Disclosing and Managing Physical Risks – a new driver for private sector adaptation?

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- New framing of climate change as a material financial risk for business & investors
- How does this enliven obligations within company & securities law to disclose and manage these risks?
- Are these legal tools driving corporate energy transition?
- How are investors & civil society using these tools to pressure companies to transition away from heavy reliance on fossil fuels & to adopt clean energy practices?

Outline

- Climate change risks for business – *physical* & transition
- Legal obligations to disclose & manage these risks
- Investor pressure through engagement, shareholder resolutions
- Potential to drive & hasten uptake of adaptation measures by business?

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TCFD | TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES

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What are the risks (& opportunities)?

Physical	Transition
• Acute risks – event driven, e.g. greater occurrence of severe weather events • Chronic risks - longer term shifts in climate patterns, e.g. changes to rainfall, temperature and other factors *Leading to disruptions to operations, transportation, supply chains; damage to physical assets; and reduced resource availability.*	• *Legal/policy* – compliance costs and potential litigation • *Technology* – existing tech. investments written off, new investments & operational changes • *Market/economic* – viability of business model? • *Reputational* *Leading to lost revenue, reduced value of operating assets and investments, 'stranded' assets, reduced co. value*

What does the law say?

Business risk disclosure – fundamental element of company & securities law – market transparency & efficiency – investors/shareholders & other market participants depend on this information

Publicly listed companies must disclosure *material* risks to their business in financial statements and accompanying commentary (annual reports, prospectus, other disclosure). Directors sign off on financial statements & reports as providing *true & fair* representation of company affairs.

Materiality – will this information influence the economic decisions of market stakeholders? Could the risk substantially impact on the company's ability to create or preserve value for shareholders?

Under current law, many Australian companies – esp. resource, energy & finance sectors - would be obliged to report climate-related risks as part of mainstream financial reporting (financial statements & director's report).

Additional - & of a distinctly different nature - to any reporting of greenhouse gas emissions under the *National Greenhouse and Energy Reporting Act 2007.*

- 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(3) *Company and Securities Law Journal*.

- Noel Hutley SC and Sebastian Hartford-Davis, *Climate Change and Director's Duties: Memorandum of Opinion* (7 October 2016).

Core Elements of Recommended Climate-Related Financial Disclosures

Governance
The organization's governance around climate-related risks and opportunities

Strategy
The actual and potential impacts of climate-related risks and opportunities on the organization's businesses, strategy, and financial planning

Risk Management
The processes used by the organization to identify, assess, and manage climate-related risks

Metrics and Targets
The metrics and targets used to assess and manage relevant climate-related risks and opportunities

Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures (June 2017)

- Disclose in mainstream financial reports
- Scenario analysis (including 2°C or lower temperature goal)
- Applies to operating companies AND financial-sector organizations, including banks, insurance companies, asset managers, and asset owners

Investor pressure

- Institutional Investors – Superfunds, esp. industry funds (e.g. Local Government Super, HESTA, AustralianSuper)
- Fund managers - BlackRock, *Adapting Portfolios to Climate Change* (2016)
- Representative bodies & service providers –ACSI
- Civil Society – Australasian Centre for Corporate Responsibility, Market Forces
- Engagement & Shareholder resolutions
  - Better climate risk disclosure (TCFD) & management
  - Transparency around industry association membership

Climate Action 100+
Global Investors Driving Business Transition

Investor Group on Climate Change

3 May 2018, Shareholder Resolution

- Market Forces & Local Government Super
- Seeking TCFD compliant disclosure
- Sub-standard disclosure
- Physical Risks - significant & increasing shareholder losses from extreme events > concern about basic business model
  - 2017: Hurricanes Harvey, Irma and Maria (Americas); Californian wildfires, Tropical Cyclone Debbie (Australia) > highest level of insured catastrophe losses on record
- & transition risks – underwriting fossil fuel projects
- Resolution not legally valid (advisory resolutions not currently permitted) BUT strong showing of shareholder support (18+%)

- Australian context: more traction on transition risks; physical risks seen as too uncertain? too long term? (political context / climate scepticism)
- Building momentum - recognition of climate change as business risk & legal requirements to disclose
- Pressure building from external stakeholders (investors, regulators, civil society) – note US litigation trends
- Best practice developing – TCFD – including physical risks
- Risk internalisation, changed behaviour?
  - internal > shifting capital, R&D etc to clean energy + adaptation / resilience
  - external > engagement, investment screening, divestment

More Information:

http://law.unimelb.edu.au/centres/creel/research/current-research-projects/corporate-energy-transition

- Anita Foerster and Jacqueline Peel, 'Liability for Misleading Disclosure of Climate Risk: could US-style claims happen in Australia?' (2017) 32(3) *Australian Environment Review*.
- 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(3) *Company and Securities Law Journal*.
- Anita Foerster and Jacqueline Peel, 'Rio Tinto's climate change resolution marks a significant shift in investor culture' *The Conversation* (3 May 2018).
- Anita Foerster and Jacqueline Peel, 'Climate Change is a financial risk, according to a lawsuit against the CBA' *The Conversation* (16 August 2017).
- Anita Foerster and Jacqueline Peel, 'Carbon Risk Disclosure: The risk for Australian companies' *Pursuit* (29 August 2016).