

## MALAYSIAN LEGAL OPINION DIRECTORS' DUTIES AND CLIMATE CHANGE

The CCLI has commissioned a [legal opinion](#) by Tan Sri Zarinah Anwar and To' Puan Janet Looi on the duties and disclosure obligations of directors of for-profit companies in Malaysia in respect of climate risks. Set out below are the key findings and background to the legal opinion, dated 22 July 2022.

### KEY FINDINGS

- Directors of Malaysian companies are duty bound to proactively and urgently apprise themselves of all aspects of climate change that can affect their companies, take action to manage the full spectrum of climate related risks by integrating them into their corporate strategies, plans and actions, and ensure proper disclosure of such risks: [242].
- Fundamentally, directors are legally required to incorporate climate change considerations into their decision-making process. Failure to do so is a violation of their fiduciary duty and their duty of care, skill and diligence: [244].
- Boards cannot deny their obligation to take into account climate change risks in discharging their duties: [127].
- Directors risk acting in breach of their duties if they do not inform themselves of climate risks, incorporate a broader sustainability agenda in their companies' operating and decision-making processes and take the required steps to address these issues: [129].
- While directors' decisions may be protected by the 'business judgment rule', this will only be available to directors where they have considered climate risks, and whether such risks pose a real and legitimate threat to the company. Where the board has totally neglected to consider the effects and risks of climate change in the discharge of their duties, it is conceivable that the business judgment rule is *prima facie* not available as a defence: [152]-[156].
- On the other hand, directors who make climate-conscious decisions which may in the short-term be less financially beneficial (such as investment in a lower emission asset with a longer-term profit horizon) could be protected by the business judgment rule as having acted in the best interest of the company: [156].
- Boards can and should pursue the support of external ESG experts and advisors, but must exercise caution in taking a simplistic approach of just placing wholesale reliance on the opinions of ESG experts. It is incumbent on directors to make an independent assessment of the sustainability and climate-related information or advice, opinions, reports or statements, having regard to their knowledge of the company's activities, structure and operations if they are to successfully avail themselves of the business judgment rule defence: [162].
- Misleading climate-related statements can expose directors of publicly listed companies in Malaysia, and their companies, to civil litigation or regulatory enforcement. Statements in annual reports, annual sustainability disclosures, corporate governance reports or information memoranda and prospectuses will also be increasingly scrutinised by regulators and regulatory action imposed in the case of misrepresentation, misstatements or 'greenwashing' if such statements are inaccurate, misleading, contain omissions or are likely to mislead the investing public: [166], [193].
- Shareholders would be able to institute legal action (either statutory, derivative or personal) directly against directors if they can demonstrate that the directors have acted in a manner prejudicial to their interests by failing to consider, mitigate or prevent climate risks or by failing to incorporate a climate-positive agenda in the company's decisions: [236].



- Additionally, the Securities Commission Malaysia has the power to bring enforcement action against directors (as well as CEOs and CFOs) of publicly listed companies for breaches of directors' duties: [63]-[64].

## BACKGROUND TO THE LEGAL OPINION

With the rising physical, economic and financial risks posed by climate change, boards must incorporate sustainability practices and climate risk mitigation into their companies' strategies and operations.

The latest scientific evidence presented in the IPPC Sixth Assessment Report and other studies has led to a seismic shift in the overall expectations of investors, regulators and the public in regard to the role of companies in contributing to greenhouse gases and climate change. Malaysia has declared it will become a carbon neutral country by 2050 and has established national policies and made various commitments on climate change at the international level.

In recent years, Malaysian regulators have increased focus on climate change, including issuing guidance. Such guidance, particularly the explicit agenda advanced by the Securities Commission Malaysia's Malaysian Code on Corporate Governance, Guidelines on Conduct of Directors of Listed Corporations and their Subsidiaries, and Corporate Governance Strategic Priorities, impose upon boards and in particular the audit and risk committees, the obligation to incorporate climate-change considerations in their decision-making process.

In addition to statutory requirements to report on environmental impacts and material information, which could include climate-related risks and impacts, in recent years publicly listed Malaysian companies have been obliged to report on the incorporation of sustainability considerations and the management of environmental risks and opportunities into their business strategies under Bursa Malaysia's Main Market Listing Requirements.

These developments will have a bearing on corporate decisions and the exercise of duties by directors as they will likely lead to new policies, laws and regulations, as well as changes to supply chains and stakeholder expectations.

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For more information on the legal opinion and the authors, read the press release [here](#) and the full text of the opinion [here](#).

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