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Wong & Leow.**

Law, Policy & Regulation: Climate Change Liabilities and Litigation

Richard Allen (Local Principal) | 16 February 2022



Agenda

1

SOURCES OF DIRECTORS' LEGAL OBLIGATIONS

2

OVERVIEW OF POTENTIAL LEGAL LIABILITIES

3

RECENT TRENDS IN CLIMATE CHANGE LITIGATION

4

QUESTIONS

1

Sources of Directors' Legal Obligations

Sources of Directors' Legal Obligations

All Companies in Singapore

■ Common Law

- Duty to act bona fide in the best interests of the company
- Duty to exercise reasonable care, skill and diligence

■ Statutory

- Duty to act honestly and use reasonable diligence in the discharge of the duties of office (§157(1) Companies Act)
- Financial statements must comply with Accounting Standards and give a "true and fair view" of the financial position and performance of the company (§201(2) Companies Act)

Sources of Directors' Legal Obligations

Companies in Certain Industries

- Environmental Protection and Management Act
 - Air, water and land pollution and control of noise and hazardous substances
 - Directors may be liable where an offence is committed with their consent or connivance or attributable to any act or default on his or her part
 - Fines of up to SGD 50,000 and/or prison terms of up to 2 years
- Carbon Pricing Act
 - Registration and reporting of greenhouse gas emissions for certain industries
 - Directors may be liable where they consented, connived or conspired in the offence; were knowingly concerned in the offence; or ought reasonably to have known about the offence and failed to take reasonable steps to prevent it
 - Fines of up to SGD 50,000 and/or prison terms of up to 2 years

Sources of Directors' Legal Obligations

Companies Listed on SGX

- Existing SGX Sustainability Reporting – “Comply or Explain”
 - Material environmental, social and governance factors
 - Climate-related disclosures consistent with the recommendations of the Task Force on Climate-related Financial Disclosures
 - Policies, practices and performance
 - Targets
 - Sustainability reporting framework
 - Board statement and associated governance structure for sustainability practices

Sources of Directors' Legal Obligations

Companies Listed on SGX

- SGX Recommended Core ESG Metrics
 - Greenhouse Gas Emissions
 - Energy Consumption
 - Water Consumption
 - Waste Generation
- Corporate Governance Code (Principle 13)
 - The Board adopts an inclusive approach by considering and balancing the needs and interests of material stakeholders

Sources of Directors' Legal Obligations

Companies Listed on SGX

- SGX Consultation Paper – Climate and Diversity: The Way Forward

FY	Reporting Practice	Publish
2022	Climate reporting on a ' <u>comply or explain</u> ' basis for all issuers	2023
2023	Climate reporting on a <u>mandatory</u> basis for issuers in (a) financial industry; (b) agriculture, food and forest products industry; and (c) energy industry	2024
2024	Climate reporting on a <u>mandatory</u> basis for issuers in (d) materials and buildings industry; and (e) transportation industry	2025

Sources of Directors' Legal Obligations

Financial Institutions

- MAS Environmental Risk Management Guidelines (Dec 2020)
 - Approve an environmental risk management framework and policies to assess and manage the financial institution's environmental risk exposures on an ongoing basis
 - Ensure that material environmental risk is addressed within the financial institution's risk appetite framework
 - Set clear roles and responsibilities for board members and senior management, including personnel who are responsible for overseeing the financial institution's environmental risk
 - Ensure adequate understanding of environmental risk and ensure senior management is equipped with appropriate expertise

2

Overview of Potential Legal Liabilities

Overview of Potential Legal Liabilities

Sanctions and Defences

- Sanctions
 - Financial Compensation
 - Statutory Fines
- Defences
 - §157C CA: Reliance on reports, statements, financial data, professional or expert advice
 - §391 CA: Acting honestly and reasonably in all the circumstances

Overview of Potential Legal Liabilities

Derivative Actions

- A minority shareholder may pursue a claim on behalf of the company
- Common Law: In the name of the shareholder, on behalf of the company
 - Companies incorporated in Singapore or overseas
 - Must prove that there has been a fraud on the minority
- Statutory (§216A Companies Act): In the name of the company
 - Companies incorporated in Singapore only
 - Must obtain permission from the Court

Overview of Potential Legal Liabilities

Oppression Actions

- A shareholder claim for unfair conduct by those in control of the company
 - Must prove a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect
 - May involve breach of legitimate expectations arising from any informal or implied understandings between the shareholders
 - Injury to the claimant must be distinct from any injury to the company
 - The Court has extensive powers to order such remedies as it may consider to be appropriate in the circumstances

Overview of Potential Legal Liabilities

“Greenwashing” Actions

- Unfair Practices (§4 Consumer Protection (Fair Trading) Act)
 - Supply of goods or services to consumers
 - False claims or acts/omissions that might reasonably deceive or mislead
 - Claims up to SGD 30,000
 - Fines up to SGD 10,000 and/or prison for up to 12 months
- False or Misleading Statements (§199 Securities and Futures Act)
 - Inducing someone to subscribe for securities or to sell/buy securities
 - Having the effect of raising, lowering or stabilising the market price
 - Knowledge or recklessness as to the misleading nature of the statement
 - Fine not exceeding SGD 250,000 and/or imprisonment not exceeding 7 years

3

Recent Trends in Climate Litigation

Recent Trends in Climate Litigation

Overview

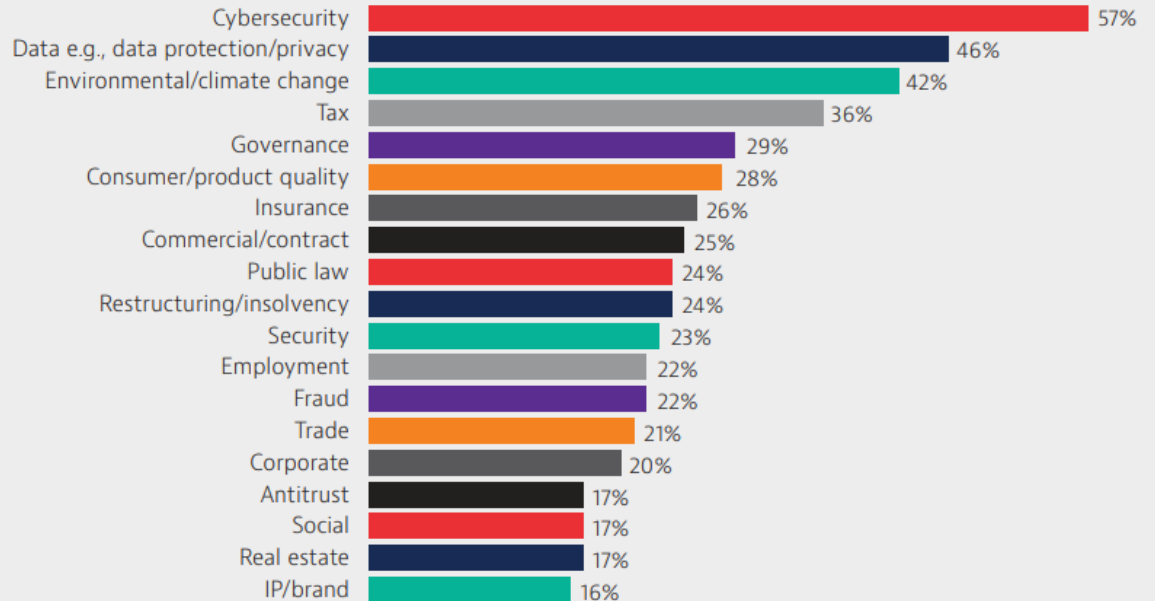
- Over 1,800 ongoing or concluded climate change cases around the world, a figure which has more than doubled since 2015.
- “Strategic” and “Activist” cases are dramatically on the rise, with an increasing number of these cases being targeted at Corporations rather than Governments.
- Notable shift away from seeking to establish corporate liability and towards a focus on financial risks, fiduciary duties, and corporate due diligence, which directly affect not only fossil fuel and cement companies, but also banks, pension funds, asset managers, insurers and major retailers.
- Increasing focus on greenwashing, corporate disclosures and human rights.

Recent Trends in Climate Litigation

Corporate Perceptions



What type of disputes present a risk to your organization in 2022?



Recent Trends in Climate Litigation

Concluded Cases

Case Name	Summary of Case
Milieudefensie et al. v Royal Dutch Shell [2021: NL]	The Court held that Dutch law imposed an “ <i>unwritten duty of care</i> ” that required Shell to reduce its own emissions and a “ <i>significant best-efforts obligation</i> ” to reduce emissions along its entire value chain, including those of its suppliers and consumers.
McVeigh v Retail Employees Superannuation Trust [2020: AUS]	Complaint alleging a failure to provide information related to climate change business risks or any plans to address those risks, in breach of the Australian Corporations Act. The case was settled on the eve of trial, with the defendant agreeing to publish the relevant details.
Advertising Standards Authority v Ryanair Ltd [2020: UK]	Complaint related to a series of advertisements stating that the airline was “ <i>Europe’s lowest emissions airline</i> ”. The ASA concluded that the claims were misleading because Ryanair did not provide the necessary evidence to substantiate that passengers would reduce their personal CO2 emissions compared to flying with another carrier.

Recent Trends in Climate Litigation

Ongoing Cases

Case Name	Summary of Case
Re Exxon Mobil Corp. [2020: USA]	Several derivative actions alleging that the directors misrepresented the costs of climate change regulations and did not appropriately project future costs of carbon and greenhouse gas emissions.
Australasian Centre for Corporate Responsibility v. Santos [2021: AUS]	A claim against an oil and gas company alleging claims in its annual report that it provides clean energy natural gas and has a plan for net zero emissions by 2040 are misleading and in breach of the Australian Corporations Act and Consumer Law.
Ewan McGaughey et al v Universities Superannuation Scheme Limited [2021: UK]	Derivative action against pension scheme alleging that the failure of the directors to create a credible plan for divestment from fossil fuel investments has prejudiced and will continue to prejudice the success of the Company.



Questions

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