



# **The Urgent Imperative for Accountability in Sustainability Claims in Nigeria: Lessons from the case of Australian Securities and Investments Commission v Mercer Superannuation (Australia) Limited 2024**

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Corporate Governance & Regulatory Compliance Insights



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## 1.0 Introduction

In 1983,<sup>1</sup> the United Nations General Assembly (UNGA) called the World Commission on Environment and Development (WCED), an international group of environmental experts, politicians, and civil servants, in response to growing concerns about ozone depletion, global warming, and other environmental issues. The group's mission was to find solutions to the growing environmental degradation and its effects on global development, ultimately promoting sustainable development by striking a balance between environmental protection, social justice, and economic growth.

The concept of sustainability was popularised by the WCED (also known as the Brundtland Commission). Its report to the UNGA defined sustainability as *“development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”*<sup>2</sup>

Sustainability has become a global concern for organisations, with regulatory bodies strengthening oversight on environmental, social, and governance (ESG) disclosures. Many organisations have increased their efforts to ensure that their product or service is environmentally friendly or has minimal negative environmental impact. Organisations voluntarily make public statements about a product or service that highlight its positive environmental impact and ethical standards to ensure that investors and stakeholders are aware of their compliance with sustainability requirements or lifespan. These statements are referred to as sustainability claims.

Although organisations globally have improved their compliance with sustainability requirements, false sustainability claims (in various forms of greenwashing) still pose a prevalent challenge. Nigeria's sustainability reporting legal framework has evolved over the past two decades.<sup>3</sup> While significant legal actions have addressed environmental pollution and corporate accountability, enforcement mechanisms addressing false sustainability claims are still nascent. Like many other jurisdictions, Nigeria has no specific laws or regulations addressing the issues of false sustainability claims. Furthermore, there is yet to be any record of false sustainability claims being addressed/ sanctioned by the appropriate enforcement body in Nigeria.

The 2024 case of the Australian Securities and Investments Commission (ASIC) v Mercer Superannuation (Australia) Limited<sup>4</sup> underscores the growing global crackdown on false sustainability claims. This case serves as a reminder of the need for

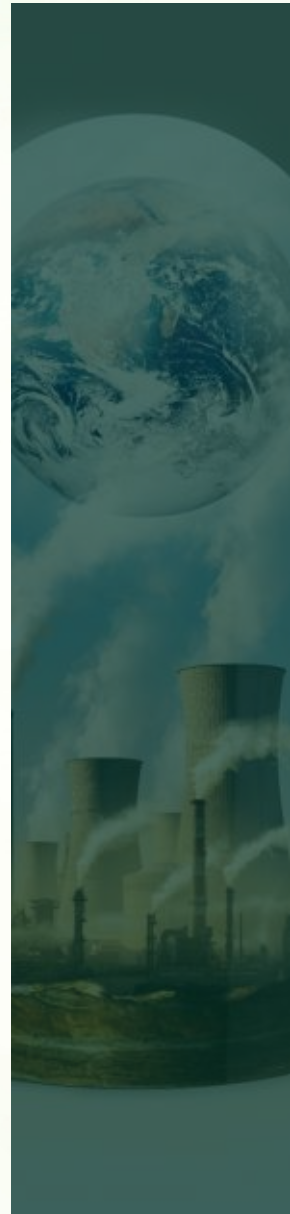
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1 Brundtland Report | Sustainable Development & Global Environmental Issues | Britannica.  
<https://www.britannica.com/topic/Brundtland-Report>

2 *Ibid*

3 Nigeria has its Environmental Impact Assessment Act, CAP E12, LFN 2004, Harmful Waste (Special Criminal Provision) Act Cap H1 LFN 2004, National Environmental Standards and Regulation Enforcement Agency (NESREA) ACT 2007, Securities & Exchange Commission, Nigeria Guidelines on Sustainable Financial Principles for the Nigerian Capital Market, 2021, Nigerian Code of Corporate Governance, 2018, etc., addressing environmental pollution and corporate accountability.

4 [FCA] 850 file number VID 117 of 2023



Nigerian regulatory authorities to ensure organisations comply with sustainability standards and that organisations are not making public statements about their products or services to make them appear more environmentally and ethically friendly than they are.

## 2. Background of the Case

By an amended originating application dated September 13, 2023, the Australian Securities and Investments Commission (ASIC) initiated an action at the Federal Court of Australia against Mercer Superannuation (Australia) Limited (Mercer), a superannuation trustee, contending that Mercer made false or misleading representations in contravention of Section 12DB(1)(a) of the Australian Securities and Investments Commission Act 2001 (Cth<sup>5</sup>) (ASIC Act) and engaged in conduct that was liable to mislead the public about their financial services in contravention of section 12DF(1) of the ASIC Act.

Section 12DB(1)(a) of the ASIC Act prohibits a person from making false or misleading statements or publications about their services being of a particular standard, quality, value or grade, and section 12DF(1) of the ASIC Act also prohibits a person from engaging in conduct that is liable to mislead the public as to the nature, characteristics, suitability for purpose or the quantity of any financial services.

Mercer's representations, which were alleged to be misleading, were written on its website and in a video published online during four different periods from November 12, 2021, to March 1, 2023. By the said representations, Mercer claimed that its "Sustainable Plus" investment options excluded, and would continue to exclude, investments in companies involved in or deriving profit from the production or sale of alcohol, gambling, and the extraction or sale of carbon-intensive fossil fuels. These claims were found to be false as companies involved in the sale of alcohol, gambling, and the extraction or sale of carbon-intensive fossil fuels were found to have investments in Mercer's sustainable plus investment options,

Both parties filed a statement of agreed facts and admissions dated September 19, 2023 (SAFA) under section 191 of the Evidence Act 1995 (Cth) and joint submissions on liability and relief dated November 24, 2023.

### 3. Decision of the Court

On August 2, 2024, the Federal Court of Australia, per Horan J, made declarations in the terms sought by the parties and ordered Mercer to pay a pecuniary penalty of \$11.3 million. The Court also made an Adverse Publicity Order directing Mercer to publish a notice outlining the admitted conduct and the false sustainability claims that led to the Act's contraventions on its website's sustainable investments page for six months.<sup>6</sup>

Furthermore, by the parties' agreement, the Court ordered Mercer to pay ASIC's costs incidental to the proceeding in the agreed sum of \$200,000.

### 4. The Rationale for the Decision

The Court's decision was grounded in Mercer's admitted contraventions, which involved making false and misleading representations about the sustainability of its "Sustainable Plus" investment options. By Mercer's admissions, the Court found that between November 12, 2021, and March 1, 2023, Mercer's public statements misled consumers by claiming that these investment options excluded companies involved in alcohol, gambling, and fossil fuels, when in fact, six out of seven of these options included such investments. The court found this conduct to constitute greenwashing, a practice that distorts the integrity of Environmental, Social, and Governance (ESG) claims, thereby misleading consumers and investors seeking to align their financial decisions with ethical and sustainable principles. Given the materiality of these misrepresentations, the Court considered the impact on consumer trust and market fairness in determining the appropriate penalties and remedies to be meted out to Mercer.

Furthermore, in giving its decision, the Court also noted that both parties, by their submission, recognised that greenwashing poses a broader risk by undermining confidence in ESG-related disclosures and creating an uneven playing field where misleading firms gain an unfair advantage over those adhering to genuine sustainability commitments. The Court stated that the absence of a specific statutory regime governing greenwashing practices did not exempt misleading conduct from regulatory scrutiny, as existing provisions under the ASIC Act and the Corporations Act 2001 prohibit deceptive and false representations.

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<sup>6</sup> An "adverse publicity order", is defined in section 12GLB (2) of the ASIC Act as an order that:

- requires the person to disclose, in the way and to third parties specified in the order, such information as is so specified, being information that the person has possession of or access to; and
- requires the person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order.

Adverse publicity orders are punitive in nature, meant to serve as a deterrent to others



The Court deems it necessary to impose the penalties that serve as a deterrent against future misconduct and as a reinforcement of regulatory efforts to uphold transparency and accountability in financial markets primarily due to the surge in greenwashing complaints.

## 5. Brief Analysis of Some Key Issues

This case presents several significant issues for consideration, some of which are:

- a. *Greenwashing:*** Greenwashing, broadly speaking, refers to making false or misleading claims about a company's environmental or sustainability credentials, product or service to appear more eco-friendly or socially responsible than they are.<sup>7</sup> This practice aims to make a company or its business appear more environmentally friendly, sustainable or ethical, mainly to induce consumers to purchase its products or services or invest in the company while exploiting the system and profiting off well-intentioned, sustainably minded consumers.<sup>8</sup> The term was coined in 1986 in an essay by environmentalist Jay Westerveld.<sup>9</sup>

In Mercer's case, it was discovered that Mercer's claims about excluding investments in alcohol, gambling, and carbon-intensive fossil fuels were without any qualifications as to the materiality of any exposure to those sectors regarded “not to be sustainable.” This means that the claims suggest that Mercer completely excluded investment in these sectors regarded as “not to be sustainable” either directly or indirectly”.

It was found that six of Mercer's seven Sustainable Plus Options had some exposure throughout the relevant period to companies participating in, or profiting from, the manufacture or sale of alcohol, gambling, or the exploitation or sale of carbon-intensive fossil fuels. Specifically, it was found that “*Mercer Sustainable Plus Australian Shares*” and “*Mercer Sustainable Plus Shares*” options each held investments in two companies involved in, or deriving profit from, the extraction or sale of carbon intensive fossil fuels; the “*Mercer Sustainable Plus High Growth*” option held investments in up to: 15 companies involved in, or deriving profit from, the extraction or sale of carbon intensive fossil fuels; 15 companies involved in the production or sale of alcohol; and 19 companies involved in gambling;

*the “Mercer Sustainable Plus Growth” option held investments in up to: 13 companies involved in, or deriving profit from, the extraction or sale of carbon intensive fossil fuels; 14 companies involved in the production or sale of alcohol; and 14 companies involved in gambling; the “Mercer Sustainable Plus Moderate Growth” option held investments in up to: 15 companies involved in, or deriving profit from, the extraction or sale of carbon intensive fossil fuels; 15 companies involved in the production or sale of alcohol; and 18 companies involved in gambling; and the “Mercer Sustainable Plus Conservative Growth” option held investments in up to: 13 companies involved in, or deriving profit from, the extraction or sale of carbon intensive fossil fuels; 14 companies involved in the production or sale of alcohol; and 14 companies involved in gambling.<sup>10</sup>*

This was a clear case of exaggerated claims about the ethical nature of the investments in the “Sustainable Plus” options. The discrepancy between Mercer's statements and the reality of its investments was a typical example of greenwashing, where organisations exaggerate their environmental or social impact for financial benefit or consumer appeal.

Mercer's greenwashing case highlights the potential dangers organisations may face when their sustainability claims are inconsistent with their business practices. This case demonstrates that greenwashing can lead to serious legal consequences and damage an organisation's reputation. Accordingly, businesses must recognise the increasing demand for honest sustainability practices and ensure substantial data support their claims.

- b. *Misrepresentation:*** In Mercer's case, misrepresentation was a central issue, alongside the greenwashing allegations. Misrepresentation is a misleading statement that induces another party to perform an act he may not have ordinarily performed but decided to do so based on false information.<sup>11</sup> Misrepresentations can be classified as either negligent, innocent or fraudulent. However, if a person making a statement can demonstrate they had reasonably believed its truth based on the information available to them, they may not be liable for misrepresentation, even if the statement turns out to be false. Essentially, this is called the “reasonable grounds' defence, which acts as a shield against a claim of misrepresentation and is a key element in determining whether a statement constitutes a misrepresentation.

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<sup>10</sup> ASIC v Mercer [FCA] 850 file number VID 117 of 2023

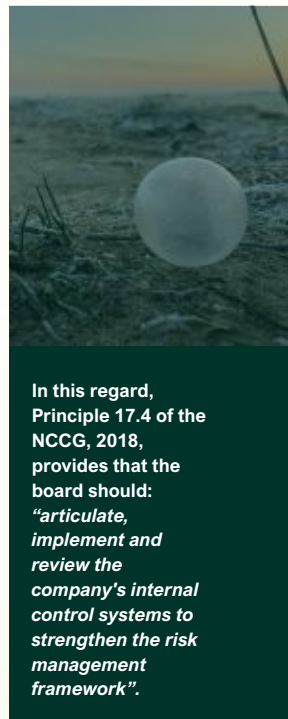
<sup>11</sup> Beatson, J., Burrows, A., Cartwright J., *Anson's Law of Contract*, Oxford University Press, 29th Edition Pp 299

Mercer admitted that each of its representations that its “Sustainable Plus” investment options excluded, and would continue to exclude, investments in companies involved in or deriving profit from the production or sale of alcohol, gambling, and the extraction or sale of carbon-intensive fossil fuels was false and misleading in contravention of section 12DB (1) of the ASIC Act. While this was said, the reality was that companies engaged in, or profiting from, the manufacture or sale of alcohol, gambling, or the exploitation or sale of carbon-intensive fossil fuels had invested in or had equity portfolios in Mercer's Sustainable Plus Options.

Mercer's failure to disclose or define the nature of the actual investments resulted in a misrepresentation of the fund's true nature. The statements made by Mercer establish a case for misrepresentation, and false sustainability claims may allow a plaintiff to sue for fraudulent misrepresentation in Nigeria, which would harm the company's reputation.

- c. *Inadequate internal controls:*** Internal controls prove a robust framework for achieving a company's strategic objectives. They encompass any internal processes, policies, or procedures contributing to the organisation's security and risk awareness. In the case under discussion, the internal control process for online publications for public consumption was inadequate. Mercer's delegations and approvals policy did not prescribe a process for approving website communications other than updates to Mercer's Product Disclosure Statement. At the relevant time, Mercer had no formal process to mandate or monitor the use of its “Marketing Checklist” (which set out a list of questions to ensure that information was accurate and complete and that there were “reasonable grounds” for making all representations) or its “Legal & Compliance Checklist.”

Mercer's admission demonstrates an apparent lack of an internal control or audit mechanism. To avoid such a scenario and risk exposure, the Nigerian Code of Corporate Governance 2018 (NCCG, 2018) mandates corporations to have a strong internal control system to manage risk. In this regard, *Principle 17.4 of the NCCG, 2018*, provides that the board should: “articulate, implement and review the company's internal control systems to strengthen the risk management framework”.



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Likewise, *Principle 17.5 of the NCCG, 2018* further provides that the board should: “conduct at least annually, or more often in companies with complex operations, a thorough risk assessment covering all aspects of the company's business and ensure that mitigating strategies have been put in place to manage identified risks”.

It cannot be overstated that inadequate internal controls can harm organisations by exposing them to reputational damage, regulatory consequences, and shareholder proceedings. This is why adherence to the corporate governance principles, as espoused in the NCCG 2018, remains imperative for serious corporations.

- d. Breach of Fiduciary Duties of Directors:** A director's fiduciary duties include acting with care to ensure that the company is protected from any risk. Mercer's board's failure to oversee that Mercer's investment activities align with the promised sustainability criteria violated the fiduciary duty of openness and care.

The breach was centred on Mercer's board of directors' failure to undertake due diligence and oversight in evaluating its sustainability claims. Fiduciaries have a responsibility to ensure that the interest of an organisation is adequately protected and that the methods adopted to grow a company strategically are in the best interests of its stakeholders while avoiding deceptive methods. Misrepresentations concerning ESG compliance breach this duty, exposing organisations to legal and reputational damage/ challenges.

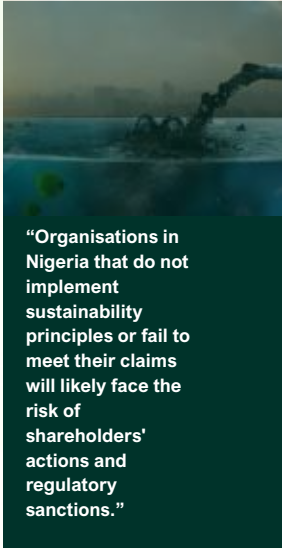
## 6. Future Implications for Sustainability Practices in Nigeria

The ASIC v Mercer Superannuation case demonstrates the growing global emphasis on holding organisations accountable for their sustainability claims. This case provides significant lessons for Nigerian organisations as corporate governance and regulatory frameworks advance their focus on sustainability. Following this case, the following future implications for sustainability practices in Nigeria can be deduced:

- i. Increased Scrutiny on Greenwashing:** Greenwashing has become a significant concern worldwide. In light of this, Nigerian regulators must increase their scrutiny of organisations' sustainability claims. There is a gradual shift among

investors towards companies that adopt sustainability practices; this has also created room for scrutiny regarding these sustainability claims. Organisations in Nigeria that do not implement sustainability principles or fail to meet their claims will likely face the risk of shareholders' actions and regulatory sanctions.

- ii. Corporate Governance Framework/ Policy Enhancement:** In light of recent developments in sustainable practices, policies addressing false or exaggerated sustainability claims by organisations in Nigeria will be developed to safeguard investors and the general public from deceptive activities. Most significantly, authorities will promote regular third-party audits of sustainability claims to enhance accountability and transparency. To align with international best standards and make Nigerian organisations more appealing to investors, Nigeria will likely develop a specific framework on sustainability compliance, appoint dedicated sustainability officers/committees, and impose sanctions for making false sustainability claims in the coming years.
- iii. Judicial Precedents:** The Mercer Superannuation case also provides a roadmap for Nigerian courts to establish more substantial legal standards around sustainable accountability. As global jurisprudence evolves around sustainability-related disputes, Nigerian courts may draw insights from foreign precedents to guide the resolution of emerging local issues. Cases like ASIC v. Mercer can help build Nigerian legal jurisprudence on issues like corporate liability for climate hazards, fraudulent sustainability claims, and fiduciary duties regarding sustainability policies. In the meantime, while specific legislations on sustainability claims are yet to be developed, stakeholders and investors in Nigeria may bring an action against a company for misrepresentations, especially where the representation has influenced the actions of such stakeholders/ investors.
- iv. Collaborative Opportunities:** Regulators, judiciary, and academic institutions can collaborate to develop legal framework, jurisprudence and practice of sustainability claims, implementation and reporting issues, preparing Nigeria's legal system for upcoming sustainability disputes.



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## **7. Recommendations for Effective Compliance with Sustainability Standards in Nigeria**

Organisations in today's world have an obligation to meet sustainability standards. Compliance with global best practices is necessary for Nigeria to maintain competitiveness and brand status and avoid legal sanctions. The Mercer case enumerated numerous sustainability issues and reinforced the need for sustainability claims backed up by credible data and independent audits to eliminate any chance of greenwashing. The procedure framed to implement the sustainability claims set forth by an organisation needs to be dependable, accurate, and regularly updated.

Organisations also must develop internal mechanisms to track and report the level of their sustainability compliance. In order to substantiate sustainability claims, the employment of external auditors not only provides trustworthy information but also reduces the chances of inaccurate reporting. These evaluations need to be done by internationally accepted standards for reports to be adopted globally.

Furthermore, to ensure consistency, established global sustainability reporting frameworks that disclose sustainability performance in a standardised manner should be adopted, and sustainability reports containing detailed metrics on environmental impact, governance practices, and social contributions should be published annually.

While Nigeria's regulatory landscape evolves, more substantial enforcement procedures and penalties for false sustainability claims are critical to ensuring compliance. Regulatory bodies, including the Securities and Exchange Commission (SEC) and the Federal Ministry of Environment, need to establish penalties for inaccurate sustainability data representation and non-compliance with sustainability criteria. Regulatory bodies must cooperate with industry stakeholders to establish defined sustainability standards and monitor implementation. They should also use technology and data analytics to track compliance in real-time, which would help authorities uncover sustainability infractions early.

These mechanisms are crucial, especially as investors, particularly international investors, will be more concerned with sustainability compliance and the credibility of businesses in which they seek to invest.

## 8. Conclusion

The ASIC v Mercer Superannuation case highlights the importance of upholding accountability in sustainability reporting practices, shedding light on the need for strict enforcement of sustainable requirements. While Nigeria's legal frameworks are evolving progressively, there is a demand for legal precedents and heightened regulatory supervision to guarantee the adoption of sustainable behaviours within organisations. To ensure investor confidence amidst escalating attention on sustainability disclosures, companies must prioritise transparency and adherence to sustainability guidelines.

Organisations should view compliance with sustainability standards as a strategic necessity instead of an optional practice to succeed in today's environmentally conscious global market/ landscape. Organisations are advised to set themselves up for long-term prosperity by upholding transparency, adhering to international reporting norms, strengthening regulatory scrutiny and educating stakeholders to encourage public responsibility. Those that overlook compliance requirements expose themselves to legal and reputational hazards and lose out on potential benefits in the growing global economy that the environmental, social and governance commitments of corporations now form a major consideration for investment.

On the other hand, it is recommended that regulators establish frameworks specifically addressing sustainability claims to ensure accountability of sustainability claims.



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