



# Climate Change and the Insurance Sector

Issue 1, October 2020

Welcome to the first of our monthly news bulletins which will provide you with a snapshot of climate change developments relevant to the insurance market, looking at significant developments, regulatory guidance, consultations, climate-related litigation, as well as providing thought pieces on the potential risk exposures for Insurers, and guidance on why climate change litigation is on the rise.

We hope you find this useful, and please do get in touch if there are any areas you would like to discuss with us in more detail.

Michelle Radcliffe, Senior Associate, CMS



## Hot off the press



### **EIOPA response to European Commission consultation on renewed sustainable finance strategy**

On 16 July 2020, the European Insurance and Occupational Pensions Authority (EIOPA) submitted its response to the consultation of the European Commission on a renewed sustainable finance strategy, which aims to increase private investment in sustainable projects and activities to support the different actions set out in the European Green Deal, and manage and integrate climate and environmental risks into our financial system. The EIOPA considers that the insurance and pensions sector can play an important role as stewards for environmental and social sustainability on account of their long-term interests and business models. [LINK](#)



### **18 months for insurers to implement approaches to managing climate change risks**

On 1 July 2020, the PRA published a Dear CEO letter which builds on expectations set out in its April 2019 supervisory statement (SS3/19) on enhancing firms' approaches to managing climate-related financial risk. The PRA had previously asked firms to have an implementation plan in place by October 2019, and the letter now sets a date of the end of 2021 for firms to fully embed their approach to management of climate-related financial risks. Firms will be expected to be able to demonstrate they meet the



expectations set out in SS3/19 in areas of governance, risk management, scenario analysis and disclosure.

Although progress has been made to date, the letter highlights several shortcomings including that many firms have limited capability to make climate disclosures. The PRA expects firms to materially improve these capabilities but stressed a proportionate approach should be taken to reflect a firm's climate-related financial risk.

Guidance has been published by the Climate Financial Risk Forum (please see below) which may help insurers take the necessary steps ahead of the PRA's upcoming deadline. [LINK](#)



### **Committee on Climate Change's report to Parliament published**

On 25 June 2020, the Committee on Climate Change published a progress report to Parliament which assessed the UK's progress in reducing emissions over the past year. The report also contains new advice on ensuring a green recovery following on from the COVID-19 pandemic.

The report sets out 5 investment priorities for the government in the months ahead (such as moving towards a circular economy) as well as highlighting opportunities to support the transition by investing in innovation such as targeted science. We expect further guidance to be produced in due course for many industries following the publication of the report: the Department of Business, Energy & Industrial Strategy is aiming to publish a manufacturing and construction decarbonisation strategy in Q1 2021; firms are expected to continue to use the Task force on Climate-related Financial Disclosure framework to better report transition and physical climate risks and shift investments away from high-carbon infrastructure by 2022. [LINK](#)



### **ClientEarth campaign challenging pension schemes**

The Environmental law charity, ClientEarth, has launched a campaign to challenge pension schemes on climate change, focusing on the extent to which investments are channelled into industries which contribute to climate change, and the premise that pension trustees and providers have a legal duty to act strategically on climate risks impacting pensions, and capitalise on the investment opportunities presented by the transition to a low carbon economy. It is worth considering this campaign alongside the Mark McVeigh case in Australia, details of which are set out below. [LINK](#)



## **Guidance/Consultations**



### **Climate Financial Risk Forum publishes guide to help the financial industry approach climate disclosure and risk management**

The Climate Financial Risk Forum (CFRF), an industry forum jointly convened by the PRA and FCA, has produced a guide to help the financial industry approach climate disclosure and risk management. Members of the forum include banks, insurers and asset managers, and four separate working groups have been convened to focus on risk management, scenario analysis, disclosure and innovation. The CFRF has produced detailed guidance on each of the four categories, some of the key points include:

- Risk management: firms should implement a governance approach for climate risks similar to that for financial risks and consider long term impact (for example 30 years) as well as shorter term impact. In terms of insurance underwriting, detailed guidance is included on the management of physical risks (both acute (natural catastrophes) and chronic (global warming and changed weather patterns)) as well as transition risks through technological and market shifts and insurance losses associated with valuation of liabilities.



- Scenario analysis: this process should be iterative, with firms inputting identified potential exposures to climate-related risks into developing suitable climate-related scenarios and assessing the financial impact.
- Disclosure: disclosure should be provided on a timely basis and be comparable among companies within the same sector or industry.
- Innovation: the quality and consistency of climate-related data should be improved to enable markets to better quantify risks and opportunities, and then act on them.

The guide acknowledges that challenges will arise due to uncertainty surrounding the long-term impact of environmental changes, for example, climate change scenarios are expected to develop as advances in climate change research are made over the years. However, new opportunities will present themselves, for example, new underwriting products. [LINK](#)



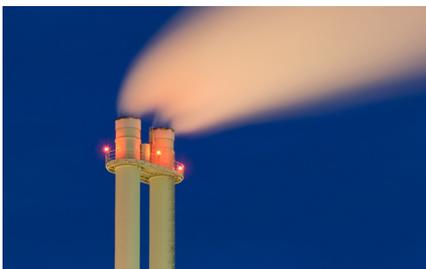
### **FCA consultation paper on new “comply or explain” disclosure requirements extended to 1 October 2020**

In March 2020, the FCA published a consultation paper in relation to a proposal to introduce a new “comply or explain” disclosure requirement for commercial companies with a UK premium listing. The new requirement would require such companies to make disclosures in their annual financial report consistent with the recommendations that the Financial Stability Board’s Task Force on Climate-related Financial Disclosures made in its June 2017 report. The FCA hopes this will achieve greater transparency and more accurate pricing of listed securities. The original comments deadline of 5 June 2020 has recently been extended to 1 October 2020 in light of the COVID-19 pandemic. [LINK](#)



## Claims

We have picked out a selection of cases to update you on below, and will revise this monthly, updating on key cases as they progress. When speaking with Insurers and Insureds on the topic of climate change, we often note that the strategy of climate change litigation differs significantly from other forms of litigation. Climate change litigation, especially of the type we are now seeing, is often ‘agenda’ setting litigation, meaning that the goal of the plaintiffs is to change patterns of behaviour, such that seeking any monetary form of settlement is often not feasible. These cases demonstrate that approach, and it is important that Insurers bear this in mind, should their Insured be on the receiving end of any such claim.



### **The Requirement to curtail carbon dioxide emissions – whether a private company violated a duty of care and human rights obligations by failing to take adequate action to curb contributions to climate change**

Readers may be familiar with the *Urgenda* case (*State of Netherlands v. Urgenda Foundation*), in which a case was brought against the Dutch government in 2013 which claimed that by not meeting a minimum carbon-dioxide emission-reduction goal put in place to avert climate change, the human rights of Dutch citizens were being endangered. In 2019, the Supreme Court found that the Dutch government was required to reduce its emissions to protect human rights, making it the first tort case taken against a government which challenged climate change decisions based on a human rights argument.

There is now a further case pending in the Dutch Courts (*Milieudefensie et al. v Royal Dutch Shell plc*) in which NGOs and more than 17,000 citizens seek a ruling from the court that Shell must reduce its CO2 emissions by 45% by 2030 compared to 2010 levels, and to zero by 2050, in line with the Paris Climate Agreement. The case is seeking to build on the *Urgenda* decision, citing that the argument extends to private companies, such that Shell has a duty of care to take action to reduce its greenhouse gas emissions. Again, the case is based on principles of human rights. A 4-day hearing has been scheduled for December 2020. When the *Urgenda* decision was made, the expectation was that the case would pave the way for more climate litigation based on



the need to protect human rights; the *Milieudefensie* case is a clear example of such litigation, and similar cases which put human rights at the heart of the claim are likely to follow. We will provide further insight in subsequent newsletters as to why human rights arguments are being used as a focal point of climate change litigation.



### **Claims arising from the 2020 Australian Bush Fires:**

#### **a) Australian & New Zealand Banking Group**

At the end of January 2020, Australian bushfire victims and Friends of the Earth Australia filed an OECD complaint against Australia and the New Zealand Banking Group (ANZ) relating to ANZ's financing of fossil fuel projects. The complaint alleges that ANZ has not adhered to the standards set out in specific chapters of the OECD Guidelines, referring to Due Diligence, Disclosure, Environment, and Consumer Interests. In order to comply with the OECD guidelines, a request has been made first for ANZ to disclose high risk greenhouse gas emissions, including indirect emissions resulting from business lending and investment; secondly to divest from investing in coal and phase out its investment in other fossil fuel industries, thirdly to commit to greenhouse targets that are in line with the Paris Agreement, and finally to conduct and disclose comprehensive climate-related scenario analysis for all sectors financed by ANZ. The plaintiffs seek accountability for the harm caused by the devastation arising from the forest fires, which are said to have been exacerbated by climate change. The claimants also request that the Australian NGO Cooperation Program recommend to the Australian government that stronger laws are drafted to deal with emissions and energy reporting.

#### **b) Allegation re Australian Office of Financial Management**

In July 2020, Kathleen O'Donnell, an owner of Australian government bonds that are traded on the country's main stock exchange, filed a class-action lawsuit on behalf of investors, alleging that the Australia government failed to disclose the material risks of climate change associated with the bond. It is argued that Australia's economy and international reputation will be significantly impacted by the government's response to climate change, alleging that authorities have failed to disclose such risks to investors. A declaration is sought from the government that it breached its duty of disclosure by failing to address Australia's climate risks in the information documents linked to the bond. An injunction is sought, restraining the government from further promoting exchange-traded bonds until it complies with the cited duty of disclosure. This is certainly a case to watch, as whilst this particularly claim is against a national government, the basis of the claim could be mirrored against a corporation which has failed to make the required level of climate-related financial disclosures.



#### **Mark McVeigh v Retail Employees Superannuation Trust – allegations that an Australian pension fund has breached its disclosure and fiduciary duties to a member by failing to disclose information on climate business risks and its strategies to address such risks**

The lawyer representing Ms O'Donnell is also representing Mr Mark McVeigh, an environmental scientist, who filed a case in the Federal Court of Australia in July 2018 against his pension fund, the Retail Employees Superannuation Trust (REST) in Australia. Whilst the claim was initially founded on disclosure obligations, it has since expanded to include an allegation that REST has breached the fiduciary duties owed to Mr McVeigh by not adequately disclosing or assessing the impact of climate change on its portfolio. REST is one of Australia's largest asset owners, with almost \$50 billion under management and around 2 million members.

The trial was set for July 2020, but will now take place from 2 November 2020. A second round of discovery is currently underway. The documents to be examined include those which evidence the stress testing policies for climate change risk from REST and investment consultant JANA, REST's climate change policy from December 2018, the fund trustee's risk management strategy relating to climate risk or investment from 1 January, the fund's investment governance framework and investee boards' policy, the fund's policy and membership of the Principles for Responsible Investment and the advice it received on the recommendations of the TCFD. It is interesting to see what type of information is likely to be relied upon in such cases.



This case will provide guidance for asset and fund managers looking at the issue of mitigating climate change risks when managing client's assets, and the extent to which they may be investing in, for example, fossil fuels, which could become stranded assets, putting the investment returns of the members at risk. Given the significance of the case, we will keep you updated with developments.



### **Lliuya v RWE – a case which focuses on the liability of greenhouse gas emitters for harm arising in a different jurisdiction as a result of the warming effects of climate change**

In November 2015, a Peruvian Farmer, Mr Lliuya, filed claims for declaratory judgment and damages in a German court against RWE, Germany's largest electricity producer. Allegations are made that RWE knowingly contributed to climate change by emitting substantial volumes of greenhouse gases, and hence ought to take some level of responsibility for the melting of the mountain glaciers near his town of Huarez, which cause an acute threat to his community due to the risk of the glacial lake flooding (such that the authorities have incurred cost in establish flood protections, and monitoring the rise of the lake). The case is grounded on the nuisance principle. What makes this claim particularly noteworthy is the fact that RWE does not operate in Peru.

Acknowledging that RWE is only a contributor to the emissions responsible for climate change and hence the increase in the volume of water in the lake, Mr Lliuya has asked the Court to order RWE to reimburse him for a portion of the costs that he and the Huarez authorities are expected to incur to establish flood protections; namely 0.47% of the total cost (\$19,000), the same percentage as RWE's estimated contribution to global industrial greenhouse gases since the beginning of industrialisation.

Whilst the case was dismissed in the first instance, in November 2017 the appeal court recognised the complaint as being well-pled and admissible, such that it has now moved into the evidentiary phase, the Court recognising that in principle a private company could potentially be held liable for the climate change related damages of its greenhouse gas emissions.

The 'test' case nature of this claim has significant ramifications for any organisation which emits significant volumes of greenhouse gases. Further, the success of the claim to date is largely based on the growth of attribution science, an important component of climate change litigation, which we will discuss in more detail in next month's news bulletin.

## **Contact us**



### **Michelle Radcliffe**

Senior Associate – Solicitor Advocate

**T** +44 20 7367 3173

**E** michelle.radcliffe@cms-cmno.com



### **Emma Hobkinson**

Associate

**T** +44 20 7367 2943

**E** emma.hobkinson@cms-cmno.com

For further information and articles, please visit our [Climate Action & Sustainability page](#)