CENTRE FOR POLICY DEVELOPMENT

media release

New legal opinion says benchmark has risen for company directors on climate change risks and opportunities

29 March 2019

Today the Centre for Policy Development (CPD) released an update of a landmark 2016 legal opinion on how Australian law requires company directors to consider, disclose and respond to climate change.

The supplementary opinion, provided by Noel Hutley SC and Sebastian Hartford Davis on instruction from Sarah Barker at Minter Ellison Lawyers, focusses on five material developments since their original 2016 opinion. These are said to constitute "a profound and accelerating shift in the way that Australian regulators, firms and the public perceive climate risk". Mr Hutley and Mr Hartford Davis conclude that "these matters elevate the standard of care that will be expected of a reasonable director".

"Company directors who consider climate change risks actively, disclose them properly and respond appropriately will reduce exposure to liability", they write. "But as time passes, the benchmark is rising."

CPD, which commissioned both opinions and has hosted crucial climate change statements by APRA, ASIC and the Reserve Bank over the past three years, welcomed the fresh clarity provided by the supplementary opinion.

"The original opinion provided by Mr Hutley and Mr Hartford Davis was ahead of its time but has subsequently been endorsed by Australia's financial regulators", said CPD CEO Travers McLeod.

"The updated opinion makes it clear that the significant risks and opportunities associated with climate change will be regarded as material and foreseeable by the courts. Boards and directors who are not investing in their climate-related capabilities are exposing themselves and their companies to serious risks", he said.

"Leadership on climate risks by our key financial regulators has been decisive", CPD Policy Director Sam Hurley said. "The unprecedented clarity and consistency of these warnings, along with concerted investor and shareholder pressure and a groundswell of community concern, has permanently reshaped expectations."

"As APRA's recent climate survey said, it is time to translate greater awareness of climate risk into urgent action", said Mr Hurley. "This is true for companies that are still dragging the chain on climate risks – and even more so for policymakers whose inaction to date has made climate risks even more profound".

The five material developments referred to by Mr Hutley and Mr Hartford Davis in the supplementary opinion include "striking" alignment between key regulators ASIC, APRA and the Reserve Bank of Australia on the "financial and economic significance of climate risks", as well as new climate reporting frameworks relevant to disclosure, increased investor and community pressure, the state of scientific knowledge, and litigation risks.

"The regulatory environment has profoundly changed since our 2016 Memorandum, even if the legislative and policy responses have not", Mr Hutley and Mr Hartford Davis write. "These developments are indicative of a rapidly developing benchmark against which a director's conduct would be measured in any proceedings alleging negligence against him or her."

The original 2016 opinion was also provided by Mr Hutley and Mr Hartford Davis. It found that directors who failed to consider foreseeable climate risks "could be found liable for breaching their duty of care and diligence in the future". Its release helped to frame climate risk as a mainstream legal and financial issue in Australia's corporate sector, sparking a series of critical interventions by financial regulators on climate change.

The updated legal opinion and further information is available in full here:
https://cpd.org.au/2019/03/directors-duties-2019/

Travers McLeod, Sam Hurley and Sarah Barker are available for interview.
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