Commonwealth Climate and Law Initiative

PHILIPPINES LEGAL OPINION DIRECTORS' DUTIES AND CLIMATE CHANGE

The CCLI has commissioned a legal opinion by Cesar L. Villanueva (Senior Founding Partner, Villanueva Gabionza & Dy), Lily K. Gruba (Senior Partner, Zambrano Gruba Caganda & Advincula), Angelo Patrick F. Advincula (Senior Partner, Zambrano Gruba Caganda & Advincula) and Joyce Anne C. Wong on the duties and disclosure obligations of directors of for-profit companies in the Philippines in respect of climate risks. Set out below are the key findings and background to the legal opinion, dated 18 October 2022.

KEY FINDINGS

- Directors play a critical role in managing climate change risks to which the corporate business enterprise is exposed, as well as in fulfilling the companies' social responsibilities towards the protection of the environment: [18], p.9.
- Under Philippine Corporation Law, the risks facing, and losses sustained by, the corporation relating to climate change fall within the same category as other foreseeable financial risk faced by directors of for-profit corporations, and are within scope of their duties to act in the best interest of the corporation and its shareholders: [20], p.10.
- Directors of for-profit corporations assume the functions of their office with the understanding that their fiduciary duties of obedience and diligence are owed not just to the shareholders but other stakeholders as well, which duties include within their scope of responsibility a stewardship role to ensure that company operations do not degrade the environment or contravene environmental laws: [14], p.8.
- Compliance by the board of directors with enterprise risk management best practice of identifying, sourcing, measuring, evaluating, mitigating and monitoring of climate change risks would constitute the best defence in climate change litigation that directors have acted in the best interest of the company, its shareholders and shareholders in facing up to the climate change risks besetting the company: [18], p.49.
- The deference to the board's business judgment means that directors are able to take actions to mitigate the impacts of climate change on their company without exposing themselves to the risk of liability for breaching their duties. For instance, directors that implement a strategy to address climate impacts to ensure the long-term viability of the company during the energy transition — even where this may risk incurring greater costs in the short term — will be protected from fiduciary liability unless they have violated the law, or acted with fraud, negligence or bad faith: [24], p.12.
- The broad materiality threshold provided under the PSE disclosure rules, which require publicly-listed companies to disclose "*any material fact or event that occurs which would reasonably be expected to affect investors' decisions in relation to trading the securities" and "such information [which] may reasonably be expected to materially affect market activity and the price of its securities,*" would generally include the disclosure of climate-related risks particularly when such impacts the trading and price of company shares: [32], p.15.
- Directors may be held personally liable for failing to identify, monitor and manage climate change risks when it can be shown that such nonfeasance or malfeasance fall within any of exceptions to the business judgment rule, including gross negligence: [6], p.60. Additionally, directors may be held personally (civilly) liable when they have wilfully and knowingly voted for or assented to violations of climate-related environmental laws: [5.1], p.59.

- The 'stewardship doctrine' provides that directors, especially those in corporations vested with public interest, owe fiduciary duty of extraordinary diligence to *stakeholders* (other than the shareholders), such that even if it cannot be proven that such directors approved a patently unlawful act, or acted with fraud or bad faith, their failure to prove that they have exercised extraordinary diligence in preventing the harm caused to the stakeholder injured by the company's operations would already amount to 'gross negligence' as to make them personally liable: [10], p. 63.
- It should be expected that environmental cases will increase, especially with the Rules of Procedure for Environmental Cases providing very accommodating procedures and judicial powers to pursue climate activism, that would expose for-profit corporations and their directors to reputational risks associated with the public's perception that directors and their companies have not acted in the best interest of the stakeholders — consumers, investors, regulators — and of society as a whole: [7], p.111.

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. The Philippine Government has stated that it will endeavour to peak its emissions by 2030 and committed to reduce its emissions by 75% against a business-as-usual trajectory by 2030 (with approximately 72% of this conditional on financial support).

The Philippines Securities and Exchange Commission (SEC) has issued guidelines on sustainability reporting, which are based on, and refer to, the recommendations of the Taskforce on Climate-related Financial Disclosures; public companies must currently report in accordance with these guidelines on a 'comply or explain' basis, and the SEC has indicated that it will make this reporting mandatory in 2023.

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 full text of the opinion here.

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