# Corporate Liability and Risk in Respect of Climate Change

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*It is irrefutable that increasing greenhouse gases resulting from human activities is causing significant changes to global climate patterns. This is a critical and urgent issue for the world today. It is also unquestionable that one of the largest contributors to this issue is business corporations. Nevertheless, "climate change denial" continues to exist on the part of certain corporate organisations. This article provides an overview of a corporate organisation's legal liability and risk in respect of climate change in New Zealand, and whether it is strong enough to hold a corporate organisation accountable for its actions. This includes for instance regulations such as climate change legislation, any other relevant reporting regulations which may be applicable in relation to climate change, and whether in accordance with the relevant regulations a company director could be held accountable for their company's actions in relation to climate change. The article also explores the potential private litigation action which may be taken against a company as a contributor to greenhouse gases. In addition, where climate change is a concern, a corporate organisation should consider factors such as reputational risk, capital risk, operational risk and risk involved in participating in greenwashing activities. In sum, there are multiple risks in respect of climate change which should not be ignored by corporate organisations in their operational activities.*

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## 1. INTRODUCTION

Climate change is a critical issue for the world today. Scientific research and evidence have indicated that carbon dioxide and other types of greenhouse gases (GHGs) resulting from human activities are causing significant changes in global and regional climate patterns.[1] It has been acknowledged as a serious and potentially irreversible threat to humanity, and one that "poses long-term economic and political risks".[2]

It is also well established that the largest contributor to GHGs is business corporations.[3] In particular, the consumption of fuel products for electricity generation and transportation by energy companies, specifically those in coal, oil and gas, contributes 70 per cent of the world's GHG emissions.[4] Nevertheless, there are still corporate leaders who seem to be in denial over climate change.[5] To some, climate change is viewed as an ethical concern, "a non-financial environmental externality that was secondary to, and largely inconsistent with, the commercial imperative to maximise financial returns".[6]

In this changing world, however, there are demands on companies to recognise the significance of climate change especially when it could pose a serious regulatory risk, litigation risk, reputational risk, capital risk and operational risk to a company. In addition, addressing climate change may in certain circumstances bring about an economic benefit and opportunities to a company.[7] In the World Economic Forum "Global Risk" perception survey for 2016, the "failure of climate change mitigation and adaption has risen to the top" and is "perceived as the most impactful risk for the years to come".[8] The Carbon Disclosure Project's Global Climate Change Report 2015 also showed that companies in New Zealand are "demonstrating an increasing appetite to act on climate change, and have been steadily developing their approach to climate

1 D Hodgkinson and R Garner *Global Climate Change: Australian Law and Policy* (LexisNexis, Chatswood, 2008) at [1.1]. See also Angus Stevenson (ed) "climate change" (2015) Oxford Dictionary of English <www.oxforddictionaries.com>.

2 Hodgkinson and Garner, above n 1, at [1.1].

3 K Douglass "Add one to the Arsenal: Corporate Securities Laws in the fight to slow global warming" (2009) 13(4) LCLR 1119 at 1120.

4 J Peel and HM Osofsky *Climate Change Litigation: Regulatory pathways to cleaner energy* (Cambridge University Press, Cambridge, 2015) at 174.

5 E Howard "Corporate leaders still in denial on climate change" *The Guardian* (online ed, UK, 15 January 2016).

6 S Barker "Director's personal liability for corporate inaction on climate change" (2015) 67(1) Governance Directions 21 at 21.

7 R Troiano "Climate Change: Corporate liability, disclosure requirements and shareholders' remedies" (2008) 26 C&SLJ 418 at 418.

8 World Economic Forum *The Global Risk Report 2016: 11th edition* (WEF, Geneva, 2016) <www2.weforum.org>.

change management".[9] Accordingly, in assessing whether a company is capable of responding to climate change, the key issue is its ability to "identify climate change risk", "assess their exposure to such risk" and "effectively manage those risks" in the operation of its business.[10]

## 2. REGULATORY OBLIGATIONS OF COMPANIES IN NEW ZEALAND IN RESPECT OF CLIMATE CHANGE

Regulatory risk is one of the main concerns for companies in respect of climate change. In order to ensure compliance with the relevant regulations, a company needs to keep updated and make changes to its environment where necessary to adapt to such regulations. As a result, there will be an increase in a company's operational cost in order for it to ensure compliance with the implementation of regulatory initiatives, and further this may impact on "business' competitiveness" due to the rising cost.[11] A further concern for companies is that there may be regulatory uncertainties in relation to climate change which make it difficult for a company to plan ahead.[12] At this juncture, although limited in scope, there are regulations in place in New Zealand addressing climate change. The main legislation is the Climate Change Response Act 2002 which regulates the emission of GHGs in New Zealand.

### 2.1 Climate Change Response Act 2002 (CCRA)

New Zealand is a signatory to the 1992 United Nations Framework Convention on Climate Change (UNFCCC)[13] and the Kyoto Protocol (KP).[14] New Zealand is listed under Annex I to the UNFCCC and has "accepted a binding emissions reduction obligation for the first commitment period".[15] The Climate Change

9 Carbon Disclosure Project *CDP Global Climate Change Report 2015* (CDP Worldwide, 2015) <www.cdp.net>. The Carbon Disclosure Project is an independent not-for-profit consortium of over 300 investors creating relationships between shareholders and corporations. The consortium focuses its discussion on climate change effects in relation to shareholder value and commercial operations.

10 Hodgkinson and Garner, above n 1, at [8.1].

11 A Cameron "Corporate and Commercial Issues" in A Cameron *Climate Change Law and Policy in New Zealand* (LexisNexis, Wellington, 2011) 393 at 395.

12 Hodgkinson and Garner, above n 1, at [8.8].

13 United Nations Framework Convention on Climate Change 1771 UNTS 107 (signed 9 May 1992, entered into force 21 March 1994).

14 Kyoto Protocol to the UN Framework Convention on Climate Change 2303 UNTS 148 (signed 11 December 1997, entered into force 16 February 2005).

15 C Warnock "Global Atmospheric Pollution: Climate Change and Ozone" in P Salmond and

Response Act 2002 (CCRA) was enacted for the purposes of ratifying the UNFCCC and the KP.[16]

### *2.1.1 New Zealand National Emissions Trading Scheme (NZETS)*

As part of the CCRA and through the Climate Change Response (Emissions Trading) Amendment Act 2008, the New Zealand National Emissions Trading Scheme (NZETS) was established.[17] The NZETS is largely based on a polluter pays principle, and requires players of certain industries to pay for their GHG emissions. These players "are required to acquire and surrender New Zealand units (NZUs) for other eligible emission units to account for their direct GHG emissions" or "emissions associated with their products".[18] NZUs are created by the government and are allocated to NZETS participants. In addition, these NZUs are carbon credits which can be traded between participants in the NZETS to ensure compliance with the CCRA.[19] As such, the NZETS provides economic incentives to GHG emitters to reduce GHG emissions.[20] Prior to the NZETS, GHG emitters were not required to recompense society for the harmful effects of their operations.

However, the NZETS could be a regulatory risk to companies who are participants in the scheme.[21] Any company which performs an activity prescribed in sch 3 of the CCRA is a mandatory participant in the NZETS, which includes without limitation contributors to GHG emissions such as companies involved in forestry, liquid fossil fuels, industrial processes and stationary energy such as purchasers of jet fuel, coal and natural gas.[22] To ensure a smooth transition, different sectors were introduced and phased in over time.[23] Schedule 4 also includes a list of organisations which could be voluntary scheme participants such as companies involved in forestry removal activities.[24] Every NZETS participant will be placed in the New Zealand Emissions Unit

DP Grinlinton *Environmental Law in New Zealand* (Thomson Reuters, Wellington, 2015) 789 at 798.

16 At 798. See also Climate Change Response Act 2002 [CCRA].

17 Climate Change Response (Emissions Trading) Amendment Act 2008.

18 Environmental Protection Authority "About the ETS" <www.epa.govt.nz>.

19 Environmental Protection Authority, above n 18.

20 Ministry for the Environment "About the New Zealand Emissions Trading Scheme" (24 November 2015) <www.mfe.govt.nz>.

21 S Schofield "The Law of Climate Change Mitigation in New Zealand" (LLM Thesis, University of Canterbury, 2012) at 70.

22 CCRA, sch 3.

23 Schedule 3.

24 Schedule 4.

Register (NZEUR), and this information is publicly available and administered by the Environmental Protection Authority (EPA).[25]

Even though the NZETS may only apply to a small number of businesses, most companies in New Zealand would be indirectly affected by it, mainly due to the rise in operational costs such as higher electricity and fuel prices.[26]

(i) Participants' obligations

All companies who are participants of the NZETS must comply with its range of obligations under the CCRA. Companies either have liability for their emissions or entitlements for their "removal" activities.[27] At the end of each obligation period (generally this is annually), companies with liabilities are obliged to surrender sufficient units for the amount of emissions produced or repay $25 for each unit they were liable to surrender.[28] Alternatively, companies with entitlements are eligible to claim one NZU for each tonne of carbon removed.[29] At this juncture, however, it is important to note that the market rate for each NZU is lower although it is increasing.[30]

In addition, companies are required to monitor and report their relevant emissions or removals annually, which must be carried out in accordance with the procedures described in the CCRA.[31] It is imperative that companies accurately report this information. The EPA has wide powers to investigate and verify information, including performing search and seizures on the relevant company.[32] There are harsh penalties imposed on a company where it fails to comply with its obligations. This includes a fine up to a maximum of $50,000 where it fails to perform the relevant monitoring, interferes with the EPA's investigation, or provides inaccurate information,[33] a fine of up to $24,000 where it fails to provide information where requested,[34] or a penalty of $30 for each unit it fails to surrender by the due date.[35]

Furthermore, in order to surrender units, corporate participants are required to maintain a holding account with the NZEUR.[36] The company should properly consider the persons it authorises to manage the holding account on its behalf,

25 Warnock, above n 15, at 805.
26 Cameron, above n 11, at 402.
27 Warnock, above n 15, at 805.
28 At 805–806. See also CCRA, s 178.
29 CCRA, s 64.
30 Carbon Forest Services "Indicative Carbon Prices — NZUs" (25 July 2016) <www.carbonforestservices.co.nz>.
31 CCRA, s 62.
32 Sections 94–95, 100–101.
33 Section 132.
34 Section 131.
35 Section 134.
36 Cameron, above n 11, at 405.

and assign relevant roles. Further, it should ensure that there are proper accountability procedures in place to avert fraud, and that the relevant reporting is performed in a timely and accurate manner.[37] A company which is eligible to obtain an allocation of NZUs should also ensure that it complies with the relevant provisions in order to receive its entitlements.[38] In general, companies should also be aware of accounting procedures in respect of NZUs.[39]

When trading NZUs, a company should have in place proper trading strategies to ensure it has sufficient units. For instance, a company which needs to acquire NZUs as it has significant surrender obligations may rely on a price cap to ensure that it is not required to pay above a certain amount.[40] Nevertheless, the company would need to consider the possibility that the price of NZUs could fall below the cap. In addition, a company may "purchase a portfolio of units to hedge against both regulatory changes" and price rises, or where it has entitlements, it could retain units to meet its future liabilities.[41] Furthermore, companies need to be aware that like any other business deals, the trading of NZUs could turn sour as in the case of *New Zealand Carbon Farming Ltd v Mighty River Power Ltd*, where there was a dispute concerning an emission reduction purchase agreement,[42] and ensure its trading agreements are properly in place. Moreover, company directors may be liable for obligations under the CCRA. This is further discussed in part 3.2 below.

### 2.2 Resource Management Act 1991 (RMA)

The second legislation in New Zealand which incorporates climate change is the Resource Management Act 1991 (RMA). In general, the RMA mainly deals with environment management and planning. Further, it promotes "the sustainable management of natural and physical resources".[43] Compared to the CCRA, the implications of climate change in the RMA are fairly limited. Nevertheless, the RMA is still significant and it is to be considered by companies

37 At 406.

38 At 410.

39 See PricewaterhouseCooper's assessment on NZUs at PricewaterhouseCooper "Emission Critical" (6 September 2008) <www.pwc.co.nz>.

40 Cameron, above n 11, at 414.

41 At 414.

42 *New Zealand Carbon Farming Ltd v Mighty River Power Ltd* [2015] NZCA 605. In this case, the agreement provided a clause which indicated that New Zealand Carbon Farming Ltd [NZCF] may need to sell to Mighty River Power [MRP] a different number of carbon credits other than those fixed in the agreement if there was a change in the account mechanism under the CCRA. NZCF contended that there was a change, and MRP disagreed. The Court agreed with MRP and held that the intention of the parties was not to double the NZUs which was beyond the capacity of the forest.

43 Resource Management Act 1991, s 5 [RMA].

applying for resource consent in relation to any further development — for example, the building of power plants, wind farms, or any other application for certain uses of land or water. There have been a number of cases where litigants have challenged resource consents due to the fact that authorities have taken insufficient account of climate change.

### *2.2.1 Historical background of the RMA and climate change*

Historically, decision-makers viewed the RMA as a device to regulate climate change.[44] For instance, in 1993 the Ministry for the Environment utilised s 141 of the RMA to call in an air discharge permit in relation to the proposed Taranaki power station (Taranaki Resource Consent) on the grounds that the proposal was:[45]

> of national significance and, given the scale of carbon dioxide emissions from the [Taranaki Combined Cycle] power station, it is likely to arouse widespread public concern or interest regarding its likely effect on the environment and affect New Zealand's ability to meet its obligations under the United Nations Framework Convention on Climate Change.

Subsequently, a board of inquiry was appointed. The board recommended that the permit be granted subject to certain conditions. This included "requiring the full mitigation of carbon dioxide emissions by way of a carbon sink to store in perpetuity the equivalent quantity of carbon emitted from the site over the term of the permit".[46] Consequently, consent was granted to the Electricity Corporation of New Zealand (ECNZ) subject to ECNZ complying with general conditions addressing "the local environmental effects of contaminants and a condition to fully mitigate any carbon dioxide" from the said power plant.[47] This is a considerably reduced obligation compared to the original recommendation. Nevertheless, this demonstrates that the RMA was used for the purposes of regulating a company's GHG emissions.

In addition to the above example, the resource consent surrounding the Stratford power plant reached the Environment Court in *Environmental Defence Society Inc v Taranaki Regional Council*, where the Court rejected the Environmental Defence Society's (EDS) appeal to impose additional conditions

44 Cameron, above n 11, at 179.

45 Ministry for the Environment "Air Discharge Permit Taranaki Combined Cycle Power Station: Decision of Hon Simon Upton Minister for the Environment" (23 March 1995) <www.mfe.govt.nz>.

46 At [29].

47 At [80].

(specifically for any excess emissions to be mitigated) on the resource consent.[48] The Court took the view that climate change was a national issue. For instance, when discussing EDS's proposed measure of offsetting carbon dioxide emissions by planting trees as carbon sinks, the Court stated:[49]

> On the evidence we have heard we are not able to adequately assess the national and international implications nor the social and economic consequences of imposing such a condition … these are quintessential policy decisions, to be arrived at after much research, discussion and consultation. On the evidence we have heard, we are not able to determine the social and economic consequences of imposing such a condition.

In addition, one of EDS's proposed mitigation measures was to remove the carbon dioxide emitted and then store it by reinjecting the same into a depleted hydrocarbon field. The Court held that while it "is technically feasible, the cost is so prohibitive that it would be unreasonable to impose such an alternative condition".[50]

The EDS was also unsuccessful in its bid to impose conditions for the resource consent in respect of the Otahuhu C power plant.[51] In *Environmental Defence Society (Inc) v Auckland Regional Council*, the Court again stated that aspects of climate change were a "policy decision" to be arrived at after research and discussion, even though it acknowledged that climate change is a widespread and serious concern,[52] and further stated that even if the regional council had jurisdiction over mitigation measures in respect of climate change, it doubted "that it can legally monitor and enforce such a condition. Quite apart from the legal position, if such a condition were imposed, the Regional Council would be confronted with considerable practicable difficulties in monitoring and enforcing it."[53]

Subsequent to the above cases, in 2003 the general condition to mitigate GHGs was removed from the Taranaki Resource Consent upon application by the consent holder, partially due to the government's preference to deal with mitigation of climate change at a national level.[54]

48 *Environmental Defence Society Inc v Taranaki Regional Council* EnvC Auckland A184/2002, 6 September 2002 at [3], [54].

49 At [44].

50 At [53].

51 *Environmental Defence Society (Inc) v Auckland Regional Council* (2002) 9 ELRNZ 1 (EnvC) at 21.

52 At [63].

53 At [92]. See also *Taranaki Energy Watch Inc v Taranaki Regional Council* EnvC Auckland W039/2003, 16 June 2003 at [86].

54 Warnock, above n 15, at 814.

### *2.2.2 2004 amendments*

In 2004 the RMA was amended by virtue of the Resource Management (Energy and Climate Change) Amendment Act 2004 (RM(ECC)A) to introduce aspects of climate change.[55] Section 7 of the RMA was amended to provide that authorities when exercising their powers should take into account "the efficiency of the end use of energy", "the effects of climate change" and any "benefits to be derived from use and development of renewable energy".[56] Further, the RM(ECC)A gave directions to local authorities in relation to control of GHGs. For instance, s 104E of the RMA states:[57]

> When considering an application for a discharge permit or coastal permit to do something that would otherwise contravene section 15 or section 15B relating to the discharge into air of greenhouse gases, a consent authority must not have regard to the effects of such a discharge on climate change, except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases, either—
> (a) in absolute terms; or
> (b) relative to the use and development of non-renewable energy.

A number of cases were brought against corporations on the basis of the RMA which discussed the said amendments. In *Greenpeace New Zealand Inc v Northland Regional Council*, which concerns the Marsden B coal-fired power station,[58] the operators of the Marsden power plant, Mighty River Power Ltd, were successful in their appeal to strike out climate change provisions in its resource consent.[59] The Court clarified that the RM(ECC)A "allow[s] consideration of the effects of discharge on climate change only in the context of applications to use or develop renewable energy that will enable a lowering of greenhouse gas emissions in either absolute or relative terms".[60]

This was reaffirmed in *Greenpeace New Zealand Inc v Genesis Power Ltd*.[61] In this case, Genesis Power Ltd intended to build a power station fuelled by natural gas which necessitated various resource consents including those under the RMA including a discharge permit.[62] Consequently, Greenpeace

55 Resource Management (Energy and Climate Change) Amendment Act 2004.
56 RMA, s 7.
57 Section 104E.
58 *Greenpeace New Zealand Inc v Northland Regional Council* EnvC Auckland A094/06, 11 July 2006.
59 At [47].
60 At [46].
61 *Greenpeace New Zealand Inc v Genesis Power Ltd* [2008] NZSC 112, [2009] 1 NZLR 730.
62 At [1]–[11].

New Zealand Inc appealed to the Supreme Court on the proper interpretation of the amended climate change provisions of the RMA, including s 70A and s 104E.[63] The Supreme Court confirmed that these sections only applied to resource consent applications related to renewable energy projects.[64] This was subsequently applied in a number of cases such as *Royal Forest and Bird Protection Society of New Zealand Inc v Buller Coal Ltd*, where it was clarified that the above reasoning applies also to decisions relating to land-use permits.[65]

The cases above seem to suggest that unlike the CCRA which reprimands organisations for GHG emission, the purpose behind including climate change in the RMA is to encourage companies to use renewable energy.[66] It seems to mainly focus on adaptation measures and the consideration of the benefits of renewable energy in reducing GHGs.[67] Associate Professor Ceri Warnock interestingly noted that the Court did not address the issue of whether consent authorities could refuse applications for a permit to discharge GHGs due to other harmful effects such as health or safety impacts. She seems to be of the view that the RMA could allow for that.[68] Further, it seems that through the development of the law, the RM(ECC)A has limited local councils' jurisdiction to regulate activity which increases the emission of GHGs. It has been suggested that the reason behind it was to avoid regional councils from reaching different standards and the confusion of "double regulation". Nevertheless, commentators have viewed this as a "policy failure" as until today no standards have been established in an entity's emission activities.[69]

Since then, companies involved in renewable energy have used the "climate change" provisions in the RMA to their advantage. In *Meridian Energy Ltd v Central Otago District Council*, Meridian Energy Ltd (Meridian) applied for a resource consent to operate a substantial wind farm for electricity generation in Central Otago.[70] Meridian appealed a prior Environment Court decision against

63 At [11].

64 At [52]–[62]. Elias CJ stated at [62]: "Local authorities are generally prohibited from having regard to the effects on climate change of the discharge of greenhouse gases, but may do so when making a rule which controls, or considering an application for consent to, an activity involving the use and development of renewable energy."

65 *Royal Forest and Bird Protection Society of New Zealand Inc v Buller Coal Ltd* [2012] NZHC 2156 at [56].

66 T Weeks "Climate Change Action Post-Paris: What Now for New Zealand Planning?" (paper presented at Over the Rainbow: NZPI Conference 2016, Dunedin, 12–15 April) at [17]–[19].

67 S Baillie "The Consideration and Regulation of Climate Change Effects under the Resource Management Act 1991" (LLB (Hons) Dissertation, University of Otago, 2012) at 14.

68 Warnock, above n 15, at 816–817.

69 Sir Geoffrey Palmer "New Zealand's Defective Law on Climate Change" (speech at Victoria University of Wellington, Wellington, 16 February 2015).

70 *Meridian Energy Ltd v Central Otago District Council* [2011] NZLR 482 at [1].

it, part of which was that the effects of climate change were not considered.[71] Consequently, the High Court allowed Meridian's appeal but it was of the view that the Environment Court did not err in law in relation to climate change.[72] As stated by the Court, "climate change is an extremely complex subject and … in the absence of a clear direction from Parliament the court should not enter into a discussion of its causes, directions and magnitudes".[73]

There have been a number of further cases involving projects which promoted renewable energy but caused an impact on the local culture and landscape. In *Motorimu Wind Farm Ltd v Palmerston North Council*, where the regional council only approved a portion of the proposed turbines due to significant landscape impacts, the Court acknowledged the wind farm's contribution to sustainable development and increased the number of resource consents.[74] In *Genesis Power Limited v Franklin District Council*, the Environment Court allowed an appeal brought by the Energy Efficiency and Conservation Authority against the refusal of permission to build a wind farm under the RMA, citing reduction of emissions of GHGs and climate change as factors supporting the case.[75] The Court rejected the "de minimis argument" (that the wind farm was relatively small and that its climate benefits were not relevant) and consent was granted.[76] Thus, the RMA has encouraged and made it beneficial for a company to use renewable energy, and this is generally supported by the courts.

### 2.3 Further Regulatory Obligations

As can be seen from the foregoing discussion, the regulatory obligations surrounding climate change are fairly limited. Aside from the duties prescribed by the NZETS, there are no "positive legal obligations" on New Zealand companies to disclose information in relation to climate change.[77] Further, NZETS participants are a small portion of New Zealand business. In fact, one of the largest emitters of GHGs in New Zealand is the agriculture sector, yet farmers are not mandatory participants of the NZETS.[78] This is partly due to the fact that in respect of agriculture and the dairy industry, there are

71 At [2]–[4].
72 At [157].
73 At [157].
74 *Motorimu Wind Farm Ltd v Palmerston North City Council* EnvC Wellington W067/08, 26 September 2008 at [353]–[367]. See also *Unison Networks Ltd v Hastings District Council* [2011] NZRMA 394 (HC).
75 *Genesis Power Limited v Franklin District Council* (2005) 12 ELRNZ 71 (EnvC).
76 At [213]–[262]. See also *Meridian Energy Ltd v Wellington City Council* EnvC Wellington W031/07, 14 May 2007.
77 Cameron, above n 11, at 395.
78 Westpac Institutional Bank "The Paris Agreement: What it means for the New Zealand

limits in technology and management solutions to help reduce emissions.[79] In addition, NZETS participants are only obliged to disclose emissions relating to the scheme, and this may not cover their own corporate emissions. For instance, a company involved in the liquid fossil sector is required to disclose the volume of fuel it produces or imports, but is not required to report the emissions produced from the transport of such fuel.[80] Further, the NZETS only requires a participant to provide information on whether it has properly met its obligations; it does not require a participant to provide any specific information in relation to its levels of emissions, or whether it participated in any emission reduction or migration activities.[81]

However, given that New Zealand companies are required to make corporate reporting in accordance with the relevant legislation and regulations, the question is could this be extended to climate change?

### *2.3.1 Mandatory reporting*

In New Zealand, every registered company is required to submit an annual report to its shareholders.[82] The annual report must include information such as financial statements or any changes to the nature of the company to the extent where the board is of the view that it is material knowledge for its shareholders.[83] There have been doubts as to whether this would extend to climate change information due to the fact that although climate change risk may affect businesses, it is "unlikely" that it would constitute a change in the nature of business itself.[84] This can be contrasted with Australia, where s 299(1)(f) of the Australian Corporation Act 2001 requires that the directors' report for the financial year include details of the entity's performance in respect of environmental regulation.[85] Even if such an addition were made to New Zealand's Companies Act 1993, it may only have limited effect in relation to the wider disclosure of climate change information. Such a provision may only apply to NZETS participants in respect of their obligations under the CCRA.[86]

economy" (4 February 2016) <www.westpac.com>. See also C Trevett "Agriculture ruled out in Emissions Trading Scheme review" *The New Zealand Herald* (online ed, Auckland, 24 November 2015).

79 Warnock, above n 15, at 803.

80 Cameron, above n 11, at 395.

81 At 396.

82 Companies Act 1993, s 209.

83 Section 211.

84 Cameron, above n 11, at 396.

85 Corporation Act 2011 (Cth), s 299(1)(f).

86 Cameron, above n 11, at 396.

Public listed companies in New Zealand have continuous and wider disclosure obligations.[87] Section 270 of the Financial Markets Conduct Act 2013 requires that companies listed on the New Zealand stock exchange (NZX) provide any information related to the company which may have a material effect on the company, such as its share prices, immediately upon it becoming aware of the same.[88] This may include a change in a company's financial forecast. It has been suggested that climate change information could possibly come within the material threshold in certain organisations and would be required to be disclosed.[89] For instance, a company with substantial forestry holdings in the NZETS may incur significant liability in the event of unforeseen circumstances such as the occurrence of a fire, and as a result there would be a change in financial forecast. This could possibly be extended to general climate change information including a company's environmental performance, which may influence the public to dispose of or acquire any shares in the company.[90] In addition, companies are required to make preliminary full-year and half-year announcements in advance of annual and full-year reports. This could include information related to a company's financial position or performance, asset value and profitability.[91]

Further to its general obligations, a company may be pressured by its shareholders and consumers to voluntarily disclose company information relating to climate change.[92] For example, participating in the Carbon Disclosure Project which encourages companies to disclose their emission details as it may improve the reputation of the company.[93] In the Carbon Disclosure Project's 2015 report, it was reported that there was a 35 per cent increase in respect of companies in New Zealand and Australia with "active emissions reduction initiatives".[94] Nevertheless, in the latest Carbon Disclosure Project survey, there were still a number of large corporate emitters which did not respond to the questionnaire, including Meridian Energy, Air New Zealand, Mighty River Power and Genesis Energy.[95]

87 See, for example, the NZX Listing Rules at NZX Limited "Main Board/Debt Market Listing Rules" (7 March 2016) <www.nzx.com>.

88 Securities Markets Act 1988, s 19B. See also Cameron, above n 11, at 396–397.

89 Cameron, above n 11, at 397.

90 Hodgkinson and Garner, above n 1, at [8.16]. See also the Listing Rules, above n 87, at r 10.1.1.

91 NZX Listing Rules, above n 87, at r 10.4.

92 Cameron, above n 11, at 398.

93 Carbon Disclosure Project "Catalyzing business and government action" <www.cdp.net>.

94 Carbon Disclosure Project, above n 9, at 14.

95 Carbon Disclosure Project "CDP announces NZ's top ranking listed companies on climate" (press release, 16 November 2015).

## 3. DIRECTOR'S LIABILITY FOR CLIMATE CHANGE

It has been established at common law that a director is the "directing mind and will" of the company and as such the company should bear any liabilities as a result of the director's actions.[96] This is reinforced in the CCRA by virtue of ss 139 and 141,[97] and directorial responsibility is entrenched in New Zealand's Companies Act 1993 (Companies Act).[98]

In general, there are no positive obligations on directors to consider the "interests of the broader community" such as environmental concerns, in performing their duties.[99] Nevertheless, in exercising their statutory duties and those imposed by common law, directors may need to take into account climate change-related risks, including the possibility that liability be extended to a director who failed to act in response to the risk of climate change.[100]

### 3.1 Director's Duties under the Companies Act

It has long been established that a director owes fiduciary duties to their company in the management of its operations. This is prescribed in the Companies Act.[101] According to s 131(1) of that Act, a director "when exercising powers or performing duties, must act in good faith and in what the director believes to be the best interests of the company".[102] In addition, s 137 provides that a director must exercise "care, diligence, and skill" when performing their duties.[103] It is important to note that such standards are subjective in nature, "in the sense that only those circumstances identical to those facing the director under scrutiny must be considered".[104] Nevertheless, in general terms, a director should understand the company's business, keep themselves up to date with their company's dealings and the company's financial status, make the relevant inquiries and obtain "competent advice where it is prudent to do so" in order to be able to make independent and informed decisions for the board.[105]

96 See *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA) at 527; *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (PC) at 511 where the Court discussed attribution of a director's actions as the "directing mind and will" of a company.

97 CCRA, ss 139 and 141.

98 Companies Act 1993.

99 Hodgkinson and Garner, above n 1, at [8.27].

100 Barker, above n 6, at 22.

101 Companies Act 1993, ss 131–138A.

102 Section 131.

103 Section 137.

104 *Laws of New Zealand* Companies (online ed) at [196].

105 At [196]. See also Cameron, above n 11, at 400.

Could the foregoing duties be extended to taking account of climate change risk? Firstly, although climate change is a serious concern, a director is not required to "decarbonise their operations" or consider environmental sustainability a top priority.[106] In addition, a company's "best interests" do not extend to external ethical concerns. Directors however should consider climate change as part of their duties where it may affect their company's operations, where it may be a risk factor, or where it plays a part in a corporate strategy. Even where a director's "subjective bona fides are not in question", liability could emerge where a director may be in denial over the effects of climate change, where a director hypothetically fails to contemplate or anticipate the benefits, opportunities and risks as a result of climate change such as operational and capital risk, where the director has insufficient regard to the "speed, scope and scale of climate change impacts", where they fail to comply with the relevant industry standards, regulatory requirements such as those under the CCRA or those pertaining to green claims,[107] or to adequately anticipate reasonably foreseeable regulatory changes which may impact upon a company's operations. Failure to do so could expose a company to reputational damage, penalties, and as a result may affect its share value. There is also a suggestion that the company's position on climate change-related issues could lead to situations where directors are at risk of personal liability and as such a company may experience difficulty attracting a director of good calibre.[108]

### 3.2 Regulatory Requirements — NZETS Participants

As discussed, the main obligations in respect of climate change are those prescribed under the CCRA, and directors of companies who are involved with the NZETS should pay attention to its requirements.[109] Failure to do so could potentially amount to a breach of their duties under the Companies Act.[110] This includes understanding and considering the cost impact of the NZETS and whether any further actions are to be taken to manage that impact.[111]

There are a number of steps a director should perhaps consider when their company is an NZETS participant. This includes putting in place adequate systems to ensure compliance with its NZETS obligations such as calculating and reporting emissions and meeting any surrender obligations, as a company's

106 Barker, above n 6, at 23.

107 At 23.

108 J Taberner "Alchemy in the Platinum Age: The Changing Climate of Corporate Liability" in W Gumley and T Daya-Winterbottom (eds) *Climate Change Law: Comparative, Contractual & Regulatory Considerations* (Thomson Reuters, Pyrmont, 2009) 247 at 262.

109 Cameron, above n 11, at 400.

110 Schofield, above n 21, at 79.

111 Cameron, above n 11, at 400.

failure to do so may result in significant adverse financial as well as reputational impacts.[112] Furthermore, a company's allocation of NZUs is potentially worth a significant sum of money. Accordingly, directors need to ensure adequate action is taken to correctly calculate and claim any free allocation, and to further ensure that it has strong internal controls in the management and operation of its holding account and adequate audit procedures of all systems and procedures.[113] In addition, directors of companies in industries where a company can voluntarily opt in as a participant to the NZETS need to take serious consideration of any financial implications for the company in opting in.[114] For example, opting in may be advantageous to owners of forests planted after 31 December 1989, as they will receive NZUs which they could sell in exchange for the carbon sequestered in their forests.[115] For a director to comply with their obligations to act in the best interests of their company, they need to understand the potential implications and ensure that its management has established a strong system to comply with obligations. Further, directors should keep abreast of any updates to the NZETS as it could be constantly reviewed.

In addition, in accordance with s 140 of the CCRA, a director could be found liable for proceedings brought against the company or other body corporate for which they are a director.[116] A director can be found guilty if it is proven that he or she authorised, permitted, or consented to the act or omission constituting the offence, or knew of the offence and did not take reasonable steps to prevent or mitigate such actions.[117]

As can be seen from above, although there are obligations which possibly could be imposed on directors, these are fairly limited. Perhaps there could be changes made to the Companies Act to take into account aspects of the environment and therefore climate change. Section 172 of the Companies Act 2006 (UK) provides that a director has a "duty to promote the success of the company", and this includes "the impact of the company's operations on the community and the environment".[118] However, this section has drawn criticism from many commentators due to the fact that the promotion of a company would supersede any duty owed to the environment, and because the duty is owed to the company it can only be subject to action brought by the

112 At 400.
113 At 400.
114 At 400.
115 Warnock, above n 15, at 804.
116 CCRA, s 140.
117 Section 140.
118 Companies Act 2006 (UK), s 172(d).

shareholders in a derivative action and only if there were losses shown resulting from the breach, and it cannot be subject to external civil litigation.[119]

### 3.3 Shareholders' Remedies

As discussed, directors need to take note of their obligations when executing their duties to the company. Failure to take note of the relevant regulations and address all potential risk in relation to climate change could potentially amount to a breach of those duties.[120] In Australia, there have been litigation proceedings brought against directors for failing to disclose material information or comply with regulatory requirements in the execution of their duties to the company. Commentators are of the view that it is not inconceivable that such duties could extend to the effects of climate change.[121]

In New Zealand, under s 169 of the Companies Act, a shareholder may bring a personal action against a director for a breach of their duties to the company.[122] In addition, pursuant to s 165 of that Act, a shareholder may bring a derivative action in the name of the company for any breach of a director's duty.[123] These sections are as yet untested in respect of climate change, but it is plausible that an action may emerge out of a director's failure to respond to climate change where it has led to financial impact and a decrease in share prices.

Further, shareholders have a right to call and attend a company's general meeting and have their views heard and vote on resolutions in respect of the company's decisions.[124] In Australia, members of the Australian Wilderness Society attempted to stop the building of the uranium mine at Jabiluka at the World Heritage Kakadu National Park as proposed by Energy Resources Australia through such methods as acquiring shares in the parent company of Energy Resources Australia in order to call for a general meeting to propose resolutions for responsible development.[125]

119 R Lyster, L Chiam and D Bortoluzzi "Sustainability and climate change: Liability of corporations" (2007) 25 C&SLJ 427 at 433.
120 Cameron, above n 11, at 401.
121 Taberner, above n 108, at 251–252.
122 Companies Act 1993, s 169.
123 Section 165.
124 Sections 120–122.
125 Troiano, above n 7, at 433.

## 4. LITIGATION RISK

Another risk companies may face in relation to climate change is the potential litigation which may ensue as a result of their GHG emissions. In the context of North American law, Shi-Ling Hsu commented:[126]

> By targeting deep-pocketed private entities that actually emit greenhouse gases … a civil litigation strategy, if successful, skips over the potentially cumbersome, time-consuming and politically perilous route of pursuing legislation and regulations. The civil litigation strategy is potentially a means of regulation itself, as a finding of liability could have an enormous ripple effect, and send greenhouse gas emitters scrambling to avoid the unwelcome spotlight.

Nevertheless, although private law action against corporations may have a significant effect, at this juncture, there are not many cases in New Zealand involving climate change. In those actions taken against companies to curb their emission activities focusing on resource consents granted under the RMA, although the courts have acknowledged that climate change is a major concern, it has so far shown limited effect in terms of the reduction of emissions.

### 4.1 Tortious Liability for GHG Emissions

At present, there are no cases involving tortious liability in respect of climate change in New Zealand, yet this should not halt the impending threat of climate change litigation to companies as can be seen in other jurisdictions. In order for action to be brought against a private corporation, a cause of action needs to be established, and this is one of the main obstacles to private action in respect of climate change.[127] Nevertheless, commentators have argued that the tortious action of negligence and public nuisance could perhaps be extended to climate change liability.

#### *4.1.1 Negligence*

To establish negligence on the part of a company, it must be ascertained that the company breached a duty of care to the potential plaintiff, which consequently

126 S Hsu "A Realistic Evaluation of Climate Change Litigation through the Lens of a Hypothetical Lawsuit" (2008) 79 U Colo L Rev 701 at 717.

127 R Abbs, P Cashman and T Stephens "Australia" in R Lord, S Goldberg, L Rajamani and J Brunnée (eds) *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, Cambridge, 2012) 67 at [5.50].

resulted in that plaintiff suffering some form of damage and loss.[128] In addition, the court must assess whether "it was just and reasonable" to impose such a duty.[129]

Negligence is an attractive cause of action in relation to climate change[130] due to the fact that "what amounts to negligence" is subject to the facts of each individual case and there is never a closed list of categories of negligence.[131] Thus, an action for negligence could possibly be brought against a company due to its failure to adapt to or mitigate climate change. For instance, a claim asserting a company's failure to mitigate in respect of climate change could potentially be brought against the producer of fossil fuels due to combustion which increased GHG emission, users of fossil fuels causing GHG emission, and product manufacturers who contribute to climate change.[132]

Nevertheless, establishing that a company owes a duty of care is a challenge. A "duty is owed to those regarded in law as neighbours of the alleged wrongdoer", and as such the relationship must be proximate enough that a reasonable person would recognise that harm may result in the event of a lack of reasonable care being exercised.[133] Further, it is necessary to show that harm to the plaintiff was a reasonably foreseeable consequence of the defendant's negligence.[134]

(i) Issues with proving negligence

*(a) Foreseeability*

A plaintiff may face challenges in showing that the action of one corporate agent resulted in the realisation of climate change, and that the harm alleged was a reasonably foreseeable consequence. The plaintiff needs to establish that a reasonable person would have anticipated the creation of such a risk and that harm would have occurred as a result of climate change (rather than the risk of climate change occurring in its generality). Such a view may differ between

128 *Laws of New Zealand* Negligence (online ed) at [1]. See also Abbs and others, above n 127, at [5.51].

129 *Laws of New Zealand* Negligence: New Zealand Law (online ed) at [9].

130 G Kaminskaite-Salters "Climate change litigation in the UK: Its feasibility and prospects" in M Faure and M Peeters (eds) *Climate Change Liability* (Edward Elgar, Cheltenham, 2011) 165 at 176–177.

131 *Laws of New Zealand* Negligence (online ed) at [1]. See also *Donoghue v Stevenson* [1932] UKHL 100, [1932] AC 562 at 619.

132 BJ Preston "Climate Change Litigation (Part 1)" (2011) 1 CCLR 3 at 6.

133 *Laws of New Zealand* Negligence (online ed) at [1].

134 Abbs and others, above n 127, at [5.52]. See also *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA): it is important to note that while foreseeability is essential, on its own, it may not be sufficient to establish a duty of care.

individuals and be rather subjective.[135] A further challenge for a potential plaintiff is that compared to the rest of the world, one party's contribution to climate change is relatively marginal,[136] and as such it may be difficult to foresee that a particular harm occurred out of a specific corporation's actions.

*(b) Proximity*

To ascertain whether there is proximity between the parties is a two-step inquiry. Firstly, based on the circumstances, was their relationship based on the fact that the parties were closely situated to each other rather than an "antecedent relationship"? In other words, based on the facts, have a company's acts or omissions affected the potential plaintiff as they are in a sense "neighbours"? Here, the courts would look at the "physical, circumstantial and causal connection" between the parties.[137] Would the courts be willing to find that this connection exists in a climate change claim?

It may be difficult to establish that physical proximity exists between a corporate defendant and a potential plaintiff. While a plaintiff and defendant may be linked on the basis that there was harm suffered out of the emission of GHGs, it may be tough for the plaintiff to show the existence of a specific relationship in order to establish a duty of care,[138] especially when such a relationship does not fall under any established category in which the law has held a duty of care to exist.[139] This is due to the fact that climate change is seen as a "global environmental tort",[140] in that a specific defendant's conduct affects people globally, rather than a particular locality.[141]

An interesting parallel to climate change in relation to proximity is the House of Lords' decision in *Sutradhar v Natural Environment Research Council*, where the Court established that there was a lack of proximity in finding a duty of care.[142] In this case, the Court held that the Natural Environment Research Council in the United Kingdom did not owe a duty of care to a Bangladeshi citizen when it had failed to inform the public of the presence of arsenic when carrying out hydro-chemical work in Bangladesh and publishing a report of the result.[143] Applying the same concept to a climate

135 Abbs and others, above n 127, at [5.61].

136 At [5.67].

137 S Todd "Negligence: The Duty of Care" in S Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) 147 at [5.3.02]. See also *Pounamu Properties Ltd v Brons* [2012] NZHC 590 at [219].

138 Kaminskaite-Salters, above n 130, at 177.

139 Preston, above n 132, at 7.

140 At 7.

141 Abbs and others, above n 127, at [5.54].

142 *Sutradhar v Natural Environment Research Council* [2006] UKHL 33, [2006] 4 All ER 490 at [2].

143 At [2], [49].

change situation, the court may lean towards finding that there was a lack of proximity.

However, there is also an aspect of causal proximity which could be defined as "the closeness or directness of a causal connection or relationship between the particular course of conduct and the loss or the injury sustained".[144] Giedre Kaminskaite-Salters is of the opinion that it may be possible to argue that causal proximity exist in certain circumstances — for instance, between residents of Pacific islands who are losing their land due to rising sea levels and the largest emitters of GHGs where the individual contribution to the global markets can be identified, or between a car manufacturer which supplies vehicles relying on fossil fuels and its customers or any other third party suffering from the GHGs emitted from such vehicles.[145]

*(c) Policy concerns*

The second concern the courts take into account in establishing proximity is based on a wider policy concern "to guard against the imposition of indeterminate liability", which may have an effect of limiting a defendant's liability.[146] In view of such policy concerns, the courts may be hesitant to impose negligence in relation to the emission of GHGs, as recognising that such negligence exists could feed into a global phenomenon with worldwide effects which may have unpredictable consequences and open the floodgates to indeterminate liability, especially when society in general is reliant on GHG-emitting activities,[147] with "catastrophic economic consequences" to society at large.[148] It is likely a corporate defendant will argue its utility outweighs climate change, as ceasing its activities could threaten the economy.[149] Further, where a particular sector is subject to relevant government regulation, such as the CCRA, it would be difficult to argue that a company which complied with the applicable regime has breached any duty of care. Accordingly, there could be understandable reluctance on the part of the courts to find proximity in such circumstances.[150]

144 See *Sutherland Shire Council v Heyman* [1985] HCA 41, (1985) 60 ALR 1 at [55]–[56] per Deane J.

145 Kaminskaite-Salters, above n 130, at 177.

146 Todd, above n 137, at [5.3.02]. See also *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) at [58]–[65].

147 Abbs and others, above n 127, at [5.63].

148 Kaminskaite-Salters, above n 130, at 177–178.

149 At 178.

150 Abbs and others, above n 127, at [5.63]. See also the US case of *North Carolina v Tennessee Valley Authority* 615 F 3d 291 (4th Cir, 2010).

*(d) Breach of duty*

Even if a court is willing to find that foreseeability and proximity exist, another obstacle facing the plaintiff is proving that a specific company has breached its duty, as the court would have difficulty evaluating the applicable standard of care for the particular corporation.[151] For instance, assessing whether the emission of GHGs is negligent and to what extent. It has been suggested that a plaintiff could attempt to argue that the knowledge of the risk of harm developed over time. Further, due to increases in scientific knowledge and awareness of the potential effect of climate change, the relevant standard of care applicable to a defendant would have increased.[152]

Moreover, the court would need to consider whether a company should take reasonable precautions against the risk of harm. It would need to identify what a reasonable person would have done in this situation. This is again rather subjective. What kind of precautions should a corporate emitter have taken to reduce the effects of climate change? Should it cease, modify, or moderate its activity?[153]

Consequently, as outlined above, there are various obstacles in proving a climate change action on the basis of negligence.

*4.1.2 Nuisance*

Nuisance refers to an interference with a person's right to their land. It is divided into two categories — private nuisance and public nuisance.[154]

(i) Private nuisance

Private nuisance refers to an unreasonable interference with a person's utilisation and enjoyment of land or of some form of right connected to said land, in which such person possesses a proprietary right.[155] It violates an individual's private rights and is not a violation of rights held in common with other members of the public. Thus, private nuisance is not an attractive cause of action in relation to climate change as the emission of GHGs does not affect a specific individual but rather the global public. Nevertheless, it has been argued

151 Kaminskaite-Salters, above n 130, at 178.

152 Abbs and others, above n 127, at [5.61].

153 At [5.62].

154 M Skinner and C Foster "Tortious Climate Change Litigation: Development and Predictions" in W Gumley and T Daya-Winterbottom (eds) *Climate Change Law: Comparative, Contractual & Regulatory Considerations* (Thomson Reuters, Pyrmont, 2009) 207 at 208.

155 At 208. See also *Laws of New Zealand* Nature of Nuisance (online ed) at [5].

that private nuisance could be available to a private person, where its land is affected by the impacts of climate change.[156]

(ii) Public nuisance

Public nuisance is a popular cause of action against corporations, as can be seen in various cases from the United States.

*(a) Public nuisance in New Zealand and how it could apply to climate change*

Public nuisance is a tortious liability which exists in New Zealand at common law and is actionable against a person who "inflicts damage, injury, discomfort or inconvenience on all members of the public who come within the sphere of its operation".[157] Such damage may affect some to a larger extent than others. The issue is the extent to which the number of persons affected would be sufficient to consider a particular nuisance public.[158] According to Lord Denning in *Attorney-General v PYA Quarries*, this would depend on whether the nuisance "is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own to put a stop to it, but that it should be taken on the responsibility of the community at large".[159] This view was however in a sense rejected by Lord Rodger in *R v Rimmington*, who stated that public nuisance "should affect the community, a section of the public, rather than simply individuals".[160] In the New Zealand case of *Coldicutt v Ffowcs-Williams*, the High Court held that substantial interference with rights enjoyed by the public generally may constitute a public nuisance even if few persons are affected.[161] In general, public nuisance affects a large group of the public and hence it is suitable for a climate change action as climate change affects the world globally rather than a specific locality.

Further, it is important to note that the type of special damage which has succeeded in respect of public nuisance includes damage to property,[162] depreciation in the value of land,[163] and interference with an occupier's right to enjoy land.[164] These types of damage are relevant to climate change as it is

156 Preston, above n 132, at 6.

157 *Laws of New Zealand* Nuisance (online ed) at [14]. See also Kaminskaite-Salters, above n 130, at 180.

158 *Laws of New Zealand* Nuisance (online ed) at [14].

159 *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169 (CA) at 191.

160 *R v Rimmington* [2005] UKHL 63, [2006] 1 AC 459 at [47].

161 *Coldicutt v Ffowcs-Williams* HC Auckland AP 130-SW00, 8 February 2001 at [14].

162 See generally *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd* [1967] 1 AC 617 (PC); *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683 (QB); *Coldicutt v Ffowcs-Williams*, above n 161, at [1].

163 *Walsh v Ervin* [1952] VLR 361 (VSC).

164 *Coldicutt v Ffowcs-Williams*, above n 161, at [1], [14].

conceivable such damage could occur due to rising sea levels and changing weather conditions. In addition, another reason public nuisance is relevant to climate change is due to the fact that it is unnecessary for the plaintiff to own the land or an interest in the said land for an action to be taken.[165] As such, it would not be far-fetched to predict that action could be taken against corporations which supply harmful climate-changing products and services.[166]

*(b) US case law*

As mentioned, public nuisance has shown to be the preferred tortious cause of action in respect of climate change against corporate entities in the United States, where the first civil climate change claim emerged. This includes the case of *American Electric Power Company v Connecticut*, in which the states of Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, Wisconsin and the City of New York brought an action against six US energy companies, for the purposes of seeking an abatement in respect of the defendants' ongoing and continuous GHG emissions.[167] The annual carbon dioxide emissions for these six companies were equivalent to 650 million tonnes, placing them among the world's largest emitters of GHGs, at approximately 2.5 per cent of worldwide anthropogenic GHG emissions.[168] However, in holding that global warming was a national policy issue, the Supreme Court stated that because the Clean Air Act supersedes federal common law, regulation of GHG emissions was not within the purview of the Court.[169]

In *California v General Motors Corp*, the state of California brought an action against six of the largest US car manufacturers on the basis that they had contributed to global warming and was seeking damages for the environmental, economic and public health harm to California.[170] After the District Court dismissed the case on the political question ground,[171] the state of California appealed to the 9th Circuit for voluntary dismissal due to the government having a different approach on climate change, for which climate change would be dealt with by executive and legislative means.[172]

165 B Atkin "Nuisance" in S Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) 525 at [10.3.04]. See also Kaminskaite-Salters, above n 130, at 180.

166 Skinner and Foster, above n 154, at 209.

167 *American Electric Power Company v Connecticut* 564 US 410 (2011) at 415.

168 At 418.

169 At 424.

170 *California v General Motors Corp* 2007 WL 2726871 (ND Cal, 2007) at 1.

171 At 5–17.

172 *California v General Motors Corp* No 07-16908 (9th Cir, June 22, 2009). See also P Martens and C Ting Chang (eds) *The Social and Behavioural Aspects of Climate Change:*

A further case which involved public nuisance was *Native Village of Kivalina v Exxon Corporation* (*Kivalina*), where residents of Kivalina, an Alaskan village of 400 native Inupiat, filed a suit in the US District Court against two dozen oil, coal and power companies, amongst them, ExxonMobil, BP, Chevron, American Electric Power and Peabody Coal, on the basis of both private and public nuisance and sought damages as a result of the defendants' impact on global warming.[173] The residents alleged that global warming was destroying their village and as a result it would cease to exist, and therefore it would need to relocate.[174] It is interesting to note that the residents further asserted claims that the energy companies conspired to mislead the public on climate change.[175] The Court however again argued that the action was displaced by the Clean Air Act which limits the domestic emission of GHGs from domestic power plants.[176] Subsequently, the United States Court of Appeal also dismissed the plaintiffs' case in *Comer v Murphy Oil* where a group of property owners brought claims amongst them on the basis of a public nuisance action against oil companies as a result of damage to their property caused by Hurricane Katrina alleging that the release in respect of the by-product of the companies' services increased climate change.[177]

As can be seen from the foregoing decisions, the courts in the United States have repeatedly thwarted climate change cases, and like the RMA cases in New Zealand, the US courts seem to not be inclined to use common law to regulate and provide a standard for GHG emissions.[178] However, this has not deterred repeated civil litigation action. In fact, in January 2016 the South Coast Air Quality Management District, the government agency regulating Southern California's air quality, brought a negligence action against Southern California Gas Company, the owner and operator of a natural gas facility where a leak was discovered in October 2015. According to the claim, it caused odours and adverse health effects as well as potent effects on climate change.[179]

*Linking Vulnerability, Adaptation and Mitigation* (Greeenleaf Publishing, Sheffield, 2010) at 219.

173 *Native Village of Kivalina v Exxon Corporation* 696 F3d 849 (9th Cir, 2012) at 853–854.

174 At 868.

175 At 858.

176 At 857.

177 *Comer v Murphy Oil USA Inc* 718 F3d 460 (5th Cir, 2013).

178 E Hammond and DL Markell "Civil Remedies" in MB Gerrand and J Freeman (eds) *Global Climate Change and US Law* (2nd ed, American Bar Association, Chicago, 2014) 239 at 240.

179 M Hamilton "Negligence by Southern California Gas Co led to massive Porter Ranch-area gas leak, AQMD says" *Los Angeles Times* (online ed, Los Angeles CA, 26 January 2016) <www.latimes.com>.

*(c) Issues with establishing public nuisance*

In general, the Attorney-General in New Zealand can bring an action in public nuisance.[180] Aside from that, public nuisance is limited to those who have suffered special damage above all others.[181] In essence, a potential plaintiff must suffer harm that is more serious and substantial in degree compared to the general public. Consequently, it would be difficult to establish "special damage" suffered by specific victims in climate change as it affects the world at large. Nevertheless, it could perhaps be argued that those living in small island states suffer damages unique to their circumstances due to the potential disappearance of their islands.

Public nuisance typically involves direct transmission to affected locations. Emission of GHGs however translates to a global phenomenon. Again, it is a proximity issue, where the defendants lack control in respect of interference.[182] In addition, it may be difficult to prove a particular damage suffered by the plaintiff and connecting the same to the action of a corporation.[183]

A further issue with taking action in New Zealand is that its contribution to global climate change is relatively small. Moreover, public nuisance may not target all corporate emitters as nuisance is usually based on possession and control of land from which nuisance proceeds.[184] As such, it may only apply to onsite GHG emitters such as companies involved in agriculture and perhaps the setting up of power stations as in the RMA cases discussed above, which could possibly rule out coal, oil and gas suppliers.[185] In addition, public nuisance cases are now mostly dealt with by statutory law, and therefore case law tends to be outdated. Consequently, it would be difficult to gauge how the courts would view its applicability to climate change.[186]

### *4.1.3 Causation*

Another element a potential plaintiff may face in a tortious climate change claim is establishing causation — essentially, proving that the corporate defendant had caused losses to the potential plaintiff.[187]

In common law jurisdictions, one of the most popular tests in establishing causation is the "but for test", which may seem too restrictive to be applied to

180 Atkin, above n 165, at [10.3.03].
181 *R v Rimmington*, above n 160, at [7]; *Walsh v Ervin*, above n 163, at 368.
182 Abbs and others, above n 127, at [5.78].
183 At [5.78].
184 *BP Oil New Zealand Ltd v Ports of Auckland Ltd* [2004] 2 NZLR 208 (HC) at [80]–[81].
185 LC Chambers "Tort Law, Climate Change and Private Nuisance" (LLB (Hons) Dissertation, University of Otago, 2012) at 22.
186 Kaminskaite-Salters, above n 130, at 181. See also Atkin, above n 165, at [10.3.06].
187 Kaminskaite-Salters, above n 130, at 182.

climate change.[188] This test was applied in *Barnett v Chelsea and Kensington*, where a patient had died due to the defendant hospital negligently sending the patient home, but the action failed as the plaintiff failed to establish on the balance of probabilities that the death of the deceased was as a result of the defendant's negligence.[189] Could this test apply towards climate change? Could it be said that as a result of a corporate defendant's action, GHGs were emitted, and in turn caused a chain of events which resulted in temperature change, and consequently, damage is suffered by a particular plaintiff? Although scientific research has repeatedly proven the cause of climate change, it would be difficult to state for certain that a specific event such as a flood resulted in damage which was caused by climate change as it is normally caused by a substantially long-term event such as rising sea levels, and it is difficult to prove that this is due to a specific corporation's GHG emissions. A potential plaintiff at best may only be able to show that the corporation's actions increased the risk of such damage.[190]

The court however has been willing to depart from the "but for" test in special circumstances. This is known as the "material increase in risk" test.[191] This test is used where the courts are unable to ascertain which party is responsible as there are many defendants. Essentially, if it can be established that each defendant breached a duty of care to the plaintiff which as a result materially increased the plaintiff's risk, such defendants could be liable for their actions.[192] This may be applicable to climate change where the damage emerging is not the result of a specific individual. Nevertheless, this test is applied in limited unique circumstances, such that flexibility would be required to extend the test to a claim in respect of climate change, and the specific "risk" threshold in establishing a breach may need to be lowered.[193] In cases where a court has found a "material increase in risk", it was possible to prove a strong connection between the harm suffered by the plaintiff and the action of each defendant, whereas in a climate change situation, a defendant's action may only contribute to "some finite degree to a generalised global process" which

188 At 183.

189 *Barnett v Chelsea and Kensington* [1969] 1 QB 428 at 433–439. See also *Smith v Auckland Hospital Board* [1965] NZLR 191 (CA) at 199 and *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 644 (CA) at 672, where the Court considered whether the loss would have occurred but for the breach.

190 Kaminskaite-Salters, above n 130, at 183.

191 See generally *Bonnington Castings Ltd v Wardlow* [1956] AC 613 (HL); *McGhee v National Coal Board* [1973] 1 WLR 1 (HL) at 12; *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32 at [67]; *Auckland City Council v Selwyn Meys Ltd* [2003] DCR 671 (DC) at 677.

192 Abbs and others, above n 127, at [5.70]–[5.73].

193 Kaminskaite-Salters, above n 130, at 183.

consequently caused damage to a plaintiff.[194] Whether a court is willing to show such flexibility is uncertain and could also depend on whether it could be persuaded by certain fairness considerations towards vulnerable victims of climate change and certain policy reasons such as compensating local authorities.[195]

It has also been suggested that courts could consider the concept of joint and several liability, so that where it may be reluctant to impose liability in light of potentially catastrophic economic consequence for potential defendants, it could perhaps consider proportionate liability between different defendants.[196]

Based on the above discussion, proving causation may be difficult in the current framework and require "judicial creativity". There are views that perhaps the current framework could be developed incrementally with the progress in case law, and therefore it may not necessitate an overhaul in respect of the relevant law.[197] Nevertheless, as already discussed, there are various other stumbling blocks in the way of climate change actions.

### *4.1.4 Statutory authorisation defence*

Another issue in respect of tortious action is that a defendant could bring forward the "statutory authorisation defence" which basically refers to a situation where the defendant will be absolved from liability as "parliament by express direction or by necessary implication" has authorised its activities.[198] In New Zealand, a company could argue that the CCRA constituted a statutory authority to emit GHGs. For instance, a corporate emitter could argue that its emission levels have complied with the relevant regulations, and as such it is unjustifiable to require it to lower its emission levels.[199] Nevertheless, it could also be argued that the CCRA is a regulatory scheme, and therefore it confers general powers, and it is not a form of statutory authorisation.[200]

### *4.1.5 Remedies*

As stated above, a corporate GHG emitter's contribution to climate change is relatively nominal, making it difficult for the courts to determine the extent of its emission contribution and award significant monetary damages. It has been suggested that one way of assessing damage is the market share theory in the

194 Abbs and others, above n 127, at [5.72].
195 Kaminskaite-Salters, above n 130, at 183.
196 At 184.
197 At 184.
198 *Allen v Gulf Oil Refining Ltd* [1981] AC 1001 (HL) at 1011.
199 Skinner and Foster, above n 154, at 215.
200 Chambers, above n 185, at 22.

US when apportioning the responsibility of defendants in causal intractable drug liability cases.[201] In addition, another avenue for a plaintiff is to perhaps seek a prohibitory injunction for GHG-producing activities. This is however discretionary; it would be difficult for a plaintiff to justify restraining a company's activities. There could also be impractical consequences, and hence, courts may take a policy decision not to proceed.[202]

### 4.2 Product Liability

It has been suggested that another, less attractive, form of liability which could be foisted on a company in respect of climate change is product liability.[203] It is arguable that liability could be imposed on companies involved in the production of goods which emit GHGs such as car manufacturers or electricity suppliers, if it could be established that their products were created defectively — for instance, where they failed to warn customers of the risk of the GHG-emitting products, or where the product contains a manufacturing defect or design defect.[204] In New Zealand, the interests of consumers are protected by the Consumer Guarantees Act 1993 (CGA).[205] A supplier is required to ensure that products are of acceptable quality, reasonably safe, and fit for purpose.[206] As such duties are entrenched in statute, it could be viewed as having a strict liability nature and hence it would assist a potential plaintiff as it need not prove a fault element. The issue with this however is proving, in a climate change context, that the product is defective in its usage by customers. It is likely a court would consider policy concerns and the "risk-utility" analysis in relation to the product's safety and based on previous decisions may find it difficult to impose climate change liability in such a claim.[207]

### 4.3 Private Action against Corporations — Effective in Addressing Climate Change?

As stated above, there is a lack of case law involving climate change tortious liability. Nevertheless, it would be interesting to see how the above would be played out in courts in New Zealand. As can be seen in the RMA cases, the courts have repeatedly stated that climate change should be addressed as national policy, therefore it should be subject to parliamentary action and

201 Abbs and others, above n 127, at [5.83].
202 At [5.84].
203 Kaminskaite-Salters, above n 130, at 179.
204 Schofield, above n 21, at 22.
205 Consumer Guarantees Act 1993, s 1A.
206 Section 1A.
207 Kaminskaite-Salters, above n 130, at 179.

decision. In general, the current legal framework raises various practical issues, and hence private law may be ill adapted to dealing with climate change.[208] As stated by Boutrous and Lanza, climate change needs to:[209]

> be confronted at the national and international levels … [This exceedingly complex issue] cannot reasonably be addressed through piecemeal and *ad hoc* tort litigation seeking injunctive relief — or, even worse, billions of dollars in retroactive and future money damages — against targeted industries for engaging in lawful and comprehensively-regulated conduct.

Nevertheless, litigation could have a wider effect. It lures public notice to climate change, and encourages political responses, which may in turn increase regulatory risk for companies, and it may also influence corporate attitudes towards climate change. Further, it indirectly plays a role in discouraging "hazardous conduct".[210] In addition, companies need to be aware that the US case law has shown that the public is not deterred in bringing corporate emitters to court for their emissions. In New Zealand, plaintiffs have also creatively used other means such as the RMA.

In addition, although it may be tough to impose liability, corporations should not underestimate litigation implications, as if an action is taken, a corporate defendant could be expected to commit significant resources, in particular financial resources, to defend legal suits and challenge the scientific basis of any claim made against them, especially as the science of climate change is complex and may be uncertain to some extent.[211] Further, companies should not discount the reputational harm litigation may cause to the company as the public may form a different view of the company's ethical concerns. In a 2011 publication by the Geneva Association, an international insurance group, climate change liability was described as a "risk iceberg" — a hazard in which only minor details are visible, but the actual shape and size of the iceberg remains unknown.[212]

208 Abbs and others, above n 127, at [5.88].

209 TJ Boutrous Jr and D Lanza "Global Warming Tort Litigation: The Real 'Public Nuisance'" (2008) 35 Ecology L Currents 80 at 81.

210 Abbs and others, above n 127, at [5.89].

211 At [5.90].

212 Peel and Osofsky, above n 4, at 183.

## 5. FURTHER RISK AREAS TO BE CONSIDERED BY COMPANIES

### 5.1 Operational Risk

One of the key effects of climate change is rising sea levels, weather changes and increasing droughts which will affect the world globally. In turn, this may disrupt supply lines and affect a business's ability to operate.[213] For instance, in 2011, coal-mining companies in Queensland, Australia suffered massive operational disruption due to major flooding across the state which consequently filled open-pit mines and caused interruption to transport routes.[214] Similarly, Hurricane Katrina in 2005 caused approximately US$108 billion in damage, including property damage, and as a result halted businesses along the Gulf Coast due to the loss of infrastructure.[215] In addition, due to the fact that there is now a price placed on GHG emissions, businesses also face "higher raw materials and energy costs",[216] which would in turn increase operational costs.

### 5.2 Capital Risk

Climate change may indirectly affect a company's ability to attract and retain capital. In today's world, financial institutions are wary of climate change. Investors may be concerned that a company's financing decisions could impact on its value due to the implications of financing decisions which may have caused harm to the environment. Accordingly, investors today are becoming more in tune with a company's response to obstacles and opportunities presented by climate change issues.[217] In such circumstances, a company may face difficulty in obtaining financing in the event it does not react to the impact of climate change.[218] Financial institutions may be concerned that a company's failure to regulate its emission of GHGs or respond to government action may adversely affect the company's reputation, its share value or asset value, and a lender's ability to recover money from the company. For example, in a recent incident, Norwegian sovereign wealth fund Norges Bank Investment Management, which has a stake in the automobile company Volkswagen,

213 Cameron, above n 11, at 401.

214 Peel and Osofsky, above n 4, at 179.

215 CNN Library "Hurricane Katrina Statistics Fast Facts" (24 August 2015) Cable News Network <www.edition.cnn.com>.

216 J Lash and F Wellington "Competitive Advantage on a Warming Planet" *Harvard Business Review* (online ed, Watertown MA, March 2007).

217 Taberner, above n 108, at 250.

218 At 252. See also Schofield, above n 21, at 71.

planned to bring action against Volkswagen for its part in providing incorrect emissions data.[219]

A number of financial institutions based in New Zealand (including Australia and New Zealand Banking Group Limited and Westpac Banking Corporation) subscribe to the Equator Principles (EPs).[220] These principles apply to project financing activities above US$50,000,000, and institutions which subscribe to them commit to providing loans to projects only where the EPs have been complied with. This includes conducting an initial screening process focusing on environmental and social criteria. Where the project is found to come within the higher categories of risk, financing activities may not proceed unless an environmental assessment has been carried out. The assessment takes into account concerns such as transboundary and global environmental aspects, which includes climate change.[221]

### 5.3 Insurance Risk

The insurance industry is one of the leading voices of climate change due to the risk posed to businesses as a result of an increase in weather-related losses.[222] As well as the possibility of cost increases in respect of insurance, it has also been suggested that insurance companies could withdraw liability insurance for directors who do not respond to climate change risk.[223] There is a possibility that indemnity under general policies may be denied in relation to climate change litigation brought against corporations.[224] For instance, in the US case of *AES v Steadfast*, where AES was sued in the *Kivalina* case discussed above, Steadfast refused to indemnify AES as climate change-related injury went beyond the scope of a general commercial liability policy.[225] This will in turn increase business operational costs, as a company may not have the protection of insurance in litigation proceedings.

### 5.4 Reputational Risk

As discussed, climate change litigation and a company's ineffectiveness in responding to climate change may affect its reputation in the eyes of

219 BBC News "Volkswagen to be sued by Norway fund over emissions scandal" (16 May 2016) British Broadcasting Corporation <www.bbc.com>.

220 The Equator Principles Association "Equator Principles Association Members and Reporting" <www.equator-principles.com>.

221 Taberner, above n 108, at 252.

222 Peel and Osofsky, above n 4, at 180.

223 Schofield, above n 21, at 71.

224 Peel and Osofsky, above n 4, at 184.

225 *AES v Steadfast* 715 SE 2d 28 (VA 2011).

the public, especially as people grow more aware of the consequences of climate change, meaning profits may reduce due to loss of customers. Many companies take advantage of public sentiment in relation to climate change by developing a "green" reputation. Those which do not address climate change through initiatives to minimise its impacts or highlight their contribution to the environment may fail to distinguish themselves in the marketplace and increase their market share.[226] Alternatively, a company may gain a competitive advantage where it lowers energy consumption and production costs by developing climate change-friendly products.[227]

### 5.5 Greenwashing

As the public becomes more aware of the effects of climate change, people become more inclined to do their part to reduce its effects. Businesses may take the opportunity to improve their reputation by making "green claims" in respect of their products and services — for instance, offering carbon offsetting options to customers.[228] However, there is also a concern that companies may provide misleading information on the environmental qualities of their services and products. Where a company does so, it could be held liable under s 9 of the Fair Trading Act 1986 (FTA) which provides that "[n]o person shall, in trade, engage in conduct that is misleading or deceptive or likely to mislead or deceive".[229] The New Zealand provisions of the FTA are similar to Australia's Consumer and Competition Act 2010 (CCA) (formerly known as the Trade Practices Act 1974 (TPA)), and Australian CCA case law could be persuasive in respect of the application of the FTA.[230] On 26 October 2007 the Australian Competition and Consumer Commission (ACCC) issued a press release stating that it would take action under its TPA in the event that any false or misleading "green" marketing claims were made.[231] In 2008 the ACCC instituted proceedings in the Federal Court against GM Holden Limited due to claims it made in respect of the carbon performance of Saab branded vehicles. Consequently, the Federal Court

226 Cameron, above n 11, at 395.
227 Peel and Osofsky, above n 4, at 179.
228 Taberner, above n 108, at 250.
229 Fair Trading Act 1986, s 9.
230 Consumer and Competition Act 2010 (Cth). See Todd, above n 137, at 245. The similarities in the law was as a result of the harmonisation initiation between Australia and New Zealand, namely the Australia–New Zealand Closer Economic Relations Treaty of 1982, one of the purposes of which was to harmonise consumer protection laws in both countries.
231 Taberner, above n 108, at 263.

held that GM Holden had made false and misleading statements, contravening the TPA.[232] GM undertook to refrain from making any further such claims.[233]

### 5.6 Risk Involved in Corporate Transactions

Companies could also take climate change into account during corporate transactions. For example, where a company acquires, enters into a merger arrangement or goes into partnership with a company involved in the emission of GHGs (the target company), due diligence should be performed to ensure the target company is complying with the relevant regulations and disclosing accurate information. In addition, the contracts entered into with a target company should also specify in detail obligations addressing climate change to ensure compliance with the relevant regulations and proper disclosure.[234]

### 5.7 Future Regulatory Changes?

Climate change law in New Zealand today is influenced by the UNFCCC and KP. It will be interesting to see if there will be any updates to these laws when the Paris Agreement comes into force.[235] Although the Paris Agreement does not necessarily impose a binding legal obligation on participants to reduce emissions, it may affect national strategies for countries endeavouring to reach their targets.[236] New Zealand has targeted to reduce its emissions to 30 per cent below 2005 levels by the year 2030.[237] As it is difficult to assess whether New Zealand will put in place any regulations or laws to ensure such targets are met, further discussion of the Paris Agreement is beyond the scope of this article. Nevertheless, companies and their directors need to keep up to date with any regulatory changes.

232 See generally *Australian Competition and Consumer Commission v GM Holden Ltd (ACN 006 893 232)* [2008] FCA 1428. See also *Australian Competition and Consumer Commission v Global Green Plan Ltd* [2010] FCA 1057.

233 Australian Competition and Consumer Commission "Saab 'Grrrrrreen' claims declared misleading by Federal Court" (18 September 2008) <www.accc.gov.au>.

234 J Bowman and S Read "Corporate Transactions" in PQ Watchman (ed) *Climate Change: A Guide to Carbon Law and Practice* (Globe Business Publishing, London, 2008) 181 at 182, 191.

235 Paris Agreement FCCC/CP/2015/L.9/Rev.1 (adopted 12 December 2015, opened for signature 22 April 2016, not yet in force).

236 Article 4(2).

237 Ministry for the Environment "New Zealand's 2030 climate change target" (29 February 2016) <www.mfe.govt.nz>.

## 6. CONCLUSION ON THE GENERAL CORPORATE RESPONSES TO CLIMATE CHANGE

Climate change is of ongoing concern and risk to companies, and they need to be aware of and take the necessary steps to mitigate such risk. Large corporations like Walmart, Goldman Sachs and Starbucks are already striving to use 100 per cent renewable energy.[238] Certain major corporate emitters like oil and gas companies, which previously opposed emission reduction measures, are also taking action to address climate change. For instance, Shell, which previously supported the American Legislative Exchange Council (ALEC) (an organisation against climate change initiatives), has now cut ties with ALEC and is supporting climate action, including investing in renewable energy and getting involved in pro-regulatory efforts such as the US Climate Action Partnership.[239] Staunch anti-regulatory companies like Chevron and ExxonMobil are also increasing their emission reduction activities and conducting climate change programmes, including "creating and disclosing internal prices for carbon", although commentators believe this could also be "in anticipation of either domestic or international carbon trading schemes".[240]

Although there are still corporate denials over climate change, in general, "economic considerations associated with the physical and regulatory risk posed by climate change" are "identified as the primary driver of corporate climate-related actions".[241] While litigation risk in altering corporate behaviour towards climate change seems to be furthest from a corporation's view compared to climate change regulations, it may however contribute towards increasing regulatory risk for companies. Moreover, there could be changes in respect of the standards applied for regulatory approvals. In turn, this may make it more challenging for a company to secure financing or improve its reputation.[242]

Lenny Bernstein, a former climate change scientist with Exxon, once stated in an email to Ohio University which was published by the *Guardian* newspaper in the United Kingdom:[243]

238 J Worland "Why Big Business Is Taking Climate Change Seriously" *TIME* (online ed, New York, 23 September 2015) <www.time.com>.

239 Peel and Osofsky, above n 4, at 188–189. N Orekes and A Schendler "Corporations will never solve climate change" *Harvard Business Review* (online ed, Watertown MA, 4 December 2015) <www.hbr.org>.

240 Peel and Osofsky, above n 4, at 188–190.

241 At 183.

242 At 182–185.

243 S Goldenberg "Exxon knew of climate change in 1981, email says — but it funded deniers for 27 more years" *The Guardian* (online ed, UK, 8 July 2015).

> Corporations are interested in environmental impacts only to the extent that they affect profits, either current or future. They may take what appears to be altruistic positions to improve their public image, but the assumption underlying those actions is that they will increase future profits.

While not everyone agrees with this point of view, it is undeniable that a huge proportion of companies do not take climate change into account unless it is a major risk. Therefore, it is important that governments initiate climate change policies which will contribute to the reduction of emissions, to the best of their abilities under the economic circumstances, whether through incentive initiatives or regulations in order to alter the behaviours of companies towards climate change. Action needs to be taken to deter and lower the impact of climate change. In the telling words of former UN Secretary-General Kofi Annan:[244]

> [T]he world is reaching the tipping point beyond which climate change may become irreversible. If this happens, we risk denying present and future generations the right to a healthy and sustainable planet — the whole of humanity stands to lose. On the other hand, climate change is an unprecedented opportunity for governments, investors, firms and citizens to work together to develop and deploy low-carbon technologies, which can sustain growth within our planetary boundaries. Shifting towards low-carbon energy systems can avert climate catastrophe while creating new opportunities for investment, growth and employment.

244 N Davis "Kofi Annan: 'We must challenge climate-change sceptics who deny the facts'" *The Guardian* (online ed, UK, 3 May 2015).