Science Update

Climate change: the case for businesses to take action hots up

In a world increasingly focused on the effects of climate change and its contributory factors it is likely that corporations will be closely scrutinised in relation to their climate-related policies and statements. Failure to substantiate claims or claims about actions with little practical effect are likely to be noticed and publicised leading to reputational loss.

Highly motivated groups such as Extinction Rebellion have demonstrated their willingness to target companies involved in 'green-washing'.[1]

In some cases, companies may face actions from regulators such as those brought in the past in relation to claimed product performance.[2]

Claims that products are 'energy efficient' or have been produced in a more 'environmentally sustainable way' are likely to undergo greater scrutiny. Increasingly, companies are making claims about offsetting emissions associated with services, flights for example, or manufacturing of products. In such cases it will be important to provide evidence of realistic offsetting, for example, capture of carbon dioxide in a meaningful time frame, such as a few years, rather than the carbon which will be captured by trees growing over the next 50 years.[3]

Most companies which assess and publicise reductions in their carbon emissions use a formalised carbon auditing framework. The most widely used voluntary standard is that provided by the 'GHG protocol'[4] which measures emissions under 3 different scopes:

- Scope 1 audits the emissions derived directly from actions of the company, for example burning of fossil fuels by back-up generators.
- Scope 2 captures indirect emissions associated with purchased or acquired electricity, steam, heat and/or cooling.
- Scope 3 relates to the "Corporate Value Chain" and allows companies to assess their entire value chain emissions impact (upstream and downstream), and identify where to focus their reduction activities. Scope 3 is intended to capture other indirect emissions (falling outside of Scopes 1 and 2 discussed above), such as those associated with the use of sold products and transportation of products and people.

Previously reporting of Scope 3 has been optional under the GHG protocol and not all companies try to assess emissions associated with Scope 3. Recently, however, there has been renewed interest in Scope 3 reporting in order to help companies make more sustainable decisions about their activities and the products they manufacture, purchase and sell.

In addition to the GHG protocol many companies have signed up to Science Based Targets (a collaboration between UN Global Compact, World Resources Institute and others) which recommends "*...if a company's scope 3 emissions are 40% or more of total scope 1, 2, and 3 emissions, a scope 3 target is required.*" Some companies have very high scope 3 emissions, such as those due to business travel, and despite indicating that they follow science based targets have not set targets to reduce scope 3 emissions.

Shareholder actions are already being brought against companies in relation to a failure to disclose adequate information concerning climate change business risks to allow an informed choice (for example in relation to pension investments[5]) or for misleading shareholders about the potential financial risks arising from climate change and activities which increase GHG emissions[6]. Other kinds of actions include climate liability claims[7]. These claims against the so called 'Carbon Majors', companies which have been identified as being responsible for large scale carbon

1 http://bianet.org/english/environment/214419-extinction-rebellion-activists-protest-greenwashing-at-istanbul-biennial

2 *Australian Competition and Consumer Commission v. Goodyear Tyres*

3 *Australian Competition and Consumer Commission v. V8 Supercars Australia Pty. Ltd 2008*

4 *"...[m]ore than 9 out of 10 Fortune 500 companies reporting to CDP use GHG Protocol."* http://ghgprotocol.org/

5 McVeigh v. Retail Employees Superannuation Trust http://www.lse.ac.uk/GranthamInstitute/litigation/mcveigh-v-retail-employees-superannuation-trust/

6 Abrahams v. Commonwealth Bank of Australia. http://climatecasechart.com/non-us-case/abrahams-v-commonwealth-bank-australia/

7 http://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/

emissions, are exploring the ability to attribute climate liability to such companies on the basis of emissions associated with the use of their products over a set number of years. The total emissions associated with their products are then measured against the overall volume of anthropogenic emissions and the company assigned a percentage responsibility for climate-related costs of mitigation and adaptation. A 3 year investigation carried out by the Philippines Commission on Human Rights recently concluded that Carbon Majors which played a role in anthropogenic climate change could be held legally liable for their impacts[8].

Comment

Although climate liability claims would initially be brought against the major carbon emitters it is possible, if the method of liability attribution is accepted, that claimant lawyers may look to companies with deep pockets which have a relatively small carbon footprint but arguably had the resources to reduce that footprint further, for example, relatively new tech companies able to design energy efficiency into their products, business and infrastructure from the beginning. Other businesses whose products are easy to quantify in terms of carbon emissions are also likely to be a target for this kind of litigation.

Future articles in IPLR will focus on the relevance of scope 3 emissions, outcomes from the COP25 meeting in Madrid, and developments in 'attribution science'.

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8 https://www.business-humanrights.org/en/philippines-commission-on-human-rights-reveals-at-cop-25-worlds-most-polluting-companies-can-be-sued-for-contributions-to-global-warming