

Directors' duties in a warming world *and* the net zero transition

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- in conjunction with Sarah Barker, Head of Climate Risk Governance, MinterEllison

Guernsey Institute of Directors, 11 June 2021

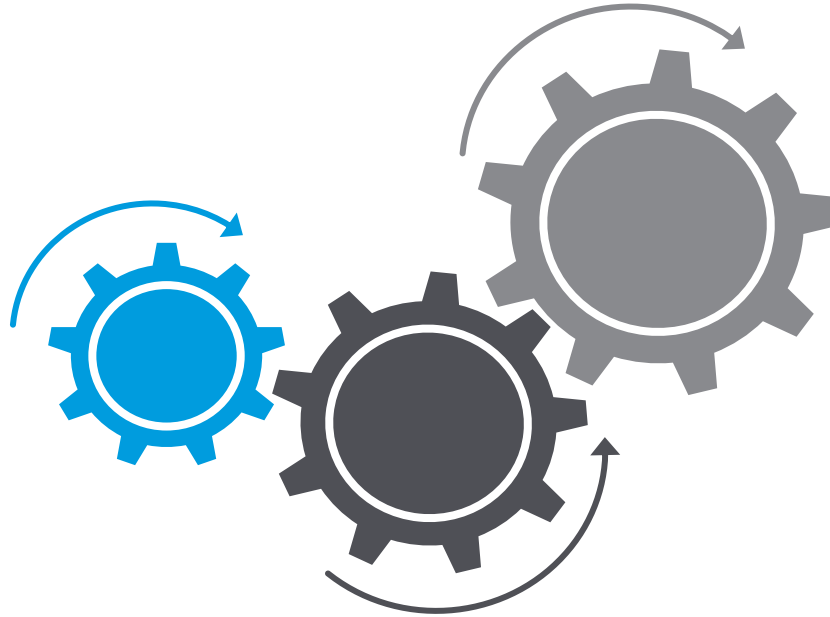
Founders



Partners



D&O liability risks (like other climate liability risks) stem from physical and transition risks



Physical risks

gradual onset changes, extreme weather events and ecological impacts



Transition risks

market impacts driven by policy and regulation, technology and social responses to those physical risks



Liability risks

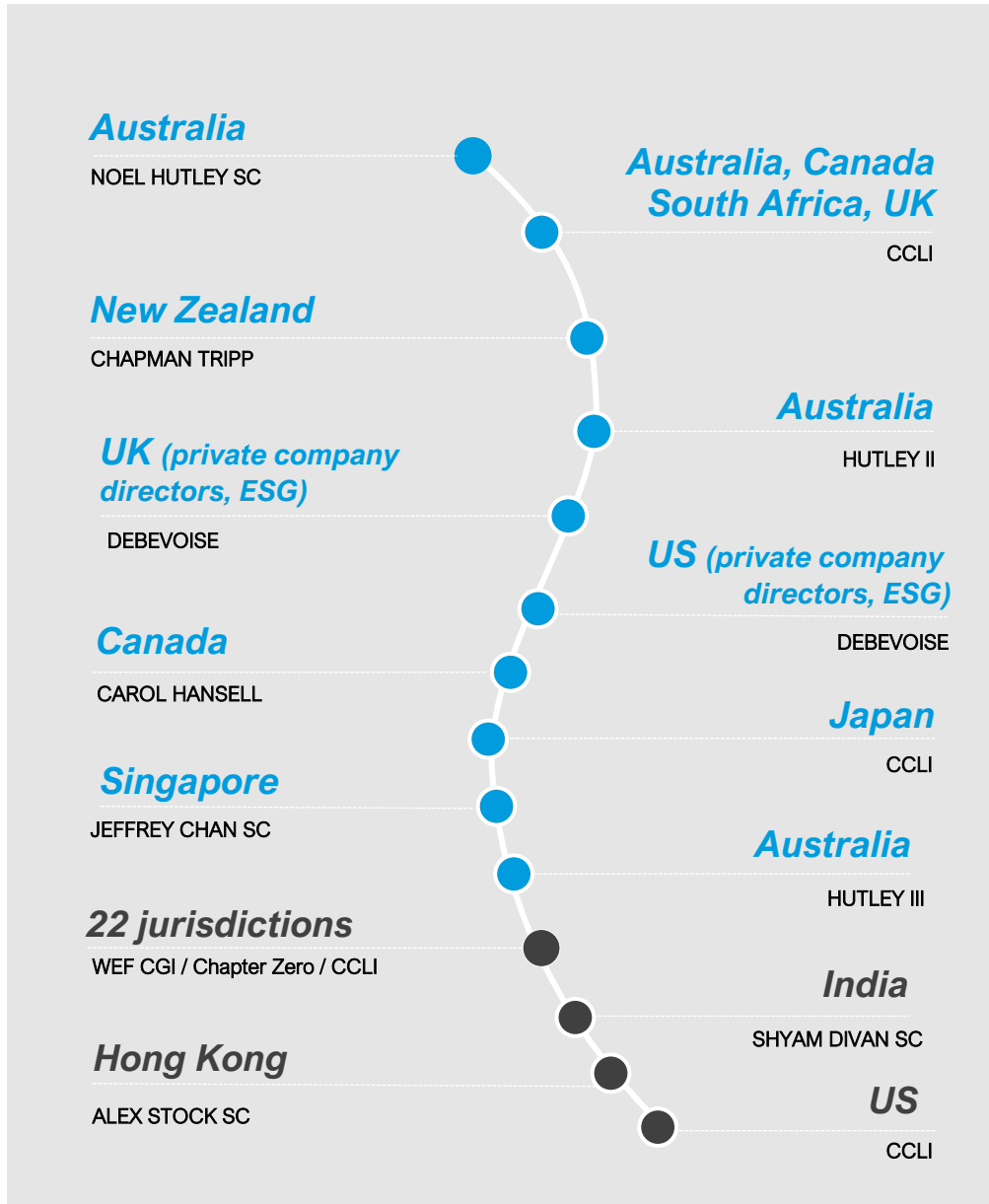
failure to mitigate, adapt to or disclose the physical or transition risks



Carbon emissions have to decline by 45% from 2010 levels over the next decade in order to reach net zero by 2050. This requires a massive reallocation of capital. If some companies and industries fail to adjust to this new world, they will fail to exist.”

Governor of Bank of England Mark Carney,
Governor of Banque de France François
Villeroy de Galhau and Chair of the Network
for Greening the Financial Services Frank
Elderson (17 April 2019)

Legal opinions on directors' duties and climate or ESG

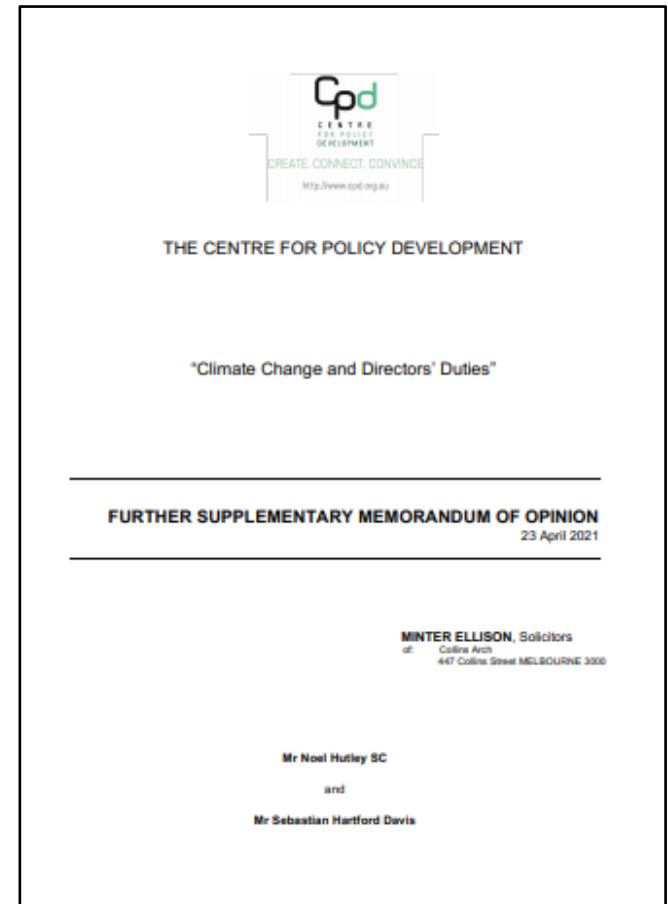


Directors' duties to act in the best interest of the company require consideration of climate issues to the extent they intersect with the interests of the company.


And the duty to exercise due care, skill and diligence requires a proactive and increasingly robust consideration of climate risks to fulfil the standard of care.

This is the case even in jurisdictions without express stakeholder considerations (Australia and Singapore, cf UK and Canada) because climate is a foreseeable and increasingly material climate risk issue for companies.

- New opinion by Australian barristers Sebastian Hartford Davis and Noel Hutley SC published in April 2021.
- The opinion concluded that:
 - Consideration and establishment of net zero commitments is becoming expected of directors in the fulfillment of their duties;
 - Net zero commitments may amount to “greenwashing” and give rise to an acute liability risk; and
 - Directors can take several practical steps to reduce their liability risk.



World-first climate risk case


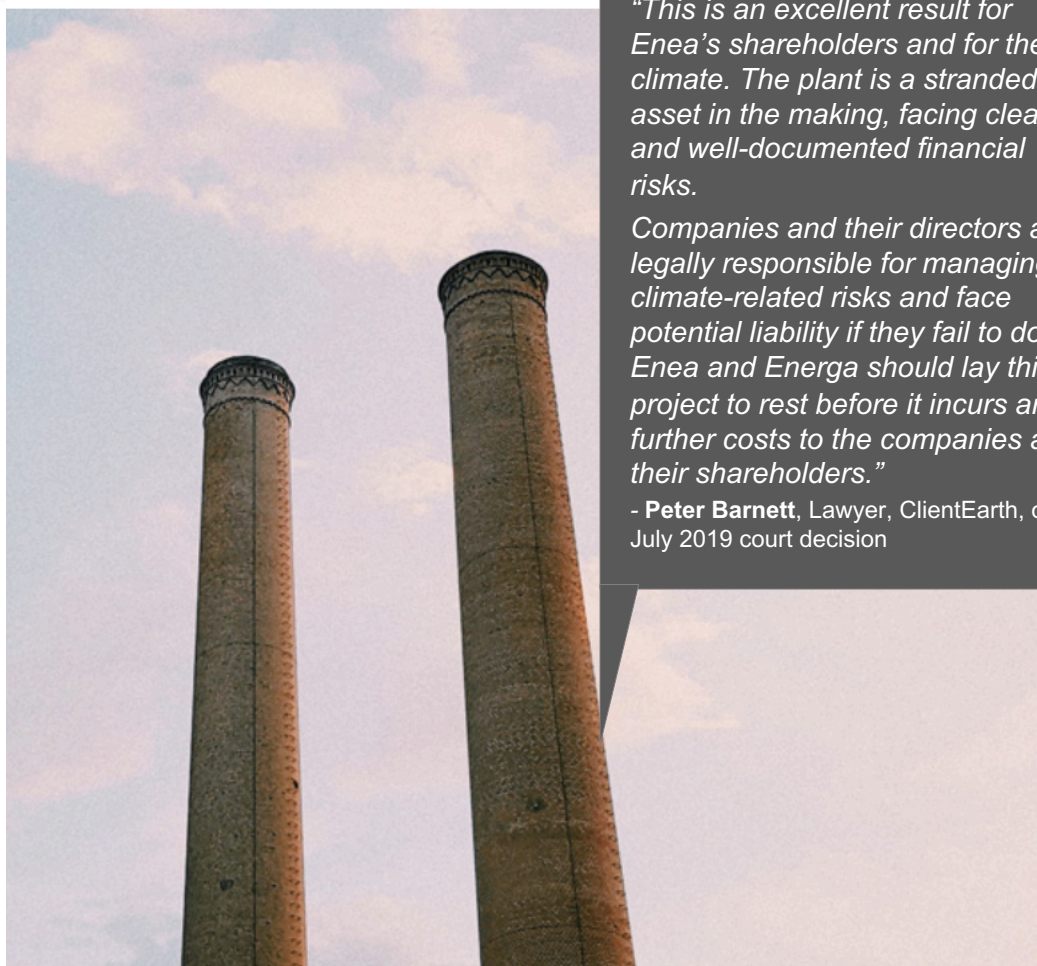


Ostrołęka C

The €1.2bn white elephant in the room at COP24

Polish energy companies ENEA and Energa are pushing ahead with plans to construct a controversial new €1.2bn, 1 GW coal power plant predicted to be a “financial and economic disaster” – just as Poland hosts the global climate conference.

Why?

“This is an excellent result for Enea’s shareholders and for the climate. The plant is a stranded asset in the making, facing clear and well-documented financial risks.

Companies and their directors are legally responsible for managing climate-related risks and face potential liability if they fail to do so. Enea and Energa should lay this project to rest before it incurs any further costs to the companies and their shareholders.”

- Peter Barnett, Lawyer, ClientEarth, on 31 July 2019 court decision

Major court win shows power of corporate law to fight climate change

Fiduciary duty and the TCFD



“[6] Presumably, in due course, the Respondent [pension fund] will argue that whether it [invests in businesses with large carbon footprints] or not is not germane to the financial performance of the fund to which he will respond that the fund will not perform very well if its investments are under water.”

- McVeigh v Retail Employees Superannuation Pty Limited [2019] Federal Court of Australia 14 (17 January 2019) Perram J

Australian proceedings in which 23 year old member claimed breach of statutory and equitable duties by pension fund trustee regarding climate change risks.

In November 2020, McVeigh and Rest agreed to a settlement in which Rest acknowledged that climate change poses a “material, direct and current financial risk” to the fund. REST also committed to net zero emissions by 2050 and to reporting against the TCFD’s recommendations.

The New York Times

California Says PG&E Power Lines Caused Camp Fire That Killed 85



*Williams (derivative as
PG&E) v Earley (US) –
shareholder claim*

*York County v Rambo
(US) – claim by
pension funds against
PG&E's former
directors as well as the
banks who underwrote
PG&E's corporate debt*

ExxonMobil

Ramirez class action 2016 (pending)

- Against ExxonMobil and 3 directors and officers
- Claim of securities fraud through misleading statements leading to inflated securities prices

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION	
PEDRO RAMIREZ, JR., Individually and on Behalf of All Others Similarly Situated,	§ Case No. 3:16-cv-3111
Plaintiff,	§ <u>CLASS ACTION</u>
vs.	§ COMPLAINT FOR VIOLATIONS OF THE § FEDERAL SECURITIES LAWS
EXXON MOBIL CORPORATION, REX W. TILLERSON, ANDREW P. SWIGER and JEFFREY J. WOODBURY,	§
Defendants.	§
	§ <u>DEMAND FOR JURY TRIAL</u>

Von Colditz derivative action 2019 (pending)

- Against 16 directors and officers and ExxonMobil as nominal defendant
- Claims include breach of fiduciary duty, waste of corporate assets and unjust enrichment

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION	
SARAH VON COLDITZ, et al.,	§
Plaintiffs,	§
v.	§ Civil Action No. 3:19-CV-1067-K
DARREN W. WOODS, et al.,	§
Defendants.	§

Litigation ratchet: duties and disclosure

O'Donnell v Cth (lodged 21 July 2020)

Retail purchaser of exchange traded Australian sovereign bonds alleges:

- a failure to disclose the climate risk impacts on the Commonwealth credit risk was misleading
- a failure by the officers to ensure adequate disclosure was a breach of the statutory duty of due care and diligence.

Consider: robustness of climate-related risk information gathering, verification and disclosure processes?

Form NCF1

Concise Statement

No. _____ of 2020

Federal Court of Australia
District Registry: Victoria
Division: General

Kathleen O'Donnell
Applicant

The Commonwealth of Australia
First Respondent

Secretary to the Department of Treasury
Second Respondent

Chief Executive Officer of the Australian Office of Financial Management
Third Respondent



Katta O'Donnell

Litigation ratchet: A court can order a corporation to reduce emissions

- Dutch court held that to meet the legal standard of care it owes to the claimants and to respect their human rights, Shell is obliged reduce its emissions by 45% by 2030 through the Shell group's corporate policy - a hard 'obligation of results' for its own scope 1 and 2 emissions, and 'best endeavours' for scope 3 customer emissions.
- Shell does not have the option of just observing changes in society and politics and acting in concert with society as a whole, rather it must play its part independently.
- Shell's current corporate policy is incompatible with this, so it is in imminent breach of its emissions reduction obligation – so the court ordered it to comply.



The Shell directors must now oversee a rapid shift in Shell's strategy to implement this judgment.

Climate lawyers are excited about the Court's findings on the 'standard of care' required of Shell. What will this mean for directors' standard of care?

How to minimise the risks of liability and continue to practice good governance

Even if potential liability exposure does not feel material, there is a difference between avoiding liability and fulfilling your responsibilities.





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