

## Article Information

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## ASIC secures victory in greenwashing case against Vanguard

***The Australian Securities and Investments Commission (ASIC) has secured victory against Vanguard, a prominent global investment management firm in Australia, marking a pivotal moment in the battle against greenwashing in the financial sector. The Federal Court has found that Vanguard Investments made false and misleading representations and engaged in conduct that was liable to mislead the public about an “ethically conscious” fund.***

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### Background

Last year Piper Alderman reported on two significant greenwashing actions launched by ASIC. The first being a greenwashing action against retail superannuation fund Mercer, alleging it misled members of its Sustainable Plus fund by claiming that fund excluded investments in “companies involved in carbon-intensive fossil fuels, alcohol production and gambling”. The second being the civil penalty proceedings in the Federal Court against investment giant Vanguard Investment (**Vanguard**), alleging misleading conduct in relation to claims about certain environmental, social and governance (**ESG**) exclusionary screens that had been applied to investments in a Vanguard fund that was represented to be “ethically conscious” (**Fund**). You can read our earlier articles [here](#) and [here](#).

In a milestone win for ASIC, on 28 March 2024, the Federal Court in *Australian Securities and Investments Commission v Vanguard Investments Australia Ltd* [2024] FCA 308 (read it [here](#)) found that Vanguard had made misleading ESG claims relating to the Fund.

### What ASIC alleged

ASIC alleged that Vanguard had made false and misleading statements and engaged in conduct liable to mislead the public in representing that all securities in the Fund were screened against certain ESG criteria.

Investments held in the Fund were based on an index called the Bloomberg Barclays MSCI Global Aggregate SRI Exclusions Float Index (**Index**) which Vanguard claimed in its Product Disclosure Statement that the Index excluded issuers of bonds with “significant business activities involving fossil fuels, alcohol, tobacco, gambling, military weapons and civilian firearms, nuclear power and adult entertainment”.

The ESG research was performed by MSCI ESG Research and provided to Bloomberg for use in the Index. However, ASIC alleges that the ESG research was not conducted over a significant proportion of the issuers of bonds in the Index, and therefore the Fund. The claim by ASIC focuses on whether investment screens were applied effectively by Vanguard with ASIC alleging that the Index and the Fund included issuers that violated the applicable ESG criteria that exposed investor funds to investments which had ties to fossil fuels, including those with activities linked to oil and gas exploration.

In bringing its claim, ASIC alleged Vanguard misled the public in

- its Product Disclosure Statement published between 7 August 2018 to 17 February 2021;
- a media release issued in August 2018;

- statements on its website;
- a statement made in an interview with Finance News Network; and
- statements made in a presentation at a Finance News Network Fund Manager Event.

### **The relevant provisions in the ASIC Act**

The prohibitions against making false or misleading representations in section 12DB and against conduct liable to mislead the public in section 12DF of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) form part of a suite of legislative prohibitions of misleading conduct in trade or commerce that originated in Australian Consumer Law and are now also contained in the ASIC Act and the Corporations Act 2001 (Cth).

The four step process that the Court endorsed for assessing misleading conduct in a greenwashing claim is the same for non-greenwashing claims and involves:

- identifying with precision the contravening conduct;
- considering if the identified conduct was “in trade or commerce”;
- considering the meaning that conduct conveyed; and
- determining whether the conduct in light of that meaning was “misleading or deceptive or likely to mislead or deceive”.

Justice O’Byrne found that Vanguard, in trade or commerce, had made false or misleading representations that the Fund was of a particular standard, quality or grade or had certain performance characteristics or benefits and thereby contravened ss 12DB(1)(a) and (e) of the ASIC Act. In addition, Vanguard engaged in conduct that was liable to mislead the public as to the nature, characteristics and suitability of the Fund contrary to s 12DF(1) of the ASIC Act.

### **Key takeaways**

Businesses can expect to see an increase in greenwashing regulatory investigations. ASIC’s case against Vanguard confirms the law on misleading or deceptive conduct as it applies to greenwashing where an investment fund makes false or misleading representations to investors that the fund offers an ethically conscious investment opportunity.

ASIC released [INFO 271](#) in June 2022 which focuses on how entities that offer or promote financial products that take into account sustainability related considerations can avoid greenwashing. ASIC has also listed ‘misleading conduct’ in relation to sustainable finance including greenwashing’ as one of its enduring priorities in 2023 and 2024.

Separately, as part of its 2023-24 Compliance and Enforcement Priorities, the Australian and Competition and Consumer Commission (ACCC) is prioritising consumer law and fair-trading adherence in relation to environmental and sustainability claims.

In December last year, the ACCC published its [final guidance](#) outlining the ACCC’s view of what businesses need to do when making environmental claims to comply with its obligations under Australian Consumer Law. The ACCC has reported that in 2024, the ACCC will release further guidance for businesses and consumers on emission and offset claims, as well as the use of trust marks. The ACCC is also set to develop guidance to help consumers confidently assess and rely on environmental claims.

The Vanguard case is set to proceed further on 1 August 2024 to deal with penalties in respect of the contraventions and an adverse publicity order sought by ASIC which require the entities to disclose and publish any contraventions that have been found.