



## Corporate Claims on Climate Change Face Greater Scrutiny



Given the inexorable move toward an international agreement on climate change mitigation, it was only a matter of time before the self-proclaimed climate “friendliness” of certain corporations came under greater scrutiny.

The recent complaint by the Australian Conservation Foundation (ACF) to the Australian Competition and Consumer Commission (ACCC) about the stance on climate change of six so-called big polluters certainly raises the stakes on corporate responsibility in Australia.

The ACF invoked the Trade Practices Act to claim Boral, Bluescope Steel, Caltex, Rio Tinto, Woodside and Xstrata each has made misleading public statements about how the proposed Carbon Pollution Reduction Scheme will affect their businesses.

The ACF argued these companies had been saying one thing when lobbying the Government – introduction of the Carbon Pollution Reduction Scheme (CPRS) would have a significant adverse impact on their businesses – and another thing to their shareholders and investors – the impact of the scheme would be negligible.

It was easy for the ACF to cite specific instances where claims were made to the effect that the introduction of the CPRS would wipe millions of dollars from bottom lines and cost thousands of jobs. All the claims were on the public record.

ACF also argued the conduct of the companies was specifically designed to stop the introduction of a CPRS, water down such a scheme, or achieve concessions in the form of free permits.

To further support its complaint, the ACF said the lobbying efforts in question had enabled the corporations to obtain increased financial support (and competitive advantage) in the form of increased allocations of free permits and direct financial assistance at every stage of the political and policy consultation process. It also enabled a delay in the commencement of the CPRS, and a price cap of \$10 per permit in the first year of the CPRS.

Putting aside the somewhat self-serving nature of these claims, the nub of the ACF’s argument – that there is a “clear disjuncture” between what these businesses are saying about climate change to their shareholders and investors as opposed to what they are saying when they are lobbying the Government – poses several clear challenges for businesses.

### Risky business

First and foremost, the complaint opens up a whole new chapter of risk management, particularly at the most senior level.

Second, regardless of whether the complaint (and the subsequent media campaign) actually succeeds, it puts companies on notice to get their climate change narratives consistent.

CarbonEdge has previously published detailed material on **climate and risk** but we had not considered campaigns such as the one being run by the ACF as a specific risk.

Of course, ultimately, this type of activity is not so much a new risk as a new spin on an old risk. The risk is a failure in essential duty of care because of what you may say as a corporation as opposed to what you actually do.

CarbonEdge believes that as a result of this kind of activity, businesses should be mindful to:

- Conduct regular, comprehensive board-level reviews and formal approval of marketing and lobbying positions and statements
- Ensure any public statements made on climate change also recognize the perspective of third parties, including environmental organizations, with which they may have no apparent relationship.

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## Do what you say

Having control over what you actually say on serious issues such as climate change should be a no-brainer, but for some corporations it appears to be a challenge.

How else to explain the situation with ExxonMobil which in recent weeks was forced to fight off perceptions that it had reneged on an agreement to stop funding lobby groups which supposedly published misleading information about climate change?

According to Bob Ward of the Grantham Research Institute on Climate Change and the Environment at the London School of Economics, ExxonMobil had been continuing to fund lobby groups that question global warming, despite a previous public pledge to cut support for climate change denial.

Ward cited his own correspondence with ExxonMobil and also a section in the company's 2007 Corporate Citizenship Report to back up his claims.



The report in question is on the company's corporate website, and the pledge is so unequivocal, it is a wonder it was made in the first place. It says: "In 2008, we will discontinue funding to several public policy research groups whose position on climate change could divert attention on the important discussion on how the world will secure the energy required for economic growth in an environmentally responsible manner."

Now, two years later, ExxonMobil is reported still to be funding groups including the Heritage Foundation which recently co-sponsored a conference of climate skeptics in Washington. The conference was attended by Australia's very own Family First Senator, Steve Fielding, who will be voting next month on the proposed CPRS in the Federal Parliament.

Not surprisingly, this situation has made it rather easy for opponents to eyeball the company about reneging on its previous promise.

CarbonEdge is not surprised ExxonMobil is one of the main targets of environmental groups and campaigners. It is a big oil company, that will always attract major green scrutiny. What is perhaps more surprising is how easy it has been to catch them out on this issue and gain traction.

## Katrina climate litigation

However, risks such as these to ExxonMobil and other companies may be small beer compared to the implications of a US court case linked with the 2005 Hurricane Katrina disaster.

Three weeks after Katrina nearly wiped out New Orleans, causing horrendous damage in excess of US\$25 billion, a case claiming energy and oil companies were in large part responsible for global warming and, therefore, for the ferocity and magnitude of the Hurricane Katrina was filed in a US court.

In *Comer v Murphy Oil USA*, a group of Gulf Coast property owners filed for damages against a number of companies

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for their contributions to climate change – which the plaintiffs claimed contributed to the intensity of Katrina.

The defendants tried to get the claims dismissed, arguing the claimants lacked standing to bring their claim and the court lacked jurisdiction to hear the case. Arguments centered on the difficulty of establishing that the damage to property suffered by the claimants as a result of Katrina was ‘traceable’ to the defendants’ conduct.




The case was dismissed in 2007 on constitutional standing and political grounds. However, that decision is now subject to an exhaustive appeal.

Lawyers for the plaintiffs are using an argument similar to one which was utilised in long-running tobacco industry litigation. They are arguing that the companies involved deliberately misled people about their activities – in this case about the negligible effect of their operations on global warming.

Leading the litigation is New Orleans-based attorney, Gerald Richard, who recently told the Sydney Morning Herald: “What’s good about the approach that I’m taking is that the tobacco litigation – and, before that, the asbestos litigation – demonstrates that one case can cause a gigantic litigation problem for corporations. It’s pretty much accepted history that asbestos and tobacco are the role models for climate change litigation now.”

It is a case, which could last for decades and have huge ramifications for future business practices. Certainly, it is the beginning of a new wave of “global warming litigation”.

Unlike tobacco litigation, which was essentially about a “personal choice” product, any finding against large, traditional energy users for their contribution to global warming really could change the planet.

CarbonEdge recommends businesses, particularly those with significant energy profiles, keep a close eye on this case [Comer v Murphy Oil USA, Inc., et al]. 



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