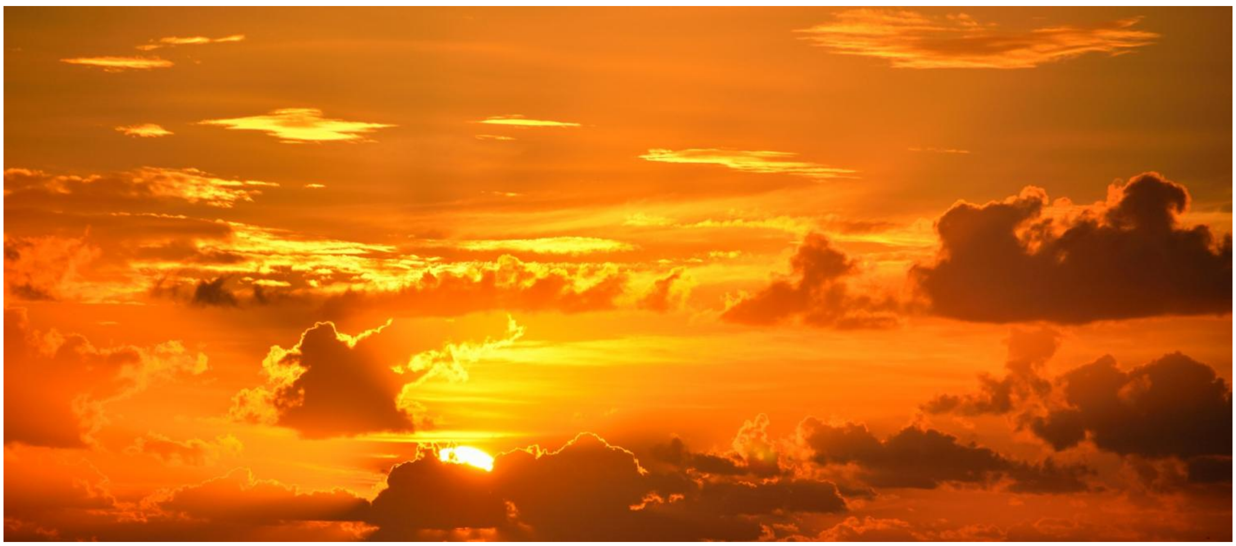
Report shows public authorities must take climate change risk seriously

February 4 2019, by Arjuna Dibley



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The tragic recent events on the Darling River, and the political and policy furore around them, have again highlighted the severe financial and environmental consequences of mismanaging climate risks. The Murray-Darling Royal Commission demonstrates how closely boards of public sector corporate bodies can be scrutinised for their management of these risks.

Public authorities must follow [private companies](#) and factor climate risk into their board decision-making. Royal Commissioner Brett Walker has delivered a damning indictment of the Murray Darling Basin Authority's management of climate-related risks. His report argues that the authority's senior management and board were "negligent" and fell short of acting with "reasonable care, skill and diligence". For its part, the authority "rejects the assertion" that it "acted improperly or unlawfully in any way".

The Royal Commission has also drawn attention to the potentially significant legal and reputational consequences for directors and organisations whose climate risk management is deemed to have fallen short of a rising bar.

It's the public sector's turn

Until recently, scrutiny of how effectively large and influential organisations are responding to climate risks has focused mostly on the private sector.

In Australia it is widely acknowledged among legal experts that private company directors' duty of "due care and diligence" requires them to consider foreseeable climate risks that intersect with the interests of the company. Indeed, Australia's companies regulator, ASIC, has called for directors to take a "probative and proactive" approach to these risks.

The recent focus on management of the Murray-Darling Basin again highlights the crucial role public sector corporations (or "public authorities" as we call them) also play in our overall responses to climate change – and the consequences when things go wrong.

Australia's economy, once dominated by publicly owned enterprises, was reshaped by waves of privatisations in the late 20th century. However, hundreds of public authorities continue to play an important role in our economy. They build and maintain infrastructure, generate energy, oversee superannuation portfolios, provide insurance and manage water resources, among many other activities.

This means that, like their counterparts in the private sector, many face risks associated with climate change. Take Melbourne Water, for instance, a statutory water corporation established to manage the city's water supply. It will have to contend with increasingly hot summers and reduced rainfall (a physical risk), and also with the risk that government policy in the future might impose stricter conditions on how water is used (a transition risk).

What duties do public authorities owe?

Our new research from the Centre for Policy Development, shows that, at the Commonwealth and Victorian level (and likely in other Australian jurisdictions), the main laws governing officials in public authorities are likely to create similar obligations to those imposed on private company directors.

For instance, a 2013 federal act requires public authority board members to carry out their duties with the degree of "due care and diligence" that a reasonable person would exercise if they were a Commonwealth official in that board position.

The concept of a "reasonable person" is crucial. There is ever-increasing certainty about the human contribution to climate change. New tools and models have been created to measure the impact of climate change on the economy. Climate risks are therefore reasonably foreseeable if you are acting carefully and diligently, and thus public authority directors should consider these risks.

The obligations of public authority directors may, in some cases, go beyond what is required of private company directors. The same act mentioned above requires Commonwealth officials to promote best practice in the way they carry out their duties. While there is still wide divergence in how private companies manage climate change, best practice in leading corporations is moving towards more systematic analysis and disclosure of these risks. Accordingly, a "best practice" obligation places an even higher onus on public sector directors to manage climate risk.

The specific legislation that governs certain public authorities may introduce different and more onerous requirements. For instance, the Murray-Darling Basin Authority's governing legislation, the Water Act 2007, imposes a number of additional conditions on the authority. This includes the extent to which the minister can influence board decision-making.

Nonetheless, our laws set out a widely applicable standard for public authority directors.

Approaches to better manage public authority climate risks

While some public authorities are already carefully considering how physical and transition climate risks affect their work, our research suggests that standards vary widely.

As with the private sector, a combination of clear expectations for better climate risk management, greater scrutiny and more investment in climate-related capabilities and risk-management frameworks can all play a role in raising the bar. Our research highlights four steps that governments should consider:

- creating a whole-of-government toolkit and implementation

strategy for training and supporting directors to account for climate-risk in decision-making
- using existing public authority accountability mechanisms – such as the public sector commissioner or auditor general's office – to more closely scrutinise the management of climate-related financial risks
- issuing formal ministerial statements of expectations to clarify how public authorities and their directors should manage climate-related risks and policy priorities
- making legislative or regulatory changes to ensure consistent consideration, management and disclosure of climate risk by public sector decision-makers.

Measures such as these would set clear expectations for more consistent, sophisticated responses to climate risks by public authorities. However, even without any changes, it should be clear that public authority directors have legal duties to consider climate risks – and that these duties must be taken seriously even when doing so is complicated, controversial or politically sensitive.

Provided by The Conversation

Citation: Report shows public authorities must take climate change risk seriously (2019, February 4) retrieved 12 May 2024 from https://phys.org/news/2019-02-authorities-climate.html