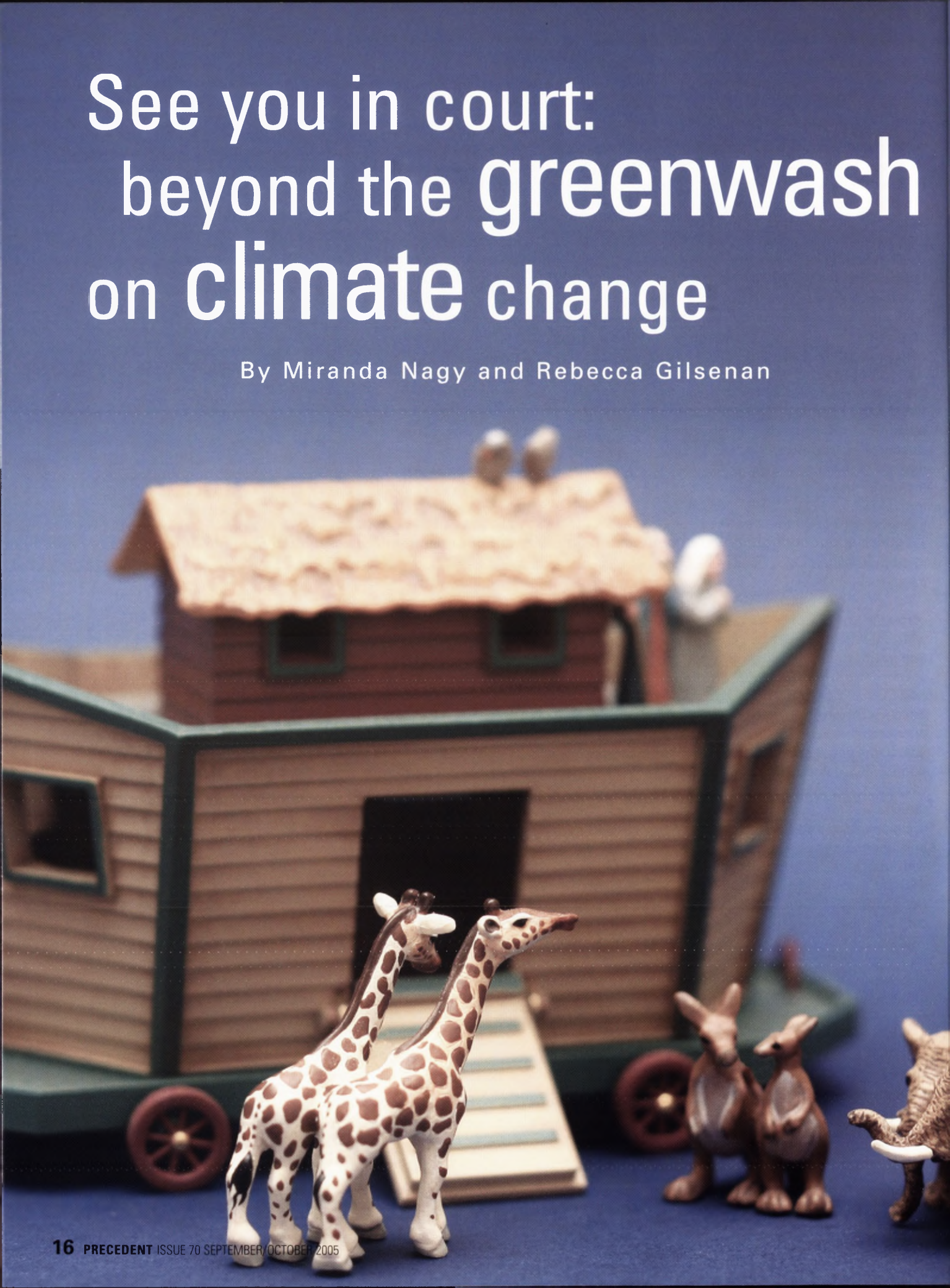
See you in court: beyond the greenwash on climate change

By Miranda Nagy and Rebecca Gilsenan



As scientific consensus on climate change continues to crystallise, market-led initiatives, the threat of lawsuits, more stringent regulation and rising shareholder pressure are converging to make climate change a core item on the emerging corporate governance agenda.

WHAT IS CLIMATE CHANGE?

Climate is the average weather.[1] 'Climate change' is defined as change in the climate, attributed directly or indirectly to human activity, that alters the composition of the global atmosphere and is in addition to natural climate variability observed over comparable time periods.[2]

Climate is critical to how the planet functions – it governs the productivity of farms, forests and fisheries, the geographical distribution of disease, the ability to live in cities in summer, the damage inflicted by storms, floods and fires, property and other losses from a rise in sea levels, expenditures on engineered environments and the distribution and abundance of species.[3]

Climate change is caused by activity that disrupts the balance in the blanket of gases that make up the earth's atmosphere and leads to an increased trapping of infrared radiation and consequent warming of the lower atmosphere. There is substantial credible evidence of recent unusual climate change and that human activity is the cause of that change.[4] The dominant human activity that leads to change in the balance is the emission of carbon dioxide from fossil-fuel combustion; the process that supplies nearly 80% of the world's energy.

> 'The problem of disruption of global climate by human-produced greenhouse gases (GHG) will likely be come to be understood over the decade or so, by the public and policy makers alike, as the most dangerous and intractable of all the environmental problems caused by human activity... It is the most dangerous because climate is the "envelope" within which all other environmental processes and conditions operate. Distortions of this envelope of the magnitude that are in prospect are likely to so badly disrupt these conditions and processes as to impact adversely every dimension of human wellbeing that is tied to environment – which is most of them.'[5]

WHAT IS CORPORATE SOCIAL RESPONSIBILITY?

Corporate social responsibility involves a commitment on the part of business to behave ethically and accountably, and to produce a positive outcome in economic, social and environmental areas that goes beyond what is necessary to merely comply with the law. Although there are many definitions of corporate social responsibility, an almost universal feature they share is that they include reference to protecting the environment and/or to sustainable development.

WHAT IS GREENWASHING?

Greenwashing is 'disinformation disseminated by an organisation so as to present an environmentally responsible public image'.[6]

CLIMATE CHANGE AND CORPORATE RESPONSIBILITY

The impact of climate change extends well beyond carbon-intensive industries. Companies in financial services, property/real estate, building and construction, transportation, telecommunications, electronics, food, agriculture, professional services, insurance and tourism are also affected.

Increasingly, companies are becoming aware of the business risks and opportunities presented by climate change. Major law firms, including some in Australia, have set up climate change departments. Insurers have introduced an environmental component to their risk assessment and acknowledge the potential impact of climate change-related natural disasters. Pollution and other forms of environmental destruction are already excluded from some types of policies. Major investors and financiers have similarly begun to include the environment and climate change in their risk-assessment processes and are beginning to differentiate companies according to whether they manage the risks presented by climate change.

Carbon Disclosure Project

A notable example is the Carbon Disclosure Project (CDP), a secretariat for the world's largest institutional investor collaboration on the business implications of climate change. It represents 143 investors who control over $US20 trillion in assets. Through the CDP, institutional investors collectively sign a single global request for disclosure of information on GHG emissions. The CDP then sends the request to the FT500 largest companies in the world. The most recent request was sent in February this year and is one of the largest initiatives on corporate responsibility ever undertaken. Since its previous request in November 2003, the number of investors that are represented by the CDP has almost doubled.

IN AUSTRALIA — CLIMATE ACTION NETWORK AUSTRALIA SERVE NOTICE CAMPAIGN

On 30 July 2003 the environmental organisation Climate Action Network Australia (CANA), an alliance of environmental, public health, social justice and research organisations, launched the Australian Climate Justice Program (the ACJP). CANA was formed in 1998 as the Australian branch of the global Climate Action Network, which has members in over 70 nations. The ACJP is an initiative directed to exploring legal avenues for making the perpetrators of climate change accountable for the damage that they cause.

The first action of the ACJP was a campaign in which CANA's lawyers[7] served notice on major greenhouse emitters >>

Establishing a duty of care may require a substantial revision of the 'neighbour' principle to encompass a notion of global neighbourhood.

of their legal obligations to address the legal and regulatory risks of climate change. CANA notified the directors of 145 ASX200 corporations identified as major emitters and facilitators of GHG emissions in Australia, plus significant resource companies that operate in Australia but are not listed on the ASX. CANA selected these companies because it believed that a significant portion of their capital was tied up in GHG-emitting activities. The companies notified included Caltex Australia, Qantas, Woodside Petroleum, AGL and Coal and Allied Industries.

The notice focused on two aspects of climate risk – litigation and regulatory. Litigation risk refers to the risk that GHG-emitters may be subject to 'climate lawsuits' – actions to recover losses suffered as a result of damage from climate change. The notice warns that litigation risk is highest for those companies which, in the face of increased scientific certainty about causes and effects of climate change, choose to fund or engage in activities that undermine measures to address it.

Regulatory risk refers to financial costs presented by various regulatory schemes being introduced to address climate change. Such schemes typically attach a cost to GHG emissions. Payments include carbon taxes and emissions-trading schemes. Various schemes to regulate GHG emissions and achieve emissions' targets are in place in Australia, and more are being developed.[8] Increased energy costs are another key consideration.

In addition to litigation and regulatory risk, CANA's notice referred to operational risk, the disruption of company operations; insurance risk, an increase in insurance premiums or the possibility of becoming uninsurable; shareholder risk through the rising number of shareholder actions on climate change; capital risk with the rise of socially responsible investing shifting capital into sustainable corporations and away from GHG-emitters; and competitive risk if companies fail to seize upon the economic opportunities that arise from climate change.

EMERGENCE OF CLIMATE LAWSUITS

The CANA campaign marked a significant departure from a solely tort-based approach to climate change litigation in Australia. The potential for such litigation has often been viewed through the lens of the common law and through tort claims in negligence and nuisance (both private and public) in particular,[9] as well as through challenges to administrative decision-making.

Perhaps surprisingly, in the US the first civil case that could arguably be called a climate lawsuit was filed in 2000 by Western Fuels Association, a coal purchaser, against a coalition of environmental groups which had published a newspaper advertisement entitled 'Global Warming – How Will It End?'[10] That defamation claim was dismissed.

It was not until July 2004 that the first climate lawsuit was filed by environmentalists in the US District Court, New York. A coalition of eight states, the City of New York, and three NGOs who hold and manage land for conservation purposes,[11] brought the claim against six energy-producing corporations which own 174 power stations between them and are allegedly collectively responsible for 652 million tonnes of carbon dioxide emissions annually (one and a half times the total annual emissions in California).[12] The suit combines claims of public nuisance at federal common law with claims of public nuisance and private nuisance under the law of New York State, for damage suffered both inside and outside the state. Damages are not sought; rather, the plaintiffs seek the abatement of GHG emissions by the imposition of caps, reducing emissions annually.[13]

Other public lawsuits have been filed in the US, targeting US export-credit agencies for funding fossil fuel projects in other countries without assessing their contribution to global warming or their impact on the US environment as required by the *National Environmental Policy Act*. In Germany, NGOs have taken action against the German government for supporting overseas fossil-fuel projects. In the US, 12 states, several cities and NGOs have also taken action against the federal Environmental Protection Agency for the Bush Government's failure to regulate carbon dioxide emissions under the federal *Clean Air Act*, while the Inuit are apparently considering a complaint in the Inter-American Human Rights Commission because of the impacts of climate change on the Arctic region's environment, subsistence living and the human rights of the Inuit.

In Australia, the first administrative law case on climate change, *Australian Conservation Foundation v Minister for Planning*,[14] centred upon a planning consent for the expansion of the Hazelwood Mine and Power station near Morwell, Victoria. A coalition of environment groups – including CANA, ACF, WWF Australia and Environment Victoria – successfully challenged the refusal of the Minister for Planning to allow a planning body to consider submissions from the environment groups on the GHG impacts of the proposed expansion. While this was indeed a significant decision, the case does not go so far as to establish

the proposition that climate change is a compulsory consideration in planning decisions. As is frequently the case in environment groups' interventions in planning decisions, the extension of Hazelwood Power Station was ultimately given the green light after consideration of the environment groups' submissions.

CONTEXT OF DIMINISHING TORTS

Australian environment groups have recently canvassed various causes of action in potential climate lawsuits:

- nuisance or negligence actions against states in the Pacific region, such as Australia and the US, for their failure to ratify and implement the Kyoto agreement, by citizens of low-lying Pacific island states such as Tuvalu Kiribati, the Marshall Islands and Niue;[15]
- personal injury claims by persons suffering tropical diseases whose prevalence is increased by reason of climate change; and
- action in public nuisance by proprietors of tourist businesses based around the Great Barrier Reef against GHG-emitters for economic loss caused by reason of coral bleaching on the Reef.[16]

Exploring such novel legal strategies to address climate change seems to require the adaptation of tort and administrative law doctrines. While inspired by these innovations, we are dubious about their utility for affecting climate change in the Australian context. Our scepticism derives from the following:

- the difficulties of establishing a causal connection between the conduct in question and the climate consequences;
- costs' rules and rules requiring solicitors' certification of the merits of civil litigation in Australian jurisdictions discourage speculative or experimental actions (in contrast to the no-costs consequences of most US litigation);
- the difficulty of applying climate-change scenarios to the elements of tort law;
- the difficulty of fitting diverse plaintiffs into a mass-tort context, using representative action procedures;
- the largely reactive quality of tort remedies; and
- the diminishing remit of tort law in Australian jurisdictions – expressed in a recent address by Chief Justice Spigelman of the NSW Supreme Court, as the reversal of the 'imperial march of the tort of negligence'.[17]

While we do not propose to examine all obstacles to establishing climate change-damage in tort, it is evident that fitting the facts into the elements of the particular tort may be difficult. In an action in negligence, establishing a duty of care may require the 'neighbour' principle enunciated in *Donohue v Stevenson*[18] to undergo substantial revision to encompass a notion of global neighbourhood.[19] How else to establish that a defendant oil or coal corporation, situated in an entirely different part of the country or the world, owes a duty of care to a plaintiff (say in NSW) who has suffered personal injury through contracting a tropical disease previously not found in that area?

Causation similarly features as a significant obstacle in any climate change action based either on nuisance or negligence. For example, in a private nuisance suit, based on rising sea levels causing damage to land and affecting property values, whose actions could be said to cause or constitute the interference? Plaintiffs are faced with the invidious task of establishing links between the actions of identified individual defendant corporations, their GHG emissions, and rising sea levels. While the overwhelming scientific consensus is that most of the global warming of the last 50 years is consequent upon human emissions of GHG (as opposed to other contributors such as volcanic eruption and solar radiation),[20] and such warming is presently causing sea levels to rise at a rate of approximately a tenth of an inch per year,[21] the capacity of multinational energy corporations to finance, mobilise and promote revisionist versions of climate change theory cannot be underestimated.[22] Climate science is big business.

However, in our view, perhaps the most significant reason why tort is not currently the most productive legal avenue for litigating climate change derives from the legislative circumscription of tort remedies in Australian jurisdictions. Post-Ipp reforms have limited general damages, capped payouts for pure economic loss, and increased injury thresholds. Further, proportionate liability has been introduced in claims for economic loss and damage to property whether in contract, tort or otherwise in various jurisdictions, including NSW[23] and WA.[24] Similar amendments are to be introduced in other states, and already operate in relation to claims for misleading and >>

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deceptive conduct under the *Trade Practices Act* 1974 (Cth), and claims for economic loss and property damage under the *ASIC Act* 2001 (Cth) and the *Corporations Act* 2001 (Cth), although the effect of the new system is yet to be felt.

Despite the requirement that defendants notify the plaintiff of concurrent wrongdoers, the system of proportionate liability is likely to force plaintiffs to greater time and expense near the commencement of the action (potentially through avenues such as preliminary discovery as well as interrogatories) in order to ensure that all relevant parties are identified and joined and to maximise the recovery of damages. In the novel context of the climate lawsuit, this creates an environment of uncertainty and unpredictability for plaintiff lawyers that we suspect will tend to inhibit such claims, particularly when those lawyers are likely to be acting on a speculative basis.

Additionally, in the US the *Alien Torts Act* appears to be of limited application to climate change claims. The famous 1789 statute grants jurisdiction to federal courts in the US in relation to civil actions brought by foreign nationals for tortious acts committed in violation of customary international law or international treaties to which the US is a party. But obligations to abate or prevent climate change are nebulous at customary international law and arguably non-existent in the US by virtue of its refusal to ratify the Kyoto Protocol (in favour of a range of voluntary initiatives for industry, including tax credits for emissions reduction). While it is possible that liability for trans-boundary pollution under the *Trail Smelter* principle[25] may assist Australian plaintiffs suing corporate defendants in relation to climate change events, this is far from certain. In addition, the US Supreme Court has recently indicated that it will engage in 'vigilant doorkeeping' in relation to uses of the statute, precluding its application beyond clear violations of definable, universal and obligatory international law norms.[26]

In view of the obstacles facing potential plaintiffs in tort claims, and because such claims largely depend upon the fact of damage and are ill-adapted to prevent the kind of damage caused by climate change, we consider that other legal avenues require exploration. It is in the sphere of directors' duties and continuous disclosure provisions under the *Corporations Act* that litigation risk and regulatory risk, as described above, coalesce.

DIRECTORS' DUTIES, CORPORATE GOVERNANCE OR FIDUCIARY DUTIES

CANA's letter notified directors of the existence of regulatory risk (financial risk due to climate change) and warned them that a failure to assess and, if necessary, address such risk could amount to a breach of directors' duties under the *Corporations Act* and general law. Potential breaches include breaching directors' duties to exercise due care and diligence; to inform themselves about the subject of business judgements to the extent they reasonably believe appropriate; and to exercise powers and discharge duties in good faith and in the best interests of the corporation.

Institutional investors have a similar duty to ensure that the risks to the money that they invest on behalf of others are properly assessed and managed in the context of the financial risks posed by climate change.

Following the high-profile corporate collapses in the US, Europe and Australia of recent years, more stringent corporate governance standards have been introduced. Concurrently, there are greater requirements for corporate transparency and disclosure.[27] These factors, combined with increasing shareholder activism in the courts in forms such as securities class actions, mean that directors and fiduciaries are more at risk than ever of being involved in litigation.

In addition to the threat of climate lawsuits, companies are being required to respond to climate change issues through increasing shareholder activism – not only in the courts but also in the general meeting. The trends of increasing emphasis on corporate social responsibility and the increasing power of institutional investors have combined to make shareholder activism a significant factor in the adoption of policies and practices that take account of climate risk. In the US, climate change is a fast-growing area of shareholder activism, with record levels of votes cast in favour of proactive climate strategies.[28] Further, in the US some of the most powerful mainstream institutional investors are increasingly becoming activists on environmental issues.[29]

CONCLUSION

Corporations engaged in the business of GHG emission, and their investors, may currently view climate lawsuits as a remote prospect, because of the difficulties in establishing causation and proving the degree of contribution by a particular entity. Although the march of climate change is upon us, we have yet to attain a high level of public and corporate awareness. The CANA Serve Notice Campaign is one attempt to facilitate this.

At present, industry's preference for market-based, voluntary solutions has won over legislatures in Australia and the US. It appears that the 'command and control' approach to climate change is on the decline, even as the first climate lawsuits get underway.

Corporate social responsibility is part of the new corporate orthodoxy, and companies are beginning to appreciate and acknowledge the financial benefits and risks posed by climate change. We wonder whether in the future climate lawsuits will motivate companies to institute real changes in corporate practice to abate climate change, or punish them for missing the opportunity. ■

Notes: **1** Glossary of Terms Used in the Intergovernmental Panel on Climate Change Third Assessment Report.
2 Article 1, United Nations Framework Convention on

Climate Change. **3** John P Holdren, Teresa & John Heinz Professor and Director, Program on Science, Technology & Public Policy, John F Kennedy School of Government, Professor of Environmental Science and Policy, Department of Earth and Planetary Sciences, Harvard University; Presentation on the Institutional Investors' Summit on Climate Risk, United Nations, New York, 21 November 2003. **4** See, for example, the three reports of the Intergovernmental Panel on Climate Change (IPCC). The IPCC is a worldwide scientific body commissioned by the UN to develop the science for policymakers and it represents the views of the vast majority of the world's scientists. **5** John P Holdren, Teresa & John Heinz, Professor and Director, Program on Science, Technology & Public Policy, John F. Kennedy School of Government, Professor of Environmental Science and Policy, Department of Earth and Planetary Sciences, Harvard University; Presentation on the Institutional Investors' Summit on Climate Risk, United Nations, New York, 21 November 2003. **6** Concise Oxford English Dictionary. **7** Maurice Blackburn Cashman Pty Ltd. **8** Schemes in operation include the NSW Greenhouse Benchmarks Scheme and the Commonwealth's Mandatory Renewable Energy Target. The Commonwealth Government is also considering a national emissions trading scheme and a carbon tax. **9** M Kerr, 'Tort-Based Climate Change Litigation in Australia', Discussion Paper prepared for Climate Change Litigation Forum, London, March 2002 hosted by Friends Of the Earth International, at *http://www.acfonline.org.au/docs/publications/rpt0030.pdf*. **10** *Western Fuels Association v Turning Point Project*, No. 00-CV-074-D (D. Wyo. 2001). **11** *Connecticut v Am Elec Power Co* No 04-04-CV-05669, 2004 WL 1685122 (S.D.N.Y. July 21, 2004). **12** 'Attorney General Lockyer Files Lawsuit to Reduce Global Warming Emissions from Five Largest Polluters: California Joins Seven Other States, New York City in Groundbreaking Action', State of California media release dated 21 June 2004. *http://www.caag.state.ca.us/newsalerts/2004/04-076.htm*. **13** Copies of the Complaint are available at: *http://www.pawalaw.com/html/documents/Global%20Warming%20Complaint%20Land%20Trusts%20Final.pdf* (NGOs). *http://www.pawalaw.com/html/documents/Global%20Warming%20Complaint%20Final%20With%20Exhibits.pdf* (States). **14** [2004] VCAT 2029 (29 October 2004). **15** Planet Ark, 'Lawsuits May be Next Weapon in Climate Change Fight', *Planet Ark World Environment News*, 6 March 2003. **16** M Kerr, 'Tort Based Climate Change Litigation in Australia', Discussion Paper prepared for Climate Change Litigation Forum, London, March 2002, hosted by Friends Of the Earth International, at *http://www.acfonline.org.au/docs/publications/rpt0030.pdf*. **17** The Hon Chief Justice J J Spigelman AC, 'Tort Law Reform in Australia', presentation to the London Market at Lloyds, London, 6 July 2004. **18** *Donohue v Stevenson* [1932] 1 AC. **19** M Kerr, 'Tort Based Climate Change Litigation in Australia', Discussion Paper prepared for Climate Change Litigation Forum, London, March 2002 hosted by Friends Of the Earth International, at *http://www.acfonline.org.au/docs/publications/rpt0030.pdf*.

20 Intergovernmental Panel on Climate Change (IPCC) Working Group I, *Climate Change 2001: The Scientific Basis 61*, at 10. **21** IPCC Working Group I, *Climate Change 2001: The Scientific Basis 61*, at 4. **22** For example, the work of the Global Climate Coalition, which styled itself as 'a voice for business in the global warming debate' and has now 'deactivated', the Coalition having 'served its purpose by contributing to a new national approach to global warming' in the US (the retreat from Kyoto): see *http://www.globalclimate.org*. **23** *Civil Liability Act* 2002 (NSW) Part 4. **24** *Civil Liability Act* 2002 (WA) Part 1F. **25** *Trail Smelter (US v Can)*, 3 R.I.A.A. 1905, 1938 (1949). **26** *Sosa v Alvarez-Machain* 542 U.S. (2004). **27** See for example, the measures introduced by the *CLERP 9 Act*, which came into effect on 1 July 2004. **28** *The Changing Landscape of Liability; A Director's Guide to Trends in Corporate Environmental, Social and Economic Liability*, SustainAbility Ltd, 2004. **29** Innovest Strategic Value Advisors, Inc. for CERES Sustainable Governance Project (2002): *Value at Risk: Climate Change and the Future of Governance*.

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