FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Vanguard Investments Australia Ltd (No 2) [2024] FCA 1086

File number(s):	VID 563 of 2023
Judgment of:	**O'BRYAN J**
Date of judgment:	25 September 2024
Catchwords:	**CONSUMER LAW –** pecuniary penalty for infringement of ss 12DF(1) and 12DB(1)(a) and (e) of the *Australian Securities and Investments Commission Act 2001* (Cth) – application of s 12GBA to contravening conduct that commenced prior to 13 March 2019 – application of s 12GBB to contravening conduct that occurs wholly on or after 13 March 2019 – relevant considerations – discount for cooperation – adverse publicity orders under s 12GLB of the *Australian Securities and Investments Commission Act 2001* (Cth) not opposed by the defendant **EVIDENCE** – statement of agreed facts tendered in evidence – where agreed facts contained footnote references to documents also tendered in evidence – observations concerning the practice of including documentary references to a statement of agreed facts and the extent to which the practice is permissible under s 191 of the *Evidence Act 1995* (Cth) **COSTS –** where one party wholly unsuccessful on single issue for which discrete hearing was required but otherwise successful in the proceeding
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 12DB(1)(a), 12DB(1)(e), 12DF(1), 12GBA(1)(a), 12GBA, 12GBB, 12GBC, 12GBCA, 12GLB(1), 12GX, 322, 327 *Competition and Consumer Act 2010* (Cth) s 76, Sch 2 s 224 *Corporations Act 2001* (Cth) s 912C *Evidence Act 1995* (Cth) s 191 *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) s 3, Sch 2 item 8 *Treasury Laws Amendment (2019 Measures No. 3) Act 2020* (Cth) s 3, Sch 3 item 3

Cases cited:	*Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36 *Australian Competition and Consumer Commission v Cement Australia Ply Ltd* (2017) 258 FCR 312 *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd trading as Bet365 (No 2)* [2016] FCA 698 *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243 *Australian Securities and Investments Commission v Vanguard Investments Australia Ltd* [2024] FCA 308 *Commonwealth v Director, FWBII* (2015) 258 CLR 482 *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39 *FV v The Queen* [2006] NSWCCA 237 *Markarian v The Queen* (2005) 228 CLR 357 *Singtel Optus Pty Ltd v ACCC* [2012] FCAFC 20 *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR 41-375 *Victoria v Sportsbet Pty Ltd (No 2)* [2012] FCAFC 174
Division:	General Division
Registry:	Victoria
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	123
Date of last submission/s:	15 August 2024
Date of hearing:	1 August 2024
Counsel for the Plaintiff:	M O'Sullivan KC with G Ayres
Solicitor for the Plaintiff:	Australian Securities and Investments Commission
Counsel for the Defendant:	P Solomon KC with A Folie

Solicitor for the Defendant: Hall & Wilcox

ORDERS

VID 563 of 2023

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**VANGUARD INVESTMENTS AUSTRALIA LTD (ACN 072 881 086)** Defendant

ORDER MADE BY: **O'BRYAN J**

DATE OF ORDER: **25 SEPTEMBER 2024**

THE COURT ORDERS THAT:

1. The defendant pay an aggregate pecuniary penalty to the Commonwealth of $12,900,000 in respect of its contraventions of ss 12DF and 12DB(1)(a) and (e) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) set out in the declarations made on 28 March 2024.

2. Pursuant to s 12GLB(1)(a) of the ASIC Act, within 30 days of this order, the defendant publish, at its own expense, a written adverse publicity notice (**Notice**) in the terms set out in the Annexure to these orders.

3. The defendant ensures that the Notice:

   (a) is published on the following webpages maintained by it (the **Webpages**):

      (i) https://www.vanguard.com.au/personal/about-us/our-esg-approach/our-approach-to-esg

      (ii) https://www.vanguard.com.au/personal/invest-with-us/etf?portId=8224;

      (iii) https://www.vanguard.com.au/personal/invest-with-us/fund?portId=8136;

      (iv) https://www.vanguard.com.au/personal/invest-with-us/fund?portId=8135;

   (b) is maintained on the Webpages for 12 months from the date of these orders; and

(c) appears immediately upon access by a person to the Webpages as a picture tile with the heading, "Notification of Misconduct by Vanguard".

4. The plaintiff pay the defendant's costs of and incidental to the hearing on 8 March 2024, and the defendant otherwise pay the plaintiff's costs of the proceeding.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ANNEXURE – ADVERSE PUBLICITY NOTICE

The Federal Court of Australia has ordered Vanguard Investments Australia Ltd (ACN 072 881 086) (**Vanguard**) to publish this notice.

Following action by the Australian Securities and Investments Commission (**ASIC**), on 25 September 2024, the Federal Court ordered Vanguard to pay a pecuniary penalty of $12,900,000 for contravening Australia's financial services laws.

On 28 March 2024, the Court declared that Vanguard contravened these laws by making false or misleading statements about the Vanguard Ethically Conscious Global Aggregate Bond Index Fund (Hedged) (**Ethically Conscious Fund**) in:

- 12 Product Disclosure Statements (**PDSs**), which related to the AUD Hedged, NZD Hedged and ETF classes of the Ethically Conscious Fund;
- a media release;
- material on Vanguard's website;
- an interview that was published on YouTube; and
- a presentation that was given at a fund manager event and then published online.

By those statements, Vanguard represented that:

- the Ethically Conscious Fund offered an ethically conscious investment opportunity and it did this by seeking to track the return of an index;
- before being included in the index, and therefore the Ethically Conscious Fund, securities were researched and screened against applicable economic, social and governance (**ESG**) criteria; and
- securities that violated applicable ESG criteria were excluded or removed from the index and therefore from the Ethically Conscious Fund.

In the PDSs and on the website, the second and third representations were limited to securities issued by companies. In the other statements, those representations related to all securities.

These representations were false or misleading and liable to mislead the public for the following reasons.

- First, the research and screening for the index, and therefore for the Ethically Conscious Fund, had significant limitations:
    - not all issuers of securities that were included in the index were researched and screened against applicable ESG criteria; rather, only companies, and generally only publicly listed companies, were researched and screened against applicable ESG criteria;
    - for companies with multiple issuing entities that shared a particular stock exchange "ticker", ESG research was not conducted on each entity; rather, ESG research was only conducted for the company with the largest debt outstanding (by market value) and was applied to all other companies with the same "ticker"; and
    - the fossil fuel screen, as in effect from 15 July 2020, did not cover companies that derived revenue from the transportation or exploration of thermal coal.

- Second, a significant proportion of securities in the index and the Ethically Conscious Fund were from issuers that were not researched or screened against applicable ESG criteria.
- Third, the index and the Ethically Conscious Fund included issuers that violated applicable ESG criteria, including ESG criteria regarding fossil fuels and alcohol. These issuers included, but were not limited to:
    - in the index: 39 issuers which collectively issued at least 144 securities; and
    - in the Ethically Conscious Fund: 12 issuers which collectively issued at least 23 securities.

Further Information

Vanguard's misconduct contravened the following financial services laws:

- section 12DB(1)(a) and (e) of the *Australian Securities and Investments Commission Act 2001* (Cth); and
- section 12DF(1) of the *Australian Securities and Investments Commission Act 2001* (Cth).

For further information about Vanguard's misconduct, see the following links:

- statement of facts agreed between ASIC and Vanguard [to be hyperlinked];
- the Court's judgments against Vanguard on liability and penalty [to be hyperlinked]; and
- ASIC's media releases [to be hyperlinked].

REASONS FOR JUDGMENT

O'BRYAN J:

A. INTRODUCTION

1 This proceeding concerns an investment fund called the Vanguard Ethically Conscious Global Aggregate Bond Index Fund (Hedged) (ARSN 618 349 090) (**Vanguard Ethically Conscious Fund** or the **Fund**), which is a registered managed investment scheme of which Vanguard Investments Australia Ltd (**Vanguard**) is, and at all relevant times has been, the responsible entity. The composition of the Fund is based on the Bloomberg Barclays MSCI Global Aggregate SRI Exclusions Float Adjusted Index (**Bloomberg SRI Index**), which is a customised index that was designed by Bloomberg for the Fund at Vanguard's request. The letters "SRI" are an initialism for "Socially Responsible Investing". The Vanguard Ethically Conscious Fund commenced operation in or around August 2018. Investors, including institutional, wholesale and retail investors, could invest indirectly in the underlying securities that comprise the Fund by acquiring units in one of three classes of units issued by the Fund: an Australian dollar (AUD) hedged class of units; a New Zealand dollar (NZD) hedged class of units; and an exchange traded fund (ETF) class of units.

2 The Australian Securities and Investments Commission (**ASIC**) alleged that, in the period between approximately 7 August 2018 and approximately 17 February 2021 (**relevant period**), Vanguard:

(a) made false or misleading representations that the Vanguard Ethically Conscious Fund, and interests in the Fund, were of a particular standard, quality or grade or had certain performance characteristics or benefits in contravention of ss 12DB(1)(a) and (e) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**); and

(b) engaged in conduct that was liable to mislead the public as to the nature, the characteristics and the suitability for their purpose of the Vanguard Ethically Conscious Fund, and interests in the Fund, contrary to s 12DF(1) of the ASIC Act.

3 In broad terms, ASIC alleged that, by statements made through different media, Vanguard represented to potential investors that:

(a) the Fund offered an ethically conscious investment opportunity;

(b) before being included in the Fund, securities were researched and screened against applicable environmental, social and governance (ESG) criteria; and

(c) securities that violated applicable ESG criteria were excluded or removed from the Fund.

4 Again in broad terms, ASIC alleged that the representations were false or misleading because:

(a) the research and screening of securities for inclusion in the Fund against the applicable ESG criteria had significant limitations;

(b) a significant proportion of securities in the Fund were from issuers that were not researched or screened against applicable ESG criteria; and

(c) the Fund included issuers that violated applicable ESG criteria.

5 The representations the subject of the proceeding were made through the following media:

(a) 12 Product Disclosure Statements (**PDSs**) that Vanguard issued in 2018 and 2020 (**PDS representations**);

(b) a media release that Vanguard issued on or about 30 August 2018 in respect of the launch of the fund (the **media release**, containing the **media release representations**);

(c) statements that Vanguard published on its website from about 11 September 2018 (**website representations**);

(d) an interview of a Vanguard representative by the Finance News Network (**FNN**), a video of which was published on YouTube on or about 14 December 2018 (**YouTube representations**); and

(e) a presentation that the same Vanguard representative gave at an FNN Fund Manager event on or about 5 December 2018, a video of which was published on the FNN website on or about 14 December 2018 (**FNN presentation representations**).

6 The prohibition in s 12DF(1) of the ASIC Act is applicable to statements and representations made in each of the above media. The prohibition in s 12DB(1) is applicable to statements and representations made in each of the above media except for the PDSs (see s 12DB(2)(c)).

7 Vanguard admitted most of ASIC's allegations, but disputed one issue concerning liability. That issue was confined to the PDS representations and the website representations. Vanguard argued that its PDSs and its website did not represent that all securities were researched and screened against applicable ESG criteria before being included in the Vanguard Ethically

Conscious Fund; rather, its PDSs and its website represented that securities *issued by companies* were researched and screened against applicable ESG criteria before being included in the Fund.

8 A hearing on the disputed issue of liability and declaratory relief was held on 8 March 2024 (**liability hearing**). For the reasons explained in *Australian Securities and Investments Commission v Vanguard Investments Australia Ltd* [2024] FCA 308 (**liability judgment**), I accepted Vanguard's submissions with respect to the disputed issue of liability and made declarations of contravention reflecting the admitted and proven allegations.

9 The proceeding was listed for further hearing on 1 August 2024 (**penalty hearing**) with respect to the imposition of pecuniary penalties under ss 12GBA(1)(a) and 12GBB(3) of the ASIC Act (as in force during the relevant period), the making of an adverse publicity order under s 12GLB(1) of the ASIC Act, and the award of costs. Vanguard did not oppose the making of the adverse publicity order sought by ASIC.

10 At the penalty hearing, ASIC sought the imposition of penalties fixed in the aggregate sum of $21.6 million, consisting of:

(a) $18 million for the contraventions in respect of the PDS representations;

(b) $2 million for the contraventions in respect of the media release representations;

(c) $2 million for the contraventions in respect of the website representations;

(d) $1 million for the contraventions in respect of the YouTube representations; and

(e) $1 million for the contraventions in respect of the FNN presentation representations,

with a 10% reduction by reason of the totality principle.

11 Vanguard accepted that a substantial penalty ought to be imposed, but submitted that the appropriate penalty is in the range of $9 million to $11.25 million, which incorporates a 25% discount for cooperation.

12 For the reasons that follow, I consider that an aggregate penalty of $12.9 million ought to be imposed on Vanguard. I will also make an adverse publicity order in the form sought by ASIC.

B. OVERVIEW OF THE EVIDENCE

13 At the penalty hearing, the parties relied on the evidence adduced at the liability hearing. Vanguard also read the following affidavits without objection:

(a) the affidavit of Curtis Jacques affirmed 14 June 2024 and its annexure;

(b) the affidavit of Andrew Eric Jones affirmed 18 June 2024; and

(c) two affidavits of Samuel John William Dowler along with their respective annexures, the first affirmed 18 June 2024 and the second affirmed 31 July 2024.

14 ASIC did not require the deponents for cross-examination.

15 The parties also tendered a statement of agreed facts dated 19 April 2024 (incorporating a revised Annexure B filed on 23 July 2024, which corrected errors in the original). During the penalty hearing, it became evident that the parties were not in agreement on the meaning of certain paragraphs in the statement of agreed facts. Pursuant to directions made at the hearing, on 8 August 2024 the parties filed an amended statement which replaced the 19 April 2024 document, and which incorporated the revised Annexure B. I will refer to the 8 August 2024 statement as the **SOAF**.

16 A practice has emerged in recent years whereby statements of agreed facts are prepared in a form with footnote references to documents, sometimes as pinpoint references, and the referenced documents are also tendered in evidence. The practice is generally unhelpful and begs a number of questions, including:

(a) are the documents being tendered to prove the agreed fact;

(b) are the documents being tendered to qualify the agreed fact in some unspecified manner; or

(c) are the documents being tendered to supplement (rather than qualify) the agreed fact?

17 Section 191 of the *Evidence Act 1995* (Cth) stipulates that evidence is not required to prove the existence of an agreed fact and evidence may not be presented to contradict or qualify an agreed fact unless the Court gives leave. It follows that documentary footnotes are not required to support an agreed fact, and it is unnecessary and unproductive for the parties to tender documents for the purpose of proving the agreed facts. It also follows that, without the leave of the Court, parties are not permitted to tender documents that qualify an agreed fact.

18 That leaves the possibility that footnoted documents are being tendered as a supplement to (as opposed to a qualification of) the agreed fact. There is *obiter* support for the proposition that evidence which supplements or elaborates upon an agreed fact does not contradict or qualify it: see *FV v The Queen* [2006] NSWCCA 237 at [42]-[44] per Kirby J (with whom McClellan

CJ and Hoeben J agreed). However, if the purpose of the tender of a document is to supplement an agreed fact, it is unhelpful to include a footnote reference to the document in the statement of agreed facts. Such a practice only generates uncertainty as to the intended meaning of the footnote. If a party wishes to rely upon a document in proof of a fact that is supplementary to an agreed fact, the party should tender the document, identify the part relied upon, and advance submissions about the asserted fact established by the document.

C. RELEVANT STATUTORY PROVISIONS AND LEGAL PRINCIPLES

19 ASIC seeks pecuniary penalties under ss 12GBA(1)(a) and 12GBB(3) of the ASIC Act (as in force during the relevant period).

20 From the start of the relevant period until 12 March 2019, the applicable penalty provision was s 12GBA of the ASIC Act which relevantly provided as follows:

> **12GBA Pecuniary penalties**
>
> (1) If the Court is satisfied that a person:
>
> (a) has contravened a provision of Subdivision C, D or GC (other than section 12DA); or
>
> …
>
> the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate.
>
> (2) In determining the appropriate pecuniary penalty, the Court must have regard to all relevant matters including:
>
> (a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; and
>
> (b) the circumstances in which the act or omission took place; and
>
> (c) whether the person has previously been found by the Court in proceedings under this Subdivision to have engaged in any similar conduct.

21 In relation to contraventions of ss 12DB and 12DF, s 12GBA(3) stipulated that the maximum penalty for a body corporate was 10,000 penalty units. Subsection 12GBA(4)(b) relevantly provided that if conduct constitutes a contravention of two or more provisions referred to in subsection 12GBA(1), the contravener is not liable to more than one pecuniary penalty under s 12GBA in respect of the same conduct. By the declarations of contravention made by the Court on 28 March 2024, the Court declared that Vanguard contravened s 12DF in respect of each of the PDS representations, website representations, media release representations,

YouTube representations and FNN presentation representations, and contravened s 12DB in respect of each of the website representations, media release representations, YouTube representations and FNN presentation representations. The effect of s 12GBA(4)(b) is that, to the extent that Vanguard's conduct involved a contravention of both s 12DF and 12DB, only one penalty is to be imposed.

22 Effective 13 March 2019, being a date partway through the relevant period, s 12GBA was repealed and substituted by new provisions dealing with pecuniary penalties: *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) s 3 and Sch 2, item 8. From that date, new ss 12GBB, 12GBC and 12GBCA relevantly provided as follows:

> **12GBB Pecuniary penalty orders**
>
> …
>
> *Court may order person to pay pecuniary penalty*
>
> (3) If a declaration has been made under section 12GBA that the person has contravened the provision, the Court may order the person to pay to the Commonwealth a pecuniary penalty that the Court considers is appropriate (but not more than the amount specified in section 12GBC).
>
> (4) An order under subsection (3) is a ***pecuniary penalty order***.
>
> *Determining pecuniary penalty*
>
> (5) In determining the pecuniary penalty, the Court must take into account all relevant matters, including:
>
> (a) the nature and extent of the contravention; and
>
> (b) the nature and extent of any loss or damage suffered because of the contravention; and
>
> (c) the circumstances in which the contravention took place; and
>
> (d) whether the person has previously been found by a court (including a court in a foreign country) to have engaged in any similar conduct.
>
> **12GBC Maximum pecuniary penalty**
>
> The pecuniary penalty must not be more than the pecuniary penalty applicable to the contravention of the civil penalty provision.
>
> **12GBCA Pecuniary penalty applicable**
>
> …
>
> *Pecuniary penalty applicable to the contravention of a civil penalty provision—by a body corporate*
>
> (2) The pecuniary penalty applicable to the contravention of a civil penalty provision by a body corporate is the greatest of:

(a) the penalty specified for the civil penalty provision, multiplied by 10; and

(b) if the Court can determine the benefit derived and detriment avoided because of the contravention – that amount multiplied by 3; and

(c) either:

(i) 10% of the annual turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision; or

(ii) if the amount worked out under subparagraph (i) is greater than an amount equal to 2.5 million penalty units – 2.5 million *penalty units.*

23 Section 322 stipulates that the new provisions apply in relation to a contravention of a civil penalty provision if the conduct constituting the contravention occurs wholly on or after 13 March 2019.

24 Section 12GBCA(2)(a) was subsequently repealed and replaced with a new paragraph specifying a penalty of 50,000 penalty units: *Treasury Laws Amendment (2019 Measures No. 3) Act 2020* (Cth) s 3 and Sch 3, item 3. Pursuant to s 327 of the ASIC Act, the amendment (which corrected a drafting error) applies retrospectively to contraventions of a civil penalty provision if the conduct constituting the contravention occurs wholly on or after 13 March 2019.

25 The intended application of the relevant transitional provisions (ss 322 and 327) to conduct that is ongoing is not entirely clear. ASIC's submissions assumed that the new provisions have no application to contravening conduct that commenced before 13 March 2019, being:

(a) the issue of six PDSs in August and November 2018;

(b) the publication of the media release on or about 30 August 2018;

(c) the publication of the website representations from about 11 September 2018;

(d) the publication of the YouTube representations from about 14 December 2018; and

(e) the publication of the FNN presentation on the FNN website from about 14 December 2018,

and that the new provisions only applied to the issue of the six further PDSs on 1 and 10 July 2020.

26 The basis of that assumption might be questioned. A contravention of ss 12DB and 12DF occurs each time the relevant false or misleading representation is made to a person. In cases

involving representations made on the internet, a representation is made each time that the relevant content is accessed and viewed by a person: *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd trading as Bet365 (No 2)* [2016] FCA 698 at [12]. It is possible that, by maintaining false or misleading representations on the internet after 13 March 2019, a person engages in conduct constituting a contravention that occurs wholly on or after that date. However, as this issue was not addressed in the proceeding, it is appropriate to determine the proceeding on the basis of the assumption made by ASIC in its submissions.

27 The practical consequence is that the only conduct that is the subject of penalty under s 12GBB is the issue of the six further PDSs on 1 and 10 July 2020. By the declarations made by the Court on 28 March 2024, the Court declared that that conduct contravened s 12DF (but not s 12DB as that section is not applicable to PDSs).

28 The Commonwealth penalty unit was $210 from 7 August 2018 to 30 June 2020 inclusive and $222 from 1 July 2020 to 17 February 2021 inclusive.

29 It follows that, for the above categories of contravening conduct that occurred wholly or partly before 13 March 2019 (being the six PDSs published in 2018, the media release representations, the website representations, the YouTube representations and the FNN presentation representations), the applicable maximum penalty is 10,000 penalty units, which is $2.1 million per contravention.

30 For contravening conduct that occurred wholly on or after 13 March 2019 (being the six PDSs published in July 2020), the applicable maximum penalty is the greater of the three amounts specified in s 12GBCA(2):

(a) With respect to s 12GBCA(2)(a), which stipulates 50,000 penalty units per contravention, the relevant amount is $11.1 million per contravention (for the period 1 July 2020 to 17 February 2021).

(b) With respect to s 12GBCA(2)(b), ASIC acknowledged that, in the circumstances of this proceeding, it is not possible to quantify any benefit derived or detriment avoided because of Vanguard's contravening conduct. Accordingly, that paragraph is inapplicable.

(c) The amount in s 12GBCA(2)(c) is calculated by reference to the annual turnover of Vanguard in the 12-month period ending at the end of the month in which it began to

contravene the civil penalty provisions. The relevant month in this case must be taken to be July 2020 (when the six PDSs were first published). Vanguard has a 31 December financial year end and the SOAF included Vanguard's total revenue for its financial years ending 31 December 2019 (being $216,372,326) and 31 December 2020 (being $296,927,190). Taking the mid-point between those two income figures (to approximate the 12-month period ending in July 2020) and dividing it by 10, the maximum penalty is $25,664,975.80 for each contravention.

31 It follows that, for contravening conduct that occurred wholly on or after 13 March 2019 (being the six PDSs published in July 2020), the applicable maximum penalty is approximately $25.6 million for each contravention.

32 The civil penalty regime in the ASIC Act is similar in form to the civil penalty regimes in other Commonwealth statutes including the *Competition and Consumer Act 2010* (Cth) (s 76) (**CCA**) and the *Australian Consumer Law* (being Schedule 2 to the CCA) (s 224). The provisions have been construed in a similar manner and the applicable principles are well known. The following is a summary of those principles.

33 First, the Court may impose a penalty in respect of each act or omission that constitutes a contravention, subject to the maximum penalty which is stated to apply to each act or omission.

34 Second, the penalty to be imposed is a penalty that the Court considers appropriate. In that regard, the principal object of imposing a pecuniary penalty is deterrence; both the need to deter repetition of the contravening conduct by the contravener (specific deterrence) and to deter others who might be tempted to engage in similar contraventions (general deterrence): *Singtel Optus Pty Ltd v ACCC* [2012] FCAFC 20; 287 ALR 249 at [62]-[63]; *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at [65] per French CJ, Crennan, Bell and Keane JJ; *Commonwealth v Director, FWBII* (2015) 258 CLR 482 at [55] per French CJ, Kiefel, Bell, Nettle and Gordon JJ and at [110] per Keane J and *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 (***Pattinson***) at [15] per Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ.

35 Third, each of s 12GBA(2) (prior to 13 March 2019) and s 12GBB(5) (on and after 13 March 2019) requires the Court, in determining the appropriate penalty, to take into account four specific matters and all other relevant matters. The four specific matters are: (i) the nature and extent of the contravening act or omission; (ii) any loss or damage suffered as a result of the

contravening act or omission; (iii) the circumstances in which the contravening act or omission took place; and (iv) whether the person has previously been found by a court to have engaged in any similar conduct. Other factors that are relevant to the assessment of the appropriate penalty, and which were the subject of evidence in this proceeding, are:

(a) the deliberateness of the contravention;

(b) whether the contravention arose out of the conduct of senior management or at a lower level;

(c) the size and financial position of the contravening company;

(d) whether the contravening company has a corporate culture conducive to compliance with the ASIC Act as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention; and

(e) whether the company has shown a disposition to cooperate with the authorities responsible for the enforcement of the law in relation to the contravention.

36 Fourth, in considering the sufficiency of a proposed civil penalty, regard must ordinarily be had to the maximum penalty. The maximum penalty provides a "yardstick", to be taken and balanced with all other relevant factors: *Pattinson* at [53]-[54] and *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 (***Reckitt Benckiser***) at [156] (see also, in a criminal sentencing context, *Markarian v The Queen* (2005) 228 CLR 357 at [31], to which both *Pattinson* and *Reckitt Benckiser* refer). Care must be taken to ensure that the maximum penalty is not applied mechanically – it instead must be treated as one of a number of relevant factors, albeit an important one: *Reckitt Benckiser* at [156] (cited with approval in *Pattinson* at [53]). In *Reckitt Benckiser*, the Full Court observed (at [157]) that the theoretical maximum penalty on the facts of that case was in the trillions of dollars (some 5.9 million contraventions at $1.1 million per contravention) and that it followed that the appropriate range for penalty in the circumstances of that case was best assessed by reference to other factors, as there was no meaningful overall maximum penalty given the very large number of contraventions over a long period of time.

37 Fifth, in determining the appropriate penalty for a multiplicity of civil penalty contraventions, the Court may have regard to two common law principles that originate in criminal sentencing: the "course of conduct" principle and the "totality" principle: *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243 (***Yazaki Corporation***) at [226]. Under the "course of conduct" principle, the Court considers whether the contravening

acts or omissions arise out of the same course of conduct or the one transaction, to determine whether it is appropriate that a "concurrent" or single penalty should be imposed for the contraventions: *Yazaki Corporation* at [234]. Whether multiple contraventions should be treated as a single course of conduct is a question of fact and degree: *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; 269 ALR 1 (***Cahill***) at [39] per Middleton and Gordon JJ, and the application of the principle requires an evaluative judgement in respect of the relevant circumstances: *Australian Competition and Consumer Commission v Cement Australia Ply Ltd* (2017) 258 FCR 312 at [425]. The principle guards against the risk that the respondent is punished twice in respect of multiple contravening acts or omissions that should be evaluated, for the purposes of assessing an appropriate penalty, as a lesser number of acts of wrongdoing: *Cahill* at [39]. However, as noted by the Full Court in *Yazaki Corporation* (at [227]), it is not appropriate or permissible to treat multiple contravening acts or omissions as just one contravention for the purposes of determining the maximum limit dictated by the relevant legislation. Accordingly, the maximum penalty for the course of conduct is not restricted to the prescribed statutory maximum penalty for each contravening act or omission: *Reckitt Benckiser* at [141]; *Yazaki Corporation* at [229]-[235]. The "totality" principle operates as a "final check" to ensure that the penalties to be imposed on a wrongdoer, considered as a whole, are just and appropriate and that the total penalty for related offences does not exceed what is proper for the entire contravening conduct in question: *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR 41-375 at 40 and 169 and *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36.

D. FACTUAL FINDINGS ON THE PENALTY FACTORS

Nature and extent of the contraventions

38 The nature and extent of the contravening acts are detailed in the liability judgment and will not be repeated in detail. The following are the key findings relevant to the assessment of penalty.

39 Vanguard contravened s 12DF(1) of the ASIC Act by engaging in conduct in relation to financial services that was liable to mislead the public as to the nature, the characteristics and the suitability for their purpose of those financial services, and also contravened ss 12DB(1)(a) and (e) by making false or misleading representations that the Vanguard Ethically Conscious

Fund and interests in it were of a particular standard, quality or grade, and had certain performance characteristics or benefits. The relevant contraventions consisted of:

(a) the media release representations, which conveyed representations that

(i) the Fund offered an ethically conscious investment opportunity, and that the Fund did this by seeking to track the Bloomberg SRI Index;

(ii) before being included in the Bloomberg SRI Index, and therefore the Fund, securities were researched and screened against applicable ESG criteria; and

(iii) securities that violated applicable ESG criteria were excluded or removed from the Bloomberg SRI Index and therefore the Fund;

(b) the YouTube representations and the FNN presentation representations which conveyed the same representations as the media release representations, save for the fact that they did not refer to the Bloomberg SRI Index; and

(c) the PDS representations and the website representations which conveyed the same representations as the media release representations save for the fact that those materials conveyed that only securities issued by *companies* (rather than securities generally) were screened against ESG criteria.

40 Each of the above representations were misleading within the meaning of s 12DF(1) and ss 12DB(1)(a) and (e) because:

(a) the research and screening for the Bloomberg SRI Index, and therefore the Fund, had limitations which meant that not all securities were screened against ESG criteria;

(b) a significant proportion of securities in the Bloomberg SRI Index and the Fund were from issuers that were not researched or screened against applicable ESG criteria; and

(c) the Bloomberg SRI Index and the Fund included issuers that violated applicable ESG criteria.

41 There is a relevant distinction between, on the one hand, the media release, YouTube and FNN presentation representations that referred to the ESG screening of all securities in the Fund and, on the other hand, the PDS representations and the website representations that referred to the ESG screening of securities in the Fund that were issued by companies. Both representations were inaccurate, but it is fair to say that the PDS representations and the website representations were less inaccurate because they correctly stated that ESG screening was confined to the securities issued by companies. As admitted by Vanguard, however, the ESG screening that

was applied to create the Bloomberg SRI Index did not screen all company securities which were included in the Bloomberg Parent Index. The relevant screening was subject to the Entity, Ticker and Fossil Fuels Limitations, which were that:

(a) (Entity Limitation) generally only publicly listed companies were researched and screened against applicable ESG criteria;

(b) (Ticker Limitation) for companies with multiple issuing entities that shared a particular stock exchange "ticker", the ESG research was only conducted for the company with the largest debt outstanding (by market value) and was applied to all other companies with the same "ticker"; and

(c) (Fossil Fuel Limitation) the fossil fuel screen, as in effect from 15 July 2020, did not cover companies that derived revenue from the transportation or exploration of thermal coal.

42 In the liability judgment, the contravening conduct was found to have occurred during the relevant period, being the period between approximately 7 August 2018 and approximately 17 February 2021. That period reflected the alleged period of contravention in ASIC's statement of claim, which was admitted in Vanguard's defence, and also reflected the declaratory relief sought by ASIC at the liability hearing. The end date of the period, 17 February 2021, was the date on which Vanguard published a supplementary PDS which removed the previous misrepresentation.

43 In the SOAF, the parties agreed the following facts regarding the extent to which the misleading representations were viewed by potential investors:

(a) In the period between 11 September 2018 and 17 February 2021, Vanguard's webpage for the Fund (which contained the website representations) was viewed approximately 10,663 times (including unique visitors and multiple views by the same user).

(b) In the period between 7 August 2018 and 30 March 2023 there were:

(i) approximately 5,890 unique visitors to the Fund webpages maintained by Vanguard for personal investors;

(ii) approximately 5,507 unique visitors to the Fund webpages maintained by Vanguard for advisers;

(iii) approximately 1,052 unique visitors to the Fund webpages maintained by Vanguard for institutional investors; and

(iv) a PDF of a PDS was displayed to a user on these webpages a total of 2,340 times.

(c) In the period between 30 August 2018 and 15 June 2023, the webpage on which the media release was published was viewed approximately 4,520 times (including unique visitors and multiple views by the same user).

(d) The YouTube representations are contained within an interview of a senior Vanguard manager, Rachel White, that was published by FNN on or about 14 December 2018 and remained available on YouTube and the FNN website for the remainder of the relevant period. The interview (including the YouTube representations) remained available on YouTube as at 2 April 2024.

(e) The FNN presentation representations were published on the FNN website on or about 14 December 2018 and remained available on that website for the remainder of the relevant period.

44 As can be seen, the above facts refer to periods after 17 February 2021 (the end of the relevant period of contravening conduct). In its submissions, ASIC estimated the number of times the misleading representations were viewed by potential investors during the relevant period by apportioning the figures in the SOAF evenly across the stated periods. In my view, that is a reasonable approach to estimation, whilst recognising that the resulting figures are only an approximation. The result of that exercise is that, during the relevant period:

(a) Vanguard's webpage on which the media release was published was viewed approximately 2,330 times;

(b) a copy of the PDS for the Fund was displayed to a potential investor online approximately 1,276 times;

(c) Vanguard's webpage for the Fund, which contained the website representations, was viewed approximately 10,663 times; and

(d) the YouTube video was viewed approximately 230 times.

45 It is common ground between the parties that a significant proportion of securities in the Vanguard Ethically Conscious Fund were from issuers that were not researched or screened against applicable ESG criteria. Issuers of securities held by the Fund were categorised as Corporates, Government Related, Treasuries and Securitised. The SOAF contained the

following summary of the extent of ESG screening of securities in the Fund as at mid-February 2021:

(a) approximately 74% of the securities in the Fund by market value were not researched or screened against applicable ESG criteria;

(b) approximately 6.4% of securities in the Corporate category of the Fund by market value were not researched or screened against applicable ESG criteria;

(c) approximately 56.3% of securities in the Government Related category of the Fund by market value were not researched or screened against applicable ESG criteria, and approximately 6.75% of securities in the Government Related category of the Fund were issued by companies that were not researched or screened against applicable ESG criteria; and

(d) approximately 81.6% of securities in the Securitised category of the Fund by market value were not researched or screened against applicable ESG criteria, and approximately 0.32% of securities in the Securitised category of the Fund were issued by companies that were not researched or screened against applicable ESG criteria.

Circumstances in which the contraventions occurred

46 It was an agreed fact that the number of investors in each of the classes of units in the Vanguard Ethically Conscious Fund grew from 12 investors as at 30 August 2018 to 959 investors as at 16 February 2021. The market value of the funds under management (**FUM**) in the Fund as at 30 June 2021 was in excess of $1.1 billion.

47 It was also an agreed fact that, in the past several years, in Australia and globally, there has been a significant increase in demand for, and investment in, investment products focused on ESG considerations. The demand by investors for investment products that are calibrated by reference to ESG criteria was expressly referenced by Vanguard when developing, launching and promoting the Fund. For example:

(a) An internal memorandum from Rachel White and Balaji Gopal to Vanguard's Global Investment Committee dated 19 March 2018 and titled "Launch of Australian domiciled ESG funds and ETFs" stated:

> Environmental, social, and governance ("ESG") investing is emerging as a global and enduring trend. Vanguard has an opportunity to help shape this trend and differentiate itself with a clear message and a low cost offer in Australia and New Zealand ("NZ"), where investors are increasingly seeking products and investments that reflect their ESG values.

(b) The media release stated that the Fund was launched to provide "greater choice for investors who wish to reflect their values in their investment holdings".

(c) In the FNN presentation, Rachel White of Vanguard stated that ESG investing was growing, with $622 billion in Australia "invested in ES&G strategies", of which $65 billion was said to be "invested in core ESG products … growing quite rapidly".

(d) In the YouTube video, Ms White said:

> … there is three key reasons we think ESG investing matters to clients and will continue to be an enduring trend. The first is around investment rationale, so there's more and more academic research showing ESG to have a neutral to slightly positive impact on company performance. The second piece is around investor preference, so we're finding that there's more investors that care about responsible and ESG investing and that's particularly true for female investors and also younger generations like millennials. Three [in] four millennials have said they would prefer their investments or superfunds to be invested responsibly than just to maximise investment returns. And, the final one is the environment is more conducive to ESG investing, so there's more indices and more products available to give investors more choice, there's more data and standardisation by companies and there's more regulation to support the ongoing development of ESG investing.

48 I accept ASIC's submission that the misrepresentations made by Vanguard with respect to the ESG characteristics of the Vanguard Ethically Conscious Fund concerned the principal or central distinguishing feature of the Fund, being its "ethical" characteristics. Vanguard developed and promoted the Fund in response to market demand for investment funds having those characteristics. Those facts increase the seriousness of the misleading conduct.

Loss and damage suffered because of the contraventions

49 ASIC did not contend that Vanguard's contraventions caused any financial loss to investors. Rather, ASIC submitted that the loss and damage in this case manifests in the loss of opportunity for investors to invest in accordance with their investment values. Vanguard accepted that its conduct had the potential to cause harm to its investors, characterised as the loss of an opportunity to make a different purchasing choice, had the investors been provided with accurate information.

50 Mr Samuel Dowler holds the title of Investment Product Analytics Lead at Vanguard. Mr Dowler analysed the daily cashflow data and records of daily FUM held by Vanguard for the period 1 January 2021 to 30 June 2021, to identify if there were any material redemptions from the Vanguard Ethically Conscious Fund that occurred during the period in which Vanguard disclosed the misrepresentations to the market. The parties were in agreement that such disclosures occurred in mid-February 2021 and in April 2021. Mr Dowler's evidence showed

that there was no material increase in Fund redemptions that can be causally attributed to Vanguard's disclosures. On the basis of that evidence, Vanguard submitted that the misrepresentations were not significant to investors in the Fund (arguing that if the disclosures had been important to investors, it would be expected that investors would redeem their investment upon learning of the true position).

51 In my view, Mr Dowler's evidence does not rise to the level for which Vanguard contends. A redemption decision is distinct from an investment decision. An investor's decision to redeem their investment is affected by many factors, including fund performance since the date of investment and tax consequences of redemption, which differ from the factors that affect the initial investment. For that reason, it cannot be inferred that Vanguard's misrepresentations were of no or little significance to the decision made by investors to invest in the Vanguard Ethically Conscious Fund at the time that the investment decision was made.

Benefits from the contravening conduct

52 The SOAF provided the following information concerning the financial returns received by Vanguard from its management of the Vanguard Ethically Conscious Fund:

(a) for the financial year ending 31 December 2018, Vanguard earned revenue of $66,573 and incurred a net loss of $243,981;

(b) for the financial year ending 31 December 2019, Vanguard earned revenue of $330,183 and incurred a net loss of $562,793;

(c) for the financial year ending 31 December 2020, Vanguard earned revenue of $630,702 and incurred a net loss of $797,142;

(d) for the financial year ending 31 December 2021, Vanguard earned revenue of $976,945 and incurred a net loss of $2,615,925; and

(e) for the financial year ending 31 December 2022, Vanguard earned revenue of $1,345,096 and incurred a net loss of $2,303,934.

53 ASIC did not attempt to quantify any financial benefit to Vanguard from the contravening conduct and I accept that any such quantification is not feasible.

54 ASIC submitted, however, that by its misleading conduct, Vanguard gained a number of benefits, including:

(a) the ability to attract investors to the Fund more effectively than would have been the case if Vanguard had accurately disclosed the screening limitations and the Fund's exposure to issuers engaged in the excluded industries;

(b) an enhanced reputation as a provider of index funds with ESG characteristics and credentials; and

(c) earning higher management fees than for a comparable fund without ESG characteristics, as illustrated by the difference between the management fees charged in respect of the ETF class of units in the Fund (0.26% pa of net asset value) and the management fees charged in respect of the EFT class of units in the Vanguard Global Aggregate Bond Index Fund (0.20% pa of net asset value).

55 Vanguard accepted that it may have benefited from the fees paid by any investors who invested in the Fund in reliance on the representations, and who would not have invested had they been aware of the true position. Vanguard submitted, however, that the quantum of any such benefit cannot be determined and that there is no evidence that any investor in fact invested in reliance on the representations. Vanguard disputed the balance of ASIC's submissions with respect to benefits gained by Vanguard as result of the contravention.

56 I accept ASIC's submissions that the misrepresentations enhanced Vanguard's ability to attract investors to the Vanguard Ethically Conscious Fund, and enhanced Vanguard's reputation as a provider of investment funds with ESG characteristics, as compared to what would have been the case if Vanguard had accurately disclosed the screening limitations and the Fund's exposure to issuers engaged in the excluded industries. However, I do not accept ASIC's submissions with respect to the higher management fees. In the absence of evidence to this effect, I cannot draw an inference that the difference in the amount of the management fee charged in the Vanguard Ethically Conscious Fund and that charged in the Vanguard Global Aggregate Bond Index Fund was attributable to the ESG characteristics.

Deliberateness of the contraventions

57 It was an agreed fact that Vanguard's contraventions were not deliberate in the sense that Vanguard did not intend to contravene the ASIC Act.

58 Nevertheless, ASIC tendered in evidence email communications involving employees of Vanguard in support of a contention that Vanguard's employees were reckless as to the accuracy of the representations concerning ESG screening. ASIC submitted that:

(a) Vanguard's contraventions are properly characterised as reckless because Vanguard had ample information that there were significant limitations in the ESG screening for the Vanguard Ethically Conscious Fund that were not disclosed to investors and were inconsistent with the Fund being marketed as "ethically conscious";

(b) the contraventions reflected (at least) a failure to understand, and a lack of curiosity about, Vanguard's own products and how they worked;

(c) the contraventions reflected a failure of compliance or oversight; and

(d) given the steady feed of adverse information about the ESG screening for the Fund, the later contraventions – those arising from the PDSs issued in 2020 – were more serious than the earlier contraventions and Vanguard was "courting the risk of illegality" by continuing to make representations about the Fund that were inconsistent with the concerns that should have been addressed by that adverse information.

59 Vanguard submitted in response that the email communications relied on by ASIC do not support the findings sought by ASIC and there is no basis for a finding that any Vanguard employee was consciously aware of the fact that any of the representations about the Vanguard Ethically Conscious Fund contained a false or misleading statement or were reckless in that regard.

60 It should be observed at the outset that the evidence adduced by the parties on the issue of the deliberateness of the contraventions was limited. It appeared that ASIC had not conducted examinations of relevant Vanguard employees and the evidence it adduced was confined to information and documents provided by Vanguard in response to notices issued by ASIC under s 912C of the *Corporations Act 2001* (Cth) (**912C notices**). Vanguard elected not to adduce evidence from any person who had been involved in the creation and promotion of the Vanguard Ethically Conscious Fund. I infer that any such evidence would not have assisted Vanguard on the question of the deliberateness (or recklessness) of the contravening conduct.

ASIC's evidence

61 The principal Vanguard employees who were party to the email communications relied on by ASIC were (in order of seniority):

(a) Rachel White, who held the positions Senior Manager, Product Strategy (until October 2020) and Head of Product Strategy (November 2020 – July 2021); and

(b) Adam Herdel, who held the position Product Analyst, Fixed Income.

62 Vanguard's response to a 912C notice dated 26 June 2023 issued by ASIC stated that each of Ms White and Mr Herdel were involved in or responsible for the creation of, and ongoing operation of, the Vanguard Ethically Conscious Fund, together with Evan Reedman, the Head of Product, and Balaji Gopal, the Head of Product Strategy (until June 2020) and the Head of Personal Investor (July 2020 – June 2023). Vanguard's response indicated that each of Ms White and Mr Herdel were subordinate to Mr Reedman and Mr Gopal. A letter from Vanguard's solicitors to ASIC dated 8 September 2022, providing a statement to ASIC on behalf of Vanguard in response to a 912C notice dated 25 August 2022 issued by ASIC, stated that Mr Reedman was responsible for the Fund's PDS due diligence process, which was managed by his team.

63 Ms White was the person whose interview with FNN was published on YouTube on or about 14 December 2018 and whose presentation at an FNN Fund Manager event on or about 5 December 2018 was published on the FNN website on or about 14 December 2018. The evidence does not reveal which employees of Vanguard were responsible for the content of the media release issued on 30 August 2018. However, the media release attributes a number of statements to Mr Reedman, and it is reasonable to infer that Ms White, as Senior Manager of Product Strategy reporting to Mr Reedman, would have been involved in the preparation of the media release. I am able to draw that inference more confidently in circumstances where Vanguard elected not to adduce evidence from any employee involved in the preparation of the documents containing the misleading representations.

64 The email communications relied on by ASIC involved employees of MSCI ESG Research LLC (**MSCI**), particularly Naomi English, Associate Director. MSCI performed the research and screening against ESG criteria on behalf of Bloomberg (as explained in the liability judgment at [27]ff).

65 The period in which the relevant emails were sent commenced in January 2018, prior to the launch of the Vanguard Ethically Conscious Fund in August 2018, and continued until September 2019. ASIC also placed reliance on an internal Vanguard email dated 17 February 2021 and an internal memorandum dated 23 February 2021. However, I do not consider that the February 2021 documents are relevant to the deliberateness of the contravention as they occurred at the end of the contravening period and are associated with steps taken by Vanguard to correct the disclosures about ESG screening of securities in the Fund made in the PDS and on its website.

66 I make the following findings with respect to the relevant email communications relied upon by ASIC.

67 In January 2018, Ms White exchanged emails with Ms English with the subject line "Global Agg SRI ex Fossil Fuels Index". The "Global Agg SRI ex Fossil Fuels Index" is a different index to the Bloomberg SRI Index (on which the Fund was based). Although not entirely clear, the emails appear to involve discussions concerning the formulation of the Bloomberg SRI Index. ASIC emphasised that, in an email sent by Ms English on 16 January 2018, Ms English notes that the SRI exclusions in the "Global Agg SRI ex Fossil Fuels Index" did not include private companies. Ms English also records MSCI's recommendation that exclusions be extended to "agencies, LA and sovereign". The fact that can be drawn from the email exchange is that Ms White was engaged in discussions with MSCI concerning the breadth of SRI exclusions from the Bloomberg SRI Index in connection with its development.

68 On 30 July 2018, Ms White sent an email to Ms English with the subject line "Government screening for our index" and asked, in respect of the "new index" (the Bloomberg SRI Index) whether "the business involvement screening is only applied to the corporate sector". The email chain indicates that Ms English was on leave at that time and Ms White's email was ultimately answered on 31 July 2018 by Mr Ruiming Mu of MSCI. Mr Mu stated that "Business Involvement screening is generally only applicable to corporate bond issuers and government-related issuers with corporate-like operations" and that "[f]or Aggregate indexes, SRI screens are not applied to Treasury, Sovereign and Securitized sectors". The fact that can be drawn from the email exchange is that Ms White was informed that the SRI screen that would be applied by MSCI was generally limited to corporate bond issuers and government-related issuers with corporate-like operations and would not be applied to treasury, sovereign and securitised sectors.

69 On 21 August 2018, a representative of the Responsible Investment Association Australasia (**RIAA**), Nicolette Boele, sent an email to Mr Herdel referring to Vanguard's application for certification of certain Vanguard investment products, including the Vanguard Ethically Conscious Fund, by the RIAA under its "Responsible Investment Certification Program" (**RICP**). The email outlined the timeline for submitting the application to the RIAA's Certification Assessment Panel (**CAP**) and attached a document titled "RICP: RIAA Summary and Report to the CAP". The report contained the RIAA's assessment of the Fund against the RIAA's criteria for certification. In response to the question, "Does the information provided

in the PDS or equivalent ACCURATELY match the description of the RI strategy as applied to this product" (capitalisation in original), the report answered "no" and included the following comment:

> The "ethically conscious" screen only applies to corporate issue securities which makes up around 15-16% of the product FUM. There are no explicit RI screens applied across the non-corporate aspect of the bond fund. Except that the Fact Sheet implies that there may be (see Criteria D comment 5). The expectation of the industry and consumer is that some sort of screen would be applied to sovereign funds such as perhaps countries being signatories to the AML & Terrorism financing TaskForce or signatories to the non-nuclear proliferation treaty.

70 On 22 August 2018, Mr Herdel forwarded the RIAA email and attachment to Ms White. The email stated (in part):

> Attached is the outcome of our RIAA proposal. The good news is that Select Exclusions funds are being put forward to the Certification Assessment Panel. Unfortunately the Ethically Conscious funds have not. However, there is a special meeting scheduled for next month that I think will provide a good opportunity for consideration. The issue is really around the available portfolio information on the products that have yet to launch. Specific to the Global Aggregate Bond option, there is a concern that as the screens impact less than 50% of the fund and a recommendation that we seek to amend our disclosure documents to reflect this.

71 The fact established by the email exchange with the RIAA in the middle of August 2018 (coinciding with the launch of the Vanguard Ethically Conscious Fund) is that the RIAA notified Vanguard of concerns with respect to its disclosure of the extent of SRI screens that were applied to securities in the Fund. The RIAA accurately identified that there were no SRI screens applied across the non-corporate aspect of the fund. In that context, it should be acknowledged that Vanguard's PDS and website disclosures concerning the Fund were more accurate than the disclosures made in its media release and the presentation and interview that were uploaded to YouTube and the FNN website. As found in the liability judgment, Vanguard's PDSs and website represented only that securities *issued by companies* were researched and screened against applicable ESG criteria before being included in the Fund. Nevertheless, the RIAA email drew attention to the broader problem associated with Vanguard promoting an "ethically conscious" fund in circumstances where a relatively small percentage of securities in the fund by value were screened against ESG criteria.

72 On 23 August 2018, Mr Herdel replied to Ms Boele of RIAA stating, in part:

> One area I did want to clarify however was in relation to the scope of the screening for the Ethically Conscious Global Aggregate Bond Index Fund (Hedged). Given that Government debt accounts for 52% of the broader benchmark, we would say that 48% of the fund is subject to the negative screening that is incorporated into the ESG

> benchmark. I'm not sure if this provides greater materiality for certification, however it is substantially higher that the 15-16% noted in your feedback. The screens also apply to Government-related and Securitized assets, though this may not have been as clear as it should have been within our application.

73 The statements made by Mr Herdel in that email overstated the true extent of the ESG screening of securities in the Fund, which has been set out earlier in these reasons (relevantly, approximately 74% of the securities in the Fund by market value were not researched or screened against applicable ESG criteria). I am not prepared to find, on the basis of this single email, that Mr Herdel intended to mislead the RIAA in that regard. However, the email supports a finding that, at that time, Vanguard's processes for verifying information concerning its investments products were inadequate.

74 On 9 September 2018, Ms White sent an email to Ms English with respect to Vanguard's application for certification of the Fund under the RICP. The email stated:

> We are trying to get our ESG fund certified by the RIAA in Australia and they have some concerns about why the government portion is not included in the screening. We have some commentary as to why we have selected this index but I wanted to see if you had a standard response around why your SRI index does not include any screening at the treasury level for the Aggregate indices?

75 The email confirms Ms White's awareness that government issued securities in the Fund were excluded from the ESG screening process.

76 In October 2018, there was email correspondence between Vanguard and Bloomberg concerning Bloomberg's Fact Sheets with respect to the Bloomberg SRI Index (which determined the Fund's investment portfolio). On 12 October 2018, Mr Herdel sent an email to Ms White stating that he had just noticed that Bloomberg's Fact Sheet for the Bloomberg SRI Index indicated that "Treasuries" were included in the ESG screening and that Mr Herdel believed that that needed to be corrected. A few minutes later, Ms White forwarded the email to Riyaz Alam of Bloomberg seeking clarification and suggesting that it was necessary to have the "methodology document" updated. I understand the "methodology document" to be the Blomberg Fact Sheet (see liability judgment at [44]). The email correspondence continues, with Bloomberg confirming that the ESG screen was only applied to corporate securities and Ms White requesting Bloomberg to update the "methodology document" because it was misleading. Those emails further confirm the awareness of Ms White and Mr Herdel that the ESG screening was only applied to corporate securities.

77 In mid-March 2019, there was further email correspondence between Ms White and Ms English concerning the fossil fuel screen and whether it was applied to government related and securitised bonds. Ms English's reply confirmed that the ESG screens, including fossil fuels, were only applied to corporate securities, although MSCI was developing new screens to be extended to "sovereign" securities.

78 In an email chain that spanned from 23 August 2019 to 27 September 2019, Mr Herdel corresponded with Bloomberg representatives with respect to a further gap in the ESG screening applied to securities in the Bloomberg SRI Index (and therefore the Vanguard Ethically Conscious Fund). A potential investor had asked Mr Herdel why certain securities, which appeared to be fossil fuel related, were included in the Fund. The response from Bloomberg was that MSCI did not "rate" or "cover" certain entities and that the rules for the Bloomberg SRI Index were that securities issued by such "unrated" entities were eligible for inclusion. In response to a question from Mr Herdel why entities were not "rated" or "covered" by MSCI, Bloomberg responded that it is usually because the entity is a private corporation with limited information concerning its business. The gap in ESG screening revealed by those emails is not directly relevant to the contraventions of the ASIC Act that are the subject of this proceeding. Nevertheless, the emails are a further instance of Mr Herdel being informed of the limitations in the ESG screening applied to securities in the Fund, including the fact that ESG screening was not generally applied to private companies.

Vanguard's evidence

79 As noted earlier, Vanguard did not adduce evidence from any employee involved in the development or promotion of the Vanguard Ethically Conscious Fund. It did, however, adduce evidence from Curtis Jacques who is the Head of Product Offer, and a director of, Vanguard. Mr Jacques joined Vanguard on 18 November 2020 in the role of Head of Risk and was appointed a director on 21 January 2022. Mr Jacques's evidence largely related to the steps taken by Vanguard to prevent a repetition of the contravening conduct that occurred in this case. However, Mr Jacques also gave evidence, based on his review of Vanguard's systems and procedures, as to the likely causes of the contravening conduct in this case. Mr Jacques's evidence on that topic was to the following effect:

(a) In the relevant period, Vanguard did not have a single overarching process for producing a PDS for a fund and instead had multiple separate processes involving different teams within Vanguard that did not always seamlessly operate together.

(b) Vanguard's Product Strategy team was the team whose personnel had the specialist skillset for researching a new proposed index which would be tracked by a Vanguard product and the methodology for constructing that index. The Product Management team had primary responsibility for establishing and maintaining a fund once its index had been created. Both teams were involved in the creation of a PDS for a new fund. However, as the Product Management team had primary ongoing responsibility for an existing fund, PDSs were treated as primarily the responsibility of that team, especially in respect of PDS maintenance and reviews. While the Product Management team had responsibility for maintenance of the PDSs, they did not have specialist expertise in the ESG screen disclosures or a structured and controlled process to obtain input from the specialist resources in the Product Strategy team that did have that expertise.

(c) Between 2018 and 2021, Vanguard did not have a formal process or 'trigger event' policy that clearly defined the circumstances that would trigger an escalation and assessment of disclosure issues, so as to cause the Risk team to become involved in matters that could potentially impact PDS disclosure.

(d) Mr Jacques had learned that some staff in the Product Strategy team had become aware during the relevant period, as a result of interactions with Bloomberg, of ESG screening limitations impacting the Vanguard Ethically Conscious Fund. However, Mr Jacques was not aware of any information which suggested that the existence of the ESG screening limitations was communicated to senior personnel in the Product Management team that had primary responsibility for the Fund's PDS disclosure at the time, or communicated to the Office of General Counsel, the board of directors, or Mr Jacques as the Head of Risk.

(e) Mr Jacques expressed the opinion that the absence of a clearly defined end-to-end PDS process and a formal 'trigger event' policy during the relevant period were material factors that contributed to the delay between some personnel becoming aware of the ESG screening limitations and the identification (and subsequent correction) of the corresponding misstatements in the Fund's PDS disclosure.

80 Looking to the future (and as discussed below in respect of compliance culture), Mr Jacques also expressed the opinion that improved PDS verification procedures would have significantly reduced the risk of the relevant misstatements regarding the operation of the ESG screens being included in the PDSs for the Vanguard Ethically Conscious Fund.

Findings

81 The evidence referred to above supports ASIC's characterisation that some aspects of Vanguard's contravening conduct were objectively reckless with respect to compliance with the company's legal obligations under s 12DB and/or 12DF of the ASIC Act. In particular, I consider that the media release, YouTube and FNN presentation representations were made with reckless disregard to their accuracy.

82 In respect of the media release representations (made on 30 August 2018), I infer that persons involved in the preparation of the media release, including particularly Ms White, were aware of the ESG screening limitations that applied to the Bloomberg SRI Index and the Vanguard Ethically Conscious Fund. Despite that, the media release misrepresented that, before being included in the Bloomberg SRI Index, and therefore the Fund, all securities were researched and screened against applicable ESG criteria and securities that violated applicable ESG criteria were excluded or removed from the Bloomberg SRI Index and therefore the Fund. I infer that the desire to promote and market the Fund as "ethically conscious" took priority over ensuring that the composition of the Fund, and the extent of ESG screening, was accurately disclosed.

83 It was Ms White who gave the interview to FNN that was subsequently uploaded to YouTube and who gave the presentation at the FNN Fund Manager event that was uploaded to the FNN website during December 2018. The interview and presentation were misleading in the same manner as the media release, in circumstances where Ms White was aware of the ESG screening limitations. Again, I infer that the desire to promote and market the Fund as "ethically conscious" took priority over ensuring that the extent of ESG screening was accurately disclosed.

84 The same characterisation cannot be applied to the representations made in Vanguard's PDSs for the Fund or on its website with respect to the Fund. It is apparent that a greater degree of diligence was applied to those representations. Vanguard's PDSs and website represented only that securities *issued by companies* were researched and screened against applicable ESG criteria before being included in the Fund. Although even that representation was not entirely accurate, the circumstances that rendered it inaccurate were more subtle and the evidence does not establish that Vanguard's employees were conscious of those limitations during the relevant period. It can be accepted that the possible limitation of ESG screening to publicly listed companies (and excluding private companies) was adverted to on two occasions in the

emails referred to earlier. However, the first of those occasions was in an email sent by Ms English of MSCI in January 2018 with respect to the composition of the Global Agg SRI ex Fossil Fuels Index which is a different index to the Bloomberg SRI Index and merely involved discussions concerning the formulation of the Bloomberg SRI Index. It provides an insufficient basis to infer that Ms White was aware during the relevant period that ESG screening in the Bloomberg SRI Index did not extend to private companies. The second of those occasions was in the email exchanges between Vanguard and Bloomberg in August and September 2019 in which Bloomberg provided an explanation of why MSCI did not "rate" or "cover" certain securities. While the difficulties of rating private companies were referred to in that context, again I consider the email exchanges provide an insufficient basis to infer that Mr Herdel and Ms White were conscious that ESG screening in the Bloomberg SRI Index did not extend to private companies, or its implications for product disclosure.

85 Additionally, the unchallenged evidence of Mr Jacques was to the effect that Vanguard's Product Strategy team, which included Ms White, was the team responsible for product development, whereas the Product Management team had primary responsibility for establishing and maintaining a fund once its index had been created. While both teams were involved in the creation of a PDS for a new fund, it was the Product Management team that had primary responsibility for the PDSs including their review over time. There was no evidence that anyone within the Product Management team was conscious of the circumstances that rendered the PDS and website representations misleading.

86 Although Vanguard's contravening conduct with respect to the PDS and website representations concerning the Vanguard Ethically Conscious Fund cannot be characterised as reckless, the conduct revealed a very substantial failure in Vanguard's practices with respect to legal compliance. Findings have been made that Vanguard's PDSs for the Fund and the website pages promoting the Fund represented that the Fund offered an ethically conscious investment opportunity. That representation was misleading because, amongst other things, the research and screening for the Bloomberg SRI Index, and therefore the Fund, had limitations which meant that not all securities issued by companies were screened against ESG criteria.

Whether the contravention arose out of the conduct of senior management

87 The evidence adduced by the parties with respect to the employees of Vanguard who were involved in the contravening conduct was limited. As observed in the preceding section, Vanguard elected not to adduce evidence from any person who had been involved in the

creation and promotion of the Vanguard Ethically Conscious Fund, and the evidence adduced by ASIC was confined to information and documents provided by Vanguard in response to 912C notices issued by ASIC.

88 Nevertheless, and as noted above, Vanguard's response to the 912C notice dated 26 June 2023 stated that the following persons were involved in or responsible for the creation, and ongoing operation, of the Vanguard Ethically Conscious Fund (listed in order of seniority):

(a) Evan Reedman, the Head of Product;

(b) Balaji Gopal, the Head of Product Strategy (until June 2020);

(c) Ms White, Senior manager, Product Strategy (until October 2020) and Head of Product Strategy (November 2020 to July 2021); and

(d) Andrew Reeve, Head of Product Management.

89 Further, and again as noted above, a letter from Vanguard's solicitors to ASIC dated 8 September 2022 (providing a statement to ASIC on behalf of Vanguard in response to a 912C notice dated 25 August 2022) stated that Mr Reedman was responsible for the Fund's PDS due diligence process, which was managed by his team.

90 The evidence does not reveal the precise role and tasks undertaken by the above persons with respect to the preparation of the media release, PDSs and website pages in relation to the Vanguard Ethically Conscious Fund. It was, of course, Ms White who gave the interview to FNN that was subsequently uploaded to YouTube and who gave the presentation at the FNN Fund Manager event that was uploaded to the FNN website during December 2018. In the absence of evidence concerning the precise role and tasks undertaken by the above persons with respect to the preparation of the media release, PDS and website pages in relation to the Vanguard Ethically Conscious Fund, it is open to find, on the basis of the statements made by or on behalf of Vanguard to ASIC (which constitute relevant admissions), that each had some involvement in the contravening conduct. That is not to say that each of those persons was aware of the misleading character of the representations in the media release, PDS and website pages in relation to the Fund. It is a finding, though, that senior employees were involved in the preparation of disclosure material relating to the Fund that was misleading and contravened ss 12DB and/or 12DF of the ASIC Act.

Size and financial position of contravening company

91 The following facts concerning the size and financial position of Vanguard were agreed between the parties.

92 For the years ending 31 December 2018 to 31 December 2022, Vanguard reported its income, profit and FUM as follows (all figures expressed in million dollars):

	FY18	**FY19**	**FY20**	**FY21**	**FY22**
Total income	$179.9m	$216.4m	$296.9m	$288.4m	$300.5m
Net profit	$10.7m	$13m	$50.4m	$21.6m	$26.1m
Total FUM	$146,977m	$185,814.5m	$175,596.7m	$112,978.5m	$104,646.1m

93 The Fund constitutes a relatively small proportion of Vanguard's overall business. The annual income earned by Vanguard from the Fund was less than 1% of Vanguard's annual income in each year to FY22, and the market value of the FUM in the Fund averaged less than 1% of the market value of Vanguard's total FUM in that period.

94 Vanguard is a wholly owned subsidiary of The Vanguard Group Inc (**Vanguard Group**), which is one of the world's largest investment management companies and has more than A$10 trillion in assets under management. As at 30 June 2023, Vanguard Group offered 430 investment funds worldwide. As at 31 December 2022, more than 50 million investors were invested in funds offered by the Vanguard Group, and it had approximately 20,000 employees worldwide.

Compliance culture

95 Mr Jacques gave evidence about:

(a) the actions taken by Vanguard once it became aware of inaccuracies in the PDSs in respect of the Vanguard Ethically Conscious Fund;

(b) the likely causes of the contravening conduct; and

(c) improvements to Vanguard's compliance systems that have been introduced subsequent to the contravening conduct occurring.

96 Each of the above topics is relevant to the Court's assessment of Vanguard's compliance culture.

97 Mr Jacques deposed that he first became aware of inaccuracies in the PDSs issued in respect of the Vanguard Ethically Conscious Fund on 15 February 2021. On that day, the ETF class of units in the Fund was placed into a trading halt. As discussed below, Vanguard self-reported the contravention to ASIC and cooperated with ASIC in the resolution of this proceeding. Mr Jacques also deposed that, immediately after discovering the problem with the Vanguard Ethically Conscious Fund, Vanguard's Product team undertook a review of Vanguard's other exclusionary screened index funds that used ESG criteria. In around May 2022, Vanguard identified and reported to ASIC that statements made in a PDS for a separate fund, the Vanguard International Shares Select Exclusion Index Fund, regarding the exclusion of "securities involved in the production, manufacturing, or significant sales of tobacco" were not accurate. On 1 December 2022, Vanguard paid three infringement notices issued by ASIC in connection with that matter.

98 Mr Jacques's evidence regarding the likely causes of the contravening conduct with respect to Vanguard's Ethically Conscious Fund is referred to above. Mr Jacques expressed the opinion that the absence of a clearly defined end-to-end PDS (verification) process and a formal "trigger event" policy (that defined circumstances that would trigger an escalation and assessment of disclosure issues) were material factors that contributed to the failure to ensure that all disclosures about the Fund accurately reflected the limited scope of ESG screening applied to the Bloomberg SRI Index.

99 Mr Jacques described the improvements that have subsequently been made to Vanguard's compliance systems, including:

(a) introducing new policies and procedures relating to the drafting, verification, implementation, finalisation and post-approval processes for PDSs and other disclosures;

(b) introducing a "trigger event" policy that articulates the circumstances in which review of a PDS may be required and a new PDS may need to be issued;

(c) creating and filling a number of new dedicated product disclosure roles, which comprise Vanguard's Disclosure Team;

(d) introducing a new governance body, the Disclosure Working Group, which is an operational forum which enables the Disclosure Team to comply with the end-to-end PDS process; and

(e) implementing training protocols to be rolled out at induction and on an annual basis for personnel in its Product, Client Operations, Finance, Office of General Counsel, Disclosure and Risk teams about (i) why the PDS process is important, having regard to Vanguard's legal and regulatory obligations, (ii) governance structures and overview of roles and expectations, and (iii) the end-to-end PDS process including the trigger event policy.

Cooperation with the enforcement authority and contrition

100 It is an agreed fact that, in respect of the matters the subject of this proceeding, Vanguard self-identified and self-reported to ASIC, and that Vanguard has cooperated with ASIC in respect of its investigation including by responding to ASIC's requests for information and documents in relation to the investigation in a prompt and constructive manner.

101 As explained in the liability judgment, Vanguard admitted ASIC's allegations in the proceeding, save for one disputed issue concerning the nature and scope of the representations made in the PDSs for the Vanguard Ethically Conscious Fund and associated website representations. On that issue, Vanguard was successful.

102 I find that Vanguard has cooperated fully with ASIC in respect of this proceeding.

Whether the contravener has previously been found by a court to have engaged in any similar conduct

103 Each of s 12GBA(2)(c) (in respect of conduct that occurred wholly or partly before 13 March 2019) and s 12GBB(5)(d) (in respect of conduct that occurred wholly on or after 13 March 2019) requires the Court to take into account certain prior conduct of the contravener. However, that conduct is defined differently in each section. Section 12GBA(2)(c) requires the Court to take into account whether the contravener has previously been found by the Court in proceedings under Subdiv 2 of Pt 2 of the ASIC Act to have engaged in any similar conduct. In contrast, s 12GBB(5)(d) requires the Court to take into account whether the contravener has previously been found by a court (including a court in a foreign country) to have engaged in any similar conduct.

104 The parties agree that Vanguard has not previously been found by a court to have contravened a provision of the ASIC Act or Chapter 7 of the *Corporations Act 2001* (Cth). I infer that it is an agreed fact that Vanguard has not previously been found by a court to have engaged in any similar conduct.

105 The SOAF refers to the fact that, in November 2022, ASIC issued three infringement notices (under Subdiv GB of Div 2 of Pt 2 of the ASIC Act) against Vanguard in respect of (alleged) contraventions of s 12DF of the ASIC Act in relation to statements made in PDSs for the Vanguard International Shares Select Exclusions Index Funds regarding the exclusion of "securities involved in the production, manufacturing, or significant sales of tobacco" from the index tracked by those funds. It is also an agreed fact that Vanguard paid $39,960 in compliance with the infringement notices on 1 December 2022 with no admission of liability. ASIC submitted that the Court may take these matters into account in determining the appropriate penalty in this case, although noted that they would not be given the same weight as civil penalty contraventions found by a court. Vanguard submitted that the Court ought not take into account, or alternatively ought place very little weight upon, these matters.

106 The issue and payment of an infringement notice under Subdiv GB of Div 2 of Pt 2 of the ASIC Act does not prove that the recipient of the notice contravened a relevant provision in Div 2 of Pt 2 of the ASIC Act. An infringement notice is issued under s 12GX(1) on the basis only of ASIC's *belief* that the recipient has contravened the relevant provision. Under s 12GXB(1), the infringement notice is required to give details of the *alleged* contravention. Under s 12GXG(1), payment of the infringement notice is not to be taken as an admission of guilt or liability in respect of the alleged contravention. It follows that the subject matter of the infringement notice rises no higher than an alleged contravention. As such, the agreed facts concerning the infringement notice, of itself, has no material bearing upon the assessment of penalty in this case.

107 However, the subject of the infringement notice was also the subject of evidence given by Mr Jacques. As noted earlier, Mr Jacques deposed that, in around May 2022, Vanguard identified and reported to ASIC that statements made in a PDS for the Vanguard International Shares Select Exclusion Index Fund, regarding the exclusion of "securities involved in the production, manufacturing, or significant sales of tobacco", were not accurate. Mr Jacques stated that that matter became the subject of the infringement notices. The foregoing evidence constitutes an admission by Vanguard to the effect that statements in the PDS for the Vanguard International Shares Select Exclusion Index Fund were inaccurate.

108 In my view, the foregoing admission is a relevant consideration in the Court's assessment of penalty. The fact that the mandatory considerations in s 12GBA(2)(c) and 12GBB(5)(d) are confined to contraventions that are the subject of judicial determination does not, by

implication, preclude the Court from taking into account a contravention that is admitted or, in some other manner, established on the evidence before the Court.

109 Mr Jacques's evidence established that the contravening conduct that is the subject of this proceeding was not an isolated event within Vanguard. However, the contravening conduct concerning the Vanguard International Shares Select Exclusion Index Fund appears to have occurred contemporaneously with the contravening conduct in this proceeding. There is no ongoing history of non-compliance. Indeed, the principal significance of the evidence about the contravening conduct involving the Vanguard International Shares Select Exclusion Index Fund is to confirm that the deficiencies in Vanguard's disclosure compliance procedures were systemic. That fact was established by Mr Jacques's evidence in any event.

E. ASSESSMENT OF APPROPRIATE PENALTIES

110 In the present case, the maximum penalty that may be imposed for the admitted contraventions is so high as to be practically meaningless. In respect of the contravening conduct that occurred wholly or partly before 13 March 2019 (being the six PDSs published in 2018, the website representations, the media release representations, the YouTube representations and the FNN presentation representations), the applicable maximum penalty is $2.1 million per contravention. Vanguard contravened ss 12DB(1)(a) and (e) and/or 12DF(1) each time a relevant representation was viewed by a potential investor. As set out earlier, that occurred on thousands of occasions, which results in a theoretical maximum pecuniary penalty in the billions of dollars. Further, in respect of contravening conduct that occurred wholly on or after 13 March 2019 (being the six PDSs published in July 2020), the applicable maximum penalty is approximately $25.6 million for each contravention. Again, in the period until the end of the contravening period (about 7 months), it can be estimated that the PDSs were viewed on hundreds of occasions. In *Reckitt Benckiser*, the Full Court observed (at [157]) that, where there was no meaningful overall maximum penalty given the very large number of contraventions, the assessment of the appropriate penalty was best assessed by reference to factors other than the statutory maximum.

111 Vanguard's contraventions should be regarded as serious. Vanguard's misrepresentations concerned the principal distinguishing feature of the Fund, being its "ethical" characteristics. Vanguard developed and promoted the Fund in response to market demand for investment funds having those characteristics. By its misleading conduct, Vanguard misrepresented the "ethical" characteristics of the Fund. Approximately 74% of the securities in the Fund by

market value were not researched or screened against applicable ESG criteria. Further, Vanguard benefited from its misleading conduct. The misrepresentations enhanced Vanguard's ability to attract investors to the Fund, and enhanced Vanguard's reputation as a provider of investment funds with ESG characteristics, as compared to what would have been the case if Vanguard had accurately disclosed the ESG screening limitations and the Fund's exposure to issuers engaged in the excluded industries. Although it cannot be demonstrated that any investor suffered financial loss by Vanguard's misleading conduct, investors lost the opportunity to invest in accordance with their investment values.

112 Recognising that the central object of imposing a pecuniary penalty is deterrence, it is necessary to weigh the factors that increase the need for deterrence in this case against the factors that decrease the need for deterrence.

113 The factors that increase the need for deterrence include the following. First, as mentioned above, the contravening conduct should be characterised as serious. Second, the contravening conduct continued for about two and a half years, from 7 August 2018 until 17 February 2021. Third, the conduct concerned a substantial investment fund, having more than $1.1 billion in FUM and close to one thousand investors. Fourth, that part of the contravening conduct which involved the publication of the media release, the interview with FNN published on YouTube and the presentation to FNN Fund Managers published on the FNN website was engaged in with reckless disregard to the accuracy of the information conveyed. The desire to promote and market the Fund as "ethically conscious" took priority over ensuring that the composition of the Fund, and the extent of ESG screening, were accurately disclosed. Although Vanguard's contravening conduct with respect to the PDS and website representations cannot be characterised as reckless, the conduct revealed a very substantial failure in Vanguard's practices with respect to legal compliance. Fifth, senior employees of Vanguard were involved in the preparation of the misleading disclosure material relating to the Fund.

114 The factors that decrease the need for deterrence are the following. First, there was some attempt, albeit unsuccessful, to ensure that the PDS and website representations accurately reflected the fact that ESG screening of securities in the Fund was limited to securities issued by corporates. Second, when Mr Jacques, as Head of Risk, became aware of the inaccuracies in the PDS and website representations in respect of the Fund, the investment product was immediately put into a trading halt and Vanguard reported the conduct to ASIC. Third, Vanguard has cooperated with ASIC in respect of its investigation of the conduct and this

proceeding. Fourth, Vanguard has taken substantial steps to improve its compliance procedures to avoid any repetition of the conduct in the future.

115 Vanguard is part of a very large financial group. The Australian operations, with which this proceeding is concerned, has very substantial annual revenue. Its annual profit for FY21 was about $21.6 million and its annual profit for FY22 was about $26.1 million. It is relevant to note that the annual income earned by Vanguard from the Fund was modest, being a little less than $1 million in FY21 and about $1.3 million in FY22. The income earned by Vanguard from the Fund was only 0.34% of Vanguard's total annual income in FY21 and only 0.45% of Vanguard's total annual income in FY22. Further, Vanguard incurred losses in managing the Fund throughout the relevant period.

116 In cases such as the present, it is appropriate to identify where multiple contraventions ought to be treated as a single course of conduct by reason of the interrelationship between the legal and factual elements of the contraventions. The purpose of identifying such courses of conduct is to avoid double punishment for those parts of the contraventions that involve overlap in wrongdoing. In my view, each of the categories of contraventions listed below ought to be identified as separate courses of conduct having regard to the interrelationship between the legal and factual elements of the contraventions:

(a) the issue of the 12 PDSs in respect of the Fund in 2018 and 2020;

(b) the publication of the misleading representation concerning the Fund on Vanguard's website from about 11 September 2018;

(c) the publication of the media release concerning the Fund on or about 30 August 2018;

(d) the publication on YouTube from about 14 December 2018 of an interview given by Ms White with FNN about the Fund; and

(e) the publication on the FNN website from about 14 December 2018 of Ms White's presentation about the Fund at an FNN Fund Manager event held on or about 5 December 2018.

117 Taking into account all of the considerations referred to in these reasons, I consider that the appropriate penalties for Vanguard's contraventions of s 12DB and/or 12DF of the ASIC Act are:

(a) in respect of the issue of the 12 PDSs in respect of the Fund in 2018 and 2020, an aggregate amount of $9 million;

(b) in respect of the publication of the misleading representations concerning the Fund on Vanguard's website from about 11 September 2018, an aggregate amount of $1.2 million;

(c) in respect of the publication of the media release concerning the Fund on or about 30 August 2018, an aggregate amount of $1.2 million;

(d) in respect of the publication on YouTube from about 14 December 2018 of an interview given by Ms White with FNN about the Fund, an aggregate amount of $750,000; and

(e) in respect of the publication on the FNN website from about 14 December 2018 of Ms White's presentation about the Fund at an FNN Fund Manager event held on or about 5 December 2018, an aggregate amount of $750,000,

being in total an aggregate penalty of $12,900,000. I consider that an aggregate penalty of this size is proportionate and strikes an appropriate balance between deterrence and oppressive severity. In aggregate, it is an amount that is many multiples of the total revenue earned by Vanguard from managing the Fund during the relevant period, and many multiples of the annual revenue earned by Vanguard from managing the Fund after the end of the relevant period. It is an amount that exceeds Vanguard's annual profit for the whole of its business in FY18, and is similar in amount to Vanguard's annual profit for the whole of its business in FY19, in circumstances where the Fund was a relatively small part of Vanguard's overall business (less than 1% in terms of income and FUM).

118 I record that, in determining the above penalties, I have applied a discount of 25% to the penalties I would otherwise have imposed to reflect the high level of cooperation that Vanguard has shown in both ASIC's initial investigation and in this proceeding. In setting a discount at that level, I am mindful of the desirability of encouraging the cooperation of contraveners in proceedings such as these, where such cooperation reduces the cost and burden of the proceeding to the Court, ASIC and the community.

F. ADVERSE PUBLICITY ORDERS

119 ASIC also sought adverse publicity orders under s 12GLB(1) of the ASIC Act, which Vanguard did not oppose. Section 12GLB provides as follows.

> **12GLB Punitive orders requiring adverse publicity**
>
> (1) The Court may, on application by ASIC, make an adverse publicity order in relation to a person who:
>
> (a) has been ordered to pay a pecuniary penalty under section 12GBB; or

(b) is guilty of an offence under section 12GB.

(2) In this section, an adverse publicity order, in relation to a person, means an order that:

(a) requires the person to disclose, in the way and to third parties specified in the order, such information as is so specified, being information that the person has possession of or access to; and

(b) requires the person to publish, at the person 's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order.

(3) This section does not limit the Court's powers under any other provision of this Act.

120 In circumstances where Vanguard does not oppose the adverse publicity orders sought by ASIC, I consider it appropriate to make an order in the form sought by ASIC.

G. COSTS

121 ASIC seeks its costs of the proceeding in respect of both the liability and penalty hearings. Although ASIC was unsuccessful in respect of the issue that was in dispute in the liability hearing, ASIC submitted that the mere fact that a court does not accept all of a successful party's arguments does not make it appropriate to deal with costs on an issue-by-issue basis (referring to *Victoria v Sportsbet Pty Ltd (No 2)* [2012] FCAFC 174 (***Sportsbet***) at [8]).

122 Vanguard submitted that the appropriate order is that it pay ASIC's costs of the proceeding, save for the contested issue on liability which was separately heard and determined by the Court and in relation to which Vanguard was wholly successful. Vanguard submitted that there is no reason why the ordinary position, that costs follow the event, ought not to apply. Vanguard argued that the present case can be distinguished from *Sportsbet* as the present case is not a case where, at trial, ASIC succeeded on some, but not all, contested issues. Rather, there was a discrete hearing which was required only by reason of the dispute between the parties on one issue, and Vanguard was wholly successful in relation to that issue.

123 I accept Vanguard's submissions in this regard and consider that the appropriate order is that ASIC pay Vanguard's costs of and incidental to the hearing on 8 March 2024 and that Vanguard otherwise pay ASIC's costs of the proceeding.

I certify that the preceding one hundred and twenty-three (123) numbered paragraphs are a true copy

of the Reasons for Judgment of the Honourable Justice O'Bryan.

Associate: 

Dated: 25 September 2024