ESG POLICY UPDATE–AUSTRALIA

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Australia Corporate Alert

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AUSTRALIAN UPDATE

Addressing Modern Slavery Risks in Renewable Energy Supply Chains

As the modern slavery risks in the supply chains of renewable energy producers and markets come into focus (ABC|GreenBiz), the office of the New South Wales Anti-Slavery Commissioner recently released the discussion paper A Code of Practice on Managing Modern Slavery Risks in Renewable Energy Value-Chains (Discussion Paper). The Discussion Paper outlines, in particular, the risks of forced labour in the supply of polysilicon (which is used in photovoltaics) from Xinjiang, China and evidence of illegal child and forced labour in the mining of cobalt (used in lithium-ion batteries) from the Democratic Republic of Congo. The paper proposes the development of a Code of Practice on Managing Modern Slavery Risks in Renewable Energy Value-Chains (Renewables COP). The Discussion Paper proposes that compliance with the Renewables COP will initially be voluntary. The Paper is currently open for comments and submission, which can be made by emailing antislavery@justice.nsw.gov.au.

ESG consultant and data provider FairSupply has also recently issued a white paper on how to address modern slavery risk in the transition to renewable energy (White Paper). The White Paper provides guidance on addressing the unique modern slavery risks that face this sector.

ASIC's Greenwashing Action Against Active Super

ASIC announced on 11 August 2023 that it has commenced civil penalty proceedings in the Federal Court against LGSS Pty Limited trading as Active Super (Active Super) alleging misleading conduct and misrepresentations to the market relating to claims it was an ethical and responsible superannuation fund.

Active Super represented on their website and a variety of other channels including social media that they eliminated investments that posed too great a risk to the environment and the community, including tobacco manufacturing, oil tar sands mining and gambling. Active Super also stated that they had added Russia to their list of excluded countries, following the invasion of Ukraine.

The claim provides specific examples of investments offered within Active Super "investment options" between 1 February 2021 and 30 June 2023, held directly or indirectly, which were contrary to the representations made. These holdings include investments in tobacco, gambling, oil tar sands mining and Russian stocks.

This is ASIC's third civil penalty proceeding court action for "greenwashing." This is in addition to multiple infringement notices and corrective disclosures. ASIC has acknowledged this is an enforcement priority and is driving substantial disclosure changes within the industry.

2023 Intergenerational Report

On 24 August 2023, Australian Treasurer Jim Chalmers released the 2023 Intergenerational Report (Report). The Report considers five "major forces" affecting the Australian economy and budget over the next 40 years, two of them being climate change and the transition to net zero emissions.

The Report notes that there needs to be "significant adaptation" in order to mitigate the disruption to economic activities caused by increasing global temperatures. The Report further states that Australia is also in a favourable position to deal with these issues due to its abundant renewable energy resources, noting, "Australia can generate renewable energy more cheaply than many countries and on a greater scale."

To enable the transformation towards a clean energy economy, the Australian Government is establishing the National Net Zero Authority with a mandate to ensure Australia's regions, workers and First Nations people benefit from the transition.

Investor Action: the Road to Resilience

The latest research indicates that the physical impacts of climate change will cost the Australian economy hundreds of billions of dollars in the coming decades.

In order to protect against the physical risks of climate change, the Investor Group on Climate Change (IGCC) launched the Road to Resilience (RTR) on 22 August 2023. The RTR aims to stimulate investment in climate resilience.

The RTR has four key objectives:

- Integrating physical risk and resilience;
- Developing a shared understanding of physical climate risks;
- Advocating for investable policy; and
- Mobilising private capital.

The IGCC hopes that meeting the four key objectives will enable investors to "protect their beneficiaries from physical climate risk and take advantage of opportunities to build resilience and adapt."

THE VIEW FROM ABROAD

Carbon Credit Markets

As previously reported by K&L Gates, the Integrity Council for the Voluntary Carbon Market (ICVCM) recently launched its Core Carbon Principles (CCPs) and Program-level Assessment Framework (Framework). The ICVCM is an independent governance body for the international voluntary carbon market. It provides guidance to and certifies carbon-crediting programs, the categories of carbon credits provided by those programs and assists with the identification of approved carbon credits.

Meanwhile in Australia, the Clean Energy Regulator is progressing its efforts to overhaul the Unit Register and establishment of the Australian Carbon Exchange, which is intended to function similarly to stock exchanges to facilitate the trading of Australian Carbon Credit Units (ACCU). More information on the timeline and progress of these projects can be found here. As reported here, the closing spot price for an ACCU as at 8 September 2023 was AU$30.

Increased Demand for Low Methane Gas

Methane emissions are one of the largest contributors to climate change. According to US Secretary of Energy, Jennifer M Granholm, “methane is a much more potent greenhouse gas than carbon dioxide, so it is crucial that [the United States Department of Energy] works closely with states and industry to develop solutions that will cut emissions at their source.” In support of this effort, on 30 August 2023, the Biden administration announced the availability of US$350 million in grant funding to monitor and reduce methane emissions from the oil and gas sector and for the environmental restoration of well sites.

The current methane intensity standard of 0.2% for gas production means that no more than 0.2% of the gas that goes to market will be lost through methane emissions. This percentage threshold is used by the US Inflation Reduction Act as a baseline for its methane emission fee for oil and gas producers.

The US$350 million funding announcement coincides with a predicted increase in demand by Chris Romer, Chief Executive Officer of Project Canary, for responsibly sourced gas (RSG) (i.e., natural gas with a methane intensity below the current industry standard of 0.2%). As RSG must meet certain (lower) emission intensity thresholds and other environmental, social and governance (ESG) standards, RSG typically sells at a modest premium compared to noncertified gases. Despite this, Romer forecasts that there will be a “very robust market” for gas supplies with a methane intensity of less than 0.2% and that eventually, “gas supplies with a higher methane intensity will trade at a discount.”

Montana Kids Win Historic Climate Lawsuit

Sixteen young Montanans sued their state over climate change and emerged victorious on 14 August 2023. The case, *Held v State of Montana*, was based on the plaintiffs' claim that the state's energy policies violated their constitutional right to “a clean and healthful environment”, a right that was enshrined in Montana's constitution in the 1970s as a “green amendment.”

In this case, the plaintiffs alleged that laws promoting fossil fuel extraction and prohibiting climate impact considerations as part of the environmental review process breached their constitutional rights. Based on scientific evidence presented during the trial, District Court Judge Kathy Seely found in favour of the plaintiffs and ruled that Montana's “emissions and climate change have been proven to be a substantial factor in causing climate impacts to Montana's environment and harm and injury [to the Plaintiffs.]”

Seely J also determined that state laws forbidding the consideration of climate impacts during environmental review was unconstitutional.

This ruling sets a precedent for climate litigation and demonstrates the way in which green amendments can be invoked to prompt environmental change.

S&P Global Retires Numerical ESG Scores

S&P Global (S&P) has halted its use of numerical ESG scores. Since 2021, the debt rating agency has published scores from one (highest score) to five (lowest score) for a company's exposure to each element of environment, social, and governance risks. Given the influential nature of S&P, these ratings can affect a company's borrowing costs.

As Republicans target Wall Street's use of ESG more broadly, conservative state attorneys general opened an investigation into S&P's use of ESG scores in credit ratings. Amidst such political pressures as well as questions and criticisms about the utility of such scores, S&P have decided that analysis of a company's ESG matters would only comprise of text, and released the following statement:

> "We have determined that the dedicated analytical narrative paragraphs in our credit rating reports are most effective at providing detail and transparency on ESG credit factors material to our rating analysis."

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