



Environmental Defenders Office

16 July 2021

Compliance Division
Australian Securities and Investments Commission
PO Box 4000
Gippsland Mail Centre VIC 3841

By email: rs.compliance@asic.gov.au

To whom it may concern,

New Hope Corporation s statements about future coal demand: Request to investigate statements potentially constituting misleading or deceptive conduct under the Corporations Act and Australian Consumer Law

1. We act for Market Forces, an affiliate project of Friends of the Earth Australia. Our client advocates for policy and practical action to redirect finance from projects and activities that harm the environment and into those that protect and enhance it.
2. By way of background, we note that the Chief Executive Officer (**CEO**) of New Hope Corporation Limited (**NHC**) was reported as making the following statement in the *Australian Financial Review* in September 2020 (**Financial Review Statement**):¹

*Thermal coal is part of the long term energy mix, it will always be there...
I am absolutely convinced about it and the way people are addressing
the whole emission issue, there is improvement in the technology with
ultra-supercritical power stations, there will always be a future for us.*

3. At NHC's Annual General Meeting on 17 November 2020, a shareholder asked the CEO whether he stood by that statement, given a number of NHC's major export markets had since committed to net zero greenhouse gas emission targets by 2050 or 2060. In response, the CEO made the following statement (**Statement A**) (emphasis added):²

*Yes, I do stand by the statements. If you look at the recent IEA World Energy Outlook scenarios, the current policies scenario or the stated policies scenario, **coal will remain to be a significant part of the energy mix.** Australia has got a very strong benefit when compared to other coal producers; our coal is of better quality and my statements remain unchanged.*

¹ Peter Ker, 'New Hope in the black despite coal collapse', *Financial Review* (online, 22 September 2020)

<<https://www.afr.com/companies/mining/new-hope-in-the-black-despite-coal-collapse-20200922-p55xxk>>.

² Market Forces, '2020 New Hope AGM: will thermal coal be part of the long term energy mix?' (YouTube, 16 November 2020)
<<https://www.youtube.com/watch?v=WLj7mG4LqD4>>.

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4. For the reasons set out below, our client considers that the making of Statement A may have constituted misleading or deceptive conduct, and therefore potentially contravened s 1041H of the *Corporations Act 2001* (Cth) and/or s 18 of the *Australian Consumer Law (ACL)* (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)).
5. Our client is concerned this forms part of a continuing course of conduct by NHC. Most recently, NHC cited outdated International Energy Agency (**IEA**) data to the Joint Standing Committee on Trade and Investment Growth's *inquiry into the prudential regulation of investment in Australia's export industries* that was more favourable to NHC's business interests than the IEA data current at the time of NHC's submission.³ When asked whether there was a reason for NHC referring to outdated IEA data, NHC's CEO replied "Not really, no. I just haven't got to it".⁴
6. Our client takes these matters very seriously. As responsible consumers and investors assess the viability of their investments in light of the global energy transition towards net zero emissions, especially that now occurring in NHC's major export markets, accuracy in the language used by companies engaged in the development, production, use and sale of fossil fuel products has never been more important.

The reasons why Statement A is potentially misleading or deceptive

7. In Statement A, the CEO refers to the IEA's current policies scenario (**CPS**) and the stated policies scenario (**STEPS**) to justify the conclusion that "coal will remain a significant part of the energy mix".
8. At the time the CEO made Statement A, the IEA's 2020 World Energy Outlook was current. Accordingly, our client assumes that Statement A refers to the CPS and STEPS as set out in the 2020 World Energy Outlook.
9. In the 2020 World Energy Outlook, the CPS and STEPS forecast that there will be significant demand for coal in 2030 and 2040. In particular, the STEPS forecast for future coal demand by 2030, despite being downgraded by 8%,⁵ remains similar to 2018 levels.⁶
10. However, the IEA qualified these forecasts by noting that they were attended by significant uncertainties, including more rapid action to phase out coal; the trajectory of the COVID-19 economic recovery and of fuel diversification in India and other emerging economies in Asia; the prospects for new coal power plants in the face of public opposition and financing difficulties; and changes in the economics of fuel switching.⁷ In our client's view, this is an important qualifying fact that the CEO did not disclose in Statement A. By failing to disclose this qualifying fact, our client considers that a reasonable NHC shareholder would potentially be misled into thinking the CEO's

³ New Hope Group, Submission No 10 to Australian Senate, *Inquiry into the prudential regulation of investment in Australia's export industries* (28 April 2021) 1.

⁴ Evidence to Inquiry into the prudential regulation of investment in Australia's export industries, Australian Senate, Canberra, 25 June 2021 (NHC CEO).

⁵ IEA, *2020 World Energy Outlook* (Report, 13 October 2020) 195.

⁶ '2019 World Energy Outlook: Coal demand by region and scenario, 2018-2040', IEA (Web Page, 21 November 2019) <<https://www.iea.org/data-and-statistics/charts/coal-demand-by-region-and-scenario-2018-2040>>.

⁷ IEA, *2020 World Energy Outlook* (Report, 13 October 2020) 198-199.

statement that coal will remain a “significant part” of the energy mix, as supported by the IEA’s CPS and STEPS, was a complete statement and not subject to any qualification.

11. For that reason alone, our client considers that Statement A may be misleading as it omits an important qualifying fact.
12. In our client’s view, this omission is compounded by the CEO selectively referencing, in Statement A, the two scenarios in the 2020 World Energy Outlook in which the IEA’s forecasts for coal demand are most optimistic. At the time the CEO made Statement A, the 2020 World Energy Outlook also included the Sustainable Development Scenario (**SDS**) and Net Zero by 2050 Scenario (**NZE2050**). In both the SDS and NZE2050, coal demand decreases dramatically.
13. In the SDS, coal demand decreases to 29Mt (-74%) in Japan,⁸ NHC’s largest market, and 192 Mt (66%) in the Asia Pacific, excluding China, India and Japan, from 2019 to 2040.⁹ Coal demand in China and India – representing 85% of Asia Pacific coal demand in 2040 – decreases to 1,343 (61%).¹⁰ China and India are significant domestic coal producers and combined accounted for less than 15% of NHC’s FY20 revenue.¹¹
14. In the NZE2050, global coal demand decreases by almost 60% from 2019 to 2030.¹² That is 55% lower than in the STEPS.¹³
15. We also note that the IEA does not specify that any one of the CPS, STEPS, SDS or NZE2050 is more likely to occur than any other.
16. In our client’s view, by omitting the two IEA 2020 World Energy Outlook scenarios in which coal demand dramatically decreases, a reasonable NHC shareholder would potentially be misled into believing Statement A was complete. That is, a reasonable NHC shareholder could be misled into believing the IEA had only forecast that coal would be a “significant part” of the energy mix, and not that the IEA had also created forecast scenarios where coal demand could dramatically decrease by 2040 and not specified that any one scenario is more likely than the other.
17. The potentially misleading nature of the omission is exacerbated by the context in which Statement A was made. Statement A was a response to a shareholder’s question about whether NHC stood by the Financial Review Statement, in circumstances where some of NHC’s major export markets had since committed to net zero emissions targets by 2050 or 2060. In those circumstances, our client considers that it is more likely a reasonable NHC shareholder would have expected the CEO, when making Statement A, to have also referred to NZE2050, which is the IEA’s coal demand forecast for the scenario in which the world achieves net zero emissions by 2050.
18. Accordingly, our client considers Statement A is potentially misleading.

⁸ IEA, *2020 World Energy Outlook* (Report, 13 October 2020) 403.

⁹ IEA, *2020 World Energy Outlook* (Report, 13 October 2020) 391 (Asia Pacific), 395 (China), 399 (India), 403 (Japan).

¹⁰ IEA, *2020 World Energy Outlook* (Report, 13 October 2020) 391 (Asia Pacific), 395 (China), 399 (India).

¹¹ NHC, *2020 Annual Report* (Report, 19 October 2020) 65.

¹² IEA, *2020 World Energy Outlook* (Report, 13 October 2020) 123.

¹³ IEA, *2020 World Energy Outlook* (Report, 13 October 2020) 129.

The significance of the potentially misleading nature of Statement A

19. Accurate information about the ways in which the energy transition may impact coal demand and NHC's future financial prospects is critical to investors being able to assess the viability of their investment, and their financial and reputational exposure to these impacts. Misleading information can leave investors vulnerable to major losses.
20. That is particularly the case here, where Statement A concerns demand for NHC's primary product and the disparity between the forecasts disclosed in Statement A, and those omitted, is significant. Indeed, the disparity between the forecasts has become more apparent in light of the IEA's recent *Net Zero by 2050: A Roadmap for the Global Energy Sector* report. It concludes that in the NZE2050, unabated coal demand declines by 90% to just less than 1% of total energy use in 2050.¹⁴ Consequently, no new coal mines or extensions of existing ones are required.¹⁵
21. Misleading statements about future demand for fossil fuels could potentially skew the market unfairly in favour of companies ignoring risks posed by the energy transition, and unfairly away from companies that are accurately disclosing and responsibly managing transition risk exposures. Further, by concealing opportunities for smart investment, they may impede an effective and timely response to climate change.
22. Therefore, in our client's view, the potentially misleading nature of Statement A is significant.

The making of Statement A may constitute misleading or deceptive conduct

23. Our client considers that by its CEO making Statement A, NHC may have engaged in misleading or deceptive conduct contrary to s 1041H of the *Corporations Act 2001* (Cth) and/or s 18 of the ACL.
24. The target audience for Statement A is NHC's actual or potential investors or shareholders. The reasons why Statement A is inaccurate, with the potential to lead NHC's target audience into error, are discussed above.
25. Statement A was 'in relation to a financial product' for the purposes of s 1041H of the *Corporations Act 2001* (Cth). The Statement concerns the future viability of NHC's coal production business, and, being made in the course of the AGM, is directed to actual or potential investors in NHC's shares. This is sufficient for the making of Statement A to be 'in relation to' NHC's shares,¹⁶ which constitute financial products.¹⁷
26. Statement A was made 'in trade or commerce' for the purposes of s 18 of the ACL for two reasons:
 - a. Statement A was made to 'outsiders' during NHC's AGM, as opposed to being

¹⁴ IEA, *Net Zero by 2050: A Roadmap for the Global Energy Sector* (Report, 18 May 2021) 21.

¹⁵ IEA, *Net Zero by 2050: A Roadmap for the Global Energy Sector* (Report, 18 May 2021) 103.

¹⁶ *Australian Securities and Investments Commission v Narain* (2008) 169 FCR 211, 215 [12].

¹⁷ *Corporations Act* s 764A(1); *ACL* s 2; *Australian Securities and Investments Commission Act 2001* (Cth) s 12BAA(7).

made internally within corporate governance.¹⁸

- b. Our client considers the purpose of Statement A was to convince actual or potential investors of the future financial viability of NHC's coal production business. This is conduct in trade or commerce because it could influence the listing and trading of shares in NHC.

Request to investigate

27. On the basis of the grounds set out above, particularly the ongoing nature of NHC's conduct, our client requests the Australian Securities and Investments Commission investigate the concerns raised by our client and take such compliance action as is deemed appropriate.
28. In particular, given the number of Australia's major export markets that have committed to net zero greenhouse gas emission targets by 2050 or 2060, our client requests that the Australian Securities and Investments Commission communicate the importance of companies such as NHC considering and disclosing the implications of NZE2050 for their business in future statements and reports.
29. We note we have also drawn the above matters to the attention of NHC, and have been instructed to request that NHC immediately cease making statements in the nature of Statement A, and:
 - a. By 30 July 2021, issue a notice to its shareholders stating that, in addition to previous representations NHC has made referring to IEA scenarios that forecast that coal will remain a significant part of the energy mix, the IEA has also developed the SDS and NZE2050 scenarios, which forecast that coal demand will decrease significantly by 2050, and that the IEA has not specified that any one scenario is more likely than the other.
 - b. Disclose the implications of the latest NZE2050 scenario for coal demand and NHC's future financial prospects in NHC's 2021 Annual Report.
30. We look forward to your response to the matters raised above by 30 July 2021. Please contact us by email to Zoe Bush at zoe.bush@edo.org.au.

Yours faithfully

Environmental Defenders Office



Elaine Johnson
Director of Legal Strategy



Zoe Bush
Solicitor, Safe Climate (Corporate)

¹⁸ *New Cap Reinsurance Corp Ltd v Daya* (2008) 216 FLR 126; *Vanguard Financial Planners Pty Ltd v Ale* (2018) 125 ACSR 1; *In the matter of Orix Australia Corporation Limited* [2020] NSWSC 1770.