotzé who acted as commentator for the paper. We also appreciate research assistance from Ms Julia Korolkova in compiling data on shareholder climate resolutions in Australia.
** Senior Research Associate, Melbourne Law School, University of Melbourne. From February 2019, Dr Foerster is a Senior Lecturer at Monash University Business School.
*** Professor and Dorsey & Whitney Chair, University of Minnesota Law School; Director, Institute for Law and Economics, University of Minnesota Law School.
[1] IPCC, 'Summary for Policymakers,' in *Global Warming of 1.5°C. An IPCC Special Report* (2018), 17.

Poland, the U.S. Trump administration allied with Russia, Kuwait and Saudi Arabia to prevent the COP's endorsement of the IPCC report.[2] At a conference side event, hosted by the United States, Australia was the sole nation to join U.S. representatives on a panel designed to 'showcase ways to use fossil fuels as cleanly and efficiently as possible.'[3] Juxtaposed, these events illustrate both the urgency of energy transition to address climate change and the enormous governance challenge it presents, particularly in countries such as the United States and Australia which continue to advocate for fossil fuels as a key part of the energy system.

While the Katowice COP was successful in finalising details of the 'Rulebook'[4] that puts flesh on the bones of state parties' commitments under the UNFCCC's supplementary Paris Agreement,[5] the gap between governments' emissions pledges and the cuts necessary to avert dangerous anthropogenic climate change continues to widen.[6] At the national level in Australia—one of the world's highest per capita emitters[7]—climate policy is in a state of considerable flux. The federal carbon tax legislation was repealed in 2014,[8] and the period since has witnessed a deepening of the 'climate wars' that have plagued Australian climate policy for the past decade.[9]

As national government policies falter and international efforts under the Paris Agreement fall short in meeting necessary greenhouse gas emissions reductions, many are looking to other

---

[2] These countries, with the tacit support of others like Australia, pushed back against proposed language 'welcoming' the IPCC's report in favour of merely 'noting' it: see Ben Doherty, 'Australia's silence during climate change debate shocks COP24 delegates', *The Guardian*, 10 Dec. 2018, at https://www.theguardian.com/environment/2018/dec/10/australias-silence-during-climate-change-debate-shocks-cop24-delegates. The watered-down version included in the final decision of the COP expresses the COP's 'appreciation and gratitude' to the IPCC and scientific community for providing the report. See Dec. -/CP.24, *Preparations for the implementation of the Paris Agreement and the first session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement* (advance unedited version), para. 25.

[3] Ben Doherty, 'Australia only nation to join US at pro-coal event at COP24 climate talks', *The Guardian*, 11 December 2018, at https://www.theguardian.com/environment/2018/dec/11/australia-only-nation-to-join-us-at-pro-coal-event-at-cop24-climate-talks.

[4] See Dec. -/CP.24, above n2.

[5] Paris Agreement, Paris, 12 Dec. 2015, entered into force 4 November 2016, C.N.92.2016.TREATIES-XXVII.7.d of 17 March 2016.

[6] UN Environment, *Emissions Gap Report 2018* (2018), 4 concludes that the emissions pledges made by parties in their nationally determined contributions (NDCs) are inadequate to bridge the gap between present levels of emissions and those needed to ensure global warming stays well below 2ºC and 1.5ºC, and instead put the world on track for about 3ºC of warming by 2100.

[7] The Global Carbon Atlas, http://www.globalcarbonatlas.org/en/CO2-emissions, measures Australia's per capita emissions in 2017 at 17 tCO_2/person compared to a world average of 4.8 tCO_2/person.

[8] See Clean Energy Legislation (Carbon Tax Repeal) Act 2014.

[9] David Fanner, 'Australia's Climate Wars: A Decade of Dithering', *The Guardian* (video), 21 Aug. 2018, at https://www.theguardian.com/environment/video/2018/aug/21/australias-climate-wars-a-decade-of-dithering-video.

actors beyond governments to help address the impending climate crisis. As Canada's environment minister, Catherine McKenna, remarked at the conclusion of the Katowice COP:

> *Of course it's important to have these rules [in the Paris Rulebook], but a lot of the real action is happening by entrepreneurs; it's happening by business people; it's happening by the finance sector; by the money flowing; it's happening at the city and state level. … Climate change is a complicated problem and it's not going to be solved by national governments alone.*[10]

This article explores the role that one such set of non-state actors—companies—might play in governing and advancing the energy transition. In particular, it examines how companies' behaviour in respect of issues of climate change and clean energy uptake is influenced by corporate law tools concerned with disclosure of business risks, directors' duties and shareholder resolutions.[11] As understanding has grown in the private sector post-Paris that climate change may pose material financial risks to businesses,[12] there has been increasing attention given by companies, as well as regulators and civil society, to how these legal obligations may be enlivened and applied to corporate decision-making relating to climate change.[13]

The article draws on our empirical research examining the scope for such corporate law tools to contribute to effective private sector governance of the energy transition through business practices relating to climate risk management and the uptake of clean energy practices.[14] Although this research reveals promising signs of a more serious consideration of climate risk

---

[10] Quoted in Brad Plumer, 'Climate Negotiators Reach an Overtime Deal to Keep Paris Pact Alive', *The New York Times*, 15 Dec. 2018, at https://www.nytimes.com/2018/12/15/climate/cop24-katowice-climate-summit.html.
[11] For a similar call in the United States for environmental law to embrace the 'nontraditional levers' of corporate law in addressing issues of cumulative harm like climate change, see Sarah E. Light, 'The Law of the Corporation as Environmental Law' (2019) 71 *Stanford L. Rev.* 137.
[12] Sarah Barker, Mark Baker-Jones, Emma Fagan and Emilie Barton, 'Climate change and the fiduciary duties of pension fund trustees – lessons from the Australian law,' (2016) 6(3) *Journal of Sustainable Finance & Investment* 211.
[13] See generally Stephanie Venuti and Martijn Wilder AM, 'Obligations on Australian companies to address climate change' (2018) 92(10) *Australian L.J.* 789.
[14] The empirical research focused on the behaviour of ASX top 50-listed companies in the energy sector e.g. companies involved in fossil fuel exploration and extraction, as well as electricity generators and retailers. In Australia, 24 interviews were conducted in person, by telephone or video conference from February-August 2018 with the following stakeholders: corporate and financial sector regulators (2 interviews), civil society advocacy groups (2 interviews), investor groups (2 interviews), investor service providers (2 interviews), companies (7 interviews with 9 participants), asset owners 9 (7 interviews with 8 participants), asset managers (2 interviews with 3 participants).

in business decision-making by Australian energy sector companies, corporate practices around climate risk disclosure and shareholder and board engagement with clean energy issues remain highly variable and in flux. If corporate law tools based on framing climate change as a matter of financial risk are to make a more substantial contribution to governance of the energy transition in Australia, they will need to be complemented by a robust regulatory framework for greenhouse gas emissions reduction.

The remainder of the article is structured as follows. Part II describes the growing interest in 'private governance' models in the environmental and climate arena, and the role corporate law tools might play in shaping any such system of energy transition governance. Part III discusses the findings of our empirical research regarding how influential corporate legal tools have been in practice on Australian company behaviour regarding climate change and clean energy issues.[15] Part IV then presents our conclusions about role of corporate law tools in driving corporate behaviour that is consistent with energy transition goals.

II. Corporate law tools and private governance of the energy transition

In the environmental policy and legal literature, of which scholarship on climate change forms part, it has become increasingly common to refer to the concept of 'governance' as distinct from the role of 'government.'[16] 'Governance' connotes broadly 'a form of coordination or use of power for defined ends within social systems,' and embraces a range of models with different levels of connection to the governing state.[17] Overall, there has been a trend in Western nations over the past few decades for governments to employ a range of regulatory and behavioural measures, in addition to formal law, in an effort to 'steer' rather than 'row' in the environmental arena.[18]

---

[15] The project encompasses a comparative dimension examining similar questions of corporate behaviour in the United States, a jurisdiction which has a longer history of using corporate law avenues to address climate risk. Empirical data has been gathered through interviews with U.S. subjects but the results of this data are not included in this article and will instead be summarised in subsequent publications of the project.
[16] E.g., Cameron Holley, 'Environmental Regulation and Governance, in Peter Drahos (ed.), *Regulatory Theory: Foundations and Applications* (2017) 741. This transition reflects the move away from state-centric regulation of environmental issues to more 'light-handed' approaches.
[17] Lee, Godden, Jacqueline Peel and Jan McDonald, *Environmental Law* (2nd ed.), 121.
[18] John Braithwaite, 'The Regulatory State?' in Robert E. Goodin (ed), *The Oxford Handbook of Political Science* (2009) 217, 220.

Accompanying this trend has been a shift to embrace various non-state actors, including private actors, as 'surrogate regulators' who supplement or supplant the traditional role of government in addressing environmental problems.[19] 'New environmental governance' is one prominent variant of this approach, involving flexible forms of collaboration between diverse public, private and non-governmental stakeholders to achieve commonly agreed or mutually negotiated goals.[20] Sometimes the term 'private governance' is used to categorise new environmental governance arrangements involving private actors in environmental regulation through models of self-regulation, partnerships and market instruments.[21] These models are increasing in number and popularity as governments seek to harness the actions of corporations, investors and businesses to contribute to public regulatory goals.[22]

In the climate sphere, there is also growing interest in private governance models as a way of responding to the complexities of the energy transition challenge and the limited scope for state action alone to solve the problem.[23] These approaches received a boost from the negotiations for the Paris Agreement, which saw unprecedented levels of business engagement and the emergence of several private sector climate initiatives. These included the release of recommendations by the G20's Taskforce on Climate-related Financial Disclosures (TCFD),[24] and the formation of global business and investor coalitions seeking to engage large emitting companies on questions of climate change action.[25]

---

[19] Neil Gunningham, Martin Phillipson and Peter Grabosky, 'Harnessing Third Parties as Surrogate Regulators: Achieving Environmental Outcomes by Alternative Means' (1999) 8 *Business Strategy & Environment* 211.
[20] Cameron Holley, Neil Gunningham and Clifford Shearing, *The New Environmental Governance* (2012), 4.
[21] See, e.g., Michael P. Vandenburgh, 'Private Environmental Governance' (2013) 99 *Cornell L. Rev.* 129; Sarah E. Light and Michael P. Vandenbergh, 'Private Environmental Governance' in Lee Paddock, Robert L. Glicksman, and Nicholas S. Bryner (eds.), *Environmental Decision Making, Encyclopedia of Environmental Law* (2016) 253.
[22] Gunningham et al, above n19 (discussing the role of institutional investors, finance institutions and insurers as potential surrogate regulators).
[23] See, e.g., Michael P. Vandenbergh and Daniel Metzger, 'Private Governance Responses to Climate Change: The Case of Global Civil Aviation' *Fordham Environmental Law Journal*, forthcoming; Vanderbilt Law Research Paper No. 18-40, 6 Sep. 2018; available at SSRN: https://ssrn.com/abstract=3245243.
[24] The industry-led Taskforce on Climate-related Financial Disclosures (TCFD) was established by the Financial Stability Board at the behest of the G20 finance ministers in December 2015 with the aim of designing a set of recommendations for consistent disclosures to help financial market participants understand their climate-related risks. The TCFD issued a final report with its recommendations in June 2017: TCFD, *Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures* (2017), available at https://www.fsb-tcfd.org/wp-content/uploads/2017/06/FINAL-2017-TCFD-Report-11052018.pdf.
[25] Examples include the We Mean Business coalition (https://www.wemeanbusinesscoalition.org/about/), Climate Action 100+ (http://www.climateaction100.org/) and the Global Investor Coalition on Climate Change (http://globalinvestorcoalition.org/).

Embracing the potential for the private sector to play a positive role in energy transition governance represents a departure from more conventional narratives that cast business entities—especially companies with a significant emissions profile—as a barrier to effective climate change action. This view remains prevalent, reflected, for example, in lawsuits presently on foot in multiple jurisdictions targeting corporate emitters known as 'carbon majors' over the contribution that their emissions make to climate change and its impacts on communities and the environment.[26] Attributing responsibility to fossil fuel corporations for the climate harms brought about by their actions is also a central goal of the climate justice movement.[27]

By contrast, this article explores the role for corporate action to *advance* energy transition goals and overall governance of this challenge, with a particular focus on the extent to which the behaviour of Australian companies might be influenced by existing corporate law tools pertaining to disclosure, directors' duties and shareholder rights.[28] In this view, companies are framed as playing a potentially positive and deliberate role in the economic shift to new, cleaner forms of energy. This role might be fostered by uses of corporate law tools that change companies' *internal* decision-making calculus about the management of climate risk and prompt the re-allocation of assets towards cleaner energy alternatives. Alternatively, it may be the employment of corporate law tools by *external* actors, including investors and environmental or investor advocacy groups, which pressures companies to shift their approach to climate risk issues.[29] The exertion of pressure by these external actors may extend to bringing legal claims against investee companies, thereby creating potential legal liability where companies fail to address climate risk in their business decision-making.

[26] Examples include lawsuits brought by Californian municipal governments against oil companies for climate-related damage to coastal property; a claim by a farmer in Peru against RWE, the largest German energy producer, in respect of the contribution its emissions make to climate change in the Andes mountains; and a complaint being investigated by the Philippines Human Rights Commission against carbon major companies that alleges the companies' activities have caused climate damage in violation of Filipino human rights. These and other examples of earlier U.S. litigation targeting carbon major corporations are discussed in Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38(4) *Oxford J. Legal Studies* 841.

[27] This has been the dominant narrative of the climate justice movement and literature: see, e.g., Kenny Bruno, Joshua Karliner and China Brotsky, *Greenhouse Gangsters v Climate Justice* (Transnational Resource and Action Center, 1999).

[28] To be clear, the authors do not reject the climate justice approach but are simply interested in exploring what potential exists to harness corporate behaviour towards the achievement of clean energy goals.

[29] These internal and external pathways are discussed in further depth in Hari M. Osofsky, Jacqueline Peel, Brett McDonnell and Anita Foerster, 'Energy Re-Investment' (2019) 94 *Indiana L.J.* 635, 639-40.

III. Influence of corporate law tools – Australian empirical findings

Since the conclusion of the Paris Agreement in December 2015, business leaders, institutional investors and financial regulators around the world have increasingly framed climate change as a financial risk to business, to investors and more systemically, to broader financial stability. This is a significant shift from viewing climate change as purely an ethical, corporate social responsibility issue relevant only to maintaining companies' social licence.[30] Climate change as a source of potential financial risks to companies was a point emphasised by the TCFD in its report, which classified climate risks as encompassing both physical risks from climate change impacts (e.g. to a company's infrastructure and supply chain) and transition risks associated with the shift to a low-carbon economy and accompanying regulatory, market and technological changes.[31] Local factors have also been important in shaping business community views that climate change now presents financial risks. These include the issue of legal opinions from respected commercial barristers highlighting the legal consequences of a failure to manage material climate risks,[32] and statements by regulators warning that companies can no longer ignore the potential impacts of climate change on their businesses.[33]

If climate change is seen to pose material financial risks to a company, this has the effect of enlivening a range of obligations under corporate law to disclose and manage those risks. It also opens up a range of new tools for investors and civil society to engage with companies on issues of climate risk management and energy transition. Our research focused on three tools under corporate law which have the potential to serve a governance role through shaping company behaviour regarding material financial risks posed by climate change. These were:

[30] Barker et al, above n12, 213-4.
[31] TCFD, Final Report, above n24, 5-6.
[32] Noel Hutley QC and Sebastian Hartford-Davis, 'Climate change and directors' duties - Memorandum of Opinion' (Centre for Policy Development and the Future Business Council, 7 October 2016).
[33] See, e.g., statements by the heads of the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA): Geoff Summerhayes (Commissioner, APRA), 'Australia's new horizon: Climate change challenges and prudential risk,' Speech delivered at Insurance Council of Australia Annual Forum, Sydney (17 Feb 2017); Geoff Summerhayes (Commissioner, APRA), 'The weight of money: A business case for climate risk resilience,' Speech delivered at Centre for Policy Development, Sydney (29 Nov 2017); John Price (Commissioner, ASIC), 'Climate Change,' Keynote address, Centre for Policy Development: Financing a Sustainable Economy, Sydney (18 June 2018); Address by ASIC Commissioners, Sean Hughes (Canberra, 7 February 2019) and Cathie Armour (Sydney, 21 February 2019 and Adelaide, 4 March 2019), ANU Climate Update, available at https://asic.gov.au/about-asic/news-centre/speeches/anu-climate-update/.

- obligations on companies to disclose material financial risks to the market, for example, in annual reports (*business risk disclosure* requirements);[34]
- obligations on company directors to exercise their powers and discharge their duties in 'good faith in the best interests of the corporation,' for a 'proper purpose' and with 'due care and diligence,' as well as to ensure disclosures are not misleading (*directors' duties*);[35] and
- rights of shareholders to bring resolutions to an annual general meeting (AGM) on matters relating to the company's disclosure and management of climate risks (*shareholder resolutions*).[36]

These tools, with some variations and differences of nomenclature, are also found in other Anglo-American corporate law systems,[37] such as the state-based and federal securities law requirements applicable in the United States.[38]

The research sought to investigate not only the scope for corporate law tools to apply to issues of climate risk but also whether, and if so how, the use or threatened use of these tools to address climate risk is influencing corporate behaviour. In examining this latter question, we drew on empirical research. This included semi-structured interviews with key stakeholders such as corporate regulators, civil society advocacy groups, investor groups and company officers. Further data was obtained from surveys of corporate reporting practices of companies in the energy sector,[39] and of the use of shareholder resolutions on climate change in Australia.[40] The following sections summarise our main findings about the role played by

[34] *Corporations Act 2001* (Cth), ss 295-7, 299A(1).
[35] *Corporations Act 2001* (Cth), ss 180(1), 181(1)(a), 674(2A), 728.
[36] *Corporations Act 2001* (Cth), ss 249D, 249F, 249N.
[37] For the United Kingdom and Canada see Alexis Staker and Alice Garton, *Directors' Liability and Climate Risk: United Kingdom – Country Paper* (Commonwealth Climate Law Initiative (CCLI), April 2018) and Janis Sarra and Cynthia Williams, *Directors' Liability and Climate Risk: Canada – Country Paper* (Commonwealth Climate Law Initiative (CCLI), April 2018).
[38] For discussion see Osofsky et al, above n29, 661-679.
[39] See Anita Foerster, Jacqueline Peel, Hari Osofsky & Brett McDonnell, 'Keeping Good Company in the Transition to a Low Carbon Economy? An Evaluation of Climate Risk Disclosure Practices in Australia' (2017) 35 *Corporate and Securities L.J.* 154; ASIC, *Climate Risk Disclosure by Australia's Listed Companies*, Report 593, Sep. 2018.
[40] Our survey found that, since 2010, there have been approximately 20 resolutions addressing climate change brought to Australian listed companies in the energy, materials, utilities, insurance and finance sectors. This information was compiled from the following sources: ACCR website - overview of resolutions, https://accr.org.au/shareholder-action/resolution-voting-history/; ASX announcements search engine - https://www.asx.com.au/asx/statistics/announcements.do; Market Forces webpage – SH resolutions - https://www.marketforces.org.au/?s=shareholder+resolutions. See also Kym Sheehan, *Shareholder Resolutions in Australia: Is there a better way?* (Australian Council of Superannuation Investors, 2017).

corporate law tools in practice in influencing Australian company behaviour regarding climate business risks.

A. Disclosure obligations

A central legal obligation for Australian companies under the *Corporations Act 2001* (Cth) is the requirement to disclose material financial risks to the market. Accordingly, where climate change poses such risks, these must be disclosed, including through periodic disclosure in annual reports (comprising the director's report and financial statements), and other additional disclosures.[41] In annual report disclosures, it is increasingly the case that climate-related risks can no longer be treated merely as a matter for discussion within the management commentary of the director's report, but should also be considered, and potentially quantified, in the context of financial statements that are signed off by company directors and external auditors.[42] In December 2018, for instance, the Australian Accounting Standards Board (AASB), together with the Auditing and Assurance Standards Board (AuASB), issued a joint guidance statement on the integration of climate change-related risks into financial statement materiality considerations.[43]

Obligations on companies regarding disclosure of business risks fundamentally turn on the question of *materiality*. Under the AASB's Accounting Policies, a particular factor will be considered to be material, and should accordingly be disclosed, if it might influence the economic decisions of stakeholders that use that information in their assessments and decisions, and if there is a real possibility that the risk in question could substantially impact the listed entity's ability to create or preserve value for security holders over the short, medium or long term.[44] This formulation of the disclosure obligation allows companies some latitude to take into account their own context and use business judgment in assessments of materiality

[41] Annual Reports must be made by companies listed on the Australian Securities Exchange (ASX). As part of the annual report, companies are required to provide both financial statements and a director's report: *Corporations Act 2001* (Cth), s 292(2). In addition to these periodic disclosures, companies have continuous reporting obligations in relation to information that could have a material effect on the price or value of an entity's securities, and there are also additional reporting requirements for mining and oil and gas production and exploration activities (ss 674-77, *Corporations Act 2001* (Cth)) and for regulated fundraising documents, such as prospectuses (s 710, *Corporations Act 2001* (Cth).

[42] *Corporations Act 2001* (Cth), ss 295-297; ss 307-8.

[43] AASB-AuASB, Climate-related and other emerging risk disclosures: assessing financial statement materiality using AASB Practice Statement 2, Dec. 2018, available at https://www.aasb.gov.au/admin/file/content102/c3/AASB_AUASB_Joint_Bulletin_13122018_final.pdf.

[44] Australian Accounting Standards Board (AASB) Standard 108 (2011) cl 5, Definitions, as amended by AASB 1031 (Dec. 2013) and AASB 2018-7 (Dec. 2018). The latter introduces amendments to the definition of materiality that will apply to annual reporting periods after 1 Jan. 2020.

and the reporting of business risks. Nonetheless, as the December 2018 AASB-AuASB joint guidance notes, in considering materiality, 'qualitative external factors such as the industry in which the entity operates, and investor expectations may make such risks 'material' and warrant disclosures when preparing financial statements, regardless of their numerical impact.'[45]

In other jurisdictions—most notably the United States but also in the United Kingdom—regulators have investigated companies for misleading disclosure of climate risks or are under increasing pressure from civil society to do so.[46] In both the United States and Australia there have also been private shareholder enforcement actions.[47] These trends provide guidance to Australian companies around market developments, emerging best practice and likely compliance expectations. In particular, they suggest that disclosures which over-value assets or under-value liabilities, which omit or under-emphasise climate risks, which materially understate risk exposure, which selectively disclose aspects of climate risk, or where there is inconsistency between internal risk assessment and external disclosure, may potentially be found to be in breach of legal obligations.[48]

Our empirical findings illustrated the influence that this growing regulatory attention (e.g. through the TCFD or statements by domestic corporate regulatory bodies) and an enhanced perception of litigation risk was having on the behaviour of companies with significant exposure to climate risk. We found that the application of current corporate legal obligations

---

[45] AASB-AuASB, Climate-related and other emerging risk disclosures, above n43, p. 3.

[46] In the United States this has included regulatory investigations of fossil fuel companies initiated by state attorney-generals and the Securities Exchange Commission (SEC): see, e.g., Stephen Mufson, 'New York sues ExxonMobil, saying it 'misled' investors about climate change risks,' *Washington Post*, 24 Oct 2018, available at: https://www.washingtonpost.com/energy-environment/2018/10/24/new-york-sues-exxonmobil-accusing-it-deceiving-investors-about-climate-change-risks/?noredirect=on&utm_term=.07f48ae90b42&wpisrc=al_environment__alert-hse&wpmk=1. In the UK, since 2016, environmental law firm, ClientEarth has submitted a series of regulatory complains against UK-based companies to the Financial Reporting Council and Financial Conduct Authority. See further: ClientEarth, *Investor Briefing: Complaints filed against SOCO International PLC and Cairn Energy PLC* (2016), available at https://www.documents.clientearth.org/library/download-info/investor-briefing-complaints-filed-against-soco-international-plc-and-cairn-energy-plc/. To date, UK regulators have not taken action on these complaints.

[47] In Australia, see *Abrahams v Commonwealth Bank of Australia (CBA)* (2017) which was discontinued after the CBA released a 2017 annual report acknowledging the risk of climate change and pledging to undertake climate change scenario analysis to estimate the risks to CBA's business. In the United States, see the ongoing shareholder class action suit against Exxon: *Ramirez v Exxon Mobil Corporation* (2016), 3:16-cv-3111. N.D. Texas. The latter action has survived a motion to dismiss action filed by Exxon. For further details see the entry on the case in the Sabin Center for Climate Change Law Climate Change Case Chart at http://climatecasechart.com/case/ramirez-v-exxon-mobil-corp/.

[48] Sarah Barker, *Directors' Liability and Climate Risk: Australia – Country Paper* (Commonwealth Climate Law Initiative (CCLI), April 2018), 33-36.

to climate risks, and the resulting obligation to disclose material business risks posed by climate change was generally well-understood at an overarching level by all respondent groups. However, despite this strong understanding, the disclosure practices of Australian companies with regard to climate risks are highly variable and, in many cases, significantly lacking in terms of coverage and quality.[49] While some large companies, particularly those in sectors which are highly exposed to climate risks (e.g. energy and utilities), are beginning to disclose these risks according to legal obligations and investor expectations, external investors describe the disclosure practices of Australian companies in general as 'totally inadequate,' 'under-developed,' 'reactive and piecemeal,' 'non-strategic,' 'pretty poor,' and 'deeply deficient.'[50]

There appear to be a number of different explanations for this current pattern of inadequate climate risk disclosure practices. One of the prominent themes to emerge in interviews was that the processes companies currently use to determine the materiality of business risks are not always picking up climate change. This is often due to the approach taken to the uncertainties and the longer timeframes associated with some climate-related risks.[51] Although climate change may not pose material risks for some companies in the near term, many companies are not looking beyond this timeframe in their materiality assessments, or are not properly considering the full implications of climate change for their business. In addition, Australian companies are currently more likely to identify and disclose the transition risks associated with unstable and changing energy markets, technology advances, and changing energy policy to be of material consequence to their businesses, and are less likely to identify and disclose physical climate-related risks. With respect to transition risks, they are also more likely to focus narrowly on policy or regulatory risks (e.g. introduction of a carbon pricing regime) than the more substantive economic shifts associated with the energy transition. In interviews, many respondents commented that Australian companies lag behind their international peers in this respect, particularly in relation to the identification and disclosure of physical risks.

[49] See Foerster, Peel, Osofsky and McDonnell and the ASIC Report, both cited above n39. The ASIC review examined climate risk disclosures by 60 listed companies in the ASX 300, in 25 initial public offering prospectuses and across 15,000 annual reports, finding that on the whole disclosures were fragmented and often too general to be of use to investors.

[50] Interview numbers 3, 5, 6 and 8.

[51] This longer time horizon conflicts with the short-termism of the shareholder primary approach: see Beate Sjåfell, Andrew Johnston, Linn Anker-Sorensen and David Millon, 'Shareholder primacy: the main barrier to sustainable companies' in Beate Sjåfell and Benjamin J. Richardson (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (2015), 79-147.

Another potential explanation for present gaps and inadequacies in disclosure practices is that many companies are reluctant to make forward-looking disclosures for fear of potential legal liability associated with these representations.[52] At the same time, a lack of compliance monitoring and enforcement activity by regulators, and a lack of regulatory guidance for companies on how to disclose climate-related risks, were also commonly identified as key factors. This suggests that as regulatory guidance improves, and regulators step up monitoring and compliance activities, companies will feel pressure to engage in enhanced disclosure of climate risk.

Indeed, it appears that practice is already shifting as a result of release of the TCFD recommendations on climate-related financial disclosures and associated investor pressure to disclose in line with these recommendations. These improvements include early experimentation with the disclosure of scenario analysis, which was a key recommendation of the TCFD.[53] Recent announcements by regulators, such as the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA),[54] referencing the TCFD recommendations, were also identified as important drivers of improved disclosure practices. Again, this suggests companies' climate risk disclosure practices are sensitive to external factors, rather than being primarily driven by internal decision-making considerations.

Overall, interview respondents recognised that in this new and rapidly developing field expectations around best practice climate risk disclosure are still evolving. Nonetheless, external stakeholders such as investors and civil society groups expressed serious concerns about the quality and usefulness of climate risk disclosure practices, such the scenario analysis, as currently being undertaken by many companies. For example, the value of scenario analysis is undermined where companies—especially in the resources sector—do not find any negative

---

[52] The *Corporations Act* applies specific rules to forward-looking statements made in the context of acquisitions, takeovers, fundraising, financial services and markets. For example, sections 670A(2), 728(2) and 769C provide that statements with respect to future matters will be deemed to be misleading if the representor does not have reasonable grounds for making it. But see also Barker, above n48, 36-7, commenting that 'the law does not provide a 'free pass' to corporations and their directors to use future uncertainty as an excuse for not exercising appropriate due diligence today, based on the best information available. In crude terms, the law will not punish directors who make an educated assessment of future risks and opportunities, but it will not tolerate those who make uneducated guesses.'

[53] TCFD, Final Report, above n24, section D. The TCFD also published further guidance on scenario analysis in *Technical Supplement: The Use of Scenario Analysis in Disclosure of Climate-related Risks and Opportunities* (June 2017).

[54] See above n33.

impact of climate change on their business, eroding investor confidence in the quality of the process. There remains a divergence of opinion about how best to achieve decision-useful, quality disclosures that allow for comparison between companies. In this respect, many interview respondents were alert to the 'danger of too much standardisation' and the potential for 'lowest common denominator metrics that don't really tell you much.'[55]

A common theme of these empirical findings was that there is increasing acceptance of climate risk as a material business risk, and evolving recognition of the need for disclosure by many companies. This is an important finding as it signals a shift in company attitudes from the pre-Paris period when climate risk as a matter of financial risk and potential liability for non-disclosure were not taken seriously in the business community.[56] Perhaps reflecting this novelty, however, actual climate risk disclosure practice by companies remains variable and in need of refinement.

B. Directors' duties

Similarly to growing understanding of how disclosure obligations apply to climate business risk, understanding of the potential for directors' duties to be enlivened by climate change considerations has advanced significantly in the last few years. An important marker in this regard was the release in 2016 of an externally-commissioned legal opinion from respected Sydney commercial law QC, Noel Hutley. This opinion found that company directors are legally bound to consider and manage climate risks and may be subject to breach of duty claims in situations where they fail to do so.[57] Hutley and co-author Hartford-Davis concluded their legal opinion with a phrase which has been often quoted:

> *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).*[58]

---

[55] Interview number 9.
[56] Nassim Khadem, 'Climate change-related litigation was once seen as a joke, but it could soon become business reality', *ABC News*, 22 Feb 2019, available at https://www.abc.net.au/news/2019-02-22/how-investors-regulators-and-litigators-are-moving-australia/10834648.
[57] See Hutley and Hartford-Davis, above n32.
[58] Ibid, para. 51.

Since then, statements by Australian regulators have reinforced this opinion.[59] Investors are also increasingly calling for company directors to demonstrate their climate competency.[60] Although there has not yet been a claim made in Australia for breach of directors' duties in relation to climate change, recent litigation activity in the European Union by shareholders against a company investment in an major new coal plant development,[61] as well as a breach of duty claim against a superfund trustee in Australia,[62] highlight the growing focus and potential liability in this area.

Our empirical findings highlighted that, in general, there is a growing understanding of the scope of directors' duties to extend to matters of climate risk and action on energy transition questions, at least at a conceptual level.[63] Most interview respondents said that if climate change poses material risks to a company, then it falls within directors' duties to identify and manage those risks. This did not necessarily mean taking a particular course of action (e.g. to

---

[59] For instance, ASIC Commissioner John Price has stated: '*While matters such as this will, in the end, be determined by a court, we think the Hutley opinion is relatively unremarkable. We say that in the sense that, in our view, the opinion appears legally sound and is reflective of our understanding of the position under the prevailing case law in Australia in so far as directors' duties are concerned.*' See Price, above n33, at https://asic.gov.au/about-asic/news-centre/speeches/climate-change/. See also Australian Institute of Company Directors (AICD), AICD Governance Leadership Centre, Special Climate Change Newsletter (2016), available at http://aicd.companydirectors.com.au/advocacy/governance-leadership-centre/practice-of-governance/is-climate-change-a-governance-issue.

[60] For example, the world's largest asset manager, BlackRock Inc, has made climate change a central engagement priority with investee companies. It has publicly called for company directors in highly exposed sectors to '*have demonstrable fluency in how climate risk affects the business*.' See BlackRock, *BlackRock Investment Stewardship's approach to engagement on climate risk*, January 2019, 2.

[61] In October 2018, ClientEarth U.K. filed a challenge against the Polish energy company Enea's decision to approve the development of a major new coal power plant project (Ostrołęka C). ClientEarth was able to bring the action as a shareholder in the company. The challenge is framed as a breach of directors' duties to act with due diligence and in the best interests of the company and its shareholders. ClientEarth argues that the project poses very significant financial risks to investors (rising carbon prices, increased competition from cheaper renewables, and the impact of EU energy reforms on state subsidies for coal power) and that, in approving the new project, directors have failed to consider and manage these risks as they are legally obliged to do. See ClientEarth, *Briefing - Ostrołęka C: Energa'sand Enea's Board Members' Fiduciary Duties to the Companies and Shareholders*, 20 Sep. 2018), available at https://www.documents.clientearth.org/wp-content/uploads/library/2018-09-20-clientearth-briefing-ostroleka-c-energa-and-enea-board-members-fiduciary-duties-to-the-companies-and-shareholders-ce-en.pdf, ClientEarth, 'World-first climate risk case launched over major coal plant in Poland', Press Release, 29 Oct. 2018, available at https://www.clientearth.org/world-first-climate-risk-case-launched-over-major-coal-plant-in-poland/.

[62] This is the case of *Mark McVeigh v Retail Employees Superannuation Pty Ltd*, NSD1333/2018, Federal Court of Australia, Concise Statement, filed 24 Jul. 2018. In Australia, superfund trustees are bound by similar duties to company directors (e.g. care and diligence, acting in the best interests of beneficiaries). For a detailed consideration of the relevant legal framework and how these duties apply to climate risk, see Noel Hutley and James Mack, *Superfund Trustee Duties and Climate Change Risk: Memorandum of Opinion* (15 June 2017) and Barker, above n48, 40-43.

[63] While the project team sought interviews with Australian company directors, no directors accepted the invitation to participate. As such, the data presented draws on the views and opinions expressed by other respondents, including internal company personnel (e.g. company secretaries, investment relations and sustainability personnel) and those external to companies (e.g. personnel within asset owners and asset managers and industry groups that interact with companies and their directors).

divest from fossil fuel assets), but rather required a thorough consideration and assessment of the risks and appropriate courses of action.

Notwithstanding this enhanced understanding, interview respondents also emphasised that there is great divergence in the approach taken by individual companies and their directors to recognising the materiality of climate risks, and, as a consequence, understanding the implications for company directors. This finding emphasises that corporations and corporate boards are not monolithic entities but collections of human beings who may have vastly different understandings of, and opinions about, climate change that shapes the behaviour of the companies they direct and manage. Indeed, the empirical research highlighted that differences in directors' approaches to climate risk are likely explained by factors such as the nature of the company, the sector it is operating in, as well as personal characteristics of the directors themselves. Directors of large listed companies, especially those in sectors where climate risks are perceived to be material in the immediate and near term (e.g. utilities, coal companies) are increasingly likely to be very well-informed and active on climate change.[64] In contrast, interviewees commented that the broader directorship of Australian companies is less likely to be fully aware of climate risk and how it plays out in terms of duties, particularly for those companies where climate risks are perceived as more remote. Many respondents noted the role of the particular personal characteristics of directors (e.g. age/generation, gender, ethnicity, values) in determining the approach taken to climate risks. Respondents expressed the opinion that scepticism of climate science remains a prevalent attitude on boards of ASX100 companies.[65]

A key factor limiting companies' preparedness to engage with directors' duties around climate risk is the perception that these duties require a focus on profit-related interests of shareholders which are often more short-term in nature. These concerns dovetail with a long running discussion in Australia over corporate purpose and the proper focus of directors' duties to act in the best interests of the company. In essence, this debate relates to whether directors should focus exclusively on the interests of shareholders who provide financial capital to the company (which tends to bring attention to short term risks) or whether they should take a broader view

[64] For example, companies like BHP Billiton, AGL Energy Ltd, Origin, National Australia Bank, Aurizon, Oil Search and South 32 have committed to implement the TCFD recommendations and a number, such as BHP Billiton and South 32 have released scenario analysis.
[65] Interview numbers 4, 5, 8, 16, 17, 18.

of the long term interests of the company, including all different sources of capital and the range of stakeholders who make the company successful.[66] The former view is supported by strong legal precedent favouring the shareholder primacy theory in Australia.[67] Given the nature of climate risks (e.g. complexities, uncertainties and long time frames) and the current tendency to focus materiality assessments on the short term, many respondents were of the view that Australian company directors focused foremost on short term shareholder-related interests and did not necessarily perceive that these interests were affected by climate risks. As such, climate change was more likely to be viewed by directors as a longer-term concern, which did not fall squarely within their consideration of the company's best interests.

As with disclosure practices discussed in the previous section, shifts in normative understandings about directors' duties and climate risk have been linked to the issue of prominent legal opinion, such as the Hutley and Hartford-Davis opinion, as well as the thought-leadership work of leading practitioners.[68] These legal interpretations and arguments are increasingly seen as non-controversial, although they had their origin in activism by civil society groups (e.g. the Hutley and Hardtford-Davis opinion was commissioned by the Centre for Policy Development).[69] Reinforcement of these views by regulators and prominent industry associations, such as the Australian Institute of Company Directors, has further strengthened their influence and is leading to 'a slow broadening [of] understanding of what those duties and expectations are, and how current law would be applied if it was … tested.'[70]

Litigation risk, associated with the threat of personal liability for directors found to be in breach of their duties,[71] is also a significant driver of changing behaviour. This is despite the lack of

[66] For discussion of the shareholder primary theory and alternatives see Sjåfell et al, above n51.

[67] Shelley Marshall and Ian Ramsay, 'Stakeholders and Directors' Duties: Law, theory and evidence' (2012) 35(1) *UNSW Law Journal* 291.

[68] Sarah Barker, Special Counsel at MinterEllison has played a leading role in this regard. See https://www.minterellison.com/people/sarah_barker/.

[69] The Centre for Policy Development is a leading independent policy institute in Australia whose mission is to develop long-term policies to promote shared prosperity and sustainable wellbeing. See https://cpd.org.au/.

[70] Interview number 6.

[71] Section 728 of the *Corporations Act 2001* (Cth) provides for directorial liability for misleading disclosure in fundraising documents such as prospectuses; s 674(2A) provides similarly in relation to continuous disclosure obligations imposed by way of ASX Listing Rules. Directors may also be liable as an accessory to their company's breach of disclosure obligations in situations where they are 'involved' in the contravention as per s 79 of the *Corporations Act 2001* (Cth). Further, in a company's annual report, the Director's Report must be adopted by a resolution of directors, dated and signed, and constitutes a representation made by directors (s 295(1)(c) *Corporations Act 2001* (Cth)). Representations of this nature made by directors in annual reports (or indeed non-disclosure of material information) will often become the focus of allegations of misleading and deceptive conduct in company litigation (see Hutley and Hartford-Davis, above n32, para. 12).

Australian claims presently for breach of directors' duties made in relation to climate risks. Nonetheless, interview respondents concurred that as soon as litigation, regulatory investigation or shareholder reaction around a potential breach of duty to manage climate risks does emerge, the pressure on directors to ensure they are fulfilling their legal obligations in this area will heighten considerably.

As these empirical findings illustrate, there is increasing acceptance by Australian companies that climate change poses material business risks, and an evolving understanding that company directors therefore have legal duties to identify, assess and manage such risks. Again, this represents a major attitudinal shift from the pre-Paris position. At present, this view may be limited to larger, listed companies, with particularly high risk exposure in the near term, such as fossil fuel majors. Our Australian empirical research did not examine attitudes in smaller and medium sized companies, or in companies operating in other, less exposed sectors (e.g. retail, property development),[72] which may well be less advanced on climate risk issues.[73] Even within the group of companies more directly exposed to climate risk, there appears to be great divergence in the approach taken by individual corporations and their directors to recognising the materiality of climate risks, and, as a consequence, understanding the implications for the potential liability of company directors.

C. Shareholder resolutions

Resolutions brought by shareholders to a company's AGM may serve as a means for focusing company attention internally on climate business risks and helping to spur companies to develop, disclose and defend their approach to climate risks more fully. More broadly, shareholder resolutions are a public engagement tool for investors (and investor coalitions backed or aided by civil society groups) to pressure companies to disclose and manage climate risks.

Decisions to engage behind-the-scenes with companies on the subject matter of a resolution, to vote in favour of a resolution (even if it is not supported by company management), or to

---

[72] However, interviews conducted as part of the U.S. portion of the research do include some companies of this kind.

[73] For instance, the ASIC report on climate risk disclosure by a sample of companies in the ASX300 (see n39, p. 10 above) found that the annual reports of top 100 companies in the ASX300 were far more likely to include climate change content than the bottom 200 companies potentially 'because of higher levels of adoption of integrated reporting within that cohort – with more climate change content featuring in ESG disclosures.'

take the lead in filing a resolution, are an important part of investment decision-making. Critically, this is a form of engagement reliant on continuing shareholding in a company, compared with a decision to divest shares.[74] Asset managers and other investment service providers, such as proxy advisors, play an important role in this form of investment decision-making,[75] as does civil society in partnering with investors to facilitate resolutions.

Although the use of resolutions as a form of shareholder activism has a long history in the United States,[76] the engagement culture in Australia is quite different. In Australia, shareholder resolutions have only recently begun to take hold as a tool for shareholder activism on environmental, social and governance (ESG) matters, including climate change.[77] In part this difference may be explained by the more restrictive rules relating to shareholder resolutions applicable in Australia. In particular, an ordinary member resolution—open to members with at least 5% of the votes or a group of at least 100 members and carried by a simple majority vote[78]—cannot direct the board on issues of management (which includes requesting certain actions such as climate risk disclosure be undertaken by company management).[79] In practice this means a climate-related shareholder resolution must be brought as, or include, a special resolution seeking a change to the company's constitution and must secure a 75% majority of the vote in order to be binding on the company.[80]

Over the last decade, there has been a steady increase in the number of resolutions brought to Australian companies that address ESG issues, and a particular, more recent surge in

---

[74] Nevertheless, successful resolutions regarding disclosure may assist divestment decisions. On the divestment movement and its evolution, aims and contribution to climate governance see Neil Gunningham, 'Divestment, Nonstate Governance, and Climate Change' (2017) 39(4) *Law and Policy* 309.
[75] Kym M. Sheehan, 'The Influence of Proxy Advisors on Australian Corporate Law Reform' (2011) *Corporate Law Reform*, Volume 7, 20 May 2011. Available at SSRN: https://ssrn.com/abstract=2187537.
[76] For a review see Maria Goranova and Lori Ryan, 'Shareholder Activism: A Multidisciplinary Review' (2014) 40 *Journal of Management* 1230. Details of ESG resolutions in the United States are maintained by CERES in its Sustainability Shareholder Resolutions database, see https://www.ceres.org/resources/tools/climate-and-sustainability-shareholder-resolutions-database.
[77] Anita Foerster and Jacqueline Peel, 'Rio Tinto's climate change resolution marks a significant shift in investor culture', *The Conversation*, 3 May 2018, available at https://theconversation.com/rio-tintos-climate-change-resolution-marks-a-significant-shift-in-investor-culture-95927.
[78] Section 249N, *Corporations Act 2001* (Cth).
[79] This position was confirmed by the Full Federal Court in *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* [2016] FCAFC 80. See also Michael Hey, 'ACCR v. CBA [2015] FCA 785: Nonbinding Shareholder Resolutions and Implications for Shareholder Activism' (2015) 40(1) *University of Western Australia Law Review* 399.
[80] Section 9 *Corporations Act 2001* (Cth).

resolutions addressing climate change specifically.[81] Climate change resolutions are largely being brought by civil society organisations or ethical investment funds, although, more recently, larger generalist institutional investors have co-filed resolutions. While often framed as requests for further disclosure, they are increasing in sophistication and diversity in terms of the underlying substantive demands related to climate risks. Over time, they have also received a higher percentage of the shareholder vote at AGMs.[82]

Given the restrictions on bringing non-binding ordinary resolutions on matters of company management, these resolutions are being put forward as special resolutions to change the company constitution in certain ways, including so as to allow shareholders to put forward an advisory resolution on a substantive matter such as climate change.[83] This approach means that the board is legally required to put the proposed resolution to the general meeting. In many cases, companies have also allowed a vote on the substantive element of the resolution and have reported this vote publicly.[84]

Our empirical research suggested emerging new practices in Australia around shareholder resolutions as a tool for influencing company behaviour on matters of climate business risk and energy transition. Investors, companies and civil society alike reported significant shifts in the approaches being taken to company engagement in Australia with 'investors … much more willing to use every tool available to them in the toolkit.'[85] Increasingly, there is a recognition of the limits, slow progress and lack of transparency associated with traditional, behind-the-scenes engagement between companies and their investor body on matters such as climate

[81] Our survey of climate change resolutions filed since 2010 found approximately 20 resolutions addressing climate change brought to Australian listed companies in the energy, materials, utilities, insurance and finance sectors. Some companies have faced multiple resolutions. This information was compiled from the following sources: ACCR website - overview of resolutions; https://accr.org.au/shareholder-action/resolution-voting-history/; ASX announcements search engine - https://www.asx.com.au/asx/statistics/announcements.do; Market Forces webpage – SH resolutions - https://www.marketforces.org.au/?s=shareholder+resolutions.
[82] See Foerster and Peel, above n77.
[83] For example, in 2017, a resolution to Downer EDI proposed that the constitution be amended to insert the following clause: 'In the exercise of their powers and duties pursuant to clause 5.1 (a) the Directors shall ensure the business of the company is managed in a manner consistent with the objective of holding global warming to below two degrees Celsius above preindustrial levels.'
[84] See, e.g., climate resolutions put to the Rio Tinto May 2018 AGM which achieved 18.03% of the vote (https://www.riotinto.com/documents/180502_Results_of_Rio_Tinto_annual_general_meetings.pdf) and to the Whitehaven Coal October 2018 AGM which achieved 40.14% of the vote (http://clients3.weblink.com.au/pdf/WHC/02039073.pdf).
[85] Interview number 6.

change. There is also an emerging willingness to divest where companies prove unwilling to respond or make changes.[86]

Along the spectrum from private behind-the-scenes engagement to outright capital divestment, shareholder resolutions are seen as an important way of escalating engagement on a particular issue, such as climate risk, and achieving more transparency. Shareholder resolutions offer a direct opportunity to gauge shareholder opinion on a particular issue such as climate change. They are understood to have the greatest impact in conjunction with behind-the-scenes engagement and also within the context of a threat of potential divestment. When a resolution is on the table, this opens up the space for more constructive behind-the-scenes engagement.

Although civil society groups leading on climate resolutions may be seen to lack legitimacy and influence with target companies, emerging partnerships between civil society and investors are increasingly viewed as credible. Similarly, new coalitions of investors forming to address climate risks, such as the Investor Group on Climate Change,[87] are seen as having enhanced potential to influence companies due to the breadth and scale of their constituents. Potential influence is also increased when international investors are involved. In essence, shareholder resolutions, and other targeted engagement activities are serving as forums or opportunities to build these multi-level partnerships and open up companies to this broader scrutiny.

Although difficult to track in a causal sense,[88] civil society advocates and investors interviewed for the research considered that shareholder resolutions on climate change in Australia to date have led to tangible changes in the approaches taken by target companies to climate risks.[89] They noted a number of prominent examples where a climate resolution has been instrumental in securing a particular substantive outcome, such as driving laggard companies to produce more comprehensive climate risk disclosure or enhancing scrutiny of indirect political advocacy for fossil fuels.[90] Climate resolutions have also prompted companies to engage more

---

[86] Interview numbers 5, 6 and 8.

[87] This group represents institutional investors with around $2 trillion funds under management: see https://igcc.org.au/.

[88] On evaluating the impact of strategic climate legal interventions such as shareholder resolutions see generally Jacqueline Peel and Hari M. Osofsky, 'Litigation as Climate Regulatory Tool' in Christina Voigt (ed), *International Judicial Practice on the Environment: Questions of Legitimacy* (2019) 311.

[89] Interview numbers 3, 4, 5, 6, 7 and 8.

[90] See, e.g., Cole Latimer, 'Activist shareholders make history in anti-lobby resolution at Origin AGM', *The Sydney Morning Herald*, 17 Oct. 2018, available at https://www.smh.com.au/business/companies/activist-shareholders-make-history-in-anti-lobby-resolution-at-origin-agm-20181017-p50a4u.html; Ruth Williams, 'Is

constructively and extensively with their investors on the issues raised. This may occur even when levels of support for the resolution represent a relatively small proportion of the overall shareholding. As one interviewee noted:

> *Even… five per cent of shareholders voting against management is significant… When you start getting up around that 10 to 15 per cent mark, things get very serious for a board.*[91]

The novelty of this tool in an Australian context may also be a factor in its effectiveness to date, although this may diminish over time if the tool is overused.

Australian companies faced with shareholder resolutions on climate change have often reacted in ways that investors and civil society describe as defensive, adversarial or dismissive.[92] Investors, on the other hand, view the use of resolutions as an important way to express views and opinions to management while continuing to support the company.[93] Over time, as more climate resolutions have been brought and have received higher levels of voting, the gap between companies' reactions and investor views on shareholder resolutions has narrowed. In interviews, some companies reported shifts in their approach, including increased emphasis on engagement with investors on climate risk.[94]

Among investors, patterns of voting on climate resolutions are also not uniform. Some institutional investors remain committed to more traditional engagement approaches and would be unlikely to vote against management except in extreme situations. Further, they would be particularly uncomfortable with supporting constitutional amendments as a way to effect change on climate risks. Others will assess each case on its merits and then decide whether to engage behind the scenes on the resolution or to vote in a certain way. Some Australian funds have even taken the lead in co-filing climate resolutions.[95]

---

corporate Australia facing a 'tipping point' on climate change?, *The Sydney Morning Herald*, Nov. 5, 2018, available at https://www.smh.com.au/business/companies/is-corporate-australia-facing-a-tipping-point-on-climate-change-20181101-p50das.html.

[91] Interview number 3.

[92] Interview numbers 3, 4, 9, 22, 23.

[93] Interview numbers 18-24.

[94] Interview numbers 9, 11, 13.

[95] For example, in 2018, resolutions put to QBE Australia (part of the QBE Insurance Group, one of the world's top 20 general insurance and reinsurance companies) were co-filed by a medium sized Australian superannuation fund – Local Government Super – in conjunction with the Church of England Pensions Board and the Swedish National Pension Fund (representing $84 billion worth of assets under management).

An investor's approach to voting shares may also differ between jurisdictions. In Australia, where investors perceive good access to boards and a strong engagement culture,[96] as well as opportunity for shareholders to influence companies through voting on remuneration or appointment of directors, funds are more likely to vote with management and not support a resolution. In other jurisdictions like the United States, however, the same fund may vote in favour of an almost identical resolution.

The governance arrangements around these issues are complex and evolving. Many funds outsource voting to fund managers for large proportions of their portfolio or rely heavily on service providers to advise on voting resolutions. Others have more in-house capacity to develop their own positions. Generally, however, Australian institutional investors are increasingly active in exercising their ownership rights in relation to shareholder resolutions.[97]

In our interviews we found that support for law reform in Australia to make it easier for shareholders to bring non-binding advisory resolutions on matters such as climate risk management was strong among investors and civil society respondents, who expressed their frustration with current limits and their support for recent law reform proposals.[98] Somewhat surprisingly, there was also support for these proposals among some of the companies interviewed. These companies expressed the view that there was merit in allowing advisory resolutions, provided safeguards were in place to prevent abuse of these tools.

Overall, these findings illustrate that there are important shifts taking place in investor-company engagement culture in Australia regarding matters of climate change and energy transition that will shape emerging governance structures. New actors are emerging through the development of influential partnerships between investors and civil society focused on climate risk. These coalitions are increasingly experimenting with shareholder resolutions of growing sophistication as part of a suite of activities that can influence a company's approach to climate risks. To date these resolutions have not secured sufficient support to pass at targeted companies' AGMs given the strict rules that have emerged in Australia regarding special resolutions that seek to direct the board on issues of company management. However, the empirical findings evidence that the filing of these resolutions may still have important indirect

[96] See Sheehan, above n40 and Hey, above n79.
[97] Interview numbers 5, 6 and 8.
[98] For example, proposals discussed in Sheehan, above n40.

impacts in influencing company behaviour and engagement with investors on issues of climate risk management and clean energy.[99]

IV. Role of corporate law tools in private sector climate governance

In this part we consider the role of corporate law tools in driving corporate energy transition in Australia and their potential to contribute positively to private sector governance in this area. The findings of our empirical research provide guidance on the effectiveness of this approach, namely, the extent to which uses of corporate law tools help shift company behaviour in ways that contribute to achieving energy transition goals. This analysis informs our conclusions about the adequacy of private governance as a basis for regulating the energy transition in Australia.[100]

A. Effectiveness of corporate law tools

As a mechanism for driving transformative change in private sector climate risk governance, our empirical research suggests that corporate law tools have some tangible benefits but also several limitations. There is clear evidence emerging from the research that the three tools of disclosure, directors' duties and shareholder resolutions in the Australian context operate in mutually reinforcing ways to place mounting pressure on companies (at least larger, more climate-risk exposed ones) to identify, assess and disclose climate business risks. This pressure is confirmed by industry surveys of directors' attitudes to climate change, which demonstrate '[t]hat climate change is now at the forefront of Australian directors' minds.'[101]

---

[99] On the direct and indirect impacts of climate litigation see Jacqueline Peel and Hari M. Osofsky, 'Climate Change Litigation's Regulatory Pathways: A Comparative Analysis of the United States and Australia' (2013) 35(3) *Law and Policy* 150.

[100] As our paper commentator, Louis Kotzé, highlighted, there is also the further question as to what might be needed to improve the effectiveness of corporate law avenues as a means for influencing internal company decision-making on energy transition questions, as well as how the role of external actors, such as investors, might be strengthened. We tackle these questions in Osofsky et al, above n29, which examines pathways for facilitating investment in clean energy to take forward energy transition, rather than just shifting resources and assets away from fossil fuel sources.

[101] Louise Pocock and Kerry Hicks, 'Climate change a growing focus for boards,' Australian Institute of Company Directors, The Governance Leadership Centre Update, 14 Feb. 2019, at https://aicd.companydirectors.com.au/advocacy/governance-leadership-centre/external-environment/climate-change-a-growing-focus-for-boards noting that, in 2018, for the first time, Australian directors nominated climate change as the number one issue they want the federal government to address in the long term. This finding was based on the AICD's Director Sentiment Index: Second Half 2018 which surveys over 1,200 public and private company directors.

Even so, the extent to which corporate law tools shape company behaviour on climate and energy transition issues is constrained by the nature of the tools themselves. The legal obligations involved are process-based not outcome-focused, and hence offer little capacity to dictate to companies how climate risk should be managed or what energy sources to invest in. Variable disclosure practices and variation across boards in their level of engagement with issues of climate risk also illustrate the extent of the challenge remaining to translate a growing business appreciation that climate change presents financial risks into improved internal corporate decision-making processes that advance energy transition goals in meaningful ways. Practice is clearly still evolving, but there is a danger that without further regulatory guidance or external pressures for improved accountability companies will just incorporate new processes, such as scenario analysis, into business-as-usual decision-making.

The extent of company engagement with climate risk via corporate law tools is also contingent on materiality determinations and the evolving regulatory and policy context (for instance, the likelihood of implementation of a carbon price). For many companies, business as usual—including a substantial role for fossil fuels in asset holdings—still makes financial sense at least over the medium term. There is the potential that increased enforcement activity—both public and private—will change this calculus by crystallising understandings around the financial materiality of climate risks and associated legal obligations.

In this regard, external pressures exerted by investors, in particular, offer significant potential to influence decision-making of the companies in which they invest. The empirical findings offer strong evidence that investors are increasingly concerned about the implications of climate risk for their portfolios. This is buttressed by recent developments, such as the announcement by Glencore that it will be capping coal production at current levels at least in part in response to climate risk concerns pushed by investor groups such as the Climate Action 100+.[102] Large institutional investors, such as superfunds, are more actively working to understand their climate risk exposure although, as the REST case illustrates, there are still clear laggards in this regard.[103] As this shift occurs, some investors are beginning to experiment

---

[102] See Joanna Mather, 'AustralianSuper targets dirty dozen in Climate Action 100+ push', *The Australian Financial Review*, 22 Feb. 2019, available at https://www.afr.com/personal-finance/superannuation-and-smsfs/australiansuper-takes-leading-role-in-climate-action-100-push-on-australian-companies-20190221-h1bjkl.

[103] See, e.g. Market Forces, *Risky Business: The majority of Australia's largest super funds disclose no consideration of climate risk* (Aug. 2017), available at https://www.marketforces.org.au/wp-content/uploads/2018/06/Market-Forces-Risky-Business-FINAL-1.pdf. Market Forces also tracks the

with engagement strategies, such as shareholder resolutions, to influence investee companies' management of climate risk.

However, in terms of prompting decisions to shift capital or resources in ways that would support energy transition, there is limited evidence of broader changes in investment strategy or more strategic allocation of funds. Again, as for investee companies, business as usual is still considered profitable and short-term considerations dominate.[104] There are some shifts emerging, such as targeted divestment decisions,[105] although these remain at the margins and are generally driven more by pressure from members of large institutional investors such as superannuation funds. Within the investment sector more broadly, debates continue over the effectiveness of divestment versus engagement as ways of influencing investee company behaviour with respect to climate change.[106]

B. Impact on energy transition governance

Beyond the question of the influence of corporate law tools on the behaviour of private sector actors, is the nature of the changes effected to energy transition governance. As highlighted in the introductory parts of the article, concern that governmental actors are not doing enough, and not with sufficient urgency, to address climate change have driven interest in the role that other non-state actors might play in taking forward energy transition governance. In this regard, could private corporate actors play a key gap-filling role to push economic change in favour of clean energy? Our analysis of the information emerging from our empirical research is that the prospects of this are, at best, mixed and depend to a large extent on concomitant changes in regulatory settings and public attitudes.

At one level, corporate behaviour, shaped by legal tools such as disclosure, directors' duties and shareholder resolutions, may positively enhance governance of the energy transition by

---

investments of Australian super funds in fossil fuel companies. See further https://www.marketforces.org.au/campaigns/super/.

[104] Interviews numbers 4, 8, 16, 17, 18, 22 and 24.

[105] A small number of funds have introduced targeted divestment initiatives designed to reduce climate risk exposure and respond to member pressure on this issue, such as actively screening out companies that make a certain proportion of their profit from fossil fuels from certain asset classes. Some funds screen fossil-fuel investments from their socially responsible investment options, which are available for members to select voluntarily. Yet the uptake of socially responsible options by members remains very modest. See John Collett, 'Super funds flex muscles on responsible investing', *The Sydney Morning Herald*, 5 Jun. 2018, available at https://www.smh.com.au/money/super-and-retirement/super-funds-flex-muscles-on-responsible-investing-20180530-p4zics.html.

[106] Interview number 5.

fostering private sector readiness to deal with the impacts of climate change and changes in the energy system. Shifts in corporate behaviour here are motivated by the need to safeguard private interests, i.e. those of shareholders particularly, but also other stakeholders such as insurers, customers and creditors. As such, positive contributions to energy transition governance will only occur to the extent that those changes align with private interests. If climate change risks are not perceived as material or are taken to be uncertain and long-term, private sector behaviour may only shift slowly and business as usual may remain the norm for many companies. This also points to the need for broader social and market shifts to underpin accompanying changes in corporate attitudes. In essence, the human investors that make up the corporation's shareholders also need to change to provide greater support for corporate action that favours addressing climate risks over simply maximising shareholder profits.

At another level, corporate law tools may help to ensure companies make a positive contribution to energy transition goals by aiding in efforts to achieve emissions reduction and energy transition targets articulated under international and national instruments. However, achieving this degree of alignment between public interest goals and the private interests that largely drive corporate behaviour is difficult in the absence of clear regulatory direction from governments. Evidently, for some more climate risk exposed companies, they are feeling pressure from investors and consumers to move in a direction that is more aligned with public interest climate mitigation goals, such as those reflected in the Paris Agreement's long-term temperature targets. But this action, as a number of company officers candidly told us, is motivated by the financial advantages of responding to consumer and investor concerns and not by some altruistic desire to contribute to averting a global climate crisis. Motivating corporate behaviour to go beyond what is dictated by private interests—even an enlightened self-interested perception of these interests[107]—is likely to require clearer signals from regulators and governments on the overall direction of climate policy development.[108] In

[107] On beyond compliance behaviours by companies and factors motivating such behaviours see the leading work by Neil Gunningham, Robert A. Kagan and Dorothy Thornton, 'Social License and Environmental Protection: Why Businesses Go beyond Compliance', 29 *Law & Soc. Inquiry* 307 (2004).

[108] Article 173 of the French Energy Transition for Green Growth Law, introduced in August 2015, is often cited as an example in this regard. The Law includes targets for reducing greenhouse gas emissions and overall energy consumption, and seeks to reduce the share of fossil fuels and nuclear power in favour of renewable energy and increasing the price of carbon. These provisions are coupled with mandatory climate risk reporting requirements for listed companies, and investors are required to provide information on ESG issues and the alignment of their policies with the national energy transition strategy. See further, Principles for Responsible Investment (PRI), *French Energy Transition Law: Global Investor Briefing* (2016), available at https://www.unepfi.org/fileadmin/documents/PRI-FrenchEnergyTransitionLaw.pdf.

Australia, opportunities for harnessing corporate behaviour to serve public interest climate goals are limited by the lack of regulatory controls on corporate emissions and governments' reluctance to embrace mandatory climate risk disclosure requirements.[109]

Of course, these two aspects are not mutually exclusive. Indeed, their potential mutuality is driving much of the current focus by civil society on using corporate law tools to spur changes in company decision-making and to pressure corporate regulators to increase enforcement efforts. There remains the potential that we will reach a governance tipping point (hopefully in advance of any climate system-related ones)[110] where the pressure exerted by external actors in litigation and through engagement avenues is sufficient to generate political pressure for regulatory change that clearly aligns corporate private interests with public climate change mitigation goals.

V. <u>Conclusion</u>

Our research on the use of legal tools of business risk disclosure, directors' duties and shareholder resolutions to drive corporate energy transition offers glimmers of hope but also important caveats. These tools, and the private governance model they underpin, are unlikely to be a panacea in advancing climate action and energy transition, especially in countries like Australia where political and economic support for fossil fuels remains strong. Identifying, assessing, disclosing and managing climate risks—as the law currently requires of companies and their directors—does not automatically translate to changed decision-making by companies on energy transition questions along the timeframes required to meet international goals such as those set by the Paris Agreement. Likewise, the potential for investment decision-making to shift progress on energy transition by companies is limited without other more substantive regulatory reforms acting in concert with these private governance drivers.

---

[109] For example, in its response to a recent Senate inquiry report on carbon risk disclosure—which recommended that the government commit to implementing the recommendations of the TCFD and undertake the necessary law reform to give them effect—the Australian government expressed that law reform was not required 'as the disclosure requirements in the *Corporations Act 2001* are principles-based and do not impede the implementation of the Taskforce's recommendations by stakeholders': Australian Government, *Australian Government's Response to the Senate Economics Committee report: Carbon risk: a burning issue*, Mar. 2018, p. 3.
[110] On climate system tipping points see Will Steffen et al, 'Trajectories of the Earth System in the Anthropocene' (2018) 115(33) *Proceedings of the National Academy of Sciences* 8252.

While the conclusion that private mechanisms have limits when it comes to governing the energy transition may seem trite, it is nonetheless important to reiterate in a context where states seem to be backing away from their national and international commitments to take progressive and ambitious action to address climate change. Private law tools like business risk disclosure requirements, directors' duties and shareholder rights—at least as they are presently framed under Anglo-Australian corporate law[111]—can certainly bring us some of the way. In particular, they give legal gravitas to the relatively recent and rapid shift in understanding in the business community that climate change is not purely an ethical, environmental concern but rather a matter of financial risk. In turn we can expect to see more companies, under pressure from investors, regulators and civil society, being more transparent about climate business risk and the internal strategies they are adopting to address these risks.

More radical change, though, that aligns with public interest climate regulatory goals is unlikely to happen through private sector shifts alone. Public sector involvement will be critical, whether by decisive government action that clearly signals to the private sector the urgency of a clean energy transition and/or public interest litigation that highlights the potential for private sector liability if there is a failure to act on climate risk.

[111] See Foerster, Peel, Osofsky and McDonnell, above n39, for a discussion of potential reforms to disclosure laws in Australia.