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Green energy, greenwashing, shareholder activism and regulatory oversight – what companies and their directors should be aware of

As decarbonisation strategies gain momentum, we are seeing an increase in new investment in renewable energy projects and growth in the demand for environmentally friendly, sustainable or ethical investment options. Companies and their boards must be careful not to overstate environmental credentials, however, or risk shareholder activism, regulatory action and negative publicity. We examine recent developments in this area and what companies and their boards should be aware of.

Ahead of the 2021 United Nations Climate Change Conference (COP26) in Glasgow, the Prime Minister has released a new climate change plan for net zero emissions by 2050, which comes with a $20 billion investment in low emissions technologies. This includes "clean" hydrogen to lower fuel emissions, carbon capture and storage, and "ultra low cost" solar power. The government expects this will unlock at least $80 billion of total private and public investment.

This follows the recent announcement by the NSW government of its Hydrogen Strategy, which will provide $3 billion in incentives for green energy production, and is expected to help attract more than $80 billion of further investment in clean energy in NSW by 2050.

In good news for the resources sector, minerals such as nickel, lithium, cobalt, copper and rare earths (all required for the renewable energy industry) are also forecast to have a significant increase in demand.

In this setting, we are seeing increasing pressure from investors and shareholders on companies to become accountable for reducing their carbon footprint and becoming more environmentally friendly and sustainable. The Responsible Investment Association Australasia (RIAA) revealed that 86% of Australians expect their superannuation or other investments to be invested responsibly and ethically.

Shareholder activism on listed companies in this space is continuing, with the Australasian Centre for Corporate Responsibility (**ACCR**) continuing to lodge shareholder resolutions relating to climate change and the Paris Agreement, including:

- Incitec Pivot Limited, calling on the company to set emission target reductions aligned with the Paris Agreement[1] (and to align its capital expenditure and remuneration with those targets).
- AGL, calling for Paris aligned targets; and
- BHP, requesting BHP strengthen its review of industry associations to ensure that it identifies areas of inconsistency with the Paris Agreement[2] (and for BHP to suspend membership if it is inconsistent with the Paris Agreement goals).

In a further development, ACCR has now commenced proceedings in the Federal Court of Australia challenging Santos' claims that natural gas provides "clean energy" and that it has a "credible and clear plan" to achieve net zero emissions by 2040. Key to the claim is that Santos is engaging in misleading and deceptive conduct in terms of its net zero emissions targets. The outcome of this legal proceeding could have implications for the ESG reporting for blue hydrogen projects that utilise carbon capture.

ASIC also continues to monitor climate change related matters and its core message to companies and directors remains:

1. Consider climate change risk (Directors should understand and continually reassess existing and emerging risks that may be applicable to the company's business)
2. Develop and maintain strong and effective corporate governance
3. Comply with the law (in terms of the statutory requirements relating to the operating and financial review for listed companies and other requirements for prospectuses or continuous disclosure announcements)
4. Disclose useful information to investors.

In July 2021, ASIC also detailed its concerns around "greenwashing", being a process of misleading the market with false information that a company is more environmentally friendly than is actually the case. ASIC Commissioner Cathie Armour recently stated that greenwashing, "poses a threat to a fair and efficient financial system" as it "distorts relevant information that a current or prospective investor might require in order to make informed investment decisions driven by an increase in further ESG considerations".

ASIC is encouraging boards to look out for any greenwashing – and to ask whether their company's disclosure around environmental risks and opportunities or their fund's promotion of ESG-focused investment products accurately reflects their practices in this area.

Directors should be aware that the *Corporations Act 2001* (Cth) prohibits misleading and deceptive conduct and false and misleading statements in relation to financial products, which could apply to "greenwashing" if there is no reasonable basis for making the claims.

This type of regulatory oversight, together with shareholder activism, will continue to pressure companies to focus on environmental and sustainability issues and ensure their ESG disclosures are accurate and have a reasonable basis.

If you need any assistance reviewing your disclosures around ESG, responding to shareholder activism or you would like assistance with projects focussed on decarbonisation please contact us.

[1] Paris Agreement is a legally binding international treaty on climate change adopted by 196 parties at COP 21 in Paris, on 12 December 2015 and entered into force on 4 November 2016, with the goal of limiting global warming to well below 2, preferably to 1.5 degrees Celsius, compared to pre-industrial levels, by achieving carbon neutrality by 2050.