

Fearless advice in the context of climate change

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Here's a provocation: can a lawyer be held to account for their failure to warn a client of the climate risk of their conduct?

Why ask the question? Because human-induced climate change poses an existential threat to humanity, and lawyers facilitate that threat.

Opinions differ, but I take it as a widely accepted scientific fact that climate change poses an existential threat to humanity.¹ And again, although opinions differ, I proceed on the basis that climate change is human-induced and that too is a widely accepted scientific fact.² More discomforting is that lawyers facilitate that threat.

The UN Secretary-General, António Guterres, identified as 'climate wreckers' those whose commercial activity generates fossil fuel emissions, and Australian industry has been ranked by the UN as among the world's very worst in generating fossil fuel emissions,³ supported by significant investment from the superannuation industry.⁴ Lawyers are among those who enable these damaging emissions – and this is the discomforting bit – by doing what their clients, the climate wreckers, ask of them.

In *Becoming a Climate Conscious Lawyer*,⁵ Vivien Holmes and Julian Webb argue that 'Lawyers have a unique role to play in the transition to a low-carbon, sustainable economy'. Not that lawyers can and should stop their clients from engaging in activity that generates fossil fuel emissions, rather, lawyers' professional duties oblige them to advise their clients of 'climate risk': the climate harm caused by their conduct; the disruption that climate harm is causing to business, society and life; the risk that they will be sued for that harm; and the risk to

their reputation. To establish this unique role, the case has to be made that lawyers are duty-bound to advise of climate risk.

A lawyer has a duty to advise.⁶ Even on the narrowest of retainers, and the most conservative conception of the lawyer's role, an implied term is that the lawyer's advice is competent. Such is the pervasiveness of climate risk in business that a lawyer's competence must extend to knowing of climate risks and formulating advice accordingly: to not do so could be negligent.

The Chief Judge of the NSW Land and Environment Court, Justice Brian Preston, argues that lawyers commonly give 'holistic' legal advice, addressing not only legal issues but a host of others that arise – such as financial, relational, social, and environmental – so that 'adding the climate change consequences as a consideration is a natural extension of this everyday practice'.⁷ Giving such holistic advice is a question of competence for a lawyer, conscious that they face tortious liability if they don't advise on climate risk.

In tort, the scope of a lawyer's duty of care could include a duty to warn 'where circumstances give rise to a real and foreseeable risk of economic loss by the client'.⁸ The nature and extent of a duty to warn is unclear in Australia,⁹ although the NSW Law Society sees that such a duty is engaged by climate change,¹⁰ citing the strongly worded duty in *Provident Capital Ltd v Papa*.¹¹

A duty to warn clearly extends at least to warning of company directors' liability. Since Noel Hutley SC and Sebastian Hartford-Davis's 2016 advice on climate change and directors' duties (updated in 2019¹²) it is unremarkable to observe that company directors who

fail to consider climate change risks could be breaching their duty of care and diligence under the *Corporations Act 2001* (Cth). It is similarly unremarkable to observe that a company's legal adviser – in-house or external – who fails to advise a company on its duty to consider climate change risks could be breaching both their duty of care and their duty to give competent advice.

Some lawyers have decided simply to not work for climate wreckers; controversially, the organisation Lawyers Are Responsible has taken a public position against complicity in the generation of fossil fuels emissions, inviting lawyers to sign a 'Declaration of Conscience' to the effect that they will withhold their services in respect of supporting new fossil fuel projects.¹³

But the real challenge is to sheet home to lawyers who do advise climate wreckers their duties to advise and warn of climate risk. For all the normative demands of lawyers' duties, there is a real accountability gap. Perhaps a climate-wrecking client who finds themselves liable for climate-related harm could sue their lawyers for failure to advise competently and to warn. Perhaps an advising lawyer could be joined as a defendant to a suit against a climate wrecker for climate-related harm. And the regulators have a role in policing conduct: they can assess whether a lawyer's failure to advise on climate risk amounts to conduct that demonstrates that they are 'not a fit and proper person to practise law', or likely to 'bring the profession into disrepute' or be 'prejudicial to, or diminish the public confidence in, the administration of justice'.¹⁴

But climate wrecking harms us all. There is a throwaway line in *AJH Lawyers Pty Ltd v Hamo*¹⁵ that there may be a duty to warn 'even a person who was not a client but who may be adversely affected'. This requires some creative thinking about foreseeability and proximity, towards a common law cause of action by

a third party to the lawyer-client relationship for failure to advise of climate risk.

These all seem a stretch at this stage. For the moment, whether lawyers fulfil their duties to advise a client of climate risk is down to the culture they work in, and their own conscience.

Notes: **1** Australian Academy of Science, *Climate change: the facts* <<https://www.science.org.au/curious/earth-environment/climate-change-facts>>. **2** NASA, *The Effects of Climate Change* <<https://science.nasa.gov/climate-change/effects/>>. **3** M Mazengarb, 'Australia exposed as one of world's worst climate wreckers in key UN-backed report', *Renew Economy* (26 August 2025) <<https://reneweconomy.com.au/australia-exposed-as-one-of-worlds-worst-climate-wreckers-in-key-un-backed-report/>>. **4** Market Forces, *The Climate Wreckers Index* <www.marketforces.org.au/campaigns/super/climatewreckersindex/>. **5** J Dehm, N Graham and Z Nay (eds) <<https://oercollective.caul.edu.au/climate-conscious-lawyer/>>. **6** See *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, Rule 7.1. **7** 'Climate Conscious Lawyering' (2021) *Australian Law Journal* 95, 2021, 51. **8** *AJH Lawyers Pty Ltd v Hamo* [2010] VSCA 222, [23]. **9** See *AS Bannister v Sirrom Enterprises Pty Ltd* [2016] SASCFC 153, [82]–[92]. **10** <<https://www.lawsociety.com.au/legal-implications-climate-change/practitioner-guidance>>. **11** [2013] NSWCA 36, [80]. **12** Centre for Policy Development <<https://cpd.org.au/work/2019-hutley-opinion-directors-duties-climate/>>. **13** <<https://www.lar.earth/sign/>>. **14** *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, Rule 5. **15** Above note 8.

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