

## AUSTRALIA'S FIRST CASE ON CLIMATE RISK DISCLOSURE IN SOVEREIGN BONDS.

The Australian Government is facing a new class action alleging that it failed to adequately disclose climate-related risks to investors in its sovereign bonds. The case promises to further clarify how climate risk should be managed and disclosed by government entities looking to raise funds in public markets.

On 22 July 2020, Kathleen O'Donnell, an investor in exchange-traded Australian Government Bonds ("eAGBs"), filed proceedings in the Federal Court of Australia<sup>1</sup> against the Commonwealth of Australia, the Secretary of the Department of the Treasury and the CEO of the Australian Office of Financial Management in the latest climate change related litigation in Australia. You can read more about the case over at the [FT](#), [Bloomberg](#) or the [ABC](#).

Ms O'Donnell has brought the case as a class action on behalf of holders of eAGBs and is seeking (i) declarations that the Commonwealth and its officers breached applicable statutory duties and (ii) an injunction restraining the Commonwealth from promoting the eAGBs without informing investors about climate change risks.

The claim turns on two key legal arguments:

- first, that the Commonwealth breached its duties of disclosure as promoter of the eAGBs and engaged in misleading or deceptive conduct in contravention of s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) by disclosing some material risks in public offer documents without disclosing any information about Australia's climate change risks; and
- secondly, that, as a result of these breaches, the Secretary of the Department of Treasury and the CEO of the Australian Office of Financial Management, being the "accountable authorities" of the two government entities responsible for the management and administration of the eAGBs for the purpose of the *Public Governance, Performance and Accountability Act 2013* (Cth), breached their obligations under s 25(1) of that Act to exercise their

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<sup>1</sup> *Kathleen O'Donnell v Commonwealth of Australia & Ors* (VID482/2020)

powers, perform their functions, and discharge their duties with reasonable care and diligence.

The claim is novel in that it is the first climate risk disclosure case in Australia made against the Australian Government. While similar climate risk disclosure cases have recently been brought against superannuation funds<sup>2</sup> and listed public entities<sup>3</sup> in Australia, a case against the Commonwealth is distinct given the different risk profile and disclosure obligations faced by the Commonwealth as a sovereign entity. Indeed, while the relevant disclosure documents in this case do specifically flag that the market price of eAGBs "will vary over time in response to a variety of influences"<sup>4</sup>, it remains to be seen whether the Court will view this kind of generic risk disclosure to be sufficient.

Ms O'Donnell's case will also be interesting to the extent that it provides commentary on the scope and nature of the duty on public entity directors to consider climate risk in the performance of their statutory duties (and how these compare with comparable duties on company directors).

Ms O'Donnell's claim comes amidst a steady rise in private and public climate change related legal actions in Australia. Australia is second only to the United States in terms of the highest number of climate change disputes globally, with our state and federal courts increasingly engaging in environmental and climate change concerns in dealing with these cases. In a landmark decision in *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7 last year, the NSW Land and Environment Court denied approval for an open-cut coal mine in NSW on the grounds of public interest and principles of sustainable development, specifically recognising Australia's obligations under the Kyoto Protocol and the 2015 Paris Agreement. More recently, in January 2020, the Australian bushfire victims and Friends of the Earth Australia filed a complaint to the Australian Government's OECD National Contact Point to hold the ANZ Banking Group accountable for financing fossil fuel projects and failing to disclose the full extent of its carbon footprint across its lending portfolio.

Regulators such as APRA and ASIC have also been increasing pressure on companies and financial institutions to actively assess and manage climate change related risks and ASIC has warned about the need for directors to consider climate change risks lest they be found liable for breaching their duties of care, skill and diligence. A number of guidelines have been released over the past year concerning assessment and disclosure obligations of corporations in order to improve industry practice relating to climate-related financial risks, and provide greater clarity on regulatory expectations. ASIC has also launched a surveillance program in respect of climate related disclosures.

Please reach out to us if you would like any further information on anything raised in this briefing.

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<sup>2</sup> *McVeigh v Retail Employees Superannuation Trust* (NSD1333/2018)

<sup>3</sup> *Abrahams & Anor v Commonwealth Bank of Australia* (VID879/2017)

<sup>4</sup> Australian Government Investor Information Statement Exchange-Traded Treasury Bonds dated 10 February 2015, p7

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