

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Vanguard Investments Australia Ltd [2024] FCA 308

File number(s): VID 563 of 2023

Judgment of: **O'BRYAN J**

Date of judgment: 28 March 2024

Catchwords: **CONSUMER LAW** – alleged contraventions of ss 12DB and 12DF of the *Australian Securities and Investments Commission Act 2001* (Cth) – investment fund titled and described as ethically conscious – where representations made by the responsible entity of the fund that securities held by the fund had been screened against environmental, social and governance criteria, but where the screening was limited to a subset of the securities held by the fund – where responsible entity admitted most allegations but disputed an allegation concerning the representations conveyed by the Product Disclosure Statements issued by the responsible entity and on the website operated by the responsible entity – whether representations conveyed that all securities held in the fund, or only securities issued by companies, were subject to research and screening against applicable environmental, social and governance criteria – declaratory relief granted

Legislation: *Australian Consumer Law* ss 18, 29
Australian Securities and Investments Commission Act 2001 (Cth) ss 12BAA, 12BAB, 12DB, 12DF, 12GBA, 322
Corporations Act 2001 (Cth) s 912C
Federal Court of Australia Act 1976 (Cth) s 21
Trade Practices Act 1974 (Cth)

Cases cited: *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 634; 317 ALR 73
Australian Competition and Consumer Commission v TPG Internet Pty Ltd (2020) 278 FCR 450
Butcher v Lachlan Elder Realty Pty Limited (2004) 218 CLR 592
Campomar Sociedad, Limitada v Nike International Limited (2000) 202 CLR 45
Damorgold Pty Ltd v JAI Products Pty Ltd [2014] FCA 448

Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd (1978) 140 CLR 216
King v Melbourne Vicentre Swimming Club Inc [2020] FCA 1639

N and E Bowder Pty Ltd v Australian Keg Company Pty Ltd (2014) 220 FCR 166

Self Care IP Holdings v Allergan Australia [2023] HCA 8; 97 ALJR 388

Division: General Division

Registry: Victoria

National Practice Area: Commercial and Corporations

Sub-area: Regulator and Consumer Protection

Number of paragraphs: 117

Date of hearing: 8 March 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: **28 MARCH 2024**

THE COURT DECLARES THAT:

1. During the period between approximately 7 August 2018 and approximately 17 February 2021 (**Relevant Period**), the Defendant (**Vanguard**) in trade or commerce engaged 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 thereby contravened s 12DF(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), in that:
 - (a) Vanguard issued 12 Product Disclosure Statements (**PDS**) for the Vanguard Ethically Conscious Global Aggregate Bond Index Fund (Hedged) (ARSN 618 349 090) (**Fund**), each PDS being issued on or about the date of the PDS;
 - (b) on or about 30 August 2018, Vanguard issued a media release relating to the Fund;
 - (c) from on or about 11 September 2018, Vanguard published and maintained on its website statements regarding the Fund;
 - (d) in an interview that was published on YouTube on or about 14 December 2018, a representative of Vanguard made statements regarding the Fund; and
 - (e) at a fund manager event on or about 5 December 2018, a representative of Vanguard made statements regarding the Fund that were subsequently published online,

and in doing so Vanguard made representations that conveyed (save that the statements identified in paragraphs 1(d) and 1(e) referred to the Fund but not the Bloomberg Barclays MSCI Global Aggregate SRI Exclusions Float Adjusted Index (**Index**)):

- (f) in each case, that the Fund offered an ethically conscious investment opportunity and the Fund did this by seeking to track the return of the Index;
- (g) in respect of each PDS referred to in paragraph 1(a) and the statements on Vanguard's website referred to in paragraph 1(c), that:
 - (i) before being included in the Index, and therefore the Fund, securities issued by companies were researched and screened against applicable economic, social and governance (**ESG**) criteria; and
 - (ii) securities issued by companies that violated applicable ESG criteria were excluded or removed from the Index and therefore the Fund;
- (h) in respect of the media release referred to in paragraph 1(b), the YouTube interview referred to in paragraph 1(d) and the statements made at the fund manager event referred to in paragraph 1(e), that:
 - (i) before being included in the Index, and therefore the Fund, securities were researched and screened against applicable ESG criteria; and
 - (ii) securities that violated applicable ESG criteria were excluded or removed from the Index and therefore the Fund,

but, contrary to the representations:

- (i) the research and screening for the Index (and therefore the Fund) had the following limitations:
 - (i) the Entity Limitation;
 - (ii) the Ticker Limitation; and
 - (iii) the Fossil Fuel Limitation;
- (j) a significant proportion of securities in the Index and the Fund were from issuers that were not researched or screened against applicable ESG criteria; and
- (k) the Index and the Fund included issuers that violated applicable ESG criteria, including but not limited to:
 - (i) in respect of the Index, 39 issuers which collectively issued at least 144 securities; and

- (ii) in respect of the Fund, 12 issuers which collectively issued at least 23 securities.
- 2. During the Relevant Period, Vanguard in trade or commerce made representations in connection with the supply or possible supply of financial services that were false or misleading in representing that the Fund and interests in it were of a particular standard, quality or grade, and had certain performance characteristics or benefits, and thereby contravened s 12DB(1)(a) and (e) of the ASIC Act, in that Vanguard made representations that conveyed the meanings identified in paragraphs 1(f) to 1(h) in the ways identified in paragraphs 1(b) to 1(e), but contrary to those representations the matters set out in paragraphs 1(i) to 1(k) were the fact.
- 3. In the declaration made in paragraphs 1 and 2, the following terms have the following meanings:
 - (a) Entity Limitation means that 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;
 - (b) Fossil Fuel Limitation means that 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; and
 - (c) Ticker Limitation means that, 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”.

THE COURT ORDERS THAT:

- 4. The matter be listed for hearing on 1 August 2024 with an estimate of 1 to 2 days with respect to the issues of:
 - (a) penalty; and
 - (b) the costs of the proceeding, including the costs of and incidental to the hearing on 8 March 2024.
- 5. By 4.00 pm on 19 April 2024, the parties file and serve any statement of agreed facts relating to penalty.

6. By 4.00 pm on 17 May 2024, the plaintiff file and serve any affidavits and a list of documents on which it intends to rely at the hearing on penalty and costs.
7. By 4.00 pm on 14 June 2024, the defendant file and serve any affidavits and a list of documents on which it intends to rely at the hearing on penalty and costs.
8. By 4.00 pm on 11 July 2024, the plaintiff file and serve:
 - (a) any affidavits and a supplementary list of documents on which it intends to rely at the hearing on penalty and costs;
 - (b) an outline of written submissions; and
 - (c) a list of authorities.
9. By 4.00 pm on 24 July 2024, the defendant file and serve:
 - (a) an outline of written submissions; and
 - (b) a list of authorities.
10. By 4.00 pm on 29 July 2024, the plaintiff file and serve an agreed Court Book in digital form which:
 - (a) is produced in a text-recognised PDF format (not being an image format);
 - (b) is paginated sequentially throughout;
 - (c) is divided into digital folders of documents such that each folder comprises a single PDF file and the file name of each PDF file is the folder number; and
 - (d) each digital folder contains electronic bookmarks to each document in that folder.
11. Subject to further order of the Court, a document included in the Court Book:
 - (a) shall not form part of the evidence at the hearing unless specifically tendered and admitted into evidence; and
 - (b) shall be treated as tendered and admitted if referred to at the hearing (including in written or oral submissions) and no objection is taken.
12. By 4.00 pm on 29 July 2024, the plaintiff file and serve a digital joint bundle of authorities and legislation in text-recognised PDF format and which contains electronic bookmarks to each document in the bundle.
13. Costs be reserved.
14. There be liberty to apply.

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

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) (**Fund**), which is a registered managed investment scheme. The Fund commenced operation in or around August 2018. The defendant, Vanguard Investments Australia Ltd (**Vanguard**), is, and at all relevant times has been, the responsible entity of the Fund. 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 plaintiff, the Australian Securities and Investments Commission (**ASIC**), alleges 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 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 Fund, and interests in the Fund, contrary to s 12DF(1) of the ASIC Act.

3 In broad terms, ASIC alleges that, by statements made in a number of forms of communication, 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 alleges 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 ASIC seeks declarations, adverse publicity orders and pecuniary penalties in respect of the alleged contraventions.

6 By its statement of claim, ASIC identified a series of communications made by Vanguard in respect of the Fund which it alleges were false or misleading in the manner indicated above. The impugned communications consisted of:

- (a) 12 Product Disclosure Statements (**PDSs**) that Vanguard issued in 2018 and 2020 in respect of each class of units in the Fund;
- (b) a media release that Vanguard issued on or about 30 August 2018 in respect of the launch of the Fund;
- (c) statements that Vanguard published on its website from about 11 September 2018 in respect of the Fund;
- (d) an interview given by a manager of Vanguard with Finance News Network (**FNN**) that was published on YouTube on or about 14 December 2018; and
- (e) a presentation given by a manager of Vanguard 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.

7 It becomes important to note that ASIC alleged that each of the above communications involved the making of a false or misleading representation or engaging in conduct that was liable to mislead the public. That approach required ASIC to prove that each of the above communications involved a separate contravention of either ss 12DB or 12DF. As discussed below, each of the communications must be considered in its context and surrounding circumstances. However, the allegations made by ASIC necessarily require a focus on each communication rather than the conduct of Vanguard considered as a whole.

8 Vanguard admits most of ASIC's allegations, but the parties remain in dispute in respect of a narrow range of issues concerning liability. On 8 December 2023, orders were made for the proceeding to be listed for hearing on issues of liability and declaratory relief. In accordance

with those orders, the parties filed a document titled “Joint List of Issues in Dispute with Respect to Matters of Liability”. By that document, the parties identified four purported issues in dispute with respect to liability. As will be explained below, three of those purported issues are not dispositive of any issue of liability and it is unnecessary to decide them. The only dispositive issue in dispute with respect to liability is relatively narrow and concerns the breadth of certain statements made by Vanguard in its PDSs issued in respect of units in the Fund and on its website in promoting the Fund.

9 The hearing on issues of liability and declaratory relief was held on 8 March 2024. The parties tendered an agreed bundle of documents and no witnesses were called to give evidence.

10 For the following reasons, Vanguard’s submissions with respect to the disputed issue of liability should be accepted. Declarations will be made substantially in the form proposed by Vanguard and timetabling orders will be made for the hearing of the remaining issues concerning relief.

B. RELEVANT LEGISLATIVE PROVISIONS AND LEGAL PRINCIPLES

Legislative prohibitions

11 Sections 12DB and 12DF of the ASIC Act are contained within Subdivision D of Division 2 of Part 2 of the ASIC Act which is titled “Consumer Protection”.

12 Section 12DB relevantly provides as follows:

12DB False or misleading representations

(1) A person must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services:

(a) make a false or misleading representation that services are of a particular standard, quality, value or grade; ...

...

(e) make a false or misleading representation that services have sponsorship, approval, performance characteristics, uses or benefits;

...

...

(2) Conduct:

...

(c) in relation to a disclosure document or statement within the meaning of section 1022A of the Corporations Act;

does not contravene subsection (1). ...

13 The effect of s 12DB(2)(c) is that the prohibition in s 12DB(1) does not apply to statements made in Vanguard’s PDSs issued in respect of units in the Fund.

14 There is no dispute that the statements made by Vanguard in respect of the Fund, on which ASIC relies, were made in trade or commerce and in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services.

15 Section 12DF relevantly provides as follows:

12DF Certain misleading conduct in relation to financial services

- (1) A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any financial services.

...

16 At all relevant times, s 12GBA of the ASIC Act provided that ss 12DB and 12DF are civil penalty provisions.

Legislative provisions concerning declaratory relief

17 Prior to 13 March 2019, s 12GBA(1) of the ASIC Act relevantly provided that, if the Court was satisfied that a person had contravened a provision of Subdivision D (including ss 12DB and 12DF), the Court may order the person to pay to the Commonwealth a pecuniary penalty. The ASIC Act did not make provision for declaratory relief in relation to such contraventions. Accordingly, the source of the Court’s power to grant declaratory relief lay in s 21(1) of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), which provides that “[t]he Court may, in civil proceedings in relation to a matter in which it has original jurisdiction, make binding declarations of right, whether or not any consequential relief is or could be claimed”.

18 On 13 March 2019, amendments were made to the ASIC Act, including the repeal and re-enactment of s 12GBA in the following form:

12GBA Declaration of contravention of civil penalty provision

Application for declaration of contravention

- (1) ASIC may apply to a Court for a declaration that a person has contravened a civil penalty provision.
- (2) ASIC must make the application within 6 years of the alleged contravention.

Declaration of contravention

- (3) The Court must make the declaration if it is satisfied that the person has contravened the provision.
- (4) The declaration must specify the following:
 - (a) the Court that made the declaration;
 - (b) the civil penalty provision that was contravened;
 - (c) the person who contravened the provision;
 - (d) the conduct that constituted the contravention.

Declaration of contravention conclusive evidence

- (5) The declaration is conclusive evidence of the matters referred to in subsection (4).

Meaning of civil penalty provision

- (6) The following provisions are *civil penalty provisions*:
 - (aa) a provision of Subdivision BA;
 - (a) a provision of Subdivision C;
 - (b) a provision of Subdivision D (other than section 12DA);
 - (ba) a provision of Subdivision DA;
 - (c) a provision of Subdivision GC.

19 The 13 March 2019 amendments also included transitional provisions, which are found in Part 27 of the ASIC Act. Section 322 relevantly provides that, subject to Part 27, the amendments “apply in relation to the contravention of a civil penalty provision if the conduct constituting the contravention of the provision occurs wholly on or after the commencement day”, being 13 March 2019.

20 The relevant period of alleged contravening conduct in the present case is between 7 August 2018 and 17 February 2021. It follows that, in the circumstances of the present case:

- (a) for conduct occurring wholly or partly before 13 March 2019 which the Court is satisfied constitutes a contravention of ss 12DB or 12DF, the Court may grant declaratory relief pursuant to s 21(1) of the FCA Act if the Court is satisfied that it is appropriate to do so; and
- (b) for conduct occurring wholly on or after 13 March 2019 which the Court is satisfied constitutes a contravention of ss 12DB or 12DF, the Court must grant declaratory relief and specify the matters set out in s 12GBA(4).

Applicable legal principles

21 The prohibitions against making false or misleading representations in s 12DB and against conduct that is liable to mislead the public in s 12DF of the ASIC Act are part of a suite of legislative prohibitions of misleading conduct in trade or commerce which originated in the *Australian Consumer Law* (through its statutory predecessor, Part V of the *Trade Practices Act 1974* (Cth)) and are now also contained in the ASIC Act and the *Corporations Act 2001* (Cth) (**Corporations Act**). The central conception of misleading conduct, which lies at the heart of each of the prohibitions, has been interpreted in a consistent manner across the various prohibitions. The applicable principles were most recently summarised by the High Court (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ) in the context of ss 18 and 29 of the *Australian Consumer Law* in *Self Care IP Holdings v Allergan Australia* [2023] HCA 8; 97 ALJR 388 as follows (citations omitted):

- [80] The principles are well established. Determining whether a person has breached s 18 of the ACL involves four steps: first, identifying with precision the “conduct” said to contravene s 18; second, considering whether the identified conduct was conduct “in trade or commerce”; third, considering what meaning that conduct conveyed; and fourth, determining whether that conduct in light of that meaning was “misleading or deceptive or ... likely to mislead or deceive”.
- [81] The first step requires asking: “what is the alleged conduct?” and “does the evidence establish that the person engaged in the conduct?”. The third step considers what meaning that conduct conveyed to its intended audience. As in this case, where the pleaded conduct is said to amount to a representation, it is necessary to determine whether the alleged representation is established by the evidence. The fourth step is to ask whether the conduct in light of that meaning meets the statutory description of “misleading or deceptive or ... likely to mislead or deceive”; that is, whether it has the tendency to lead into error. Each of those steps involves “quintessential question[s] of fact”.
- [82] The third and fourth steps require the court to characterise, as an objective matter, the conduct viewed as a whole and its notional effects, judged by reference to its context, on the state of mind of the relevant person or class of persons. That context includes the immediate context – relevantly, all the words in the document or other communication and the manner in which those words are conveyed, not just a word or phrase in isolation – and the broader context of the relevant surrounding facts and circumstances. It has been said that “[m]uch more often than not, the simpler the description of the conduct that is said to be misleading or deceptive or likely to be so, the easier it will be to focus upon whether that conduct has the requisite character”. That said, the description of the conduct alleged and identified at the first step should be sufficiently comprehensive to expose the complaint, because it is that conduct that will ultimately, as a whole, be determined to be or not to be misleading or deceptive.
- [83] Where the conduct was directed to the public or part of the public, the third and fourth steps must be undertaken by reference to the effect or likely effect

of the conduct on the ordinary and reasonable members of the relevant class of persons. The relevant class of persons may be defined according to the nature of the conduct, by geographical distribution, age or some other common attribute, habit or interest. It is necessary to isolate an ordinary and reasonable “representative member” (or members) of that class, to objectively attribute characteristics and knowledge to that hypothetical person (or persons), and to consider the effect or likely effect of the conduct on their state of mind. This hypothetical construct “avoids using the very ignorant or the very knowledgeable to assess effect or likely effect; it also avoids using those credited with habitual caution or exceptional carelessness; it also avoids considering the assumptions of persons which are extreme or fanciful”. The construct allows for a range of reasonable reactions to the conduct by the ordinary and reasonable member (or members) of the class.

- [84] Although s 18 takes a different form to s 29, the prohibitions are similar in nature. In these appeals, there is no relevant meaningful difference between the words “misleading or deceptive” in s 18 and “false or misleading” in s 29. Under s 29 it is necessary to identify a representation made in connection with the supply or possible supply of goods or services, or in connection with the promotion of the supply or use of goods or services, that is false or misleading and meets one of the descriptions in subs (1)(a) to (n).

22 In *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2020) 278 FCR 450, the Full Court (Wigney, O’Bryan and Jackson JJ) observed (at [22]):

... The central question is whether the impugned conduct, viewed as a whole, has a sufficient tendency to lead a person exposed to the conduct into error (that is, to form an erroneous assumption or conclusion about some fact or matter): *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 (*Taco Bell*) at 200 per Deane and Fitzgerald JJ; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 (*Puxu*) at 198 per Gibbs CJ; *Campomar Sociedad, Limitada v Nike International Limited* (2000) 202 CLR 45 (*Campomar*) at [98]; *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 (*TPG Internet*) at [39] per French CJ, Crennan, Bell and Keane JJ; *Campbell* at [25] per French CJ. A number of subsidiary principles, directed to the central question, have been developed:

- (a) First, conduct is likely to mislead or deceive if there is a real or not remote chance or possibility of it doing so: see *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 at 87; *Noone (Director of Consumer Affairs Victoria) v Operation Smile (Australia) Inc* (2012) 38 VR 569 at [60] per Nettle JA (Warren CJ and Cavanough AJA agreeing at [33]).
- (b) Second, it is not necessary to prove an intention to mislead or deceive: *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 228 per Stephen J (with whom Barwick CJ and Jacobs J agreed) and at 234 per Murphy J; *Puxu* at 197 per Gibbs CJ; *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435 (*Google*) at [6] per French CJ and Crennan and Kiefel JJ.
- (c) Third, it is unnecessary to prove that the conduct in question actually deceived or misled anyone: *Taco Bell* at 202 per Deane and Fitzgerald JJ; *Puxu* at 198 per Gibbs CJ; *Google* at [6] per French CJ and Crennan and Kiefel JJ. Evidence that a person has in fact formed an erroneous conclusion is admissible and may be persuasive but is not essential. Such evidence does not itself establish that

conduct is misleading or deceptive within the meaning of the statute. The question whether conduct is misleading or deceptive is objective and the Court must determine the question for itself: see *Taco Bell* at 202 per Deane and Fitzgerald JJ; *Puxu* at 198 per Gibbs CJ.

- (d) Fourth, it is not sufficient if the conduct merely causes confusion: *Taco Bell* at 202 per Deane and Fitzgerald JJ; *Puxu* at 198 per Gibbs CJ and 209-210 per Mason J; *Campomar* at [106]; *Google* at [8] per French CJ, Crennan and Kiefel JJ.

23 Half-truths may be misleading by the insufficiency of information that permits an ordinary or reasonable member of the class of persons to whom the conduct is directed to draw a reasonably open but erroneous conclusion: *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 634; 317 ALR 73 at [46] (Allsop CJ). However, the causing of confusion or questioning is insufficient. It is necessary to establish that the ordinary or reasonable consumer is likely to be led into error: *Campomar Sociedad, Limitada v Nike International Limited* (2000) 202 CLR 45 (*Campomar*) at [106] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

C. AGREED FACTUAL BACKGROUND

24 As already noted, Vanguard admits most of ASIC's allegations. The following summary of the factual background is drawn from the pleadings and the tendered documents.

The Fund

25 In operating the Fund during the relevant period, Vanguard provided financial services for the purposes of Division 2 of Part 2 of the ASIC Act in that the Fund was a registered scheme within the meaning of s 12BAB(1)(d) of the ASIC Act and Vanguard was dealing in financial products within the meaning of s 12BAB(1)(b) of the ASIC Act in that:

- (a) an interest in the Fund was a financial product within the meaning of s 12BAA(7)(b)(i) of the ASIC Act; and
- (b) Vanguard issued interests in the Fund within the meaning of s 12BAB(7)(b) of the ASIC Act.

26 Investors in the Fund included institutional, wholesale and retail investors.

27 ASIC alleges, and Vanguard admits, that at all relevant times the composition of the Fund was based on the Bloomberg Barclays MSCI Global Aggregate SRI Exclusions Float Adjusted Index (**Bloomberg SRI Index**). "SRI" in the name of the Index is an initialism for "Socially

Responsible Investing”. ASIC also alleges, and Vanguard admits, that at all relevant times the Bloomberg SRI Index:

- (a) has been made available to Vanguard by Bloomberg Finance LP or its affiliates (collectively, **Bloomberg**);
- (b) has been compiled, calculated and maintained by Bloomberg;
- (c) has been composed of issuers of securities from four sectors: treasury, government-related, corporate and securitised;
- (d) has been based on a parent index known as the Bloomberg Barclays Global Aggregate Float Adjusted Index (**Bloomberg Parent Index**); and
- (e) has excluded some securities that are contained in the Bloomberg Parent Index, the exclusion based on research and screening against ESG criteria that is performed by MSCI ESG Research LLC or its affiliates (**MSCI**) and provided to Bloomberg for use in the Bloomberg SRI Index.

28 The relationship between the Fund and the Bloomberg SRI Index is more clearly explained in the PDSs issued by Vanguard in respect of units in the Fund. Vanguard issued a separate PDS for each class of units in the Fund, and the PDS issued for each class of units was updated from time to time. Each PDS explained the Fund’s investment strategy. The relevant statements in that section of the PDS are central to the issues in dispute in the proceeding and are reproduced below. For present purposes, it is sufficient to note that the investment strategy deployed by the Fund during the relevant period was to track the Bloomberg SRI Index. As explained in the PDS, the Bloomberg SRI Index is a market value weighted index comprised of global investment grade securities in the form of bonds, which includes government, government-related, corporate and securitised fixed rate bonds from both developed and emerging market issuers. The Fund aims to hold an appropriate number of securities so as to produce a portfolio risk exposure profile consistent with that of the Bloomberg SRI Index. This is achieved by holding a representative sample of securities included in the Bloomberg SRI Index or securities that provide similar characteristics to those securities in the Index.

29 In a response to a notice issued by ASIC under s 912C(1) of the Corporations Act, Vanguard described the development and function of the Bloomberg SRI Index in the following terms:

... the index is a customised index established by Bloomberg Barclays, with input from Vanguard. Vanguard initiated the engagement with Bloomberg Barclays to explore the ESG exclusionary screen options that could be applied to the Bloomberg Index and the

customised index was initially designed by Bloomberg Barclays to support the proposed product Vanguard was seeking to launch (which later became known as the Ethically Conscious Fund).

...

During the research phase for the index underlying the Ethically Conscious Fund, Vanguard identified the screens it wanted to be applied to the Bloomberg Index. Bloomberg Barclays, as the index provider, provided information to Vanguard relating to the screens that were available and how those screens could be applied to the index. Following internal consideration of the options presented by Bloomberg Barclays, Vanguard selected the index that most closely matched its requirements for the Ethically Conscious Fund, as a standard index that met these requirements was not available.

...

Vanguard does not apply any ESG screens at the fund level, screens are only applied by the index provider at the index level.

30 As is apparent from the foregoing, the Bloomberg SRI Index excludes certain securities that are contained in the Bloomberg Parent Index based on screening against ESG criteria. The ESG criteria relate to fossil fuels, alcohol, tobacco, gambling, military weapons, civilian firearms, nuclear power and adult entertainment. MSCI performed the research and screening for the Bloomberg SRI Index.

The ESG screening applied to the Bloomberg SRI Index

31 ASIC alleges, and Vanguard admits, that the research and screening that was performed to create the Bloomberg SRI Index had the following limitations:

- (a) First, 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. This is referred to as the **Entity Limitation**.
- (b) Second, for companies with multiple issuing entities that shared a particular stock exchange “ticker”, the ESG research was not conducted on each such entity. Rather, 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”. This is referred to as the **Ticker Limitation**.
- (c) Third, 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. This is referred to as the **Fossil Fuel Limitation**.

32 ASIC alleges, and Vanguard admits, that 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. ASIC also alleges, and Vanguard admits, that the Bloomberg SRI Index, and the Fund, included securities from issuers that violated applicable ESG criteria, including the securities and issuers identified in schedule 4 of the statement of claim (except for the securities of four issuers that ASIC does not press).

33 In response to a notice issued by ASIC under s 912C of the Corporations Act, Vanguard produced a spreadsheet that provided data regarding the categories, number and market value of the securities (bonds) in the Fund as at 12 February 2021 and 16 February 2021, and the number and market value of those securities that were not subject to ESG screening by MSCI. There is no material difference in the figures as at 12 and 16 February 2021. The figures as at 12 February 2021 are as follows:

Categories	Total no of securities	Total value of securities	No of securities not screened	Value of securities not screened
Corporates	2,169	\$206,591,424	208	\$13,300,387
Government related	988	\$148,706,492	647	\$83,872,897
Treasuries	861	\$597,755,623	861	\$597,755,623
Securitized	467	\$135,130,648	347	\$110,283,509
Total	4485	\$1,088,184,187	2063	\$805,212,416
% of total			46%	74%

34 It can be seen from the above table that, as at 12 February 2021, 46% of the securities held by the Fund were not subject to ESG screening by MSCI, and that those securities amounted to 74% of the market value of the Fund. A much smaller proportion of corporate securities were not screened (approximately 10% by number and 6% by value).

Statements made by Vanguard concerning the ESG screening

35 In this proceeding, ASIC alleges that certain statements made by Vanguard concerning the ESG screening that was applied in respect of the Bloomberg SRI Index were false or misleading. There is no dispute that Vanguard made the statements on which ASIC relied. There is also no dispute that the impugned statements were made in trade or commerce.

36 The first statement on which ASIC relied was the name of the Fund, specifically the words “Ethically Conscious”. As noted earlier, other statements on which ASIC relied were made in the following documents and videos:

- (a) in 12 PDSs that Vanguard issued in 2018 and 2020 in respect of the Fund;
- (b) in a media release that Vanguard issued on or about 30 August 2018 in respect of the Fund;
- (c) in statements that Vanguard published on its website from on or about 11 September 2018 in respect of the Fund;
- (d) in an interview with Rachel White (Product Research and Development Manager, Vanguard) by Jessica Amir of FNN, published on YouTube on or about 14 December 2018; and
- (e) in a presentation that Ms White 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.

37 In general terms, Vanguard admits that the statements it made concerning ESG screening were false or misleading. Further, in respect of all statements other than those contained in the PDSs and published on Vanguard’s website, Vanguard admits that the impugned statements were false or misleading for the reasons alleged by ASIC. However, in respect of the impugned statements contained in the PDSs and published on Vanguard’s website, Vanguard admits that the statements were false or misleading for reasons that are narrower than the reasons alleged by ASIC. In the context of that dispute, it is relevant to refer to all of the statements made by Vanguard concerning ESG screening that ASIC alleges were false or misleading.

The PDS statements

38 Vanguard issued the following PDSs for the Fund on or about the date of each PDS: a PDS dated 7 August 2018 for the AUD class of units; a PDS dated 7 August 2018 for the NZD class of units; a PDS dated 31 August 2018 for the ETF class of units; a PDS dated 1 November 2018

for the AUD class of units; a PDS dated 1 November 2018 for the NZD class of units; a PDS dated 1 November 2018 for the ETF class of units; a PDS dated 1 July 2020 for the AUD class of units; a PDS dated 1 July 2020 for the NZD class of units a PDS dated 1 July 2020 for the ETF class of units; a PDS dated 10 July 2020 for the AUD class of units; a PDS dated 10 July 2020 for the NZD class of units; and a PDS dated 10 July 2020 for the ETF class of units.

39 Each PDS contained slightly different wording, but the differences are not material for present purposes. It is sufficient to refer to the PDS dated 7 August 2018 for the AUD class of units (**August 2018 AUD PDS**).

40 The August 2018 AUD PDS was 8 pages long. It contained information under the following nine headings: About Vanguard Investments Australia Ltd; How the Vanguard Ethically Conscious Global Aggregate Bond Index Fund (Hedged) – AUD Hedged works; Benefits of investing in the Vanguard Ethically Conscious Global Aggregate Bond Index Fund (Hedged) – AUD Hedged; Risks of managed investment schemes; How we invest your money; Fees and costs; How managed investment schemes are taxed; How to apply; and Other Information.

41 Only one of the nine categories of information concerned ESG screening. That was category five headed “How we invest your money”. The August 2018 AUD PDS contained the following statements (emphasis added):

Investment strategy and investment return objective

The Fund seeks to track the return of the Bloomberg Barclays MSCI Global Aggregate SRI Exclusions Float Adjusted Index hedged into Australian dollars (AUD) before taking into account fees, expenses and tax.

The Bloomberg Barclays MSCI Global Aggregate SRI Exclusion Float Adjusted hedged into AUD index is a market value weighted index comprised of global investment grade securities (bonds). This includes government, government-related, corporate and securitised fixed rate bonds from both developed and emerging market issuers. **The index excludes companies with significant business activities involving fossil fuels, alcohol, tobacco, gambling, military weapons and civilian firearms, nuclear power and adult entertainment. Details on the benchmark methodology can be accessed by visiting Bloomberg Barclays at www.bloomberg.com.**

The Fund aims to hold an appropriate number of securities so as to produce a portfolio risk exposure profile consistent with that of the index. This is achieved by holding a representative sample of securities included in the index or securities that provide similar characteristics to those securities in the index. Security weightings in the Fund may vary from the index weightings. The Fund may gain exposure to securities directly or through interests in other funds, such as exchange traded funds.

...

Strategic asset allocation	International fixed interest (Hedged to AUD) 100%
Minimum suggested investment timeframe	Five years
Summary risk level	Moderate – relatively stable returns, with a potential for loss of capital over shorter time periods.
Who it may suit	Investors seeking exposure to a diversified portfolio of international fixed interest securities with an ethically conscious screen that is relatively unaffected by currency fluctuations.

...

Environmental, social, and ethical considerations

Vanguard does not take into account labour standards, environment, social or ethical considerations when selecting, retaining or realising investments in the Fund to track the performance of the benchmark index. **Vanguard has engaged Bloomberg Barclays to provide an index of securities for the Fund that excludes companies with significant business activities involving fossil fuels, alcohol, tobacco, gambling, military weapons and civilian firearms, nuclear power and adult entertainment.**

The Vanguard Group, Inc. has established a formal procedure for identifying and monitoring portfolio companies, for example, whose direct involvement in crimes against humanity or patterns of egregious abuses of human rights would warrant engagement or potential divestment.

The Vanguard Group, Inc. is also a signatory to the Principles for Responsible Investment (PRI).

- 42 ASIC placed particular reliance on the statements highlighted in bold type above. Vanguard does not dispute that the highlighted statements were inaccurate. As noted earlier, the ESG screening that was applied to create the Bloomberg SRI Index did not screen all companies the securities for which were included in the Bloomberg Parent Index. The relevant screening was subject to the Ticker, Entity and Fossil Fuels Limitations. Vanguard does dispute, however, that the highlighted statements, when read in context, conveyed a representation that the ESG screening that was applied to the Bloomberg Parent Index to create the Bloomberg SRI Index screened all securities, including bonds issued by governments or government owned entities. Rather, Vanguard admits that the above statements in the PDS conveyed representations that:
- (a) the Fund offered an ethically conscious investment opportunity and the Fund did this by seeking to track the return of the Index;

- (b) before being included in the Index, and therefore the Fund, securities issued by companies were researched and screened against applicable ESG criteria; and
- (c) securities issued by companies that violated applicable ESG criteria were excluded from the Index and therefore the Fund,

and admits that those representations were false or misleading.

43 Whether the statements in the PDSs conveyed that all securities in the Bloomberg SRI Index, and therefore the Fund, were screened against ESG criteria, or only that securities issued by companies were screened, is the central issue in dispute between the parties with respect to liability.

44 It is also relevant to note the highlighted statement: “Details on the benchmark methodology can be accessed by visiting Bloomberg Barclays at www.bloomberg.com”. As discussed below, the Bloomberg website contained a “fact sheet” describing the methodology used to create the Bloomberg SRI Index. The first such fact sheet was dated 31 July 2018 and the second was dated 15 July 2020. In this proceeding, ASIC does not allege that Vanguard incorporated the statements made in the fact sheets by reference, nor that Vanguard made the statements in the fact sheets. Rather, ASIC alleges, and Vanguard admits (save in respect of one PDS that did not cross-refer to the Bloomberg website), that the fact sheets “provided context for the representations in the PDSs”. The meaning and significance of that allegation and admission is discussed further below.

Media Release statements

45 Vanguard issued a media release in respect of the launch of the Fund on or about 30 August 2018. ASIC relied on the following statements appearing in the media release:

Vanguard offers investors greater choice with suite of ethically conscious funds

30 August 2018

Vanguard Australia has announced the launch of a range of Environmental, Social and Governance (ESG) funds, providing greater choice for investors who wish to reflect their values in their investment holdings.

The Vanguard Ethically Conscious International Shares Index Fund and Vanguard Ethically Conscious Global Aggregate Bond Index Fund will offer investors access to broadly diversified international equities and international fixed income exposures that exclude fossil fuel reserves, alcohol, tobacco, gambling, weapons, nuclear power and adult entertainment. The new managed funds are available to investors now and will be offered as exchange traded funds (ETFs) from September 2018.

...

Evan Reedman, Vanguard Australia’s Head of Product and Marketing, said Vanguard was committed to offering greater choice to investors while maintaining broad diversification at a low cost.

“We understand that some investors want products that allow them to achieve their investment objectives while also investing in line with their values. We are pleased to be offering ESG equities and fixed income funds that meet this need while maintaining the hallmarks of Vanguard funds, low cost and broad diversification,” Mr Reedman said.

The funds add to Vanguard Australia’s existing ESG offering, joining the Vanguard International Shares Select Exclusions Index Fund that was launched in November 2016.

“We have been offering screened ESG products internationally for almost 20 years and are excited to be able to provide more choice for Australian investors while leveraging our global scale and investment management expertise,” Mr Reedman said.

The Vanguard Ethically Conscious International Shares Index Funds track the FTSE Developed ex Australia ex Non-Renewable Energy/Vice Products/Weapons Index, while the Vanguard Ethically Conscious Global Aggregate Bond Index Funds track the Bloomberg Barclays MSCI Global Aggregate ex SRI Exclusions Index hedged to Australian dollars.

46 There is no dispute between the parties as to the effect of the statements made in the media release. Vanguard admits that the impugned statements conveyed representations that:

- (a) the Fund offered an ethically conscious investment opportunity and the Fund did this by tracking the Index;
- (b) before being included in the Bloomberg SRI Index, and therefore the Fund, securities were researched and screened against applicable ESG criteria; and
- (c) securities that violated applicable ESG criteria were excluded or removed from the Index and therefore the Fund,

and admits that those representations were false or misleading.

Website statements

47 From about 11 September 2018, Vanguard’s website contained information concerning the Fund. ASIC relied on the following statements that appeared on Vanguard’s website between September 2018 and May 2020 (emphasis added):

Investment objective

Vanguard Ethically Conscious Global Aggregate Bond Index (Hedged) ETF seeks to track the return of the Bloomberg Barclays MSCI Global Aggregate SRI Exclusions Float Adjusted Index Hedged into Australian dollars before taking into account fees, expenses and tax.

Fund Overview

The ETF provides low cost exposure to high-quality, income-generating securities issued by governments, government-owned entities, government-guaranteed entities, investment-grade corporate issues and securitised assets from around the world. **The ETF excludes companies with significant business activities involving fossil fuels, alcohol, tobacco, gambling, military weapons and civilian firearms, nuclear power and adult entertainment.**

Suitability

Investors seeking exposure to a diversified portfolio of international fixed interest securities that is relatively unaffected by currency fluctuations and excludes securities associated with fossil fuels, alcohol, tobacco, gambling, military weapons and civilian firearms, nuclear power and adult entertainment.

48 ASIC placed particular reliance on the statements highlighted in bold type above. As can be seen, the statements are materially the same as appeared in the PDSs. As for the equivalent statements in the PDSs, Vanguard disputes that the highlighted statements, when read in context, conveyed a representation that the ESG screening that was applied to the Bloomberg Parent Index to create the Bloomberg SRI Index screened all securities, including bonds issued by governments or government owned entities. Vanguard made the same admissions as in respect of the equivalent statements in the PDSs.

49 ASIC also relied on the following statements that appeared on Vanguard's website from June 2020 (emphasis added):

Investment objective

Vanguard Ethically Conscious Global Aggregate Bond Index (Hedged) ETF seeks to track the return of the Bloomberg Barclays MSCI Global Aggregate SRI Exclusions Float Adjusted Index Hedged into Australian dollars before taking into account fees, expenses and tax.

Fund Overview

The ETF provides low cost exposure to high-quality, income-generating securities issued by governments, government-owned entities, government-guaranteed entities, investment-grade corporate issues and securitised assets from around the world. **The ETF excludes companies with significant business activities involving fossil fuels, nuclear power, alcohol, tobacco, gambling, weapons, adult entertainment and conduct related screens based on severe controversies.**

Suitability

Investors seeking exposure to a diversified portfolio of international fixed interest securities that is relatively unaffected by currency fluctuations, and excludes companies with significant business activities involving fossil fuels, nuclear power, alcohol, tobacco, gambling, weapons, adult entertainment and conduct related screens based on severe controversies.

50 Again, ASIC placed particular reliance on the statements highlighted in bold type above. As can be seen, the statements are materially the same as appeared in the PDSs. The final statement

under the heading “suitability” differs from the earlier website version. The earlier website version refers to the exclusion of “securities” while the later website version refers to the exclusion of “companies”.

FNN interview statements published on YouTube

51 Rachel White, Product Research and Development Manager at Vanguard, was interviewed by Jessica Amir of FNN. The interview was published on YouTube on or about 14 December 2018. ASIC relied on the following statements that were made by Ms White during the interview:

Ms Amir: What can you tell us about the Vanguard Ethically Conscious international shares index fund and its ETF?

Ms White: So the ethically conscious range was built around three key categories, and the fund screens out companies involved in these three categories. The first is non-renewable energy, so that’s things like nuclear power and fossil fuels. The second is vice products, so alcohol, gambling, adult entertainment and then the final screen is around weapons, so firearms and controversial weapons. And, these are issues that when we surveyed our clients and we went out and did research with individual investors and intermediary investors, they said mattered to them. And, we believe mattered to a broad set of Australian investors.

...

Ms Amir: Thanks Rachel. And also in the range you’ve got the global aggregate bond index fund and ETF?

Ms White: Exactly. So we’ve got the global aggregate bond fund which is part of our ethically conscious range and applies the same screening methodology as the international shares fund providing access to bonds across the globe at our hallmark investment characteristics of diversified, broad and low cost.

52 There is no dispute between the parties as to the effect of the foregoing statements. Vanguard admits that the impugned statements conveyed representations that:

- (a) the Fund offered an ethically conscious investment opportunity and the Fund did this by tracking the Index;
- (b) before being included in the Bloomberg SRI Index, and therefore the Fund, securities were researched and screened against applicable ESG criteria; and
- (c) securities that violated applicable ESG criteria were excluded or removed from the Index and therefore the Fund,

and admits that those representations were false or misleading.

FNN presentation statements published on the FNN website

53 Ms White also gave a presentation at an FNN Fund Manager event on or about 5 December 2018. A video of the presentation was published on the FNN website on or about 14 December 2018. ASIC relied on the following statements that were made by Ms White during the presentation:

So Vanguard’s Australian ESG offering – so we have recently launched two new funds, and they’re offered both as funds and as ETFs to give investors choice based on their preferred access method.

The funds apply screens, or they exclude stocks, associated with these three categories: so the first is non-renewable energy, so that is screening out stocks that are involved with fossil fuels and nuclear power. The second category is vice products, so adult entertainment, tobacco, gambling, alcohol. And, then finally weapons, controversial weapons, firearms. And the way that we came about this list was doing a lot of primary research, so we went out to our investors and we asked them what issues do they care about and do they not want to invest in. ESG can be quite personal and quite individual, so we’re not going to be able to meet the needs of absolutely everyone, but we found these to be a really broad section of categories that a large proportion of Australian investors do care about.

...

So, these are the two funds, so we have an ethically conscious international shares index fund ...

The second offering is the Vanguard ethically conscious global aggregate bond fund ...

54 ASIC also relied on the following statements that were contained in an accompanying overhead slide presentation that was also published on the FNN website:

Our Ethically Conscious Funds apply nine screens across three categories

Non-Renewable energy

- Fossil fuels
- Nuclear power

Vice Products

- Adult entertainment
- Alcohol
- Gambling
- Tobacco

Weapons

- Controversial weapons eg cluster munitions
- Conventional military weapons

- Firearms

...

Vanguard Ethically Conscious Global Aggregate Bond Index Fund (Hedged)

Broad and diversified exposure to over 18,000 bonds, screening out approximately 2,500 bonds from the broad market index

55 The statements appearing on the overhead slides were not in evidence, but were not disputed by Vanguard.

56 Again, there is no dispute between the parties as to the effect of the foregoing statements. Vanguard admits that the impugned statements conveyed representations that:

- (a) the Fund offered an ethically conscious investment opportunity and the Fund did this by tracking the Index;
- (b) before being included in the Bloomberg SRI Index, and therefore the Fund, securities were researched and screened against applicable ESG criteria; and
- (c) securities that violated applicable ESG criteria were excluded or removed from the Index and therefore the Fund,

and admits that those representations were false or misleading.

Bloomberg fact sheets

57 Bloomberg published on its website a “fact sheet” containing information about the composition of the Bloomberg SRI Index. The first such fact sheet was dated 31 July 2018 and the second was dated 15 July 2020.

58 As noted earlier, although the PDSs for the Fund published by Vanguard stated that details concerning the “benchmark methodology” could be accessed from the Bloomberg website, ASIC does not allege that Vanguard incorporated the statements made in the fact sheets into its PDSs by reference, nor that Vanguard made the statements in the fact sheets. Rather, ASIC alleges, and Vanguard admits, that the fact sheets “provided context for the representations in the PDSs”.

59 Relevantly, the 31 July 2018 fact sheet commenced with the following statement:

The Bloomberg Barclays MSCI Global Aggregate SRI Exclusions Float-Adjusted Index is a multi-currency benchmark that includes investment grade treasury, government-related, corporate and securitized fixed-rate bonds from both developed and emerging markets issuers. The index follows the same general criteria as the Bloomberg Barclays Global Aggregate Float-Adjusted Index, but removes issuers with

evidence of owning fossil fuel reserves or are involved in certain controversial business lines. ...

60 The 15 July 2020 fact sheet contained a similar statement.

61 Under the heading “Rules for inclusion”, the 31 July 2018 fact sheet included a lengthy table which commenced with the following entries:

Sector	Treasury, government-related, corporate, and securitized bonds are included.	
Business involvement screening	Adult Entertainment	Excludes all issuers classified as adult entertainment producers that earn more than 5% in revenue, or more than \$500 million in revenue, from adult entertainment materials
	Alcohol	Excludes all issuers classified as alcohol producers that earn more than 5% in revenue, or more than \$500 million in revenue, from alcohol-related products.
	Gambling	Excludes all issuers classified as involved in gambling operations or support that earn more than 5% in revenue, or more than \$500 million in revenue, from gambling-related activities.
	Tobacco	Excludes all issuers classified as tobacco producers or distributors, retailers, or suppliers that derive 15% or more of their revenue from tobacco-related products
	Military Weapons	Excludes all issuers classified as involved in manufacturing of nuclear weapons, nuclear weapons components, chemical and biological weapons components, or depleted uranium weapons. Excludes all issuers that earn more than 5% in revenue, or more than \$500 million, from manufacturing conventional weapons, conventional weapons components, or conventional weapons support systems and services.

	Civilian Firearms	Excludes all issuers classified as civilian firearms producers or retailers that derive 5% or more of their revenue, or more than \$20 million in revenue, from civilian firearms-related products
	Nuclear Power	Excludes all issuers classified as nuclear utilities or involved in uranium mining, designing nuclear reactors, or enrichment of fuel for nuclear reactors. Excludes all issuers that earn 15% or more revenues as a supplier to the nuclear power industry.
Fossil Fuel Exclusions		This index excludes issuers with evidence of owning fossil fuel reserves regardless of their industries, including companies that own less than 50% of a reserves field. Fossil reserves are defined as proved and probable reserves (i.e., 2P) for coal and proved reserves (i.e., 1P) for oil and natural gas. Evidence of owning reserves includes companies providing the exact volume of reserves, and companies making a statement about their ownership of reserves.

62 The 15 July 2020 fact sheet was framed in a different manner. It contained a separate table headed “Environment, Social, and Governance (ESG) Rules”. The table comprised two sections titled “Business Involvement Screening” and “ESG Controversy”. In respect of “Business Involvement Screening”, the table referred to “all companies” involved in specified ways in the adult entertainment, alcohol, gambling, tobacco, controversial weapons, conventional weapons, nuclear weapons, civilian firearms, nuclear power and fossil fuel industries. In respect of “ESG Controversy”, the table referred to “all issuers” involved in one or more “very severe ESG Controversies” according to an MSCI score which measures an issuer’s involvement in major ESG controversies.

Changes made by Vanguard from mid-February 2021

63 It is common ground that, from mid-February 2021, Vanguard altered the wording of its PDSs for the units in the Fund and its website to correct the misleading statements. ASIC placed reliance on the altered wording in support of its case and the principal issue in dispute. While it is appropriate to record the alterations made by Vanguard, the alterations do not assist in

resolving the principal issue in dispute: what was conveyed by the impugned statements in Vanguard’s PDSs and on its website prior to their alteration.

64 On 17 and 18 February 2021, Vanguard issued new PDSs (including a supplementary PDS for the ETF class of units) which, in the section headed “How we invest your money”, contained statements in the following or similar form (emphasis added):

Investment strategy and investment return objective

The Fund seeks to track the return of the Bloomberg Barclays MSCI Global Aggregate SRI Exclusions Float Adjusted Index hedged into Australian dollars (AUD) before taking into account fees, expenses and tax.

The Bloomberg Barclays MSCI Global Aggregate SRI Exclusion Float Adjusted Index hedged into Australian dollars (AUD) is a market value weighted index comprised of global investment grade securities (bonds). This includes government, government-related, corporate and securitised fixed rate bonds from both developed and emerging market issuers. **The Index provider screens public companies to check for ties to fossil fuels, nuclear power, alcohol, tobacco, gambling, weapons and adult entertainment as well as conduct related screens based on severe controversies, so that they can be excluded from the Fund. Investors should be aware that the Index provider’s screening process does not review government bonds, securitised fixed rate bonds and some company structures, particularly government related corporations and non-listed companies, for ties to these business activities.**

Bonds issued by these non-screened entities may still be contained in the Fund. Details on the benchmark methodology can be accessed by visiting Bloomberg Barclays at www.bloomberg.com/professional/product/indices/bloomberg-barclays-indices-factsheets-publications/.

Warning: Vanguard has elected to amend the above information having recently discovered that some entity structures, including non-listed companies, are not excluded by the screens applied by the index provider. As a consequence, we have updated this index information whilst we continue to investigate the level of exposure the Fund has to securities with ties to fossil fuels, nuclear power, alcohol, tobacco, gambling, weapons and adult entertainment. Where further information becomes available, we will provide any updated information on our website or otherwise by way of a reissue of the PDS.

The Fund aims to hold an appropriate number of securities so as to produce a portfolio risk exposure profile consistent with that of the index. This is generally achieved by holding a representative sample of securities included in the index or securities that provide similar characteristics to those securities in the index. Security weightings in the Fund may vary from the index weightings. The Fund may exclude certain securities that are included in the index or may invest in securities that have been or are expected to be included in the index. The Fund may gain exposure to securities directly or through interests in other funds, such as exchange traded funds.

...

Strategic asset allocation*	International fixed interest (Hedged to AUD) 100%
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Minimum suggested investment timeframe	Five years
Summary risk level	Medium – The potential for relatively higher returns than lower risk investments with the potential for some loss of capital over the medium term
Who it may suit	Investors seeking exposure to a diversified portfolio of international fixed interest securities with an ethically conscious screen that is relatively unaffected by currency fluctuations.

...

Environmental, social, and ethical considerations

Vanguard does not take into account labour standards, environment, social or ethical considerations when selecting, retaining or realising investments in the Fund to track the performance of the benchmark index. Vanguard has engaged Bloomberg Barclays to provide an index of securities for the Fund that excludes companies with significant business activities involving fossil fuels, nuclear power, alcohol, tobacco, gambling, weapons, adult entertainment and conduct related screens based on severe controversies.

The Vanguard Group, Inc. has established a formal procedure for identifying and monitoring portfolio companies, for example, whose direct involvement in crimes against humanity or patterns of egregious abuses of human rights would warrant engagement or potential divestment.

The Vanguard Group, Inc. is also a signatory to the Principles for Responsible Investment (PRI).

65 The statements highlighted in bold type are the alterations made by Vanguard to disclose more fully the limitations to the ESG screening performed by MSCI. The altered statements are relatively clear in their terms. As already noted, however, the altered statements do not assist in determining what was conveyed by the statements made in earlier PDSs. It should also be noted that statements relied upon by ASIC in earlier PDSs were retained by Vanguard in the amended PDSs without criticism by ASIC. In particular, the following statements were not amended:

- (a) the statement opposite the heading “Who it may suit”: Investors seeking exposure to a diversified portfolio of international fixed interest securities with an ethically conscious screen that is relatively unaffected by currency fluctuations; and
- (b) the statement under the heading “Environmental, social, and ethical considerations”: Vanguard has engaged Bloomberg Barclays to provide an index of securities for the Fund that excludes companies with significant business activities involving fossil fuels,

nuclear power, alcohol, tobacco, gambling, weapons, adult entertainment and conduct related screens based on severe controversies.

66 On or about 12 March 2021, Vanguard amended its website to include the following statement:

Investors should be aware that the index methodology only screens the securities of issuers that are researched by MSCI. The screening process does not review government securities, and certain securitised assets and company structures, particularly government related corporations and non-listed companies. Accordingly, securities issued by non-screened entities may also be contained in the Index that is tracked by the ETF.

D. ADMITTED CONTRAVENTIONS AND ISSUES IN DISPUTE

67 The parties' pleadings were subject to amendment made informally by the filing of the Joint List of Issues in Dispute. The following summary of the allegations made by ASIC and admitted by Vanguard in the proceeding takes account of those amendments.

68 ASIC alleges that, during the relevant period, each PDS in respect of units in the Fund and Vanguard's website, conveyed the following representations:

- (a) that the Fund offered an ethically conscious investment opportunity and the Fund did this by seeking to track the Bloomberg SRI Index;
- (b) that before being included in the Bloomberg SRI Index, and therefore the Fund, securities were researched and screened against applicable ESG criteria; and
- (c) that securities that violated applicable ESG criteria were excluded or removed from the Bloomberg SRI Index and therefore the Fund.

69 ASIC also alleges that the media release issued in respect of the launch of the Fund, the FNN interview published on YouTube and the FNN presentation published on the FNN website conveyed the same representations save that the FNN interview and the FNN presentation did not refer to the Bloomberg SRI Index.

70 ASIC alleges that the foregoing representations were misleading because:

- (a) the research and screening for the Bloomberg SRI Index, and therefore the Fund, had the Entity, Ticker and Fossil Fuel Limitations;
- (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.

71 Vanguard admits ASIC's allegations in their entirety in so far as they relate to the media release issued in respect of the launch of the Fund, the FNN interview published on YouTube and the FNN presentation published on the FNN website.

72 Vanguard admits ASIC's allegations in part in so far as they relate to the PDSs in respect of units in the Fund and its website during the relevant period. Vanguard admits that the PDSs and the website conveyed the following representations:

- (a) the Fund offered an ethically conscious investment opportunity and the Fund did this by seeking to track the return of the Bloomberg SRI Index;
- (b) before being included in the Bloomberg SRI Index, and therefore the Fund, securities issued by companies were researched and screened against applicable ESG criteria; and
- (c) securities issued by companies that violated applicable ESG criteria were excluded from the Bloomberg SRI Index and therefore the Fund.

73 It can be seen that the point of difference between ASIC's allegations and Vanguard's admissions in respect of the impugned statements in Vanguard's PDSs and on its website is that Vanguard does not admit that those materials conveyed representations that all securities included in the Bloomberg SRI Index and the Fund were screened against ESG criteria. Vanguard contends that those materials conveyed that only securities issued by companies were screened against ESG criteria. Notwithstanding that disputed issue, Vanguard admits that the representations conveyed by the impugned statements in its PDSs and on its website were misleading for the reasons alleged by ASIC, namely that:

- (a) the research and screening for the Bloomberg SRI Index, and therefore the Fund, had the Entity, Ticker and Fossil Fuel Limitations (which meant that not all securities issued by companies 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.

74 Save for the single issue in dispute between ASIC and Vanguard, I am satisfied on the admissions that have been made and the evidence that has been filed that ASIC has established the contraventions admitted by Vanguard.

75 The Joint List of Issues in Dispute filed by the parties stated that the parties agreed that the following four issues were in dispute with respect to matters of liability:

- (a) **(Issue 1)** whether, in respect of the alleged representations contained in the PDS dated 31 August 2018 for the ETF class of units, the fact sheets published on the Bloomberg website provided context;
- (b) **(Issue 2)** whether during the relevant period each PDS and Vanguard’s website conveyed:
 - (i) that before being included in the Bloomberg SRI Index and therefore the Fund, *securities* were researched and screened against applicable ESG criteria, and that *securities* that violated such criteria were excluded or removed from the Bloomberg SRI Index and therefore the Fund (ASIC’s position); or
 - (ii) that before being included in the Bloomberg SRI Index and therefore the Fund, *securities issued by companies* were researched and screened against applicable ESG criteria, and that *securities issued by companies* that violated such criteria were excluded or removed from the Bloomberg SRI Index and therefore the Fund (Vanguard’s position);
- (c) **(Issue 3)** whether the purpose and effect of the amendments made to the PDSs in about February 2021 and to Vanguard’s website in about 12 March 2021:
 - (i) was to *warn* investors about the Entity Limitation (ASIC’s position); or
 - (ii) was to *disclose* the Entity Limitation to investors (Vanguard’s position).
- (d) **(Issue 4)** whether, from on or about 9 April 2021 and in order to address the Ticker Limitation:
 - (i) Vanguard transitioned to bond-level mapping of ESG data in order to address the Ticker Limitation (ASIC’s position); or
 - (ii) Bloomberg (and as a consequence, Vanguard) transitioned to bond-level mapping of ESG data (Vanguard’s position).

76 The parties were in error to describe all of the four issues as being issues in dispute with respect to matters of liability. Only issue 2 is an issue in dispute with respect to liability.

77 Issue 1 merely raises a question concerning the evidentiary relevance of the Bloomberg fact sheets to the assessment of the statements contained in the PDS dated 31 August 2018 for the ETF class of units. That specific issue has barely any relevance in the proceeding, although it

will be necessary to consider the Bloomberg fact sheets, and ASIC's submission that the fact sheets are "context" for the statements contained in the PDSs and on Vanguard's website, when considering issue 2.

78 Neither issue 3 nor issue 4 raises a matter that requires determination in connection with liability. Both concern events that occurred after the alleged and admitted period of contravention. If the issues are relevant at all, they would only be relevant to matters of relief. Furthermore, the issues do not raise any dispute with respect to questions of primary fact. The dispute merely concerns the adjectival characterisation of the facts.

E. DETERMINATION OF THE ISSUE IN DISPUTE

ASIC's submissions

79 ASIC contends that, when read in context, the PDSs issued in respect of units in the Fund and Vanguard's website conveyed a representation that all securities that were included in the Bloomberg SRI Index, and thereby the Fund, were researched and screened against the applicable ESG criteria, and that all such securities that violated the applicable ESG criteria were excluded or removed from the Index and therefore the Fund. ASIC advanced the following submissions in support of that contention.

80 First, ASIC submitted that a central representation in the PDSs is to the following effect (quoting from the August 2018 AUD PDS):

The Bloomberg Barclays MSCI Global Aggregate SRI Exclusion Float Adjusted hedged into AUD index is a market value weighted index comprised of global investment grade securities (bonds). This includes government, government-related, corporate and securitised fixed rate bonds from both developed and emerging market issuers. The index excludes companies with significant business activities involving fossil fuels, alcohol, tobacco, gambling, military weapons and civilian firearms, nuclear power and adult entertainment. Details on the benchmark methodology can be accessed by visiting Bloomberg Barclays at www.bloomberg.com.

81 ASIC submitted that the PDSs refer to four categories of "issuers" and then immediately state that: "The index excludes companies ...". ASIC argued that this "verbal sequencing", absent other words warning that a distinction is being drawn, conveys that the words "issuer" and "company" are used interchangeably. The absence of other words informing the reader that "companies" is a sub-set of "issuers" is a relevant silence comprising the context in which the meaning of the representations is to be construed.

82 In support of that submission, ASIC referred to the amendments made to the PDSs by Vanguard from February 2021 and submitted that, by the amendments, Vanguard acknowledged the significance of the failure to warn readers that “companies” is a sub-set of “issuers”.

83 ASIC advanced the same submissions in respect of Vanguard’s website which contained materially the same statements as extracted above from the August 2018 AUD PDS.

84 Second, ASIC submitted that the PDSs included other important statements conveying that the ESG screening was complete, rather than partial, thereby undermining the notion that the change in terminology to “companies” expresses a limitation in the scope of the screening. In particular, the PDSs, under the heading “*Who it [the Fund] may suit*” stated that the Fund may suit:

Investors seeking exposure to a diversified portfolio of global fixed interest securities with an ethically conscious screen that is relatively unaffected by currency fluctuations.

85 ASIC argued that, again, there was no indication in that sentence that the “ethically conscious screen” applied only to some of the securities in the Fund. To the contrary, the natural reading of the sentence is that the ethically conscious screen applied to the whole portfolio of securities.

86 In respect of Vanguard’s website, ASIC submitted that, from 11 September 2018 to June 2020, the website contained the following statement under the heading “Suitability”:

Investors seeking exposure to a diversified portfolio of international fixed interest securities that is relatively unaffected by currency fluctuations, and excludes securities associated with fossil fuels, alcohol, tobacco, gambling, military weapons and civilian firearms, nuclear power and adult entertainment.

87 ASIC argued that the statement conveys that the whole portfolio excludes securities associated with fossil fuels, alcohol, tobacco, gambling, military weapons and civilian firearms, nuclear power and adult entertainment.

88 Third, ASIC submitted that the PDSs (except the ETF PDS dated 31 August 2018) referred readers to Bloomberg’s website for “[d]etails on the benchmark methodology” or “further information regarding the index methodology”, and thereby directed readers to the Bloomberg fact sheets concerning the Bloomberg SRI Index published on Bloomberg’s website. ASIC argued that the 31 July 2018 fact sheet reinforced the message that the “ethically conscious screen” applied to all issuers of securities and not only corporate issuers or a subset of corporate issuers. ASIC referred to the following statement in the 31 July 2018 fact sheet:

The index follows the same general criteria as the Bloomberg Barclays Global Aggregate Float-Adjusted Index, but removes issuers with evidence of owning fossil fuel reserves or are involved in certain controversial business lines.

89 ASIC also submitted that the 31 July 2018 fact sheet states, under the heading “Rules for Inclusion”, that “Treasury, government-related, corporate, and securitized bonds are included” and then provided the details of the “Business Involvement Screening” rules and “Fossil Fuel Exclusions”. In each case, the description of the rule commences with the words “Excludes all issuers” with no reference to “companies”.

90 ASIC submitted that the 15 July 2020 fact sheet similarly states:

The index follows the same general criteria as the Bloomberg Barclays Global Aggregate Float-Adjusted and Scaled Index, but removes issuers with evidence of owning fossil fuel reserves or are involved in certain controversial business lines. The index also excludes issuers with very severe ESG Controversies or Red Flags.

91 ASIC acknowledged that, under the heading “Environment, Social, and Governance (ESG) Rules”, the 15 July 2020 fact sheet describes the exclusions using the words “all companies”. However, ASIC maintained its submission that the use of the words “all companies” was not sufficient to alert readers to the fact that not all securities in the Fund were screened.

92 Fourth, ASIC submitted that the title and description of the Fund as “Ethically Conscious” conveyed the message that all securities in the Fund, and not a subset of securities (being securities issued by companies), was the subject of ESG research and screening.

93 Fifth, ASIC submitted that the statements made in the media release issued in respect of the launch of the Fund, the FNN interview published on YouTube and the FNN presentation published on the FNN website also provided context for the impugned statements made in the PDSs and on Vanguard’s website and reinforced the message that all securities in the Fund, and not only a subset of those securities being securities issued by “companies”, were subject to ESG screening.

Consideration of ASIC’s submissions

94 I do not accept ASIC’s contention. In the relevant period, the PDSs issued in respect of units in the Fund and Vanguard’s website stated in clear terms that the Fund comprised bonds issued by governments, government related entities and companies, but the ESG screening was applied only to companies. The submissions advanced by ASIC in support of its contention that the PDSs and the website conveyed a representation that ESG screening was applied to all securities are strained and, in some instances, conceptually flawed as discussed below.

95 ASIC’s submissions correctly commence with the impugned statements in Vanguard’s PDSs and on its website, but the conclusion it urges cannot be accepted. Section five of the PDSs are headed “How we invest your money”. The PDSs states in clear terms that:

- (a) the Fund seeks to track the return of the Bloomberg SRI Index (hedged into Australian dollars);
- (b) the Bloomberg SRI Index is a market value weighted index comprised of global investment grade securities (bonds) which includes government, government-related, corporate and securitised fixed rate bonds from both developed and emerging market issuers; and
- (c) the Bloomberg SRI Index excludes companies with significant business activities involving fossil fuels, alcohol, tobacco, gambling, military weapons and civilian firearms, nuclear power and adult entertainment.

96 Statements to that effect appear twice in section five of the PDSs. They appear first under the sub-heading “Investment strategy and investment return objective”, and are repeated under the sub-heading “Environmental, social, and ethical considerations”.

97 The relevant statements on the website are stated in equally clear terms:

- (a) the Fund provides exposure to high-quality, income-generating securities issued by governments, government-owned entities, government-guaranteed entities, investment-grade corporate issues and securitised assets from around the world; and
- (b) the Fund excludes companies with significant business activities involving fossil fuels, alcohol, tobacco, gambling, military weapons and civilian firearms, nuclear power and adult entertainment.

98 ASIC’s submission rests on a foundational argument that because the words “issuers” and “companies” are used in the same paragraph, an ordinary and reasonable reader would understand them to be interchangeable and carry the same meaning. That submission needs only to be stated to be rejected.

99 The present question concerns the meaning of the words as would be understood by an ordinary member of the public who is considering an investment in the Fund. The legal presumption in statutory and contractual construction that the use of different words within a relevant text usually conveys a different meaning has no direct application. However, the common sense that underlies that legal presumption has considerable force. As Vanguard correctly submitted,

the relevant statements in the PDSs and on the website draw an immediate distinction between the four categories of issuers of bonds which are included in the Bloomberg SRI Index and the bonds which are screened, being those issued by companies which engage in significant business activities that breach the applicable ESG criteria.

100 The change in terminology from “issuers” to “companies” was not, as ASIC submitted, misleading by silence or a half-truth. It was a complete truth in the sense that the ESG screening was limited to companies and did not extend to governments or government related entities. Vanguard has admitted that the ESG screening did not apply to all companies included in the Bloomberg SRI Index and the Fund, and for that reason the PDSs and the website contained misleading statements, but that is a separate matter. What is clear from the PDSs and the website is that the ESG screening did not go beyond companies.

101 In its submissions, ASIC sought to support its contention by reference to a range of contextual considerations. The matters relied on by ASIC do not change the clear meaning conveyed by the central statements in the PDSs and on the website. Some of the matters relied on by ASIC are not truly matters of relevant context in any event.

102 First, ASIC sought to place reliance on the amendments made by Vanguard to its PDSs and website from February 2021. The amendments do not assist ASIC’s argument. The question is whether the statements made in the relevant period were misleading. The fact that Vanguard chose, from February 2021, to make more extensive disclosures about the ESG screening that was applied in the compilation of the Bloomberg SRI Index does not necessitate any conclusion that the earlier disclosures conveyed the representation alleged by ASIC (that screening was applied to all securities in the Index).

103 Second, ASIC sought to place reliance on the “suitability” statements contained in the PDSs and on the website. Perversely, ASIC’s argument requires those statements to be read out of context. On their terms, the “suitability” statements are not purporting to describe the parameters of the ESG screening that is applied to the Blomberg SRI Index. They are broad statements as to the nature of the Fund. In the PDSs, the statement is to the effect that the Fund is suitable for investors “seeking exposure to a diversified portfolio of global fixed interest securities with an ethically conscious screen that is relatively unaffected by currency fluctuations”. The phrase “ethically conscious screen” does not specify the parameters of the ESG screen. That phrase does not override or alter the clear meaning of the statements in the PDSs, which occur both immediately before and immediately after the “suitability” statement,

that the screen applies to companies which engage in significant business activities that breach the applicable ESG criteria.

104 Third, and relatedly, ASIC sought to place reliance on the title and description of the Fund as “Ethically Conscious”. Again, the description “ethically conscious” does not specify the parameters of the ESG screen that is applied in compiling the Bloomberg SRI Index. Information concerning the screen is stated in clear terms in the PDSs and on the website.

105 Although a digression, it is important to emphasise at this point that Vanguard’s use of the phrase “ethically conscious” in the title of the Fund and in the PDSs and on the website is not without significance or consequence. Vanguard has admitted that the PDSs and the website conveyed the representation that the Fund offered an ethically conscious investment opportunity. Vanguard has admitted that that representation was misleading because:

- (a) the research and screening for the Bloomberg SRI Index, and therefore the Fund, had the Entity, Ticker and Fossil Fuel Limitations;
- (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.

106 The issue in dispute is not whether the use by Vanguard of the phrase “ethically conscious” in connection with the Fund was misleading. That has been admitted by Vanguard. The issue in dispute is only whether the PDSs and the website conveyed a further representation that ESG screening was applied to all securities in the Bloomberg SRI Index and the Fund. It is that contention which I reject.

107 The fourth matter that ASIC sought to place reliance on are the fact sheets published by Bloomberg on its website. As discussed earlier, the fact sheets contained information about the composition of the Bloomberg SRI Index. I accept ASIC’s submission that the 31 July 2018 fact sheet conveyed that all issuers of securities included in the Index were subject to ESG screening in accordance with the criteria described in the fact sheet. However, I reject ASIC’s submission that the 15 July 2020 fact sheet conveyed that representation. The description of the ESG “Rules” in the 15 July 2020 fact sheet principally conveyed that only companies involved in specified ways in the adult entertainment, alcohol, gambling, tobacco, controversial

weapons, conventional weapons, nuclear weapons, civilian firearms, nuclear power and fossil fuel industries were excluded.

108 Although I accept that the content of the 31 July 2018 fact sheet was misleading, there is a conceptual flaw in the manner in which ASIC sought to place reliance on that document as “contextual” material affecting the meaning conveyed by the impugned statements in Vanguard’s PDSs and on its website. ASIC has not alleged that Vanguard made or restated the representations contained in the fact sheets by referring to them in the PDSs, and accordingly ASIC has not alleged that the publication of the fact sheets involved representations or conduct of Vanguard. If those allegations had been made, it would have been necessary to consider whether the impugned statements made by Vanguard about the ESG screening methodology in the PDSs, on the website and in the fact sheets, considered as a whole, conveyed the representation alleged by ASIC. Rather, ASIC has alleged that the impugned statements in Vanguard’s PDSs and on its website conveyed the representation that ESG screening was applied to all securities because those statements must be read in the “context” of the statements made in the fact sheets published by Bloomberg.

109 I do not accept ASIC’s argument. The fact sheets are not matters of context affecting the meaning that would be given to the impugned statements in Vanguard’s PDSs and on its website by ordinary members of the public considering an investment in the Fund. The statements in the 31 July 2018 fact sheet contradict the relevant statements in Vanguard’s PDSs and on its website concerning the ESG screening methodology. One or other could be understood to be correct, but not both. The impugned statements in Vanguard’s PDSs and on its website were made by Vanguard, whereas the statements made in the 31 July 2018 fact sheet were made by Bloomberg. Vanguard cannot be held liable for the misleading statements in the fact sheet unless Vanguard adopted and repeated those statements. That is not alleged by ASIC. The relevant circumstances are that Vanguard made one set of statements about the ESG screening methodology and Bloomberg made another set of statements. If potential investors read the Bloomberg fact sheets and formed the erroneous impression that ESG screening was applied to all securities in the Fund, that would have been the fault of the misleading statements in Bloomberg’s fact sheets. The erroneous impression would not have been caused by the statements in Vanguard’s PDSs and on its website.

110 Underlying ASIC’s submissions was an unhelpful blurring of the concepts of context and causation. It is axiomatic that the meaning of all statements is affected by their context. In the

case of written statements, the immediate context includes all the words in the document in which the statements are made and the manner in which those words are conveyed: *Self Care* at [82]. The broader context includes the surrounding facts and circumstances, including particularly the types of goods and services being supplied, the manner in which they are supplied and the habits and characteristics of purchasers of those goods and services: *Butcher v Lachlan Elder Realty Pty Limited* (2004) 218 CLR 592 at [109] (McHugh J); *Coles Supermarkets* at [41]. Although context is relevant to assessing the likely meaning of an impugned representation, the central question remains whether an alleged misconception was caused by the impugned representation. In the early case of *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216, Stephen J explained that, in order to determine whether there had been a contravention of the prohibition against misleading or deceptive conduct, it is necessary “to inquire why this misconception has arisen in the minds of others” (at 228). In *Campomar*, the High Court referred to that statement of Stephen J and further explained that the question is whether there is a sufficient (causal) nexus between the impugned conduct and the misconception (at [98]).

111 The difficulty with ASIC’s argument in the present case is that it is seeking to rely on a statement made by a third party, Bloomberg, to “colour” or “contextualise” the impugned statements made by Vanguard. It can be accepted that Bloomberg is the creator and publisher of the Bloomberg SRI Index, and has done so under contract with Vanguard. It can also be accepted that, in the PDSs, Vanguard informed investors that information with respect to the Index methodology was available on Bloomberg’s website. It can be accepted that some potential investors may have reviewed the 31 July 2018 fact sheet on Bloomberg’s website before investing and may have been misled. Notwithstanding those connections, the relevant question remains whether the impugned statements made in Vanguard’s PDSs and on its website conveyed the representation alleged by ASIC. That question is to be answered in circumstances where ASIC did not allege that Vanguard made (by repeating) the statements in the 31 July 2018 fact sheet. In my view, the relevant question must be answered in the negative. The impugned statements made in Vanguard’s PDSs and on its website conveyed that ESG screening was only applied to companies whose securities were included in the Bloomberg SRI Index. Bloomberg’s 31 July 2018 fact sheet contained a contradictory statement, but that statement was not made by Vanguard and did not alter the meaning conveyed by Vanguard’s statements.

112 The fifth matter that ASIC sought to place reliance on were the statements made in the media release issued in respect of the launch of the Fund, the FNN interview published on YouTube and the FNN presentation published on the FNN website. ASIC submitted that those matters reinforced the message that all securities in the Fund, and not only a subset of those securities being securities issued by “companies”, were subject to ESG screening. I reject that submission. Again, the submission has a logical flaw and involves a misuse of the concept of “context” in this field.

113 In order to rely on the statements made in the media release, the FNN interview and the FNN presentation as matters of context, it must be assumed that a potential investor read or saw those materials (or one or more of them). To state the obvious, if a potential investor did not see or read those materials, they cannot constitute context in which the impugned statements in the PDSs and on the website were read. However, Vanguard has admitted that the media release, the FNN interview and the FNN presentation conveyed the representation that all securities in the Fund were subject to ESG screening, and that that representation was misleading. It follows that, if a potential investor read or saw those materials, they would have been misled by those materials. The issue in dispute is whether, by reason of the potential investor having read those materials, the impugned statements in Vanguard’s PDSs and on its website were thereby rendered misleading (as separate acts of contravention of the ASIC Act). In my view, the answer is in the negative. The impugned statements in Vanguard’s PDSs and on its website have a clear meaning, and the meaning of the statements is not altered by the fact that contrary statements are made elsewhere. The existence of the inconsistent statements published by Vanguard about the ESG screening methodology may well have caused a potential investor confusion; the investor may have wondered which statement was correct. But the inconsistency was not capable of changing the meaning of the impugned statements made by Vanguard in its PDSs and on its website.

114 In my view, none of the so-called contextual matters relied on by ASIC altered the plain meaning of the impugned statements in Vanguard’s PDSs and on its website, which were to the effect that securities issued by companies were researched and screened against applicable ESG criteria, and that securities issued by companies that violated those criteria were excluded or removed from the Bloomberg SRI Index and therefore the Fund.

F. CONCLUSION

115 Declarations reflecting the conclusions expressed in these reasons will be made. As discussed earlier, the relevant period of alleged contravening conduct in the present case is between 7 August 2018 and 17 February 2021, which includes a period after the commencement of the re-enacted form of s 12GBA of the ASIC Act. By that section, the Court is required to grant declaratory relief and the declaration must specify the following matters:

- (a) the Court that made the declaration;
- (b) the civil penalty provision that was contravened;
- (c) the person who contravened the provision; and
- (d) the conduct that constituted the contravention.

116 Declarations will be made substantially in the form proposed by Vanguard which reflect the conclusions expressed in these reasons and the matters specified by s 12GBA(4).

117 The grant of declaratory relief does not determine all of the rights of the parties at issue in the proceeding. ASIC also seeks an adverse publicity order and penalties. I favour the view expressed by Rangiah J in *N and E Bowder Pty Ltd v Australian Keg Company Pty Ltd* (2014) 220 FCR 166 at [7]-[9] that, in such circumstances, this judgment granting declaratory relief is interlocutory in nature (cf *Damorgold Pty Ltd v JAI Products Pty Ltd* [2014] FCA 448 at [3]-[9] (Tracey J) and *King v Melbourne Vicentre Swimming Club Inc* [2020] FCA 1639 at [5] (Snaden J)). The parties have agreed a timetable to prepare for the hearing on penalty and I will make orders substantially in the form proposed by the parties.

I certify that the preceding one hundred and seventeen (117) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Bryan.



Associate:

Dated: 28 March 2024