Published on *The National Law Review* https://natlawreview.com

ESG Policy Update-Australia

Article By:

Clive Cachia

Adam Levine

Lisa Lautier

Michael Hain

Mélanie Bruneau

Giovanni Campi

Australia Corporate Alert

AUSTRALIAN UPDATE

Warnings Issued About Active Investment Greenwashing

As reported by the **Australian Financial Review**, Australian Securities and Investments Commission (ASIC) has warned that superannuation funds who justify investments into fossil fuel companies by claiming to use their power as shareholders to advocate for lower emissions may be greenwashing. In the past year, analysis conducted by

Market Forces Australia demonstrated that AustralianSuper increased its holding in Woodside but allegedly failed to use its additional influence to push for climate change action.

A number of superannuation funds are active investors and seek to influence companies through direct engagement, voting activities and involvement in class actions. Often active shareholder engagement can be more effective at encouraging companies to “go green” rather than divestment. Nevertheless, some members are calling superannuation funds out on their stewardship activities, claiming they are failing to achieve meaningful change. Some query whether the superannuation funds are overstating the extent to which they follow through on “green” promises.

Currently, active engagement strategies do not feature in ASIC’s list of greenwashing actions. However, ASIC Deputy Chairwoman Sarah Court issued a warning to superannuation funds that it could happen. “Funds need to ensure that they are actually doing what they are telling members they will do in relation to responsible investment issues, and if they are not then they may be engaging in greenwashing,” Ms Court said.

Mitigating the Risk of Carbon Leakage

On 6 September 2023, the Australian Government announced that it engaged Professor Frank Jotzo to provide expert input into the Department of Climate Change, Energy, the Environment and Water's review of additional policy options to address the "risk of carbon leakage" (Review).

The "risk of carbon leakage" refers to the risk of businesses moving their operations overseas in order to take advantage of looser restrictions and policies on carbon emissions.

The purpose of the Review is to:

- Assess carbon leakage risks;
- Develop policy options to address those risks; and
- Conduct an assessment of the feasibility of the proposed policy options, including an Australian Carbon Border Adjustment Mechanism (CBAM).

The final Review report will be provided to the Australian Government by 30 September 2024.

The terms of reference of the Review note that "detailed design" of agreed policy options would take place after the review and may be taken into account in the Australian

Government’s “Net Zero 2050” plan.

AICD Releases Detailed Guide for Directors Ahead of Mandatory Climate Reporting

Joe Longo, ASIC Chair, has stated that the “shift to mandatory climate-related disclosure presents the biggest change to corporate reporting in a generation.”[1]

Helpfully, the Australian Institute of Company Directors (AICD) have initiated a joint publication aimed at preparing directors for this major reform. Given the significant reputational, legal and strategic issues involved, the board plays a critical function in overseeing climate reporting.

A director’s guide to mandatory climate reporting, issued on 3 October 2023, provides an overview of the current climate reporting landscape, sets out the legal duties and responsibilities of directors in respect of climate reporting and provides practical steps that directors can take to meet their obligations to report on climate-related risks and opportunities.

The Australian Government first signalled its intention to introduce mandatory climate reporting obligations for large businesses and financial institutions in December 2022.

Since then, it has released two consultation papers seeking views on the key considerations for the design and implementation of standardised, internally-aligned requirements for disclosure of climate-related risks and opportunities in Australia.

On 23 October 2023, the Australian Accounting Standards Board released an exposure draft of the Australian Sustainability Reporting Standards – Disclosure of Climate-related Financial Information.

Whilst the reporting framework is still being developed, the first cohort of disclosing entities will be required to report for reporting periods beginning on or after 1 July 2024. Disclosing entities that fulfil two of the following three thresholds will be required to report:

- Over 500 employees;
- AU$1 billion+ in consolidated gross assets; and
- AU$500 million+ consolidated annual revenue.

This is expected to capture a number of public companies, registered schemes and large private companies.

Fortescue Metals Group: Plan to Achieve “Real Zero” by 2030 Includes Eliminating its Purchase of Carbon Offsets

On 20 September 2022, Fortescue Metals Group Limited (ASX:FMG) **announced** an update to its “heavy industry decarbonisation strategy”, which aims to eliminate all terrestrial emissions from its iron ore operations by 2030. By implementing this strategy, FMG estimates saving up to AU$3 million by 2030 and yielding returns to investors by 2034. FMG’s announcement comes just after the European Union (EU) announced its intention to ban claims that products are “carbon neutral” based on emission offsetting schemes.

Under its plan, FMG will cease buying voluntary carbon offsets (though it will still buy any mandatory offsets under the Australian industrial emissions regime) and divert those funds to achieving “real zero”. FMG defines “real zero” as using no fossil fuels and not requiring any offsets unless they are used as a temporary solution.

In an interview with **S&P Capital IQ**, a spokesperson for FMG said that “For years we have been saying that voluntary offsets don’t work—they just pass the buck. Rather than using them to reduce emissions, we are removing the use of fossil fuels across our Australian iron ore operations and replacing them with renewable energy. We are focused on reducing emissions, not offsetting them”.

THE VIEW FROM ABROAD

EU to Ban Greenwashing by Banning Unfounded Claims by 2026

On 19 September 2023, the European Parliament and the Council of the EU reached a **political agreement** on final text aimed at banning misleading advertisements and provide consumers with better product information. Under the proposed regime, the EU is expected to ban, amongst others, the following by 2026:

- Claims based on emissions offsetting schemes that a product has neutral, reduced or positive impact on the environment;
- Sustainability labels not based on approved certification schemes or established by public authorities; and
- Generic environmental claims, e.g. “environmentally friendly”, “natural”, “biodegradable”, “climate neutral” or “eco”, without proof of recognised excellent environmental performance relevant to the claim.

The EU Parliament's rapporteur, Biljana Borzan, stated that with these new rules "[we] are clearing the chaos of environmental claims, which will now have to be substantiated, and claims based on emissions offsetting will be banned". The **Financial Times** reported that these rules are a win for consumers, particularly since "Climate NGOs have long pointed to misleading claims made across consumer sectors".

Institutional Investors Call for Policies for Net Zero

A group of institutional investors with over US$11 trillion in assets under management has urged governments to remove policies, which impede investment in clean energy. The United Nations-convened Net-Zero Asset Owner Alliance (NZAOA) are encouraging governments to implement clearer and stronger policies to support the transition to a low-carbon economy.

Ahead of its first annual general meeting in September, the NZAOA published the discussion paper **Unlocking Investment in Net Zero** (Paper), calling for the removal of political barriers to achieving net zero greenhouse gas emissions by 2050. Notably, the Paper finds there are significant investment opportunities for keeping global warming below 1.5 degrees Celsius, which could require investments in climate solutions totalling US$136–US$276 trillion by 2050. Conversely, there are many risks associated with failure to transition, including the risk of an annual reduction of US$4–US$6 trillion in gross domestic product by 2050 as heat and humidity outpace production in agriculture, construction and mining.

EU Launches World's First Carbon Tariff

On 1 October 2023, the EU officially **launched** the transitional phase of its CBAM, the world's first carbon tariff, in an attempt to limit polluting foreign products from undermining the EU green transition. This initial phase, which will run until 31 December 2025, will allow the European Commission to gather relevant data and importers/producers (declarants) to familiarize themselves with the system when starting to **report** GHG emissions linked to their products/imports.

In 2026, the CBAM will become fully operational and, the EU will start imposing carbon emission tariffs on carbon-intensive imports such as iron, steel, cement, electricity and hydrogen, meaning European importers will have to report on the greenhouse gas emissions linked to the production process of these imported goods. While CBAM has caused a stir amongst certain trading partners, the border levy is in line with the World Trade Organisation rules in treating foreign and domestic products alike and allows deduction from border fees for any carbon costs already paid abroad.

In that regard, the European Economy Commissioner noted that:

- The aim of CBAM is to encourage a worldwide shift to greener production and to prevent European manufacturers from relocating to countries with lower environmental standards; and

- CBAM is not about trade protection, but rather about protecting the EU's climate ambition and seeking to raise the level of climate ambition worldwide.

FOOTNOTES

[1] A director's guide to mandatory climate reporting dated 3 October 2023, page 2.

Rebecca Mangos, Rynier Brandt, Cathy Ma, and Nathan Bodlovich also contributed to this article.

National Law Review, Volume XIII, Number 300