Global warming, emerging corporate risk and lawyer disclosure

The impacts of climate change are upon us and corporations now face the ramifications. Those with emissions intensive processes have boards, in-house counsel and even external litigators who will increasingly bear reputational responsibilities and legal consequences if they do not prepare.

Is there an emerging duty on lawyers to protect shareholder value by blowing whistles about clients’ climate-damaging activities? I think such a duty is ‘emerging’, for the following reasons:

- First, there will be, in my opinion, an ethical responsibility upon lawyers to disclose clients’ climate-damaging actions, or those that show a lack of climate-mitigation in relation to emissions;
- Second, there exists a permissive exception to client confidentiality in the conduct rules, allowing us report iniquity or wrongdoing; and
- Third, all lawyers have the inherent right and autonomy, not to suffer a decline in their own reputation for honesty and integrity.

So a key legal issue is: to what point in time will future courts and regulators look back and determine that climate risk was reasonably foreseeable by key corporate decision makers, and also say that boards and their legal advisors ought to have known this? Given the quantity and depth of publicly available information about climate-deterioration, it is conceivable that that ‘look-back point’ is, more or less, now.

Consider the current state of play in climate litigation. Presentations to a law and climate change workshop at Melbourne Law School in November 2016 heard that

- although no Australian cases have so far resulted in injunctions or damages against either government or miners in relation to climate damaging activity, the cases that have been heard establish that climate science is acceptable in evidentiary terms, that single projects can contribute to average global warming and that emissions are cumulative;
- government participation in and ratification of international climate mitigation treaties could constitute adequate assumption of a duty of care by such governments; and
- ‘…there is a real prospect of success [in tort] against government in an Australian context’, for failure to ensure that harm is not inflicted on citizens by the consequences of climate change.1

While there is obviously an emerging personal risk to directors and a financial risk to corporations with no, or no credible, climate-exposure plans (which can be activated through shareholder class actions),2 there is also a longer-term regulatory compliance requirement, likely to be policed by ASIC or APRA, for which the consequences of breach will be quasi-criminal or criminal, in a similar way to that in which, for example, lawyers’ artificial tax schemes are prosecuted today and any money laundering activities will be too.3

The G20 Financial Stability Board

Let’s look at the latter regulatory compliance issue, because that is where the immediate action is, and the story begins with the Financial Stability Board. In the aftermath of the global financial crisis, the G20 set up its Financial Stability Board and, in turn, the Task Force on Climate-related Financial Disclosures (TCFD), chaired by Michael Bloomberg and including representatives of ratings agencies, mega-banks, asset managers, stock exchanges, accountancy firms, insurers/ re-insurers, miners and carmakers.4

The TCFD has produced a draft framework for corporate disclosure of climate risks, with recommendations that encourage the key financial and industrial sectors to develop and disclose to markets, over a 5 year time frame, progressively deeper and ‘…more complete, consistent and comparable information, for market participants, [with] increased transparency and appropriate pricing of climate-related risks and opportunities.’5

Although Australia’s largest fossil fuel industries are well behind the global trend to disclose and manage their exposure to climate change...
risk in terms of the TCFD draft framework, 4 APRA has very recently decided that the TCFD direction – involving both risk and opportunity – is the right way to go. 7

Implications for lawyers’ duties
So what has this got to do with lawyers, especially those with transactional and litigation practices and connections to major climate-exposed clients? Lawyers inside corporations and external firms acting for them, have rarely been concerned about corporate negligence being imputed to them personally. Even disciplinary action or prosecution by regulators is unusual, unless there is clear evidence, for example, of corruption or tax evasion.

Part of the reason for this protective bubble around us is our traditionally agnostic attitude to our clients’ activities – this is the so-called ‘agency’ rationale for non-engagement of lawyers with the moral issues behind our clients’ behaviour. 1 Where a client decides to try to keep secret or deliberately underestimates a climate risk – even though they know about the TCFD recommendations – or we become aware that the client is just careless (negligent) as to the real extent of the risk – our natural conditioning is to keep the secret too. But is it professionally necessary to speak out?

I’ll get to this, but there is a preliminary issue here – a lot depends on who the client is. If the client is obviously the corporation (and not the CEO), it may be easier for us to say, ‘Ok, my client is the corporation and its shareholders’, and therefore their interests are better served by disclosure of that risk to the market or a regulator.

Take this very contemporary local example – the 23 remaining coal-fired electricity generators around Australia: with renewable energy prices falling rapidly and no clean coal technology available, these generators may shortly find themselves saddled with coal mines and turbines that are huge, financially stranded assets.

• Should we, as the in-house lawyers be worried about this personally, if we know the company has ignored the need to model their climate risk under the TCFD guidelines?
• Answer: not if we are clear that our true ‘clients’ are the company’s shareholders and we act accordingly. 9

As climate risk becomes a more immediate financial risk to corporations, especially for emissions-intensive industries and their many customers, corporation lawyers (internal and external) who succumb to CEO pressure to contain awareness of that risk, are in turn at risk of breaching an emerging duty to disclose to shareholders what is going on.

So, what does legal ethics say to lawyers who may be caught up in this scenario? Many will think they have no option but to stay silent in any event, because of the duty to preserve client confidentiality. But this is not necessarily the case.

Lawyers’ Ethical Types
Looking closely at confidentiality first requires a look at what is known in legal ethics as the dominant lawyers’ ethical type. The Adversarial or Zealous Advocate type of lawyer is dominant because most lawyers generally agree with the view that they need to do what their client tells them to do. This sort of lawyer is moderately to highly partisan; i.e., they consider they must do everything possible for their client within the law. But adversarial advocacy encourages an unhealthy tacit agreement between client and lawyer – a mutual avoidance of ethical responsibility, particularly for ultimate actions that cause damage to others.

This is a process where some clients (even sophisticated, corporate clients) can become over-reliant on their adversarial advocate lawyer for ‘advice’, but the lawyer, even though they know this, will be content to stick with the view they typically learned in law school – that their client is ultimately in charge and always makes their own independent decisions. The result is that these clients can effectively, be aided and abetted in ignoring the intention of the law and focus on complying with its letter only.

But for climate-exposed companies with ASX values that are dependent on reputations, complying only with the letter of the law may not be enough for much longer. Self-aware adversarial advocates may guard against this cosy relationship, but all who practice private law with monthly budgets,
know that it is in their short-term financial interests to go along with such avoidance devices. And because adversarial advocacy dominates most lawyers’ thinking, we almost always say that, as long as what a client wants is ‘legal’, ethics are less important.

Take this example. A client cement producer, who knows that they are breaching environmental emission standards because of their under-maintained and old sintering furnaces, may be content to rely on an EPA inspector’s report that emission levels are being maintained, even though the inspector was rushed and did not have the resources to properly measure the emissions. When the client’s internal risk management report to this effect comes to the attention of in-house counsel, they are able to fall back on the Adversarial Advocate ideal, rationalise their silence, maintain confidentiality and avoid whistleblowing by convincing themselves that the EPA inspector’s report established company compliance. And further up the line, in the office of the CEO or chief risk manager, they are able to say that as the corporate counsel’s office is happy with the situation, they are also.

Lawyers who are stuck inside this framework keep hearing the same script in their heads: adversarial advocates do not talk! And, because there have been notorious examples of this type of lazy-ethics thinking (AWB, the Reserve Bank’s note printing subsidiaries) the notion of lawyers’ excessive adversarialism or hyper-zeal has emerged. Hyper-zeal is sometimes used to describe an ‘anything goes’ mentality among adversarial advocates, in the interests of meeting a client’s instructions:

- Can you think of a hyper-zealous colleague who can be relied upon to keep silent, no matter what?
- Are you at any risk of Trending this way yourself?

This issue of mandatory silence and secrecy has long been a feature of the United States’ legal ethics, but here in Australia the courts are very clear that anything does not go, and that silence is not required in all cases. The overall interests of the court and the administration of justice, trump what a client may want.

This is the reason why the alternative type of lawyer, the so-called responsible lawyer, has emerged in recent decades. This lawyer is also very respectful of their client’s instructions, but considers wider public interests as part of their implicit brief from their client, and is constantly seeking to balance the two, in their client’s longer term (as opposed to short-term) interests.

A responsible lawyer inside AWB for example, would have reasoned that the company’s decision to hide the bribes they paid to the former Iraqi dictator’s regime, was a decision that was likely to unravel at a later date and do considerable harm to the company’s reputation, since bribes paid to unstable governments are rarely secret for long.

And, to go back to the above example of the cement producer who is prepared to rely on a flawed EPA inspectors’ report, a responsible in-house lawyer inside that corporation would realise that the company’s own internal risk assessment report, or reports, would likely come to public attention sooner or later – just as the internal reports showing big tobacco’s early knowledge of the toxicity of cigarettes, were eventually unearthed.

Climate change – better described now as climate deterioration – has far more adverse public consequences than big tobacco’s deceits, and there is much more at stake for a corporation these days, should it decide to bury adverse information about its’ climate impacts, or to delay others’ efforts to force such disclosure.

In particular, since the TCFD is very likely to recommend progressively more market disclosure of climate risks in the manner outlined above: then transactional or litigation lawyers, whether in-house and therefore corporatised or otherwise, who become aware of secret efforts to avoid these disclosures, will be faced with a choice:

- Are they hyper-zealous (that is, considerably more than adversarial) and silent
- Or are they responsible, in their ethical orientation?

If responsibility prevails, and if the many disincentives to whistleblowing are overcome, then the conduct rules can provide support for disclosure.

Rules of Professional Responsibility – ASCR9

The Australian Solicitors’ Conduct Rules (ASCR) say almost nothing about what a lawyer must or may do when confronted with client secrets that may or may not be narrowly legal, but are certainly morally empty. Inference from the rules is therefore necessary.

The ASCR start well by expressly stating that they supplement the general law, rather than replace it (ASCR 2.2: “the Rules apply in addition to the common law’). Legal ethics is a part of the general law, and covers a lot more ground than just the principles expressed in the ASCR. Both have traditionally valued client confidentiality above almost all other professional duties. But confidentiality, as a matter of everyday reality, is rapidly disintegrating. Some are beginning to ask if any reliance on confidentiality is prudent anymore, anyway. We are all entitled to wonder if the concept still has enough basis as a matter of practice.

And if information is already public because of social media, leaks or hacks, then there is nothing to keep secret and no legal barriers to disclosure. But even if the information a company has about its own emissions’ profile is still secret, there is a vector for disclosure, which can support an emerging duty on lawyers to act in a climate-protecting manner.

ASCR Rule 9 is the relevant vector – Rule 9 basically says: keep your client’s secrets, but subject to two exceptions which permit lawyers to disclose a client’s confidential information when the consequences of secrecy may be too great...

ASCR 9.2 A solicitor may disclose confidential client information if:

- the solicitor is permitted or is compelled by law to disclose

ASCR 9.2.4 – ‘serious criminal offences’

ASCR 9.2.4 permits disclosure where serious criminal offences by others are involved. Could a breach of the forthcoming TCFD recommendations about disclosure of climate risk be considered a ‘serious criminal offence’? Enough, for example, to permit a responsible lawyer to disclose under ASCR 9.2.4? Definitely not yet, because the recommendations are voluntary – but this could change rapidly and, as mentioned earlier, the ‘look back point’ to what is reasonably foreseeable, is arguably now.

At common law however, there are other well-established exceptions to confidentiality, for example, the so-called ‘crime-fraud’ exception to privilege, which covers and encompasses disclosures about crimes, fraud or civil offences, and extends to communications made with the intention of frustrating the processes of law, and which may be described as a “fraud on justice”.

By extension to the global warming issue, a client who directs their lawyers not to disclose the company’s true climate mitigation preparations with anyone, would be acting inconsistently with recommended TCFD disclosures, and might therefore be said to be engaged in a fraud on justice, particularly if the share price collapses when that information becomes public. And it is not inconceivable that the lawyers involved could be found personally liable in such circumstances.

ASCR 9.2.2 – ‘permitted or compelled by law to disclose’

In relation to the other limb of ASCR 9, 9.2.2, what does it mean to say permitted or compelled by law to disclose? As
mentioned previously, the forthcoming TCFD recommendations are likely to be voluntary in the short term, so clients and their lawyers are unlikely to be compelled to disclose their climate risk assessments or preparations. Accordingly, lawyers who do disclose are unlikely to be able to assert that they were compelled to do so under that arm of 9.2.2.

But what if the final TCFD recommendations, considered as a whole, make it abundantly clear that global financial stability is profoundly threatened by lack of preparation for and mitigation of climate risk? Will a lawyer inside such a corporation, or inside an advising law firm, be ‘permitted to disclose’ under 9.2.2?

Christine Parker and I address this in Ch. 4 of the forthcoming third edition of Inside Lawyers’ Ethics. It is clear that the possession of so-called ‘inquisitorial information’ about crimes or frauds does not attract confidentiality, that ‘crimes, frauds and misdeeds’ may occur in the future, that ‘…almost any civil wrong [may fall] within the category’, and finally that if an iniquity is involved the court must then balance the competing interests to determine whether disclosure is justified.

Conclusion

Since the TCFD framework and APRAs adoption of the same are imminent, it is probable that there will be instances where secrecy will constitute an iniquity by defrauding and degrading the market. There is therefore support for a disclosure ‘permitted by law’ under ASCR 9.2.2 where iniquity or wrongdoing as understood by Australian common law is involved, providing competing interests in secrecy or disclosure are actively balanced. This balancing process is essential for any prospective whistle-blower, and no less so for a corporate, responsible lawyer concerned for their own reputation for integrity, given the likelihood of later publicity.

On behalf of the Australian in-house legal sector, ACC Australia recently provided a submission to the federal parliamentary inquiry into whistle-blower protections in the corporate, public and not-for-profit sectors. This submission can be viewed via the ACC Australia website.

Footnotes

4 2019 is the year when lawyers may be required to secretly ‘dob in’ clients for possible money laundering.
9 Do you remember this example? the case of AWB, the major wheat exporter which covered up bribes to the former Iraqi regime of Saddam Hussein. Inside AWB, at least one in-house lawyer was in close contact with other AWB executives and knew of their decision to keep quiet about the bribery and did not act. See Christine Parker and Adrian Evans, Inside Lawyers’ Ethics, 2nd ed, Cambridge University Press, Melbourne, 2014, pp.13-16. Jane Lee, ‘Five Year Ban, $50,000 Fine for Former AWB boss’, The Age, 11 April 2017.
11 Parker and Evans, n7, p.34.
12 Parker and Evans, n7, p.13.
13 Parker and Evans, n7, p.332-333.
14 There is insufficient space here to discuss this large issue, but see this site for an overview: https://www.whistleblowing.com.au/learn/whistleblowing/whistleblowing-legislation/
15 (1884) 10 QB 153 (158).
16 Attorney-General (N.T) v Keaney (1985) 158 CLR 510, 514 (Gibbs CJ), R v Bell, ex parte Lees (1988) 146 CLR 141, 156 (Stephen J).
17 For example, an Australian lawyer who advised company directors to phoney their companies to avoid paying properly due debts was disciplined for being ‘involved’ in the contravention. ASIC v Somerville & Ors (2009) NSWSC 934.
19 Gartside v Outram (1857) LJR Ch 113.
20 Initial Services v Rutterill (1968) 1 QB 396.
22 Koomen, above n 59, 76 (emphasis in original).
23 See Parker and Evans, n7, Ch.4.
24 The concept of honesty is unsurprisingly, a baseline in the ASCR, ASCR 4.1. ‘A solicitor must … [4.1.2] be honest … in all dealings in the course of legal practice’.