FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v LGSS Pty Ltd (No 3)

[2025] FCA 205

File number(s):	NSD 847 of 2023
Judgment of:	**O'CALLAGHAN J**
Date of judgment:	18 March 2025
Catchwords:	**BANKING AND FINANCIAL INSTITUTIONS –** imposition of civil penalties following findings and declarations of breach of ss 12DB(1)(a) and 12DF(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**) – whether by reference to s 12GBB(5)(e) of the ASIC Act any penalty imposed on a defendant superannuation trustee should be fixed by reference to an amount that ensures that there is no direct, negative impact on the members of the superannuation fund – nature of the harms caused by "greenwashing" – where parties were poles apart on proposed penalty – total penalty imposed of $10.5 million – adverse publicity order made under s 12GLB of the ASIC Act – rationale for such orders discussed
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 12DB(1)(a), 12DF(1), 12GBB and 12GLB *Competition and Consumer Act 2010* (Cth) Sch 2 (Australian Consumer Law), s 224(2) *Corporations Act 2001* (Cth) Ch 7 *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) *Superannuation Industry (Supervision) Act 1993* (Cth) ss 19, 56(2) and 57(2) *Trade Practices Act 1974* (Cth) *Financial Sector Reform (Hayne Royal Commission Response) Bill 2020* (Cth) *Superannuation Administration Act 1996* (NSW) s 127 *Trustee Act 1925* (NSW) s 63
Cases cited:	*Application by LGSS Pty Ltd atf Local Government Super* [2021] NSWSC 1613 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157

Australian Building and Construction Commissioner v Pattinson (2022) 274 CLR 450

Australian Competition and Consumer Commission v Aveling Homes Pty Ltd [2017] FCA 1470

Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd (2007) 161 FCR 513

Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd [2016] FCAFC 181; (2016) 340 ALR 25

Australian Competition and Consumer Commission v SMS Global Pty Ltd [2011] FCA 855

Australian Competition and Consumer Commission v Woolworths Ltd [2016] FCA 44; [2016] ATPR 42-521

Australian Securities and Investments Commission v Commonwealth Bank of Australia (No 2) [2021] FCA 966

Australian Securities and Investments Commission v Gallop International Group Pty Ltd [2019] FCA 1514; (2019) 138 ACSR 395

Australian Securities and Investments Commission v GE Capital Finance Australia, in the matter of GE Capital Finance Australia [2014] FCA 701

Australian Securities and Investments Commission v LGSS Pty Ltd [2024] FCA 587

Australian Securities and Investments Commission v LGSS Pty Ltd (No 2) [2024] FCA 665

Australian Securities and Investments Commission v Mercer Superannuation (Australia) Ltd [2024] FCA 850

Australian Securities and Investments Commission v MLC Nominees Pty Ltd [2020] FCA 1306; (2020) 147 ACSR 266

Australian Securities and Investments Commission v Statewide Superannuation Pty Ltd [2021] FCA 1650

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

Australian Securities and Investments Commission v Web3 Ventures Pty Ltd (Penalty) [2024] FCA 578

Australian Securities and Investments Commission v Westpac Banking Corporation [2019] FCA 2147

Australian Securities and Investments Commission v Wooldridge [2019] FCAFC 172

Finch v Telstra Super Pty Ltd (2010) 242 CLR 254

Flight Centre Ltd v Australian Competition and Consumer Commission (No 2) (2018) 260 FCR 68

Medical Benefits Fund of Australia Ltd v Cassidy (2003) 135 FCR 1

Re Chemeq Ltd; *Australian Securities and Investments*

	Commission v Chemeq Ltd [2006] FCA 936; (2006) 234 ALR 511 *Re QSuper Board* [2021] QSC 276 *Trade Practices Commission v CSR Ltd* [1990] FCA 762; [1991] 13 ATPR 41-076
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	146
Date of hearing:	17 December 2024
Counsel for the Plaintiff:	J Hewitt SC with J Buncle
Solicitor for the Plaintiff:	Australian Securities and Investments Commission
Counsel for the Defendant:	H K Insall SC with A E Smith
Solicitor for the Defendant:	Allens

ORDERS

NSD 847 of 2023

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**LGSS PTY LTD (ACN 078 003 497) AS TRUSTEE FOR LOCAL GOVERNMENT SUPER (ABN 28 901 371 321)** Defendant

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

DATE OF ORDER: **18 MARCH 2025**

THE COURT ORDERS THAT:

1. Pursuant to s 12GBB of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), within 30 days of receipt of a penalty notice the defendant pay an aggregate pecuniary penalty to the Commonwealth of $10.5 million in respect of its contraventions of ss 12DB(1)(a) and 12DF(1) of the ASIC Act set out in the declarations made in this proceeding on 20 June 2024.

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

3. The defendant ensures that the Notice:

   (a) is emailed to all members of Local Government Super as at 20 June 2024;

   (b) is published on the following webpages maintained by Vision Super Pty Ltd (the **Webpages**):

      (i) https://www.activesuper.com.au/why-us/;

      (ii) https://www.activesuper.com.au/investing/;

      (iii) https://www.activesuper.com.au/fund-info/; and

      (iv) https://www.activesuper.com.au/investing/ways-you-can-invest-your-money/;

   (c) is maintained on the Webpages for 6 months from the date of these orders; and

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

4. The defendant pay the plaintiff's costs of the proceeding.

5. The defendant have liberty to apply to vary the terms of orders 2 and 3.

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

ANNEXURE

ADVERSE PUBLICITY NOTICE

The Federal Court of Australia has ordered LGSS Pty Ltd ACN 078 003 497 (**LGSS**) as trustee for Local Government Super (otherwise known as the **Active Super fund**) to publish this notice.

Following action by the Australian Securities and Investments Commission (**ASIC**), on 18 March 2025 the Federal Court ordered LGSS to pay a pecuniary penalty of $10.5 million for contravening Australia's financial services laws.

On 5 June 2024, the Court found that LGSS had engaged in greenwashing by making false and misleading representations to members and potential members of the Active Super fund about its "green" or "ESG" credentials. The representations were made in:

- the Active Super fund's website (the **Website**);
- an email sent to 45,621 members of Active Super, that was also published on the Website;
- the Impact Report for 2021/22;
- PDS Fact Sheets issued in 2021;
- PDS Fact Sheets issued in 2022;
- the Responsible Investment Report for 2021/22;
- the Sustainable and Responsible Investment Policy which was available in three separate versions during the period 10 August 2022 to May 2023; and
- an interview with the CEO of Active Super in *Investment Magazine*.

In these publications, LGSS represented that it had eliminated investments in gambling, coal mining, oil tar sands and – following the invasion of Ukraine – Russia.

These representations were false or misleading and liable to mislead the public in circumstances where, at the time of publishing them, the Active Super fund held investments in companies such as:

- SkyCity Entertainment Group Ltd and Pointsbet Holdings Ltd (Gambling);
- Whitehaven Coal Ltd and Coronado Global Resources Inc (Coal mining);
- ConocoPhillips and Shell Plc (Oil tar sands); and
- Gazprom PJSC and Sberbank of Russia (Russian entities).

A full list of the relevant investments is set out in Annexure B to the orders made by the Federal Court on 20 June 2024. A link to those orders is below.

The penalty will be paid from insurance proceeds, however the receipt of those insurance funds will create a capital gains tax liability which may need to be met from members' funds. LGSS will be in contact with members to update them on this issue.

Further Information

LGSS's misconduct contravened the following financial services laws:

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

For further information about LGSS's misconduct, see:

- the Federal Court's judgments against LGSS on liability and penalty:
  - *Australian Securities and Investments Commission v LGSS Pty Ltd* [2024] FCA 587;
  - *Australian Securities and Investments Commission v LGSS Pty Ltd (No 2)* [2024] FCA 665; and
  - *Australian Securities and Investments Commission v LGSS Pty Ltd (No 3)* [2025] FCA 205 [to be hyperlinked]; and
- ASIC's media releases [to be hyperlinked].

REASONS FOR JUDGMENT

O'CALLAGHAN J

AGREED FACTS

1 The following facts were agreed and were set out in a document entitled "Statement of Agreed Facts" (**SOAF**). Much of that document merely summarises findings already made. What follows should thus be read together with:

(a) my reasons in *Australian Securities and Investments Commission v LGSS Pty Ltd* [2024] FCA 587 (the **Liability Judgment**) in which I found that LGSS had made false or misleading representations and had engaged in conduct liable to mislead the public in relation to investments made for the superannuation fund known as Local Government Super (**Active Super**); and

(b) the declarations I made in *Australian Securities and Investments Commission v LGSS Pty Ltd (No 2)* [2024] FCA 665 (the **Declarations**) that, between 1 February 2021 and 30 June 2023 (the **Relevant Period**), LGSS made representations that were false or misleading in contravention of s 12DB(1)(a) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and that were liable to mislead the public in relation to financial services in contravention of s 12DF(1) of the ASIC Act.

The contravening conduct

2 The statements for which LGSS was found liable were made on or in:

(a) the Active Super website from 25 May 2021 to 1 March 2023 (each a **Website Statement**; together, **the Website Statements**);

(b) an email dated 25 May 2022 from LGSS to members (**Email Statement**) and a similar statement published on the Active Super website from May 2022 to April 2023 (**Reproduced Statement**) (together, the **Email and Reproduced Statements**);

(c) the impact report that LGSS published on its website from 28 October 2021 to 1 March 2023 (**Impact Report Statements**);

(d) an article, which was published in *Investment Magazine* on 19 January 2022 and which remains publicly available as at the date of this judgment, containing statements by the

chief executive officer (**CEO**) of LGSS, Phillip Stockwell (**Investment Magazine Statement**);

(e) the three versions of the sustainable and responsible investment (**SRI**) policy that LGSS published on its website from October 2021 to May 2023 (**SRI Policy Statement**);

(f) the responsible investment report that LGSS published on its website from 20 December 2022 to March 2023 (**Responsible Investment Report Statements**); and

(g) product disclosure statement fact sheets that LGSS published on its website from 25 May 2021 to 30 June 2022 and from 1 July 2022 to 1 May 2023 (each a **PDS Fact Sheet Statement**; together, **the PDS Fact Sheet Statements**)

(collectively, **the Statements**).

3 The Statements conveyed representations in relation to investments that would not be made or held by Active Super in relation to gambling, coal mining, oil tar sands or entities based in Russia (each a **Representation**; together, **the Representations**). The Representations are listed in Annexure A to the Declarations and do not need to be repeated here. For present purposes, it is relevant that:

(a) the Website Statements conveyed Representations 1 and 2;

(b) the Email and Reproduced Statements conveyed Representation 17;

(c) the Impact Report Statements conveyed Representations 5 and 6;

(d) the Investment Magazine Statement conveyed Representation 11;

(e) the SRI Policy Statement conveyed Representation 13;

(f) the Responsible Investment Report Statements conveyed Representations 15, 16 and 18; and

(g) the PDS Fact Sheet Statements conveyed Representations 19 and 20.

Duration and extent of contraventions

4 During the Relevant Period, the Active Super website was not configured to track usage or downloads of PDF documents via "click events". Nevertheless, based on an analysis of a sample period, it is estimated that in the period between:

(a) 25 May 2021 and April 2023, the webpage containing the Website Statement conveying Representation 1 was viewed 991 times;

(b) 25 May 2021 and April 2023, the webpage containing the Website Statement conveying Representation 2 was viewed 5,807 times;

(c) 10 August 2022 and May 2023, the webpage containing the SRI Policy Statement conveying Representation 13 was viewed approximately 312 times;

(d) 1 May 2021 and 30 June 2022, the webpage containing the PDS Fact Sheet Statement conveying Representation 19 was accessed or viewed approximately 367 times; and

(e) 25 May 2021 and 30 June 2022, the webpage containing the PDS Fact Sheet Statement conveying Representation 20 was accessed or viewed approximately 94 times.

5 The above estimates include unique visitors, multiple views or downloads by the same visitor and views by ASIC during the course of its investigation.

6 On 25 May 2022, the Email Statement conveying Representation 17 was sent to 45,621 members, of which 26,143 members opened the email. The Reproduced Statement also conveying Representation 17 was published on the Active Super website from approximately May 2022 to April 2023 and viewed 24 times.

7 The Investment Magazine Statement, published on 19 January 2022 and conveying Representation 11, remains available as at the date of this judgment. The number of views is unknown.

8 In the period between 20 December 2022 and March 2023, the responsible investment report containing the Responsible Investment Report Statements (which conveyed Representations 15, 16 and 18) was downloaded 71 times.

9 On the assumption that there was a similar level of interest in the impact report containing the Impact Report Statements (which conveyed Representations 5 and 6), it is estimated that the impact report was downloaded approximately 616 times between 28 October 2021 and 1 March 2023.

Background, size and financial position of LGSS and Active Super

Active Super Background

10 Active Super was established in 1997. It was formerly known as the Local Government Superannuation Scheme.

11 Active Super is a regulated superannuation fund and a registrable superannuation entity within the meaning of the *Superannuation Industry (Supervision) Act 1993* (Cth) (the **SIS Act**).

12 Active Super was established by the then Treasurer under s 127 of the *Superannuation Administration Act 1996* (NSW), which authorised the Treasurer to approve the preparation of a trust deed for a superannuation scheme for the benefit of certain classes of state public sector employees. From 5 February 2001 to 13 November 2022, s 127(5) provided that "the trust deed must be consistent with the requirements of [the SIS Act] for a regulated fund within the meaning of that Act" and stipulated that "any trustee must satisfy the requirements of [the SIS Act] for a trustee".

13 Active Super operates on a profit-to-member model.

14 As at 30 June 2023, Active Super employed 103 staff members.

15 As at 30 June 2024, Active Super managed approximately $14.7 billion in superannuation assets for 86,547 members.

LGSS Background

16 LGSS is a limited liability proprietary company.

17 Pursuant to cl 1.2 of its constitution, LGSS was formed for the purpose of acting as the trustee of a regulated superannuation fund within the meaning of s 19 of the SIS Act.

18 Active Super is the only superannuation fund for which LGSS acts, or has ever acted, as trustee.

19 LGSS currently has eight shares on issue, being:

(a) four "Employer Class Shares" held by Local Government NSW, the peak body for NSW councils (see cl 2.2 of the LGSS constitution); and

(b) four "Member Class Shares" held by individuals for, or who are otherwise representatives of, the United Services Union, the Local Government Engineers' Association of NSW and the Development and Environmental Professionals' Association (see cl 2.3 of the LGSS constitution).

20 The LGSS constitution contains limitations on the entitlements of the shareholders of LGSS, including that:

(a) the directors are prohibited from declaring or determining a dividend or applying any portion of the capital of LGSS or income to be paid or transferred, directly or indirectly, in any way to a shareholder (cl 21.1); and

(b) in the event that LGSS is wound up, any assets remaining after the satisfaction of its debts and liabilities must not be paid or distributed among shareholders (cl 22.1).

Financials of LGSS

21 For the financial years ending 30 June 2021 to 30 June 2024, LGSS reported its revenue, expenses and net profit (after finance costs and income tax) as follows:

Category	**2021 FY ($'000)**	**2022 FY ($'000)**	**2023 FY ($'000)**	**2024 FY ($'000)**
Total revenue	40,769	45,101	45,788	49,258
Total expenses	40,682	44,907	45,476	48,713
Net profit after tax	Nil	137	265	279

Financials of Active Super

22 For the financial years ending 30 June 2021 to 30 June 2024, Active Super reported its income, expenses and net profit (after net change in defined benefit member liabilities, net benefits allocated to defined contribution member accounts and income tax) as follows:

Category	**2021 FY ($'000)**	**2022 FY ($'000)**	**2023 FY ($'000)**	**2024 FY ($'000)**
Total superannuation activities income	2,051,120	(475,130)	958,286	1,266,472
Total expenses	(69,593)	(88,328)	(81,638)	(84,239)
Profit from operating activities	1,981,527	(563,458)	876,648	1,182,233
Net change in Defined Benefit member liabilities	(344,873)	(53,673)	(188,828)	(212,186)
Net benefits allocated to Defined Contribution member accounts	(1,226,218)	308,998	(640,373)	(858,251)
Income tax expense	(189,676)	139,105	(34,688)	(70,959)
Net profit after tax	220,760	(169,028)	12,759	40,837

23 At the end of each financial year, profits were reinvested for the benefit of members.

Capital indemnity reserve of LGSS

24 With effect from 1 January 2022, ss 56(2) and 57(2) of the SIS Act were amended by the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) (**Financial Sector Reform Act**) so as to limit the capacity of a trustee (such as LGSS) to be indemnified out of a regulated superannuation fund (such as Active Super) for, among other things, "an amount of a criminal, civil or administrative penalty incurred by the trustee of the entity in relation to a contravention of a law of the Commonwealth". See ***Re QSuper** Board* [2021] QSC 276 at [27] (Kelly J).

25 The amendments to ss 56(2) and 57(2) were discussed in the explanatory memorandum to the *Financial Sector Reform (Hayne Royal Commission Response) Bill 2020* (Cth) which stated at [9.166] that, as a result of the changes, "a superannuation trustee … cannot use trust assets to pay a penalty that they incurred for the contravention of a provision of the Corporations Act or ASIC Act". See *Re QSuper* at [28] (Kelly J).

26 As a consequence of the changes to the SIS Act, LGSS made an application for judicial advice pursuant to s 63 of the *Trustee Act 1925* (NSW) to the effect that LGSS is justified in amending its trust deed to charge a fee for acting as trustee. The purpose of the proposed amendment was to provide LGSS with funds to be utilised to meet liabilities to pay pecuniary penalties. That application was heard on 1 December 2021 and a judgment was handed down on 14 December 2021. See *Application by LGSS Pty Ltd atf Local Government Super* [2021] NSWSC 1613. LGSS received advice that it would be justified in amending the trust deed of Active Super.

27 LGSS now charges a fee of approximately $36,000 per month for the purpose of building up a "capital indemnity reserve" to cover any Commonwealth penalties, infringement notices or other liabilities incurred by LGSS for which LGSS is precluded from recovering from Active Super through its indemnity under the Active Super trust deed.

28 As at 30 June 2024, LGSS's capital indemnity reserve account had a balance of $681,000.

Insurance

29 LGSS was insured under a superannuation fund liability insurance policy for the period 30 June 2022 to 30 June 2023 with a total coverage of $20 million and an excess of $200,000 for any one claim (the **Insurance Policy**). (The SOAF correctly identified at paragraph 34 that the limit of liability under the primary component of the Insurance Policy was $10 million but failed to mention the additional $10 million limit of liability under the secondary component.)

30 In May 2023, LGSS lodged an indemnity claim with QBE UK Limited through Lloyd's Australia Limited as the underwriters under the Insurance Policy. The underwriters confirmed that the Insurance Policy would respond to any pecuniary penalty and agreed to advance defence costs for an Insurance Policy limit of $10 million arising from ASIC's investigation into LGSS and this proceeding.

Merger with Vision Super Pty Ltd

31 On 14 May 2024, Vision Super Pty Ltd (**VSPL**) and LGSS signed a successor fund transfer deed (**Transfer Deed**). The Transfer Deed provided for a merger by way of a transfer of the benefits of all Active Super members to the Local Authorities Superannuation Fund (for which VSPL acts as trustee) on 1 March 2025.

32 By email to my associate dated 5 March 2025, the parties informed me that:

(a) the merger between LGSS and VSPL completed on 1 March 2025 (the **merger date**); and

(b) since the merger date, VSPL (rather than LGSS) has maintained the Active Super website and has made various changes to the form and content of the website (including discontinuing the publication of the voluntary adverse publicity notice discussed at paragraph 76 of the defendant's written submissions dated 2 December 2024).

33 The merger described above has created an entity with approximately $29 billion in funds under management and approximately 165,000 member accounts.

34 Under clause 12.1 of the Transfer Deed, VSPL agreed to indemnify LGSS, at and from the merger date, for any liabilities for which LGSS would have been entitled to be indemnified by Active Super. This indemnity does not cover liability for a civil penalty payable by LGSS given that s 56(2)(b) of the SIS Act now prevents a superannuation trustee from being indemnified for penalties incurred for contraventions of the ASIC Act.

35 Clause 15.1 of the Transfer Deed requires VSPL to provide the human and technological resources that LGSS reasonably requires to undertake specified activities after the merger. Clause 15.2 limits the activities that LGSS can engage in but preserves its ability to carry out essential activities such as enforcing rights (including rights the enforcement of which may benefit transferred Active Super members) and performing activities associated with being the former trustee of Active Super. LGSS can carry out any other activities with the prior written consent of VSPL (which must not be unreasonably withheld or delayed or provided subject to

any unreasonable conditions). Clause 15.3, headed "Continuation of LGSS", provides that VSPL and LGSS must not take any step towards the winding up or deregistration of LGSS for at least 7 years after the merger date. It also provides that if LGSS is to be deregistered or wound up, it must transfer to the trustee of VSPL any assets of LGSS that are not required to satisfy any remaining liabilities of LGSS.

Active Super's awareness and action over the Relevant Period

Investment committee

36 LGSS's investment committee meetings were held on a quarterly basis in the period between 1 March 2021 and 31 December 2022.

37 The standing attendees and members at the investment committee meetings included: Kyle Loades, chair of the LGSS board; Phillip Stockwell, CEO of LGSS; Craig Turnbull, chief investment officer (**CIO**) of LGSS; Donna Heffernan, then deputy CEO and company secretary of LGSS; and Craig Peate, director of LGSS and chair of the investment committee meetings.

38 The head of responsible investment, Moya Yip, and portfolio manager, Ken Pholsena, attended multiple investment committee meetings for specific agenda items during the Relevant Period.

39 Between 26 May 2021 and 31 December 2023, papers titled "Domestic SRI" and "International SRI" were either submitted for notation or presented to the investment committee. These papers outlined LGSS's equity exposure to companies that were included on a list of restricted investments (the **Restrictions List**), including Aristocrat Leisure Limited, Crown Resorts Limited, Skycity Entertainment Group, Tabcorp Holdings Limited, The Star Entertainment Group and Whitehaven Coal Limited.

Investment action during Relevant Period

40 Restricted investments were identified by LGSS's responsible investment team on an annual basis through a process that utilised data provided by MSCI ESG Research (UK) Limited (**MSCI**).

41 On 26 August 2021, responsible investment analyst, Jeremy Tan, emailed Ms Yip regarding updates to Active Super's Restrictions List. This email identified the new companies caught by the MSCI screens and stated that PointsBet Holdings Limited (**PointsBet**) and Coronado Global Resources Inc (**Coronado**) were held by BlackRock.

42 On 29 September 2021, both PointsBet and Coronado were added to the Restrictions List.

43 The Restrictions List was subject to approval by the investment committee and the board. Once approved, the Restrictions List was provided to LGSS's investment managers. Under investment management agreements entered into by LGSS and its investment managers, managers were prohibited from making investments in companies on the Restrictions List. LGSS also provided the Restrictions List to its custodian, JPMorgan, who conducted compliance checks to ensure that the investment managers were acting in accordance with their mandates and would notify LGSS if an investment manager instructed it to purchase a restricted investment or if it held an investment that LGSS had recently added to the Restrictions List.

44 LGSS held PointsBet investments directly from 29 June 2020 until 23 December 2021 and indirectly from 4 February 2021 until 19 September 2022. PointsBet was first listed on the Australian Stock Exchange (**ASX**) on 12 June 2019 and was not identified as a company involved in proscribed activities in data received from MSCI for 2020.

45 LGSS held Coronado investments directly from 30 June 2021 until 31 December 2021 and indirectly from 20 June 2022 until at least 31 May 2023. Coronado was listed on the ASX on 23 October 2018 but was not identified in MSCI data as having the relevant proscribed activity levels until 2021 when it was added to the Restrictions List.

46 On 28 February 2022, Mr Stockwell requested that Mr Turnbull determine whether LGSS had any investment exposure to Russian or Ukrainian based entities. On the same day, Mr Turnbull responded that LGSS held $16,700,000 in Russian equity holdings, which equated to 0.5% of Active Super's international equities portfolio and 0.1% of its entire portfolio.

Overlay process

47 Prior to the Relevant Period, LGSS operated an "overlay process" through which it sought to negate its exposure to restricted investments held indirectly through pooled trusts by short trading or swapping stocks in the restricted companies.

48 The overlay process was generally not employed during the Relevant Period. However, LGSS maintained the overlay portfolio which provided liquidity to fund the overlay process and respond to any risks realising, including margin calls when they arose.

49 Ten of LGSS's restricted investment holdings were held in its domestic overlay portfolio, through exposure to the SPDR ASX 200 fund. As at 31 May 2023, the market value of Active Super's exposure to the SPRD ASX 200 fund was $10.322 million (or approximately 0.07% of assets under management as at 30 June 2023).

Board of LGSS

50 On 17 March 2022, Ms Yip was instructed by Mr Turnbull to collate information relevant to LGSS's investments in Russian entities to present to the investment committee and LGSS board for consideration on whether to restrict these investments. Ms Yip prepared a submission to the LGSS board recommending that they approve Russia as a restricted country in the SRI policy. This recommendation was approved by the investment committee on 29 March 2022, followed by the LGSS board on 7 April 2022.

Complaints and inquiries received by LGSS

51 In the period between 4 February 2021 and 14 June 2024, LGSS received 14 complaints from some of its approximately 86,500 members expressing dissatisfaction about their superannuation investments with Active Super, including non-disclosure of Active Super's exposure to restricted investments.

Dealings between ASIC and LGSS regarding the relevant conduct and contraventions

52 LGSS removed the Statements conveying the relevant Representations after ASIC commenced its investigation. The Investment Magazine Statement remains available to the public as at the date of this judgment because LGSS does not control *Investment Magazine*.

53 On 10 August 2023, ASIC commenced proceedings by filing the originating process and concise statement against LGSS.

54 On 25 September 2023, LGSS filed a response to ASIC's concise statement. LGSS made admissions as to:

(a) the making of the Statements that ASIC alleged conveyed the impugned Representations;

(b) the investments that were alleged to be contrary to those Representations; and

(c) the characteristics of the companies invested in which gave rise to the allegedly false or misleading representations and conduct.

55 LGSS otherwise denied liability.

56 LGSS did not admit the contraventions of ss 12DB(1)(a) or 12DF(1) of the ASIC Act at any stage of the proceeding.

No prior misconduct

57 LGSS has not previously been found by a court to have contravened a provision of the ASIC Act or Chapter 7 of the *Corporations Act 2001* (Cth).

ADDITIONAL EVIDENCE

58 The parties relied on some additional evidence on the question of relief.

59 Ms Heffernan is the acting CEO and company secretary of LGSS.

60 She affirmed an affidavit dated 6 November 2024 for the purposes of the penalty hearing.

61 Among other things, she gave evidence about LGSS's engagement with ASIC and the removal of the Statements from publication, the steps that LGSS took as part of a remediation procedure (including reviewing its ESG "disclosures"), financial information relating to the investments held by Active Super during the Relevant Period that were found to have contravened the ASIC Act, the adverse publicity following the Liability Judgment, the merger with VSPL, LGSS's insurance coverage and the impact of potential penalties on members of the fund.

62 More particularly, she deposed that if the court were to order a penalty in excess of $2.456 million, this would have an impact on Active Super members, as follows:

(a) LGSS is insured under an Insurance Policy with a total coverage of $20 million;

(b) LGSS will be able to pay a penalty up to $20 million using funds received pursuant to its Insurance Policy;

(c) any insurance proceeds will be treated as a capital gain, and will be subject to taxation at the corporate income tax rate (i.e. 30 per cent);

(d) the Insurance Policy does not extend to the tax liability incurred on insurance proceeds; and

(e) therefore, for every dollar of the penalty amount awarded, LGSS will need to pay a corresponding tax of 30 cents.

63 ASIC objected to some of the evidence in support of those propositions, but I will admit it because it is relevant to the issue of general deterrence and it provides an explanation of the likely effect on members of issuing a penalty that exceeds $2.456 million.

64 Ms Heffernan also deposed that LGSS expected to have approximately $877,000 in its capital indemnity reserve account by 1 March 2025, from which it would need to pay an excess of

$200,000 consistent with the terms of the Insurance Policy. The remaining $677,000 would be available to meet, either wholly or partially, the tax liability on an insurance payment.

65 As described in paragraphs 31–35 above, the merger between LGSS and VSPL was completed on 1 March 2025, prior to any tax liability falling due in respect of the receipt of insurance proceeds to pay a pecuniary penalty. Ms Heffernan deposed at paragraphs 85 and 93 of her affidavit that, in these circumstances, LGSS has the right to recover any excess tax liability amount (but not a civil penalty liability amount) from VSPL pursuant to its right of indemnification in cl 12.1 of the Transfer Deed.

66 Ms Heffernan also deposed that exercising this indemnification right is the only way LGSS could meet that tax liability. As such, LGSS's members would have to pay from their retirement savings at least 30 cents on the dollar of any penalty exceeding $2.456 million.

67 She also deposed at paragraph 11 of her affidavit that:

> the majority of Active Super's members are NSW council employees, for example waste collection workers, truck drivers, administrative staff, and gardening and landscaping labourers, or former NSW council employees. The average income of our members is modest, contributing to an average superannuation balance of $173,000. Typically, our members are middle-aged or older Australians; more than two thirds of our members are over the age of 40. …

68 Ms Heffernan also expressed some contrition on behalf of LGSS at paragraphs 96 and 97 of her affidavit, as follows:

> I acknowledge that we failed to meet the standard members expected of us. In particular, I acknowledge that we expressed our ESG restrictions in a way that was misleading.
>
> I am sorry for the effect this has had on our members, and apologise to anyone who was misled by our ESG disclosures. Responsibility for this failure lies with LGSS.

69 ASIC relied on an affidavit dated 22 October 2024 of Ms Melissa Smith, who is employed by ASIC as a senior manager in enforcement and compliance. She produced some further documents, relating to LGSS's ESG investment products and superannuation assets and, at paragraphs 14 and 15, gave the following evidence about reportable situations:

> ASIC maintains a database whereby computer records are kept of, among other things, details of reportable situations (formerly known as 'breach reporting') which requires Australian financial services licensees and Australian credit licensees to self-report specified matters to ASIC pursuant to section 912DAA of the Corporations Act and section 50B of the *National Consumer Credit Protection Act 2009* (Cth) (ASIC's Reportable Situations Database).
>
> On 22 October 2024, I conducted searches of the Defendant using the ASIC's

Reportable Situations Database and located a record of the Defendant submitting a reportable situation to ASIC on 1 May 2023, approximately three months after ASIC had commenced its investigation, in respect of the matters subject of this proceeding.

PRINCIPLES RELEVANT TO PECUNIARY PENALTY

70 Section 12GBB(5) of the ASIC Act – which overlaps significantly with s 224(2) of the *Australian Consumer Law* (**ACL**) contained in Sch 2 to the *Competition and Consumer Act 2010* (Cth) – provides that in determining an appropriate pecuniary penalty, the court must have regard to "all relevant matters", including:

(a) the nature and extent of the contravention;

(b) the nature and extent of any loss or damage suffered because of the contravention;

(c) the circumstances in which the contravention took place;

(d) whether the person has previously been found by a court to have engaged in any similar conduct; and

(e) in the case of a contravention by the trustee of a registrable superannuation entity — the impact that the penalty under consideration would have on the beneficiaries of the entity.

71 Deterrence, both specific and general, is the primary, if not sole, objective for imposing pecuniary penalties under that provision. The penalty must be fixed at a level that ensures that neither the contravener, nor would-be contraveners, would regard it as an acceptable cost of doing business. That said, a penalty is appropriate if it is no more than is reasonably necessary to deter further contraventions by the defendant and others.

72 The loss or damage to be considered by the court is not limited to financial harm. It could be non-pecuniary, such as a lost opportunity to make a different purchasing choice with accurate information. The court must assess the nature and extent of the harm even if quantifying the harm is difficult and requires broad or rough estimation.

73 The prescribed maximum penalty is one yardstick that ordinarily must be applied and must be treated as one of a number of relevant factors. Unlike the criminal law, the concept that a penalty must be proportionate to the seriousness of the offence such that the maximum penalty is reserved for the most serious examples of misconduct has no place in the civil penalty context. Considerations such as deterrence and the public interest may justify the imposition of the maximum penalty where no lesser penalty will be an effective deterrent against future contraventions of a similar kind. What is required is a reasonable relationship between the

theoretical maximum and the final penalty imposed. That relationship is established where the maximum penalty does not exceed what is reasonably necessary to achieve specific and general deterrence of future contraventions of a like kind by the contravener and by others. This may be established by reference to the circumstances of the contravener and the contravening conduct.

74 Two principles or tools of analysis that can assist the court in determining an appropriate penalty for multiple contraventions are the course of conduct principle and the totality principle. These concepts may assist in the assessment of what may be considered reasonably necessary to deter further contraventions.

75 The course of conduct principle is commonly referred to as recognising that, where there is an interrelationship of legal and factual elements of multiple contraventions, the court may penalise the acts or omissions as a single course of conduct.

76 In this case, the parties agreed that it would be appropriate for the court to analyse the contraventions as giving rise to distinct courses of conduct according to the different documentary sources of the Statements, and that, accordingly, the contraventions in this case may be seen as involving a total of eight courses of conduct, reflecting the characterisation of the conduct of LGSS in respect of:

(a) the Website Statements;

(b) the Email and Reproduced Statements;

(c) the Impact Report Statements;

(d) the Investment Magazine Statement;

(e) the SRI Policy Statement;

(f) the Responsible Investment Report Statements;

(g) the PDS Fact Sheet Statement published in 2021; and

(h) the PDS Fact Sheet Statement published in 2022.

77 The totality principle is that the total penalty for related contraventions should not exceed what is proper for the entire contravening conduct involved. This can be used by the court as a tool of analysis to ensure that the penalty is no more than reasonably necessary for deterrence. The exercise of the totality adjustment is directed to the overall impact of the accumulated effect of

otherwise acceptable penalties to ensure that the whole is not greater than the sum of the parts. It is typically used as a "final check".

78 In *Trade Practices Commission v CSR Ltd* [1990] FCA 762; [1991] 13 ATPR 41-076 (a case concerned with, among other things, the imposition of pecuniary penalties under the former *Trade Practices Act 1974* (Cth)), French J articulated at [42] other commonly relevant factors to consider in determining a penalty. More recently, however, the High Court clarified that these factors should not be considered a "rigid catalogue of matters for attention". See *Australian Building and Construction Commissioner v* ***Pattinson*** (2022) 274 CLR 450 at 461 [19] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). In *Australian Competition and Consumer Commission v* ***Woolworths*** *Ltd* [2016] FCA 44; [2016] ATPR 42-521 at [123]–[126], Edelman J set out the following commonly relevant matters outside of those already mentioned in s 224(2) of the ACL (and, by extension, s 12GBB(5) of the ASIC Act):

(a) the size of the contravening company;

(b) the deliberateness of the contravention and the period over which it extended;

(c) whether the contravention arose out of the conduct of senior management of the contravener or at some lower level;

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

(e) whether the contravener has shown a disposition to cooperate with the authorities responsible for the enforcement of the relevant statute in relation to the contravention;

(f) whether the contravener has engaged in similar conduct in the past;

(g) the financial position of the contravener;

(h) whether the contravening conduct was systematic, deliberate or covert;

(i) the extent of contrition;

(j) whether the contravening company made a profit from the contraventions;

(k) the extent of the profit made by the contravening company; and

(l) whether the contravening company engaged in the conduct with an intention to profit from it.

79 I consider several of the factors mentioned above to be "relevant matters" which I am required under s 12GBB(5) of the ASIC Act to take into account in determining the appropriate pecuniary penalty in the present case. See *Woolworths* at [123].

80 The size of a contravener is relevant because, all other things being equal, a greater financial incentive will be necessary to persuade a well-resourced contravener to abide by the law as compared to a poorly resourced contravener. In some cases, when determining the extent of the need for deterrence, the circumstances of the contravener may be more significant than the circumstances of the contravention.

81 The extent to which the conduct was deliberate is relevant because the demands of specific deterrence are greater for deliberate conduct (in contrast to careless, isolated conduct which was not concealed). More specifically, the demands or requirements of specific deterrence are generally more acute in the case of contraveners who have engaged in deliberate or systematic conduct over lengthy periods, or where covert or concealed contraventions which are difficult to detect are involved.

82 The extent to which the contravener has conceded liability and cooperated with the investigating authority is relevant to determining penalties and typically results in a discount of the penalty that otherwise would have been imposed. This reflects the fact that such discounts increase the likelihood of cooperation in the future by contraveners and free up the resources of the relevant regulator.

Where the parties differed

83 On the question of the size of the penalties that should be imposed, the parties were poles apart. That is partially explained by the fact that they differed on the meaning and effect of s 12GBB(5)(e) of the ASIC Act – that is, the provision that says that, in determining the pecuniary penalty, the court must take into account all relevant matters, including "in the case of a contravention by the trustee of a registrable superannuation entity — the impact that the penalty under consideration would have on the beneficiaries of the entity". Less significantly, they also differed about the nature of LGSS's contrition; whether LGSS adequately or at all explained how and why the breaches occurred; the nature and extent of any profit or loss arising from the breaches; and the proper characterisation of LGSS's "cooperation" with ASIC. They also differed about the extent to which there is a need for the general deterrence of greenwashing. I will deal with each of these matters in the course of dealing with the various

considerations relevant to the penalties to be imposed in the circumstances of this case, to which I will turn shortly.

Where the parties agreed

84 On the other hand, the parties agreed about many matters too. As Mr Insall SC (who appeared with Ms Smith for LGSS) said in the course of his oral submissions (see transcript at pages 27 and 28):

> And, your Honour, can I just indicate at the outset that everything I say accepts in totality your Honour's liability judgment, as it must. And in particular, we accept your Honour['s] findings that the defendant has contravened sections 12DB and 12DF of the ASIC Act by making the representations identified in your Honour's declarations.
>
> …
>
> Your Honour, can I also indicate that LGSS does apologise for the conduct that gives rise to these proceedings. Ms Heffernan has prepared an affidavit in which she has said she is sorry, and lest there be any doubt about it, LGSS is sorry for the conduct. It failed to ensure that the restrictions based on environmental, social and governance factors were accurately disclosed to members and to the wider public, and it accepts responsibility.
>
> …
>
> Could I just start by saying, just in general terms, that we are accepting a large part of what ASIC is putting, and I will just run through a few matters, just to get them out of the way, your Honour. We accept that there was a contravention each time a website was viewed, so that there were numerous contraventions. We accept ASIC[']s position that the theoretical maximum penalty is so high as to be practically meaningless in this case, and it's an appropriate case for a course of conduct approach. We accept that there were eight courses of conduct, which is, I think, the case put forward by ASIC.
>
> We accept that the conduct was serious, and we accept that [at] the heart of the contraventions was a failure by LGSS to have in place properly functioning systems and processes designed to ensure that representations were not false or misleading. I think that's in ASICs submissions, which we have accepted in ours, and we accept that the contraventions were failings for which senior management [was] responsible, and we accept that there is a need for deterrence in respect of the contraventions and, in particular, contraventions that relate to ESG investments. And so we accept that, in accordance with the principles and the authorities, an appropriate penalty should be imposed having regard to all relevant matters.

85 It was also agreed that LGSS has not previously been found to have engaged in similar contravening conduct.

RELEVANT CONSIDERATIONS

Maximum penalty

86 As is clear from what has been stated above, there are thousands of separate contraventions because LGSS contravened ss 12DB(1)(a) and 12DF(1) of the ASIC Act each time a relevant

Representation was made to a consumer. So the theoretical maximum penalty is in the realm of billions of dollars, which is meaningless. It follows that the appropriate penalty must be assessed by reference to factors other than the statutory maximum. See *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; (2016) 340 ALR 25 at [157] (Jagot, Yates and Bromwich JJ).

87 It is to those factors that I now turn.

Course of conduct

88 As I have already noted, the parties agreed that the contraventions in this case may be seen as involving a total of eight courses of conduct.

Parity

89 The parity principle is a relevant matter in determining whether the penalties that are sought are appropriate in all of the circumstances. See, by way of example only, *Pattinson* at 469–470 [45] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

90 But there are limits to the usefulness of this principle as a tool in determining an appropriate penalty. As Moore, Dowsett and Greenwood JJ said in *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* (2007) 161 FCR 513 at 529–530 [68]:

> an assessment of previous determinations … may provide a high level broad range within which an appropriate pecuniary penalty may be imposed having regard to the character and content of the contravention and other considerations reflecting some elements broadly consistent with the evidence in the particular case.

91 Senior counsel for ASIC, Mr Hewitt (who appeared with Ms Buncle of counsel), submitted the following (see transcript at page 70):

> And so, here, where you're dealing with contraventions such as greenwashing, which have common elements with the two civil penalty proceeding[]judgments that have been handed down this year – we say that they are relevant matters for your Honour to have regard to, to assess what might be a high-level, broad range within which to order an appropriate penalty.

92 The two cases Mr Hewitt was referring to are *Australian Securities and Investments Commission v **Vanguard** Investments Australia Ltd (No 2)* [2024] FCA 1086 and *Australian Securities and Investments Commission v **Mercer** Superannuation (Australia) Ltd* [2024] FCA 850.

93 LGSS agreed with the use to which similar cases can be put as a matter of principle, but the parties disagreed about the particular relevance of them to the facts of this case.

94 Mr Hewitt sought to emphasise the following about the decision in *Vanguard*, where the penalty was $12.9 million (see transcript at pages 71 and 72):

(a) unlike LGSS, the conduct in the case of Vanguard did not relate to Vanguard's own investments, but rather its understanding of the way an index had been designed by Bloomberg;

(b) the contravening conduct extended over a period of about two and a half years, comparable with the Relevant Period in the present case;

(c) Vanguard admitted most of ASIC's allegations;

(d) the Vanguard fund involved quite a small fund (albeit Vanguard was part of a large financial services firm);

(e) Vanguard self-reported the contravention to ASIC and cooperated fully with ASIC in the resolution of the proceeding;

(f) there were five courses of conduct (not eight);

(g) Vanguard was part of a very large financial group, whereas LGSS is not;

(h) were it not for the level of cooperation exhibited by Vanguard, the penalty would have been somewhere around $17 million;

(i) the level of cooperation that was exhibited by Vanguard has not been exhibited by LGSS, because LGSS did not admit the contraventions of ss 12DB(1)(a) and 12DF(1) of the ASIC Act; and

(j) consequently, taking cooperation into account should not result in a reduction in the penalty that LGSS would otherwise be awarded.

95 Mr Hewitt sought to emphasise the following about the decision in *Mercer*, where the penalty was $11.3 million (see transcript at page 73):

(a) Mercer admitted the contraventions;

(b) as Mercer was a large superannuation fund with almost 300,000 member accounts and significant net assets of approximately $29.8 billion, the Mercer fund was larger than the Active Super fund;

(c) the scope of Mercer's conduct was less comprehensive than the contravening conduct of LGSS;

(d) there was a joint position put forward by ASIC and Mercer in respect of penalties; and

(e) Mercer cooperated with ASIC, both by agreeing to substantial proposed pecuniary penalties and by taking remedial and corrective action.

96 Mr Insall, on the other hand, sought to emphasise the following in relation to the *Vanguard* and *Mercer* decisions:

(a) 76 per cent of the investments in *Vanguard* were contrary to Vanguard's representations, whereas only a "very, very small proportion" of LGSS's investments were contrary to its Representations (see transcript at page 37);

(b) Vanguard and Mercer were "huge multinational corporations effectively involved in a profit-making enterprise, where if they make representations to gain new members, that means money is going into their pocket", whereas LGSS is a profit-for-members fund, and the whole thesis behind those funds is that you have a trustee who is working for the sole purpose of benefiting members" (see transcript at page 39); and

(c) the penalties imposed on Vanguard and Mercer "would not have even touched the sides" of those companies (see transcript at pages 46 and 47).

97 As the Full Court of the Federal Court said in *Flight Centre Ltd v Australian Competition and Consumer Commission (No 2)* (2018) 260 FCR 68 at 86 [69] (Allsop CJ, Davies and Wigney JJ):

> There is little utility in reference to the other cases with different facts. One does not work back or forward from other more or less serious cases. One evaluates all the circumstances of the case at hand. Comparables may give some broad guidance. None of the cases to which we were referred requires particular consideration.

98 I adopt the same approach here – that is, neither of the *Vanguard* or *Mercer* cases requires particular consideration. As Yates J said along similar lines in *Australian Securities and Investments Commission v* ***MLC Nominees*** *Pty Ltd* [2020] FCA 1306; (2020) 147 ACSR 266 at 289 [132]:

> … Given the variety of facts and circumstances with which the Court is presented in cases involving contraventions based on false or misleading representations, the analogical value of other cases might be very limited indeed or even non-existent. …

Totality principle

99 The totality principle is a final consideration that may be used to ensure that the "total penalty is just and appropriate and not excessive having regard to the totality of the relevant contravening conduct". See, by way of example, *Australian Securities and Investments Commission v Westpac Banking Corporation* [2019] FCA 2147 at [272] and [308] (Wigney J).

100 ASIC submitted at paragraphs 66 and 67 of its written submissions dated 19 November 2024 that, "applying the totality principle, civil penalties in an aggregate amount of $13.5 million are appropriate in the present case and do not exceed an amount that is proper having regard to the contravening conduct considered as a whole, and are not so high as to be oppressive", as follows:

(a) $3.5 million for the contraventions relating to the Representations conveyed by the Website Statements;

(b) $1 million for the contraventions relating to the Representation conveyed by the Email and Reproduced Statements;

(c) $1 million for the contraventions relating to the Representations conveyed by the Impact Report Statements;

(d) $0.5 million for the contraventions relating to the Representation conveyed by the Investment Magazine Statement;

(e) $2.5 million for the contraventions relating to the Representation conveyed by the SRI Policy Statement;

(f) $1 million for the contraventions relating to the Representations conveyed by the Responsible Investment Report Statements;

(g) $2 million for the contraventions relating to the Representation conveyed by the PDS Fact Sheet Statement published in 2021; and

(h) $2 million for the contraventions relating to the Representation conveyed by the PDS Fact Sheet Statement published in 2022.

101 LGSS, on the other hand, submitted at paragraphs 23 to 31 of its written submissions that the penalty should be fixed by reference to an amount that ensures that there is no "direct, negative impact on Active Super members", viz $2.456 million.

Nature and extent of the conduct

102 The Representations were made in numerous documents. The conduct extended over a period of approximately two and a half years, and the Representations were viewed by thousands of people.

103 There was no dispute that the breaches were serious. Ms Heffernan admitted that expressly in the course of her cross-examination, as follows (see transcript at page 23):

> MR HEWITT: So, Ms Heffernan, before the – before the objection, I think I asked you whether you agreed that Active Super did, in fact, mislead members and you – I think you agreed with that; is that correct?---Through our disclosures, yes. Yes.
>
> And you agree that Active – that LGSS also misled members of the public through those disclosures?---Yes.
>
> And do you regard those as serious failures by LGSS?---Yes. As I said, I'm very sorry that that occurred.

Nature and extent of any loss

104 ASIC accepted, at paragraph 77 of its written submissions, that LGSS's contraventions do not appear to have caused any financial loss to investors. But the cases make clear that the absence of specific financial loss does not mean that contraventions may not be characterised as very serious. See, by way of example, *Australian Securities and Investments Commission v Gallop International Group Pty Ltd* [2019] FCA 1514; (2019) 138 ACSR 395 at 446–447 [305] (Charlesworth J). See also *Australian Securities and Investments Commission v GE Capital Finance Australia, in the matter of GE Capital Finance Australia* [2014] FCA 701 at [90] (Jacobson J).

105 Further, as ASIC submitted at paragraph 77 of its written submissions, and I must accept, "the real harm of greenwashing is not the harm to an individual investor, but rather the harm more generally to ESG programs as a whole and investor confidence in them".

106 ASIC submitted at paragraph 79 of its written submissions, and I agree, that by its misleading or deceptive conduct, LGSS potentially gained a number of benefits in connection with its conduct, including:

(a) the ability to attract investors to Active Super more effectively than would have been the case if LGSS had accurately disclosed:

  (i) Active Super's exposure to investments in the excluded industries; and

  (ii) the limitations on its Restrictions List and the use of the overlay process; and

(b) the maintenance of Active Super's reputation as a provider of superannuation investment funds with green and ESG characteristics and credentials.

Circumstances and extent of the conduct

107 In addition to the matters dealt with above, ASIC submitted at paragraph 80 of its written submissions that the contravening conduct has "the added seriousness of involving superannuation accounts" which is relevant to the penalty assessment.

108 There is no doubt that superannuation plays a critical role in Australia's financial and social system. As the High Court said in *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254 at 271 [33] (French CJ, Gummow, Heydon, Crennan and Bell JJ), "[f]or some people, superannuation is their greatest asset apart from their houses; for others it is even more valuable".

109 But that is no reason to impose higher penalties on superannuation trustees than on other actors. As Yates J said in *MLC Nominees* at 304 [203]:

> … I do not accept, as ASIC appeared to suggest in its written submissions, that a contravention of s 12DB of the ASIC Act is necessarily more serious than a contravention of the corresponding provision in s 29 of the Australian Consumer Law, attracting more substantial penalties as a result. Similarly, I do not accept that a more substantial penalty for a contravention of s 12DB is necessarily warranted when the contravening conduct is undertaken by a trustee towards a beneficiary, as ASIC also appeared to suggest in its written submissions. When determining the appropriate pecuniary penalty, the injunction of s 12GBA(2)(a) and (b) of the ASIC Act is to have regard to the nature and extent of the act or omission giving rise to the contravention, and to the circumstances in which the act or omission takes place. The injunction is not to impose, automatically, higher penalties on certain actors compared to others, or to impose, automatically, higher penalties when certain circumstances exist.

110 ASIC submitted at paragraph 81 of its written submissions that "LGSS's conduct continued throughout the Relevant Period despite LGSS receiving complaints and inquiries from members of Active Super during the Relevant Period". LGSS received 14 complaints from 13 different members between 4 February 2021 to 28 June 2024. These complaints expressed dissatisfaction about Active Super's investments in coal, oil, gas and Russia.

111 In my view, not much can be made of these complaints because they were not "red flags". By way of example, one person wrote: "Good morning, I would like more information on what companies Active is investing in that (a) are net zero and (b) are climate polluters. What is the ratio of investment in cleaner climate companies? I was not happy to read the 2050 target and would like to know what ASIC is doing today". See Annexure B to the SOAF.

112 As I said to Mr Insall at the penalty hearing (see transcript at page 34):

> HIS HONOUR: Before ASIC[']s investigation revealed these things, you would have to be a pretty diligent member to have found these things out, wouldn't you?
>
> MR INSALL: Yes, and, again, we accept that. And I think, maybe, in some of the authorities, the – it is definitely a feature of this sort of matter that members are really in the hands of the trustee. They're relying on the trustee, and we accept that, your Honour.
>
> HIS HONOUR: Especially members who aren't sophisticated investors, in the sense that expression is used.

MR INSALL: Yes, your Honour, and we accept that. …

Involvement of senior management

113 LGSS accepted that, to the extent that the contraventions were caused by the failure of LGSS to have in place properly functioning systems and processes designed to ensure that representations made by LGSS regarding the ESG credentials of Active Super were not false or misleading, senior management was ultimately responsible for that failure. See transcript at page 28.

Corporate culture

114 In assessing a penalty, relevant considerations include the steps taken by the wrongdoer to identify the causes of the contravening conduct and further steps taken to avoid its repetition. See ***Re Chemeq*** *Ltd*; *Australian Securities and Investments Commission v Chemeq Ltd* [2006] FCA 936; (2006) 234 ALR 511 at 533 [97] (French J): "The acknowledgment by a corporation that it has contravened the law, its cooperation with the regulator in that regard, the steps it has taken internally to avoid repetition and relevant changes in the composition of the board or senior management should also be taken into account in the kind of risk assessment that informs a deterrent approach to punishment".

115 LGSS did not adduce evidence as to the likely causes of the contravening conduct. That said, Ms Heffernan gave evidence of LGSS providing training which focused on ESG matters and LGSS's consumer law obligations, undertaking a review of publications on its website and undertaking an external review of "the internal controls over certain ESG elements of Active Super's Investment Governance Framework".

The impact of the penalty on members of Active Super: s 12GBB(5)(e) of the ASIC Act

116 Section 12GBB(5)(e) of the ASIC Act provides that, in determining an appropriate pecuniary penalty in the case of a contravention by the trustee of a registrable superannuation entity, the court must have regard to "the impact that the penalty under consideration would have on the beneficiaries of the entity".

117 Section 12GBB(5)(e) commenced on 1 January 2021. It was added by the Financial Sector Reform Act at the same time as amendments were made to s 56(2) of the SIS Act to prevent a trustee of a superannuation entity from being indemnified from trust assets for liability for an amount of a criminal, civil or administrative penalty incurred by the trustee in relation to a contravention of a law of the Commonwealth.

118 ASIC submitted at paragraph 110 of its written submissions that "the penalty under consideration" (that is, the penalty of $13.5 million proposed by ASIC) will not have a significant impact on the beneficiaries of Active Super because LGSS has insurance funds available to meet those penalties. It agreed that LGSS would be required to make an excess payment of $200,000, but points out that LGSS has sufficient funds in its capital indemnity reserve account to meet that obligation without any impact on Active Super members.

119 For the reasons set out earlier, LGSS submitted at paragraph 29 of its written submissions that "[a] penalty in excess of $2.456 million would reduce the pool of funds available for investment, and thereby reduce the returns that the fund members rely on for financial security in their retirement" and that "[t]he punitive effect of such a penalty would fall directly on the 'waste collection workers, truck drivers, administrative staff, and gardening and landscaping labourers, or former NSW council employees' who are fund members". It submitted at paragraph 31 that "[h]aving regard to those matters, if specific and general deterrence can be achieved without adverse impact on members' funds, the Court would exercise its discretion to limit the penalty accordingly".

120 I do not accept LGSS's submission.

121 First, s 12GBB(5)(e) did not create new law. The cases have long recognised that it may be relevant to consider the impact, if any, on shareholders when a penalty is sought against a corporation. See, by way of example, ***Re Chemeq*** at 533–534 [98]. As French J also said in that passage:

> Penalties imposed on the corporation may affect shareholders including those who have become shareholders on a set of assumptions induced by the very non-disclosure complained of. In some cases it is possible also that creditors may be affected. Who then is being deterred when only the corporation is penalised? I am not sure that there is a satisfactory answer to this concern within the present statutory scheme. One might imagine that if a penalty is to be significant to a corporation it will also be significant to its shareholders in its impact on the capital which backs their shares.

122 Secondly, as the High Court said in *Pattinson* at 470 [47] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), the court's task is to determine what is an appropriate penalty to protect the public interest by deterring future contraventions of the relevant statute. To fix a penalty by reference to a sum that seeks to guarantee that fund members suffer no indirect loss by a reduction in their returns would neutralise the sting of any penalty. That would be contrary to authority. As Keane, Nettle and Gordon JJ observed in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262

CLR 157 at 195–196 [116], "[u]ltimately, if a penalty is devoid of sting or burden, it may not have much, if any, specific or general deterrent effect, and so it will be unlikely, or at least less likely, to achieve the specific and general deterrent effects that are the raison d'être of its imposition".

123 Thirdly, the tail wagging the dog approach contended for by LGSS would fly in the face of the s 12GBB(5), which requires the court to take into account "all relevant matters".

Deterring greenwashing

124 ASIC submitted the following at paragraph 45 of its written submissions:

> [I]n circumstances where ESG considerations are increasingly important to investors, and where the market is responding by offering a wider range of ESG products, it is important for the penalties in greenwashing cases, and this case, to send a clear message to market participants that false or misleading representations about matters pertaining to ESG investing are regarded as serious and unacceptable and will result in substantial pecuniary penalties that are more than just the cost of doing business. For those reasons, greenwashing is an area where there are strong grounds for penalties resulting from regulatory oversight by ASIC to be set toward the higher end of the scale.

125 LGSS, on the other hand, submitted as follows at paragraph 55 of its written submissions:

> [T]here is a diminished need for general deterrence in relation to greenwashing due to wide-ranging action already taken to deter this conduct. ASIC's enforcement action in relation to greenwashing practices and the guidance it has released to the market has already clearly indicated to market participants that they are not to engage in greenwashing conduct.

126 LGSS relied on the following matters in support of that submission:

(a) from at least 2023, ASIC has listed various forms of greenwashing as an enforcement priority;

(b) ASIC has issued nine infringement notices to companies alleged to have engaged in greenwashing;

(c) ASIC has been successful in securing significant civil penalties in two other cases (namely, *Mercer* and *Vanguard*); and

(d) ASIC has released Information Sheet 271 which provides information about misrepresentations in relation to sustainable, environmentally friendly or ethical investment strategies or financial products.

127 I am not persuaded by either party's submission. The fact of the matter is that the contravening conduct was serious; it is not more serious because it is colloquially called "greenwashing",

and it is not less serious because ASIC has taken actions against other parties in relation to similar conduct.

128 It follows that I need not rule on the defendant's objection to paragraph 13 of Ms Melissa Smith's affidavit, which referred to several documents containing information on total assets held in superannuation in Australia and investment products focused on ESG considerations.

Contrition, cooperation with ASIC and corrective measures

129 I accept that LGSS has expressed some contrition for its contravening conduct. As mentioned above, Ms Heffernan deposed as follows at paragraphs 96 and 97 of her affidavit:

> I acknowledge that we failed to meet the standard members expected of us. In particular, I acknowledge that we expressed our ESG restrictions in a way that was misleading.
>
> I am sorry for the effect this has had on our members, and apologise to anyone who was misled by our ESG disclosures. Responsibility for this failure lies with LGSS.

130 Although Ms Heffernan made that apology, it must be seen in light of the response of LGSS when it was confronted by ASIC with allegations of the contraventions and in particular the contentions that it made at trial in its defence.

131 Many of the submissions that it pressed in its defence at the liability hearing were contrived, among them:

(a) that no part of the conduct impugned by ASIC in its concise statement was "in trade or commerce" within the meaning of s 12DB or s 12DF of the ASIC Act (see Liability Judgment at [43]ff);

(b) that no reasonable person would understand the "gambling" restriction to extend to companies that sold lottery tickets, because the reasonable person would only "associate gambling-related social ills with pokie machines, casinos and online sports betting agencies, but not retailing lottery tickets" (see Liability Judgment at [80]ff);

(c) that some of the individual gambling representations contained language which indicated that the gambling component of Representations 1, 2, 5, 6, 11, 18 and 19 (i.e. the representation that LGSS would not make or hold investments in companies that derive more than 10% of their revenue from gambling) was a "guiding principle" rather than "a strictly applied rule", despite the fact that some of those Representations included the assurance that there was "No Way" relevant investments would be made (see Liability Judgment at [101]ff);

(d) that the relevant consumer would not understand any of the relevant Representations to prevent LGSS from indirectly investing in proscribed shares (see Liability Judgment at [122]ff);

(e) that the Representations about Russia were directed towards processes that had begun and commitments as to future investments decisions, and that LGSS did not hold investments in Russian entities because they were held through a pooled fund, despite the fact that LGSS said that Russia was "out", that "until recently" Active Super "had" or "did have" an exposure to Russian stock, and that "now" Russia is on the list of countries in which the fund "will not invest" (see Liability Judgment at [182]ff);

(f) that the Representations that LGSS would "eliminate investments" in oil tar sands and that LGSS's Restrictions List "will include companies which derive their revenue or assets from … oil tar sands" meant only that LGSS "would consider whether to divest the holding" (see Liability Judgment at [196]ff);

(g) the "threadbare" submissions regarding the Representations about coal mining (see Liability Judgment at [213]ff); and

(h) the indefensible submission about the Representations conveyed in the Investment Magazine Statement (see Liability Judgment at [234]ff).

132 I also accept that LGSS cooperated with ASIC by attending voluntary conferences with ASIC, but again, such cooperation must be seen in light of the way that LGSS chose to run its case at the liability hearing.

133 At paragraph 70 of its written submissions, LGSS cited paragraph [76] of Jackman J's decision in *Australian Securities and Investments Commission v Web3 Ventures Pty Ltd (Penalty)* [2024] FCA 578 as purported support for the proposition that "contested liability at the liability hearing does not negate LGSS's cooperation in respect of the investigation". But as his Honour said of the matter before him, in his view the defendant "ha[d] adopted a bona fide and reasonably arguable position throughout these proceedings, and [was] not open to criticism for the way in which it ha[d] conducted the proceedings". For the reasons I have given, the same cannot be said for LGSS in this case.

134 I accept, as it submitted in paragraph 38 of LGSS's written submissions, that LGSS has taken steps to improve its compliance systems since the contraventions. By April 2023, LGSS had taken the following steps to mitigate the likelihood of similar conduct occurring in the future, including:

(a) training the board, executive leadership team and other relevant staff members on ESG matters and LGSS's consumer law obligations;

(b) reviewing all publications on Active Super's website, and making amendments to ensure a clearer and more nuanced description of Active Super's responsible investment approach;

(c) engaging in ongoing monitoring and regular review of Active Super's public disclosures to ensure alignment with Active Super's SRI policy;

(d) having an external review conducted by PwC of the internal controls over certain elements of Active Super's investment governance framework;

(e) conducting an internal review of the LGSS policies and practices that contributed to the contravening conduct; and

(f) strengthening controls, including by amending the SRI policy to:

(i) allow the CIO to take immediate action to add companies to the Restrictions List;

(ii) place greater emphasis on LGSS actively confirming that the responsible investment definitions, as developed by external ESG providers and adopted by LGSS in relation to negative screens, are consistent with its SRI policy; and

(iii) provide for regular monthly checks to monitor whether any investments are approaching or have reached relevant activity thresholds.

Merger with VSPL

135 ASIC conceded, and I agree, that although there is a need for specific deterrence, it is moderated by the merger with VSPL (described in paragraphs 31–35 above) because the completion of the merger on 1 March 2025 means that LGSS ceases acting as trustee for Active Super. See *Australian Securities and Investments Commission v Statewide Superannuation Pty Ltd* [2021] FCA 1650 at [100] (Besanko J): "the likely merger means that specific deterrence is of less importance in this case compared with other cases".

CONCLUSION REGARDING PENALTY

136 It was not disputed that LGSS's contraventions were serious. LGSS benefitted from its misleading conduct by misrepresenting the "ethical" nature of a significant part of its investments, which on any view enhanced its ability to attract investors to the Active Super

fund and enhanced its reputation as a provider of investment funds with ESG characteristics. As a result, investors lost the opportunity to invest in accordance with their investment values.

137 Further, the contravening conduct continued over an extensive period of time (approximately two and a half years); the likely causes of it were never explained; it concerned substantial investments; it was likely to have led to investors losing confidence in ESG programs; and the failure by LGSS to have in place properly functioning systems and processes designed to ensure that its representations were not false or misleading was the responsibility of senior management. Further, when confronted with the allegations by ASIC, LGSS ran a host of contrived arguments in its defence at trial.

138 On the other side of the deterrence ledger, LGSS apologised (albeit belatedly); it has not previously been found to have engaged in similar contravening conduct; it has taken steps to improve its compliance systems; it attended two voluntary conferences with ASIC; and the need for specific deterrence is of less importance in this case compared with other cases because of the successful merger described above.

139 In all the circumstances, subject to consideration of the totality principle, I consider the following penalties to be appropriate:

(a) $3 million for the contraventions relating to the representations conveyed by the Website Statements (i.e. Representations 1 and 2, which correspond to Declarations 1(a), 1(b) and 2(a));

(b) $750,000 for the contraventions relating to the representation conveyed by the Email and Reproduced Statements (i.e. Representation 17, which corresponds to Declarations 1(i) and 2(a));

(c) $750,000 for the contraventions relating to the representations conveyed by the Impact Report Statements (i.e. Representations 5 and 6, which correspond to Declarations 1(c), 1(d) and 2(a));

(d) $250,000 for the contraventions relating to the representation conveyed by the Investment Magazine Statement (i.e. Representation 11, which corresponds to Declarations 1(e) and 2(a));

(e) $2 million for the contraventions relating to the representation conveyed by the SRI Policy Statement (i.e. Representation 13, which corresponds to Declarations 1(f) and 2(a));

(f) $750,000 for the contraventions relating to the representations conveyed by the Responsible Investment Report Statements (i.e. Representations 15, 16 and 18, which correspond to Declarations 1(g), 1(h), 1(j) and 2(a));

(g) $1.5 million for the contraventions relating to the representation conveyed by the PDS Fact Sheet Statement published in 2021 (i.e. Representation 20, which corresponds to Declaration 2(c)); and

(h) $1.5 million for the contraventions relating to the representation conveyed by the PDS Fact Sheet Statement published in 2022 (i.e. Representation 19, which corresponds to Declaration 2(b)).

140 I have considered whether any reduction is required on the basis of the totality principle. See, by way of example only, *Australian Securities and Investments Commission v Wooldridge* [2019] FCAFC 172 at [26] (Greenwood, Middleton and Foster JJ). I do not consider that any reduction is required. I will therefore impose a total penalty of $10.5 million.

ADVERSE PUBLICITY ORDER

141 The power to make an adverse publicity order is found in s 12GLB of the ASIC Act. Section 12GLB relevantly provides:

> **12GLB Punitive orders requiring adverse publicity**
>
> (1) The Court may, on application by ASIC, make an adverse publicity order in relation to a person who:
>
> (a) has been ordered to pay a pecuniary penalty under section 12GBB; or
>
> (b) is guilty of an offence under section 12GB.
>
> (2) In this section, an *adverse publicity order*, in relation to a person, means an order that:
>
> (a) requires the person to disclose, in the way and to third parties specified in the order, such information as is so specified, being information that the person has possession of or access to; and
>
> (b) requires the person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order.
>
> (3) This section does not limit the Court's powers under any other provision of this Act.

142 An adverse publicity order serves three purposes.

143 The first purpose is punitive, as the heading to s 12GLB makes clear. The second purpose is not only to serve the notion of deterrence but also to provide a fitting curial response to the

impugned conduct. The third purpose is to protect the public interest in dispelling incorrect or false impressions created by contravening conduct, alert the consumer to the fact of contravening conduct, aide the enforcement of primary orders and prevent the repetition of contravening conduct. See *Australian Competition and Consumer Commission v Aveling Homes Pty Ltd* [2017] FCA 1470 at [59] (McKerracher J), citing *Australian Competition and Consumer Commission v SMS Global Pty Ltd* [2011] FCA 855 at [128] (Murphy J); and *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1 at 20–21 [49]–[52] (Stone J). See also *Australian Securities and Investments Commission v Commonwealth Bank of Australia (No 2)* [2021] FCA 966 at [9]–[15] (Lee J).

144 In this case, the parties quibbled about the precise form of an adverse publicity order, and LGSS asserted, without evidence, that there may be practical difficulties with an order that the text of the adverse publicity order remain available on relevant webpages after the merger is effected. But in my view, an order substantially in the form sought by ASIC is appropriate in light of the purposes that s 12GLB is intended to serve.

COSTS

145 ASIC seeks its costs of the proceeding on the basis that they should follow the event. LGSS withdrew its written submission that each party should bear its own costs and, much more realistically, submitted instead that because it succeeded on the tobacco representations that should result in a costs order that LGSS pay 90 per cent of ASIC's cost to reflect what Mr Insall correctly called its "modest degree of success" in that regard. See transcript at page 78.

146 Ordinarily, a successful party is entitled to an award of costs in its favour. There is no hard and fast rule. It is a matter of the discretion of the court. Here, I do not consider that the outcome of the tobacco representations issue justifies departure from the ordinary position. I will accordingly order that LGSS pay ASIC's costs of the proceeding.

I certify that the preceding one hundred and forty-six (146) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Callaghan.

Associate: 

Dated: 18 March 2025