

# FEDERAL COURT OF AUSTRALIA

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

### FCA 587

File number(s): NSD 847 of 2023

Judgment of: **O'CALLAGHAN J**

Date of judgment: 5 June 2024

Catchwords: **BANKING AND FINANCIAL INSTITUTIONS** – application by Australian Securities and Investments Commission (ASIC) alleging that defendant contravened ss 12DB(1)(a) and 12DF(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) by making false or misleading representations, and engaging in conduct liable to mislead the public in relation to investments made by the superannuation fund in the nature of what is colloquially called “greenwashing” – where defendant trustee of superannuation fund – whether various representations that defendant would not make or hold investments in gambling, tobacco, oil tar sands, coal mining or in Russia were conveyed by the statements on which ASIC relied – whether the representations were made “in trade or commerce” – whether defendant engaged in conduct contrary to the representations – whether ordinary and reasonable member would have read representations as being subject to the fund’s sustainable investment policy on its website – whether ordinary and reasonable member would understand the fund’s “overlay” process – whether ordinary and reasonable member would draw a distinction between directly holding shares in a company and indirect exposures through a pooled fund – whether the representations were as to future matters and whether defendant had a reasonable basis for making them – meaning of “gambling” considered – whether lotteries a form of gambling

**PRACTICE AND PROCEDURE** – undesirability of use of concise statements in cases of complexity, or where multiple representations are said to have been conveyed by or in myriad places – concise statements not intended to be a substitute for conventional pleadings

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth) ss 12BB(1), 12BB(2), 12DB, 12DB(1)(a), 12DF, 12DF(1)

*Superannuation Industry (Supervision) Act 1993* (Cth) s 19  
*Trade Practices Act 1974* (Cth)  
*Superannuation Administration Act 1996* (NSW) ss 127,  
127(5)  
*Trustee Act 1925* (NSW) s 63

Cases cited:

*Allianz Australia Insurance Ltd v Delor Vue Apartments*  
CTS 39788 (2021) 287 FCR 388  
*Astrazeneca Pty Ltd v GlaxoSmithKline Australia Pty Ltd*  
[2006] ATPR 42-106; [2006] FCAFC 22  
*Australian Securities and Investments Commission v*  
*Australia and New Zealand Banking Group Ltd* [2023]  
FCA 1150  
*Australian Securities and Investments Commission v*  
*National Australia Bank Ltd (No 2)* [2023] FCA 1118  
*Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169  
CLR 594  
*George Weston Foods Ltd v Goodman Fielder Ltd* (2000)  
49 IPR 553; [2000] FCA 1632  
*iNova Pharmaceuticals (Australia) Pty Ltd v Reckitt*  
*Benckiser (Australia) Pty Ltd* [2018] FCA 1209  
*Invisalign Australia Pty Ltd v SmileDirectClub LLC* [2023]  
FCA 395  
*Invisalign Australia Pty Ltd v SmileDirectClub LLC* [2024]  
FCAFC 46  
*Kowalski v MMAL Staff Superannuation Fund Pty Ltd*  
(2007) 242 ALR 370; [2007] FCA 1069  
*RB (Hygiene Home) Australia Pty Ltd v Henkel Australia*  
*Pty Ltd* [2024] FCAFC 10  
*Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd*  
(2023) 97 ALJR 388; [2023] HCA 8

Cherry MA, “The Law and Economics of Corporate Social  
Responsibility and Greenwashing” (2014) 14 UC Davis  
Bus LJ 281

Das C, Pearce P and Henson T, “What’s Green and Ethical  
about Greenwashing in the Promotion of Financial  
Products” [2023] NZLJ 400

Fisch JE, “Making Sustainability Disclosure Sustainable”  
(2019) 107(4) Geo LJ 923

Peterson VJ, “Gray Areas in Green Claims: Why  
Greenwashing Regulation Needs an Overhaul” (2024)  
35(1) Vill Env’t LJ 177

Division:

General Division

Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	239
Date of last submission:	9 April 2024
Date of hearing:	25 and 26 March 2024
Counsel for the Plaintiff:	J Hewitt SC with J Buncle
Solicitor for the Plaintiff:	Australian Securities and Investments Commission
Counsel for the Defendant:	HK Insall SC with AE 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:**   **5 JUNE 2024**

### **THE COURT ORDERS THAT:**

1.     The proceeding be listed for further hearing on a date to be fixed.
2.     The costs of the proceeding to date be reserved.

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

# REASONS FOR JUDGMENT

**O'CALLAGHAN J**

## INTRODUCTION

1 In the realm of financial product investments, “greenwashing” is a term that:

... pertains to the misleading and deceptive disclosures employed by financial institutions to entice environmentally conscious investors into purchasing their financial products that, in reality, fall short of meeting the expected Environmental, Social, and Governance (**ESG**) or green credentials. These ESG credentials encompass environmental compliance and measures to protect the environment, reduce greenhouse gas emissions, and manage natural resources; social compliance, which evaluates how a company treats its stakeholders; and governance compliance, focusing on appropriate governance practices such as executive transparency and accountability.

See Das C, Pearce P and Henson T, “What’s Green and Ethical about Greenwashing in the Promotion of Financial Products” [2023] NZLJ 400 at 401.

2 Some American authors have said that the origin of the term “greenwashing” can be traced to an unpublished 1986 essay by an environmentalist named Jay Westerveld, in which he is claimed to have:

described a hotel sign urging patrons to use fewer towels to reduce their environmental impact. Despite the hotel’s purported concern for the environment, Westerveld opined that the hotel’s true incentive for posting the sign was to save money by not having to launder as many towels. Based on the term “whitewashing” - using white paint to cover up dirt - environmental groups adopted the term “greenwashing” to signal misleading environmental claims.

(footnotes omitted)

See Peterson VJ, “Gray Areas in Green Claims: Why Greenwashing Regulation Needs an Overhaul” (2024) 35(1) Vill Env’t LJ 177 at 179. Professor Miriam A Cherry, however, suggests that the story described by Ms Peterson may be apocryphal. See Cherry MA, “The Law and Economics of Corporate Social Responsibility and Greenwashing” (2014) 14 UC Davis Bus LJ 281 at 284 (and footnote 5).

3 In this proceeding, commenced on 10 August 2023 by way of originating process and concise statement, the Australian Securities and Investments Commission (**ASIC**) alleges that the defendant (**LGSS**) contravened s 12DB(1)(a) and s 12DF(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) by making false or misleading representations, and engaging in conduct liable to mislead the public in relation to investments

made by the superannuation fund, of which LGSS is the trustee, now known as **Active Super** (also known as Local Government Super), during the **relevant period**, being from 1 February 2021 to 30 June 2023. ASIC alleges, in substance, that LGSS engaged in greenwashing by making false or misleading representations to members and potential members of the fund about their “green” or “ESG” credentials.

4 LGSS contended in its response to ASIC’s concise statement, in substance, that:

- (a) none of the representations ASIC relied on was conveyed;
- (b) the representations, if made, were not made “in trade or commerce”;
- (c) it did not engage in conduct contrary to the representations, if made; and
- (d) in any event, the representations, if made, were as to future matters and LGSS had a reasonable basis for making them; and
- (e) the proceeding was without merit and should be dismissed.

5 On 24 August 2023, Yates J ordered that LGSS’s alleged liability for contravening ss 12DB(1)(a) and 12DF(1) of the ASIC Act and ASIC’s application for declarations in respect of those alleged contraventions be determined separately from, and prior to, all other claims for relief. The matter was subsequently reallocated to my docket.

6 At the hearing, Mr J Hewitt SC appeared with Ms J Buncle for ASIC. Mr HK Insall SC appeared with Ms AE Smith for LGSS.

7 ASIC read the affidavits of Vanessa Keir dated 13 November 2023, and of Liam Toohey dated 1 March 2024.

8 Ms Keir is a Senior Manager at ASIC responsible for the management and supervision of enforcement matters in investigation and litigation. Among other things, Ms Keir produced a number of documents obtained by ASIC during the investigation it carried out in 2023 in relation to suspected contraventions by LGSS of the ASIC Act.

9 Mr Toohey is employed by ASIC as an Investigator in Enforcement and Compliance. He also produced a number of documents upon which ASIC relied.

10 LGSS read the affidavits of Craig Anthony Turnbull dated 9 February 2024, Moya Yip dated 9 February 2024 and of Ken Pholsena dated 16 February 2024.

11 Mr Turnbull is the Chief Investment Officer of Active Super. He deposed, among other things, to the history and growth of Active Super, the content of various documents (annual reports and so on), the nature of the fund’s investments, Active Super’s corporate structure and governance, its investment structure, its “long standing commitment to responsible investing”, its responsible investment policies, its “investment restriction list”, certain investment agreements and its 2022 ban on investing in Russia.

12 Mr Pholsena is employed by Active Super as a Portfolio Manager. He deposed, among other things, to Active Super’s so-called “overlay process” and related short trading.

13 Ms Yip is employed by Active Super as the Head of Responsible Investment. She described various activities that she undertook “to ensure that Active Super’s portfolios maintained strong ESG credentials”, and restricting investments in Russia.

14 Mr Turnbull, Ms Yip and Mr Pholsena were cross-examined.

#### **LGSS AND ACTIVE SUPER**

15 LGSS holds an Australian Financial Services Licence and is the trustee of Active Super.

16 Active Super was originally known as the Local Government Superannuation Scheme. It was established as a “profit-to-member” industry scheme under a trust deed dated 30 June 1997. It thus reinvests its profits for the benefit of its members.

17 By the time of the relevant period Active Super was an “open” fund — that is, any member of the public could invest their superannuation in Active Super, whether or not they were a local government employee. Further, local government employees had a choice as to whether they invested in LGSS, or another fund.

18 By the end of the relevant period, Active Super managed approximately \$13.5 billion in superannuation assets for around 89,000 members.

19 Its investment portfolio was spread across various asset classes, including, relevantly: international equities (about 21% of assets held); Australian equities (about 40% of assets held); international unit trusts (about 10% of assets held); and Australian unit trusts (about 2% of assets held). During the relevant period, LGSS held units in, among other funds, Colonial First State Wholesale Small Companies Fund - Core ARSN 089 460 891 (**CFS Fund**), the Macquarie Emerging Markets Fund (Class I USD) (**Macquarie Fund**), the Wellington Emerging Markets Fund (Australia) ARSN 133 266 903 (**Wellington Fund**) and the SPDR

S&P/ASX 200 Fund (**ASX 200 Fund**), which is an exchange traded fund that provides investment exposure to all of the companies comprising the ASX 200 index (together, the **Investment Funds**).

20 LGSS says that it is committed to “environmental, social and governance” (usually abbreviated as “ESG”) factors in its investment decision making, including pursuant to its “Sustainable and Responsible Investment Policy”, which is often abbreviated as “the SRI Policy”.

21 The concept of corporate “sustainability”, and investor focus on it, is accelerating globally. See generally Fisch JE, “Making Sustainability Disclosure Sustainable” (2019) 107(4) Geo LJ 923. As Professor Fisch said at 925–926:

The extent to which corporations should incorporate sustainability objectives into their operational decision making is highly contested, as is the relationship between societal impact and economic value. Indeed, the Department of Labor subsequently issued new guidelines for retirement plans cautioning that “[f]iduciaries must not too readily treat ESG factors as economically relevant to the particular investment choices at issue when making a decision.” At the same time, however, issuers are modifying their operations in response both to investor demands and to the claim that sustainable business practices lead to improved economic performance. Being able to assess an issuer’s sustainability practices is critical to evaluating the effect of sustainability practices on economic value. For investors and capital markets to consider the societal impact of a firm’s operations--and to determine the consequences of that impact--they must have access to adequate sustainability disclosure.

(footnotes omitted)

22 The idea behind sustainability is decision making “that incorporates social, political, and ethical concerns in addition to traditional financial performance” and “involves matters that can impact the long-term success of the company and the economy”. Ibid at 931.

## **THE LAW**

23 Section 12DB(1)(a) of the ASIC Act provides that “[a] person must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services: (a) make a false or misleading representation that services are of a particular standard, quality, value or grade...”

24 Section 12DF(1) provides that “[a] person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any financial services”.

25 Determining whether a person has engaged in misleading or deceptive conduct involves four steps: first, identifying with precision the “conduct” said to contravene the relevant provision;



second, considering whether the identified conduct was conduct “in trade or commerce”; third, considering what meaning that conduct conveyed; and fourth, determining whether that conduct in light of that meaning was misleading or deceptive or likely to mislead or deceive. Compare *Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd* (2023) 97 ALJR 388; [2023] HCA 8 at [80] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ); *RB (Hygiene Home) Australia Pty Ltd v Henkel Australia Pty Ltd* [2024] FCAFC 10 at [168] (Nicholas, Burley and Hesse JJ).

- 26 The third and fourth steps require the court to characterise, as an objective matter, the conduct viewed as a whole and its notional effects, judged by reference to its context, on the state of mind of the relevant person or class of person. That context includes the immediate context (including all the words in the document or other communication and the manner in which those words are conveyed, not just a word or phrase in isolation) and the broader context of the relevant surrounding facts and circumstances. See *Self Care* at [82].
- 27 Where the conduct was directed to the public or part of the public, the third and fourth steps must be undertaken by reference to the effect or likely effect of the conduct on the ordinary and reasonable members of the relevant class of persons. This avoids using the very ignorant or the very knowledgeable to assess the effect or likely effect; it also avoids using those credited with habitual caution or exceptional carelessness; it also avoids considering the assumptions of persons which are extreme or fanciful. *Self Care* at [83].
- 28 Further, conduct is, or is likely to be, misleading or deceptive if it has a tendency to lead into error. The threshold “likely to be” is satisfied where there is a real and not remote possibility that conduct will mislead or deceive.
- 29 Where the persons in question are not identified individuals to whom a particular misrepresentation has been made or from whom a relevant fact, circumstance or proposal was withheld, but are members of a class to which the conduct in question was directed in a general sense, the alleged conduct must be judged by its effect on ordinary or reasonable members of the class. In this case, ASIC contended, and LGSS did not say otherwise, that the relevant class to which the representations alleged were directed are consumers who are members or prospective members of the fund.

## THE REPRESENTATIONS ALLEGED

### The concise statement

30 ASIC alleged in its concise statement that LGSS made false or misleading representations and engaged in conduct liable to mislead the public contrary to ss 12DB(1)(a) and 12DF(1) of the ASIC Act as follows:

#### *Active Super's ESG marketing*

...

8. During the relevant period, LGSS represented Active Super in the manner described in the preceding paragraph by the following means:
  - (a) statements on its website and on social media concerning the investments that Active Super seeks to eliminate because of the risks posed to the environment and the community;
  - (b) the publication on Active Super's website of multiple versions of a Sustainable and Responsibility Investment Policy (**SRI Policy**) which purported to outline the responsible investment principles by which Active Super was managed;
  - (c) the publication on Active Super's website of an annual Impact Report which purported to explain why "Active Super investments are making a difference" (**the Impact Report**);
  - (d) the publication of product disclosure statements (**PDS**); and
  - (e) public statements by a senior executive of LGSS on its behalf in relation to Active Super's investments.
9. In relation to paragraph 8(e) above, Active Super's chief executive officer at the time, Phil Stockwell, recently stated that Active Super sees its commitment to ethical and sustainable investment as being a critical part of its offering in a competitive superannuation market. Mr Stockwell also stated that Active Super was one of the first super funds in Australia to rule out investing in tobacco 20 years ago, and that Active Super specifically excludes any investments in gambling, tobacco, weapons manufacture and certain investments which are carbon intensive.

#### *Active Super's representations*

10. During the relevant period, LGSS made each of the statements identified in Annexure A to this Concise Statement (**Annexure A**) in relation to the investments that would not be made or held by Active Super.
11. During the relevant period, by making the statements numbered 1, 2, 5, 6, 11, 18 and 19 in Annexure A, LGSS represented that Active Super would not make or hold investments in companies that derive more than 10% of their revenue from gambling (**the Gambling Representations**).
12. During the relevant period, by making the statements numbered 2 through 11, 18 and 19 in Annexure A, LGSS represented that Active Super would not make or hold investments in companies that derive any revenue from tobacco (**the Tobacco Representations**).

13. During the relevant period from May 2022, LGSS made statements in respect of the restrictions it placed on investments by Active Super in Russia from in or around May 2022. By making the statements numbered 12, 15, 16, 17 and 19 in Annexure A, LGSS represented that following Russia's invasion of Ukraine, Active Super would divest its Russian investments and make or hold no further investments in Russia (**the Russia Representations**).
14. During the relevant period, by making the statements numbered 6, 13, 14 [which was not pressed], 18, 19 and 20 [also not pressed] in Annexure A, LGSS represented that Active Super would not make or hold investments in companies that derive any revenue from oil tar sands projects (**the Oil Tar Sands Representations**).
15. During the relevant period, by making the statements numbered 13, 14 [not pressed] and 20 in Annexure A, LGSS represented that Active Super would not make or hold investments in companies that derive one-third or more of their revenue from coal mining (**the Coal Mining Representations**).
16. Each of the representations referred to in paragraphs 9, and 11 to 15 above were continuing representations.

*Active Super's investments*

17. During the relevant period, LGSS made investments for Active Super that were contrary to the statements and representations referred to in paragraphs 9 to 15 above.
18. Specifically, and as identified in Annexure B to this Concise Statement (**Annexure B**), during the relevant period LGSS made or held (either directly or indirectly):
  - (a) investments contrary to each of the Gambling Representations, being investments in the companies identified in Table 1 of Annexure B each of which derived more than 10% of its revenue from gambling;
  - (b) investments contrary to each of the Tobacco Representations, being investments in the companies identified in Table 2 of Annexure B;
  - (c) investments contrary to each of the Russia Representations, being investments in the companies identified in Table 3 of Annexure B;
  - (d) investments contrary to each of the Oil Tar Sands Representations, being investments in the companies identified in Table 4 of Annexure B; and
  - (e) investments contrary to each of the Coal Mining Representations, being investments in the companies identified in Table 5 of Annexure B each of which derived one-third or more of its revenue from coal mining.

31 Annexure A to the concise statement was headed "Representations" and it is attached to these reasons.

32 Annexure B was headed "Active Super's investments contrary to representations" and it is also attached to these reasons.

33 The matters relied on in Annexure A were, variously, published on Active Super’s website; in its SRI Policy, in Active Super reports and factsheets, on its social media platforms; and in an email sent from Active Super to existing members. The statements identified at item 11 in Annexure A were contained in an article published by *Investment Magazine*.

34 LGSS did not dispute that it made the express statements identified in Annexure A, except for the statements contained in item 11 (in which the then CEO is quoted as saying that Active Super ruled out investing in tobacco 20 years ago and also specifically excludes any investments in gambling and weapons manufacturers).

### **The case should have been pleaded**

35 In order to make sense of ASIC’s allegations, it is regrettably necessary, not to say inconvenient, to have the concise statement in one hand, and Annexures A and B in the other.

36 Judges of this court have repeatedly pointed to the unsatisfactory nature of concise statements in cases of complexity, or where multiple representations are said to have been conveyed in myriad places. See, by way of example, *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd* [2023] FCA 1150 at [15]–[17] (Beach J); *Australian Securities and Investments Commission v National Australia Bank Ltd (No 2)* [2023] FCA 1118 at [30]–[39] (Derrington J); *Invisalign Australia Pty Ltd v SmileDirectClub LLC* [2024] FCAFC 46 at [38]–[39] (O’Callaghan, Halley and Button JJ) (where the Full Court observed that a “concise statement was a most unfortunate way of pleading a case about alleged false, misleading or deceptive representations said to arise from a large body and variety of promotional material”).

37 In *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2021) 287 FCR 388 at 416 [140] McKerracher and Colvin JJ reiterated that concise statements are not intended to be a substitute for conventional pleadings. They are instead intended “to enable the applicant to bring to the attention of the respondent and the Court the key issues and key facts at the heart of the dispute and the essential relief sought from the Court before any detailed pleadings.”

38 As their Honours went on to say at 416–417 [141]:

The concise statement is intended to facilitate the case management of the proceedings from an early stage. It enables the Court to consider whether it is appropriate for the application to proceed on the basis of the concise statement without pleadings, whether the efficient conduct and disposition of the application is better served by requiring pleadings or whether some other procedure might be followed to expose the issues, such as requiring a statement of issues, the provision of detailed particulars of

particular aspects of the claim or the disclosure of certain categories of documents that are of key significance for the resolution of the dispute.

39 This proceeding is yet another example of a case where the efficient conduct and disposition of the application would have been better served by it being pleaded in the conventional fashion at an early stage.

40 Senior counsel for ASIC also pressed the tender of the following six documents, which were said to contain requests for particulars and responses thereto:

- Letter from ASIC to LGSS Pty Ltd requesting particulars dated 28 September 2023.
- Letter from LGSS Pty Ltd to ASIC providing particulars dated 12 October 2023.
- Letter from ASIC to LGSS Pty Ltd requesting further particulars dated 13 October 2023.
- Letter from LGSS Pty Ltd to ASIC providing further particulars dated 27 October 2023.
- Letter from LGSS Pty Ltd to ASIC requesting particulars of evidence dated 15 November 2023.
- Letter from ASIC to LGSS Pty Ltd providing particulars of evidence dated 23 November 2023.
- Schedule of particulars of Exhibit VCK-1 23 November 2023.

41 When he said that he sought to tender each of those documents — which run to over forty pages — the following exchange ensued between us:

MR HEWITT: And then what I was proposing to do is to tender, from the court book, part A, tabs 3 through 10, which are the requests for particulars and various responses. And then ---

HIS HONOUR: What bearing do they have on it?

MR HEWITT: Well, for example, I took your Honour to one of those letters this morning to indicate to your Honour what the metes and bounds of the disputed issues are, so they – that’s the bearing they have, is that there were some – effectively, some admissions made in the course of that correspondence about what’s in dispute.

HIS HONOUR: Well, this is the problem with concise statements, isn’t it, that – what are the metes and bounds of what’s pleaded?

MR HEWITT: Well, yes, I mean, that ---

HIS HONOUR: And then even using the word “pleaded” isn’t, strictly speaking, accurate, because they’re not meant to be pleadings ...

MR HEWITT: Well, one of the things the authorities contemplate in terms of how the concise statement process can be made workable is by request for particulars, and so that’s one of the steps that was taken here, and the response that we received – I

don't think there's any attempt to resile from the responses, in terms of it being a statement of what's in dispute.

HIS HONOUR: All right. Well

MR HEWITT: So we do think that it would be relevant for your Honour to have that material. Whether it's – you know, should be tendered, or if it just forms part of a – of, in effect, the body of material that is loosely defined as the pleadings – and that's – but I think we would press for the tender.

HIS HONOUR: All right. Well, Mr Insall is not objecting, so over my own objection, it will go in. Yes.

42 None of the tendered documents listed in paragraph 40 was ever mentioned again – which does suggest a lack of focus by the parties on defining with precision the issues that truly divided them. Rather than resorting to the exchange of lengthy requests for particulars (and tendering at trial the requests and responses thereto), the parties should have jettisoned the “concise” approach, and adopted pleadings instead. I have no doubt that, had they done so, this proceeding would have been more efficiently heard and determined. As the correspondence about particulars and the lengthy annexures to these reasons demonstrate, in any event, there is nothing remotely concise about the concise statements.

### **IN TRADE OR COMMERCE**

43 LGSS submitted 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.

44 Its submission in support of that proposition was as follows.

45 Active Super is a “profit-for-member” fund, established by a trust deed dated 30 June 1997 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. Section 127(5) required that “the trust deed must be consistent with the requirements of [the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**)] for a regulated fund within the meaning of that Act”.

46 Pursuant to clause 1.2 of its constitution, LGSS was formed for the sole purpose of acting as the trustee of a regulated superannuation fund within the meaning of s 19 of the SIS Act and “has no commercial purpose”.

47 The constitution of LGSS contains limitations on the entitlements of the shareholders, including that the directors are prohibited from declaring or determining a dividend or applying any portion of the trustee's capital or income to a shareholder (clause 21.1).

48 Before 1 January 2022, LGSS did not charge any fee for providing trustee services to the fund. Following the receipt of judicial advice pursuant to s 63 of the *Trustee Act 1925* (NSW), LGSS amended its trust deed. In reliance on that amendment LGSS has determined to charge a fee of around \$36,000 per month for acting as trustee, for the purpose of guarding against the risk of a future penalty for which LGSS could not be indemnified due to amendments to the SIS Act.

49 While LGSS provides a service to its members and recovers its costs of providing that service, any profits from its activities are reinvested for the benefit of its members. It follows, so it was submitted, that the relationship between LGSS and its members is not “intrinsically commercial” (citing *Kowalski v MMAL Staff Superannuation Fund Pty Ltd* (2007) 242 ALR 370; [2007] FCA 1069 at [52] (Finn J)), and statements made to those members about the nature of the investments made on their behalf could not therefore be “in the central conception” of trade or commerce.

50 It was further submitted that LGSS’s relationship with prospective members is not materially different, and that “it is difficult to see where commerce manifests in the relationship between the trustee and prospective beneficiaries. The only service that LGSS was offering was its services as a trustee for which it recovered its costs but was not otherwise rewarded. The offer and acceptance of those services is not trade or commerce”.

51 As a consequence, it was submitted, none of the statements that ASIC relied upon fulfills the statutory condition of being made “in trade or commerce”.

52 That submission cannot be accepted.

53 In my view, as ASIC submitted, nothing turns on the fact that the trustee is a not-for-profit company in circumstances where it is the trustee of a trust, which is a superannuation fund, and which is operating with a view to making profits for the members of the fund.

54 The size of the profit made is neither here nor there as a matter of principle, but it is worth noting that Active Super’s profits in the 2021 financial year were in the order of \$220 million.

55 I reject the submission made by LGSS that merely because a trustee company is a not-for-profit company, that means, without more, that it is not operating in trade or commerce.

56 The profit earned (or not) by the trustee company is not the point. The function of the trustee company was to operate and manage the superannuation fund.

57 And part of that function was to engage in promotional activities in relation to or for the purpose  
of the supply of services to actual or potential customers of the fund.

58 LGSS submitted that most if not all of the statements itemised in Annexure A of the concise  
statement were not of a promotional nature.

59 But that is simply not so.

60 The whole thrust of the itemised statements in the context in which they appear is to promote  
the green and community credentials of the fund, by “eliminat[ing] investments that pose too  
great a risk to the environment and the community ... [such as] Tobacco, Nuclear weapons,  
Oil tar sands [and] Gambling”. That is to say, the statements are directed towards encouraging  
existing members to remain and new members to join, and to share in the success of investing,  
directly or indirectly, in enterprises which promote ESG objectives.

61 By way of example, the 2020-2021 “Impact Report” said the following:

At Active Super we continually monitor the organisations we invest in **to ensure  
they’re meeting our standards for financial performance** and ESG impact. If they  
fall short, we engage in different ways to turn things around.

(emphasis added)

62 Further, the 2021-2022 “Responsible Investment Report” said the following:

In line with our [SRI Policy] (available on our website) **all our investments are  
assessed for their ability to deliver strong financial returns**, balanced against the  
[ESG] risk they pose to the world. So, as a member, **you can take comfort knowing  
we’re focused on your financial future** while also looking out for the future of the  
planet.

(Emphasis added).

63 How could it be otherwise? It would be passing strange – not to say a fundamental breach of  
its duty – for a trustee to pursue ESG objectives without proper and cautious regard to financial  
performance. As the United States Department of Labor is quoted as saying in the extract from  
Professor Fisch’s article at paragraph 21 above, “fiduciaries must not too readily treat ESG  
factors as economically relevant to the particular investment choices at issue when making a  
decision.”

64 LGSS relied on the following answers given by Mr Turnbull for the proposition that “the reason  
for [its] approach to responsible investing was not to make itself attractive to prospective  
members, but was rather the legacy of the values of certain ... directors some years ago”:



Now, did you understand that Active Super’s approach to responsible investments was a means by which Active Super was trying to make itself more attractive to members?--I’m aware that that is definitely not how it started out. It – it was a value-based approach that was in place before I joined, and we just continued that and tried to do the best that we could.

But when you say – when you give evidence about how it started out, what’s your perception over – in recent years? Do you say that Active Super’s approach to responsible investing is something it does to make itself attractive to members?--I don’t agree with that.

And why don’t you – why do you say that?--We did it because it was the values of our directors that they didn’t want investments in certain areas.

65 I intend no disrespect to Mr Turnbull, but those answers — and the submission of LGSS founded on them — defy common sense and must be rejected, because: (i) responsible investment objectives of a trustee cannot possibly be met without proper regard to financial performance; and (ii) the various publications directed to members and new members were self-evidently intended to broaden the fund’s appeal to a wider membership base by promoting the fund as an attractive investment.

66 In my view, it is quite plain that each of the statements relied on in Annexure A to the concise statement were, and were intended, to promote LGSS’s supply of services to actual or potential members.

67 That includes the *Investment Magazine* article. LGSS submitted that the article “was directed towards those working in the industry rather than prospective members of LGSS” and that “so much is clear from the references to fund mergers and growth strategies and other industry jargon”. Quite how that fact, if it be one, was relevant to the issue was left unexplained.

68 Despite the assertion by LGSS to the contrary, the alleged conduct is obviously “in trade or commerce”. As Mason CJ, Deane, Dawson and Gaudron JJ said in *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at 602, “[i]t is well established that the words ‘trade and commerce’ ... are not terms of art but are terms of common knowledge of the widest import”. And as their Honours went on to say at 604:

What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character. **Such conduct includes, of course, promotional activities in relation to, or for the purposes of, the supply of goods or services to actual or potential consumers, be they identified persons or merely an unidentifiable section of the public.**

(emphasis added)

69 LGSS sought to make much of Finn J’s reasons in *Kowalski*. But that was a case with facts far removed from this one. Mr Kowalski, who was self-represented, brought proceedings against MMAL Staff Superannuation Fund Pty Ltd claiming, among other things, that it had engaged in misleading and deceptive conduct in contravention of the *Trade Practices Act 1974* (Cth). His Honour held, at [50]–[53] and [55], that those claims should be dismissed as having no reasonable prospect of success, because his claims related to the fund’s failure, as a trustee, to discharge obligations owed to Mr Kowalski as a beneficiary of the fund, and that the fund’s impugned conduct was not in trade or commerce. As his Honour said at [52]:

[The] relationship [between the fund and its members] was not intrinsically a commercial relationship nor did the conduct complained of otherwise bear a trading or commercial character: compare *Village Building Co Ltd v Canberra International Airport Pty Ltd* (2004) 139 FCR 330 ; 210 ALR 114 ; [2004] FCAFC 240 at [52] . This is not to say that, in the management of the fund, [the trustee] may not have engaged in conduct that was in trade or commerce as, for example, in the making and management of the trust’s investments. The relevant conduct in question here related simply to [the fund’s] performance of the obligations it had to Mr Kowalski under the trust. That conduct, in the context of their relationship, was not an aspect of an activity or transaction that bore a trading or commercial character. It related simply to the provision by [the trustee] of such entitlements as Mr Kowalski had under the trust instruments by virtue of his membership of the fund to which he had had access in virtue of his employment ...

70 The case has no bearing on the facts here, because the claims concerning misleading and deceptive conduct in it related solely to the fund’s performance of its obligations under the trust to Mr Kowalski. In any event, that passage from the reasons of Finn J stands for the very opposite of the proposition for which LGSS contended. As his Honour said, had the case been about allegations concerning “the making and management of the trust’s investments” (as is plainly the case in this proceeding) he would have considered that conduct to be in trade or commerce.

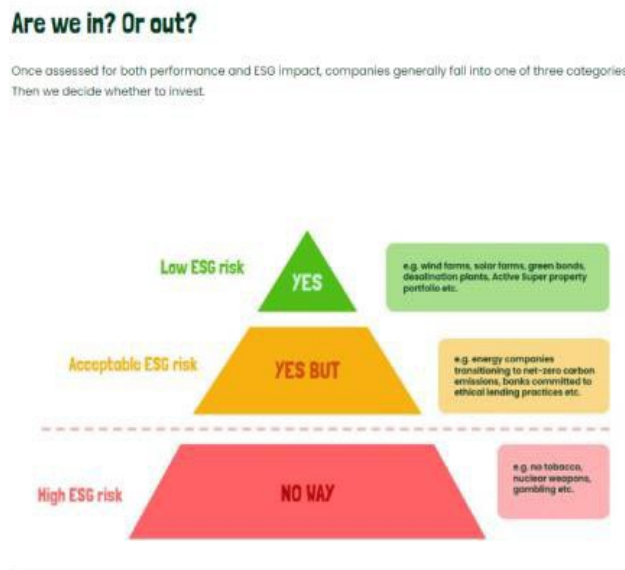
71 It follows that the submission by LGSS that none of the impugned conduct was in trade or commerce is not accepted.

72 I will now turn to the gambling representations alleged by ASIC.

### **GAMBLING REPRESENTATIONS**

73 The first gambling statement was published on the Active Super website on 25 May 2021, was removed on 28 February 2023, and was in these terms: “Additionally, we will not invest in organisations that derive more than 10% of their revenue from armaments, **gambling**, old-growth logging and uranium mining ...” (emphasis added).

74 The second gambling statement was published on the Active Super website on 25 May 2021, was removed on 1 March 2023, and was set out in this visual representation:



75 The third and fourth gambling statements were published by LGSS in Active Super’s 2021 Impact Report. The report included a similar visual representation to that above, and said that gambling investments fall into the “No way” category of investment and that Active Super’s negative screens will “eliminate” Active Super’s “exposure to high ESG risk industries”. The 2021 Impact Report was available to the public on Active Super’s website from 28 October 2021 to 1 March 2023.

76 The fifth gambling statement was comprised of words attributed by *Investment Magazine* to the then CEO of Active Super, Mr Phil Stockwell. Relevantly, he is reported as having said that Active Super “specifically excludes any investments in gambling”.

77 The sixth gambling statement was published in the Responsible Investment Report 2021-2022 on 20 December 2022. A relevantly identical statement, the seventh gambling statement, was made in several Product Disclosure Statements (**PDS**) published on 1 July 2022, as follows: “[w]e eliminate investments that pose too great a risk to the environment and the community, for example nuclear weapons, tobacco manufacturing, oil tar sands and **gambling** ... ” (emphasis added).

78 ASIC contended that contrary to each of the above statements, during different times in the relevant period, LGSS made or held investments indirectly in seven gambling companies through the CFS Fund and the ASX 200 Fund that derived more than 10% of their revenue from gambling; and directly in two gambling companies (**PointsBet** Holdings Limited and

**Jumbo Interactive Limited**) that derived more than 10% of their revenue from gambling, as follows:

No.	Company	Type of holding	First date held	Disposal date/Last date held
1.	Skycity Entertainment Group Limited	Indirect (via the Colonial First State Wholesale Small Companies Fund)	1 February 2021	Held as at 31 May 2023
		Indirect (via SPDR S&P/ASX 200 ETF)	30 November 2016	21 March 2022
2.	PointsBet Holdings Limited	Indirect (via SPDR S&P/ASX 200 ETF)	4 February 2021	19 September 2022
		Direct	30 November 2016	23 December 2021
3.	Jumbo Interactive Limited	Direct	3 April 2019	6 June 2023
4.	Aristocrat Leisure Limited	Indirect (via SPDR S&P/ASX200 ETF)	30 November 2016	Held as at 23 May 2023
5.	The Lottery Corporation Limited	Indirect (via SPDR S&P/ASX200 ETF)	Added to the ASX200 24 May 2022	Held as at 23 May 2023
6.	Tabcorp Holdings Limited	Indirect (via SPDR S&P/ASX200 ETF)	30 Nov 2016	Held as at 23 May 2023
7.	Crown Resorts Ltd	Indirect (via SPDR S&P/ASX200 ETF)	30 Nov 2016	20 June 2022
8.	The Star Entertainment Group Ltd	Indirect (via SPDR S&P/ASX200 ETF)	30 Nov 2016	Held as at 23 May 2023
		Indirect (via the Colonial First State Wholesale Small Companies Fund)	31 March 2023	Held as at 31 May 2023

79 LGSS contended, on the other hand, that it did not make or hold investments in any companies that derived more than 10% of their revenue from gambling for the following reasons.

### **Are lotteries “gambling”?**

80 In the case of Jumbo (in which it held shares directly), LGSS contended that it was not a company that derived more than 10% of its revenue from gambling. Rather, it said that Jumbo’s principal business was running lotteries, and that “[n]o reasonable person would understand the ‘gambling’ restriction to extend to companies that sold lottery tickets”, because the reasonable member or prospective member of Active Super would only “associate gambling-related social ills with pokie machines, casinos and online sports betting agencies, but not retailing lottery tickets”. The submission continued:

This is especially true for Jumbo, which provides its proprietary lottery software

platform and lottery management expertise to charity and government lottery sectors, including Mater, Endeavour Foundation, Deaf Services, Gatherwell, St John and Paralympics Australia. Lottery ticket retailers include local newsagencies and most charities. It might be supposed that many people have had some experience in buying the odd lottery ticket. It is submitted that it would be a rare person indeed who associated gambling addictions with such activities, such that they would expect lottery ticket retailers to be excluded under the “gambling” restriction. The Court would not accept that an ordinary and reasonable member of the class would have harboured that view.

81 Jumbo operates the website [www.ozlotteries.com](http://www.ozlotteries.com) and sells tickets in national draw lottery games to customers under an agreement with the licenced operator, The Lottery Corporation.

82 The Lottery Corporation is the owner of the “Lott” and “Keno” lotteries in Australia. Its total revenue for FY 2022 was approximately \$104.3 million, of which \$91.1 million was derived from “Lottery Retailing”. The 2021 figures were about \$83.3 million and \$75.08 million respectively. Its total revenue from operations for 2020 was about \$71.17 million, of which about \$64.28 million was derived from “Internet Lotteries Australia”.

83 The submission that the reasonable ordinary member or prospective member of Active Super would associate “gambling-related social ills” with pokie machines, casinos and online sports betting agencies, but not retailing lottery tickets, cannot be accepted.

84 No evidence was adduced in support of such a contention and how or why it was asserted that lotteries are not associated with gambling-related “social ills” (including gambling addictions) was never explained.

85 But in any event, the relevant question is not whether a reasonable member would associate lotteries with “social ills”. The relevant question is whether that reasonable member would consider “gambling” to include lotteries. In my view, an ordinary reasonable consumer who was a member or prospective member of the fund would reasonably understand the business of running lotteries to be a gambling business, because so much follows as a matter of ordinary English.

86 “Gambling” is defined in the Macquarie Dictionary as “to stake or risk money, or anything of value, on the outcome of something involving chance”; “to act on favourable hopes or assessment”; “to risk or venture”; or as a noun, “any matter or thing involving risk or uncertainty”.

87 It seems to me plain that “gambling” includes and would be understood by the ordinary reasonable consumer to include lottery tickets, because the purchase of such tickets satisfies each of those definitions.

### **The role of the Sustainable and Responsible Investment Policy**

88 LGSS contended that the statements on which the gambling representations were based did not convey a representation that Active Super would not invest in investment funds which held shares in gambling companies.

89 LGSS said that the gambling representations should be understood in their relevant context, which, it was argued, included the terms of LGSS’s Sustainable and Responsible Investment Policy, which I will refer to either as “the SRI Policy” or “the policy”. It relevantly stated that LGSS “will not” derive 10% or more of its revenue from gambling, defined as companies “involved in the manufacture and/or production of gambling machines and services and/or ownership of outlets housing these machines.”

90 It will immediately be observed that there is a tension between that version of the anti-gambling policy, and what was said in the Impact Reports and on the website, which said nothing about the proscription on investing in gambling being limited to companies making, servicing, owning or housing “gambling machines” and, in almost all instances, made no reference to any 10% revenue threshold amount.

91 It is convenient first to deal with the role that LGSS contended is to be played by the policy in the context of the gambling representations. As will become apparent, the role played by the policy arises in respect of each of the other alleged representations.

92 LGSS submitted that the policy appeared prominently on Active Super’s website under the “Investments” tab, which appeared at the top of every page of the website. It says that from wherever a viewer happened to be located on the website, “the SRI Policy was two clicks away”. It relied on a document marked during the hearing as exhibit MFI D6, which consisted of annotated screenshots of the website headed “25 March 2024 Web Archive Home Page ‘Investment’ Menu”. Those screenshots are attached to these reasons, marked as Annexure C. In the course of the hearing, LGSS also referred to a “web capture” of Active Super’s website as it existed at the relevant time, to demonstrate how a viewer may navigate the website to arrive at, and download, a PDF copy of the policy.

93 ASIC submitted that the policy was densely worded, and was not readily viewable without a lot of searching. LGSS disagreed, and maintained that the policy was accessible because it was expressly referred to in the Impact Report, the Responsible Investment Report, and the PDS. LGSS also said that “importantly” the policy did not “commit to perfect exclusion of restricted companies and identified relevant limitations to LGSS’s investment approach”.

94 It was further contended that “a reasonable fund member would not expect its trustee to be immediately aware of, and immediately divest holdings in, a company that tipped above a threshold such that it ought to become a restricted investment”.

95 In support of each of those propositions, LGSS pointed to the following language in the SRI Policy (version 7, dated December 2020) which, like the relevantly identical policies for other years, it said qualified the gambling representations relied on by ASIC:

**1. Policy statement**

- a) Local Government Super (LGS) was established in 1997 as the fund for NSW local government employees. It is an open fund and provides responsible and sustainable investments for its members. LGSS Pty Limited, the Trustee of the Fund is solely responsible for the management and control of the Fund, ensuring LGS operates in accordance with the LGS Trust Deed and superannuation law.
- b) This Sustainable and Responsible Investment Policy (‘Policy’) recognises that LGS is long term in nature and that the long term prosperity of the economy and the wellbeing of members depends on a healthy environment, social cohesion and good governance of LGS and the companies in which it invests. As a highly diversified investor, LGS has an interest in a large number of all major companies in Australia and internationally.
- c) This Policy sets down the responsible investment principles by which LGS will be managed, and the requirements for all investments made by LGS. It covers the total investment portfolio, with specific policies for public and private equity investments and direct property. The Policy includes the list of collective engagement initiatives that LGS will participate in and the ESG risk assessment required of LGS’ asset consultants and investment managers.

...

**3. Governance**

- a) This Policy provides a description of how the Trustee incorporates sustainability considerations and ESG risks as part of its fiduciary investment management obligations. It should be read in conjunction with the Guidelines, LGS Investment Policy Statement, Investment Governance Framework, Risk Management Framework and Due Diligence Policy.
- b) The Policy is consistent with the long term investment objectives of

LGS and its risk tolerance. LGS' Investment Beliefs recognise ESG factors and sustainability as important considerations in driving both long term investments returns and reducing risk. These factors are likely to become more important in all investment decisions.

- c) The following sections in this Policy outline how LGS implements responsible investment throughout its investment processes. It uses a combination of internal management, including specialist responsible investment personnel, along with the provision of outsourced responsible investment-related services. The Board, via its nominated subcommittees, has ultimate oversight of responsible investment activities.

...

## 9. **Investment restrictions**

- a) The Trustee has determined that LGS will not make investments in companies that derive any revenues in the following areas of activity:
  - i) Controversial weapons: Companies involved in the manufacture and/or production of controversial weapons such as land mines, cluster bombs and nuclear weapons
  - ii) Tobacco: Companies involved in the manufacture and/or production of tobacco products
- b) The Trustee has determined that the Fund will not make investments in companies that derive 10% or more of their revenues in the following areas of activity:
  - i) Armaments: Companies involved in the manufacture and/or production of armaments
  - ii) Gambling: Companies involved in the manufacture and/or production of gambling machines and services and/or ownership of outlets housing these machines
  - iii) Old growth logging: Companies involved in the logging of old growth forests
  - iv) Uranium Mining/Nuclear: companies involved in uranium mining and production of nuclear energy
- (c) The Trustee has determined that the Fund will not make investments in companies that derive 33.3% (one-third) or more of their revenues in high carbon sensitive activities.
  - i) Companies assessed as being the most vulnerable from the sectors that are evaluated as being highly sensitive to the multiple investment risks associated with climate change. This list will include companies which derive their revenue or assets from coal mining, oil tar sands and coal fired electricity utilities. LGS will reference external research to determine which companies are high carbon sensitive.

...

## 10. **SRI and High Carbon Overlays**



- (a) In situations where it is not possible to avoid indirect investment in restricted companies, for example because of index mandates or investments made through pooled trusts, LGS will aim to eliminate exposure to restricted companies by shorting the same number of securities via an overlay process.

96 LGSS contended that it negated its exposure to restricted investments through the “overlay” process referred to in clause 10 immediately above, which, it was said, was supposed to involve entering short positions for the same number of securities in instances where there was an unavoidable exposure to restricted companies. But it emerged during the hearing that the overlay policy, in the main, was not employed during the relevant period.

97 LGSS also relied on the October 2020 version of the SRI Policy which included the following information about LGSS’s policy of using an external ESG research provider to source the list of companies to be placed on the “Investment Restrictions List”:

## 7.2 Investment Restrictions List

- (a) LGS will use an external ESG research provider to source the list of companies to be placed on the Investment Restrictions List. The excluded companies are sourced from the entire universe of indices used to benchmark LGS’ aggregate portfolio performance (ASX 300 companies for listed Australian equities and MSCI World ACWI for International equities).
- (b) The data is sourced bi-annually from the external ESG research provider. LGS’ Responsible Investment and Investment teams produce the Investment Restrictions List highlighting companies excluded, exclusion criteria, stock identifiers and market capitalisation.
- (c) The Head of Responsible Investment is responsible for updating and maintaining the Restrictions List. The Head of Responsible Investment will send the Restrictions List to Head of Investment Operations, who will send to the custodian for software coding.
- (d) The Head of Responsible Investment will complete a letter with Restrictions List attachment for issuance to applicable LGS fund managers. This will be signed by two authorised signatories.
- (e) Any changes and updates to the Investment Restrictions List are reported to the Committee as required.

98 The ESG research provider employed by LGSS to source the list of companies to be placed on the Investment Restrictions List and to prepare, update and maintain it, was a company called MSCI ESG Research (UK) Limited (**MSCI**).

99 Among other things, MSCI defined the parameters of the Investment Restrictions List according to its methodology. For example, for reasons that were not explained, it excluded “retailing lottery tickets” or “[manufacturing] lottery ticket printing machines” from the definition of “gambling”.

100 In summary, LGSS submitted that:

The Gambling Representation [as alleged by ASIC] was not conveyed by the Gambling Statements. Read in light of all the context, the Gambling Statements conveyed that:

- (a) Active Super restricted investments in companies that derived more than 10% of their revenue from gambling;
- (b) Active Super had processes utilising external research by MSCI to identify whether companies met this definition;
- (c) if a company was found to derive more than 10% of their revenue from gambling, Active Super would consider whether to divest the holding (though it may not do so); and
- (d) if Active Super considered it appropriate to divest the holding, it would do so within a reasonable period.

101 Aside from the SRI Policy, LGSS also contended that some of the individual gambling representations contained language that indicated that the Gambling Representation (as LGSS defined it in its concise response) was a “guiding principle”, rather than “a strictly applied rule”. LGSS pointed to an example of language immediately above the statements found in the Impact Reports (item 5 and 6 in Annexure A) that stated: “Any investments on our restricted list are considered on a case-by-case basis.” Those words were said “[to] imply[] that investments may be held in restricted companies”.

### **PointsBet**

102 In the case of its direct investment in PointsBet, LGSS relied on the following evidence about the role of MSCI.

103 PointsBet was first listed on the Australian Stock Exchange on 12 June 2019. LGSS first held its investment in it on 29 June 2020 (not 30 November 2016, as ASIC alleged), and disposed of the investment on 23 December 2021. It was omitted entirely from the 2020 MSCI Report. Why that was so was not explained.

104 PointsBet was included in the 2021 MSCI Report, where it was identified as deriving a maximum of 100% revenue from gambling.

105 Ms Yip deposed to the following.

106 On 26 July 2021, LGSS received a report from MSCI containing the ESG research and data.

107 By 26 August 2021, an analyst in the Responsible Investment Team had completed a review of the data (which it was said took three weeks) and identified PointsBet as a proposed addition

to the Investment Restrictions List. Ms Yip and Mr Turnbull then prepared a Responsible Investment Report, which included the proposed additions to the Investment Restrictions List.

108 On 29 September 2021, the Responsible Investment Report was presented to the Investment Committee, and it approved the proposed amendments.

109 Letters were then provided to Active Super’s domestic and international equities investment managers providing the updated Investment Restrictions List, which included Pointsbet.

110 LGSS submitted that “the investment in PointsBet was not contrary to the Gambling Statements, as properly understood” and that “[c]onsistent with the SRI Policy”:

- (a) LGSS maintained its Investment Restrictions List, reasonably relying on external data provided by a specialist ESG research provider;
- (b) an external investment manager made an investment decision that was, at the time of investment, consistent with the Investment Restrictions List;
- (c) LGSS identified that PointsBet ought to be a restricted company once MSCI provided data with respect to its activities; and
- (d) LGSS followed its proper processes within a reasonable time to add PointsBet to the Investment Restrictions List and instruct its external investment manager to divest of the stock.

### **Consideration**

111 I do not accept LGSS’s submissions about the role of the SRI Policy set out above.

112 First, no reasonable person would construe the gambling representations as mere “guiding principles”, because the critical language used in them (such as “not invest”, “No Way” and “eliminate”) was unequivocal.

113 In the case of the expression “No Way”, it must be read in the context of the pyramid set out at paragraph 74 above. In response to the questions “Are we in? Or out?”, it was there said that “wind farms, solar farms, green bonds, desalination plants, Active Super property portfolio, etc” are a low ESG risk and that “Yes”, Active Super invests in such projects. Next is the category “Yes, But” which is said to be an “[a]cceptable ESG risk”. Companies in that category were said to include “energy companies transitioning to net-zero carbon emissions, banks committed to ethical lending practices, etc”. And then it was said that there was “No way” that Active Super would invest in “high ESG risk” tobacco, nuclear weapons or gambling companies. The “Yes, But” category obviously admits of exceptions. The “No Way” category does not.

114 Secondly, in my view, the ordinary reasonable consumer is unlikely to have read any of the gambling representations as being the subject of potential qualification by LGSS’s “Sustainable and Responsible Investment Policy.”

115 I do not agree with the submission made by LGSS that the ordinary reasonable consumer, having read statements of the kind contained in the pyramid at paragraph 74 above, would nonetheless follow the menus from the homepage of the website to access, and then read through the detail of, the SRI Policy.

116 In my view, the emphatic statements made in the pyramid and elsewhere, and upon which ASIC relied, did not admit of the possibility that they were subject to any terms and conditions. There were, for example, no footnotes or asterisks appended to them, containing the sort of language that all consumers are familiar with, such as that the claims are subject to specific limitations contained in terms and conditions. Compare for example *Invisalign Australia Pty Ltd v SmileDirectClub LLC* [2023] FCA 395 at [792]–[795] (Anderson J), *iNova Pharmaceuticals (Australia) Pty Ltd v Reckitt Benckiser (Australia) Pty Ltd* [2018] FCA 1209 (Bromwich J); *George Weston Foods Ltd v Goodman Fielder Ltd* (2000) 49 IPR 553; [2000] FCA 1632 (Moore J); *Astrazeneca Pty Ltd v GlaxoSmithKline Australia Pty Ltd* [2006] ATPR 42-106; [2006] FCAFC 22 (Wilcox, Bennett and Graham JJ).

117 If such a consumer was told, as they were told, that there was “No way” that LGSS would invest in tobacco or gambling, he or she would not search around for some investment policy that might qualify such statements. Absent some indicator on the face it, such as a footnote or asterisk with some accompanying statement that the apparently unqualified language was, in fact, something that was subject to qualifications or limitations, they would have no reason to.

118 It is true that in certain limited examples relied upon by ASIC, the SRI Policy is referred to in terms. For example, the 2020-2021 Impact Report states that “[a]t Active Super, we’ve had a *Responsible and Sustainable Investment Policy* since 2009.” But the Policy is not hyperlinked, and neither those words (nor the surrounding context) give any indication that the references to the policy were intended to suggest to the consumer that it in some fashion or another qualified or modified what was being said elsewhere.

119 Thirdly, in my view, no ordinary reasonable consumer could possibly have understood the SRI Policy to convey that if a company was found to derive more than 10% of their revenue from gambling, Active Super “would consider whether to divest the holding” and “may not do so”;

or that “if Active Super considered it appropriate to divest the holding, it would do so within a reasonable period”. Even if one were to read the gambling statements in light of the SRI Policy, the policy does not say that, nor does it remotely suggest it.

120 Fourthly, LGSS’s submission that “it did not commit to the perfect exclusion of restricted companies and identified relevant limitations to its investment approach” because the assertion in an Impact Report that “[a]ny investments on our restricted list are considered on a case-by-case basis’ necessarily implied that investments may be held in restricted companies” only has to be stated to be rejected.

121 Fifthly, I do not accept LGSS’s submission that the investment in PointsBet was not contrary to the gambling statements and was consistent with the SRI Policy because LGSS maintained its Investment Restrictions List, reasonably relied on external data provided by a specialist ESG research provider and “followed its proper processes within a reasonable time” to put it on the Investment Restrictions List and sell the stock. The argument boils down to saying that the ordinary reasonable consumer would, if they read it at all, read the terms of the SRI Policy as a whole to imply that all that LGSS promised to do was to use its best endeavours not to invest in gambling. That is, if I may say so, farfetched and no ordinary reasonable consumer would ever have imagined any such a thing.

### **Indirect ownership of shares**

122 It is next necessary to deal with the issue of “indirect” ownership of shares by way of units held in the Investment Funds, which was also an issue raised by LGSS with respect to many of the alleged representations.

123 LGSS adduced evidence, and ASIC did not dispute, that the CFS Fund, the Wellington Fund and the ASX 200 Fund were unit trusts that have the following common features:

- (f) although a unit holder has an interest in the assets of the fund as a whole, it does not have any interest in any particular fund asset; and
- (g) no unit holder is entitled to interfere in the management of the fund.

124 LGSS also relied on the undisputed fact that each Investment Fund had its own investment strategy and was managed in accordance with that strategy by a third-party fund manager.

125 In view of these features, it was submitted:

an investment in an Investment Fund cannot be conflated with an investment in the

underlying shares. It is simply not accurate to describe an investor in any of those Investment Funds as “holding” any shares that happen to form part of the Investment Fund’s assets under management from time to time.

The [r]epresentations (if made) would be understood to convey that LGSS would not invest in the companies deriving revenue from the proscribed industries or in Russia or in Russian entities, not that LGSS would not invest in Investment Funds.

126 LGSS contended that an ordinary and reasonable consumer “would undoubtedly draw a distinction between holding shares in a company and indirect exposures through a pooled fund” and that “[t]hey would appreciate that when LGSS makes statements about its investments, those statements are likely to be about matters LGSS can control (for example, its direct holdings in companies) and not about matters LGSS cannot control (for example, its indirect exposure to companies via a pooled fund managed by a third party manager)”.

127 ASIC submitted, on the other hand, that an ordinary and reasonable member of the relevant class would not draw a distinction between investment exposure to companies based on the manner in which the investment was held by the trustee and that there is nothing in any of the statements in Annexure A that refers to such a distinction.

128 ASIC pointed to the fact that not only did Active Super not draw any express distinction between “indirect” and “direct” investments or between investments in companies and investments in managed funds but, to the contrary, its annual reports asserted that “[a]ll investments are held directly by Active Super”.

129 As to LGSS’s submission that a member as a unit holder does not have any interest in any particular fund asset, and that no unit holder is entitled to interfere in the management of the fund, ASIC said that that was irrelevant in circumstances where LGSS accepted that it had an interest in the assets of the funds as a whole in relation to the managed funds in which it held units.

130 I am unable to accept LGSS’s contention that an ordinary and reasonable member of the relevant class would draw a distinction between holding shares in a company and indirect exposures through pooled funds. It seems to me that such a consumer would not draw that distinction, including in particular because there is nothing in the Impact Reports or on the LGSS website that suggests that the claims that there was, for example, “No way” Active Super would invest members funds in gambling, tobacco and so on, was to be read subject to a proviso that there **was** a way in which it would do exactly that, by investing indirectly, not directly. In my view, that distinction is one which no ordinary reasonable consumer would draw.

131 I should also deal with one other submission made by LGSS about the “overlay” process, which I refer to above. That process had no relevance to the CFS Fund, the Wellington Fund or the Macquarie Fund, because it was not used in relation them. But as to the seven investments in companies that ASIC alleged were contrary to the gambling representations (and the three coal mining investments dealt with below) which were held in the ASX 200 Fund, LGSS denied that it engaged in conduct contrary to the alleged representations “because it did not have a net exposure” to the fund, as a result of the application or adoption of the overlay process.

132 Mr Pholsena gave an explanation of the overlay process in that context in his evidence, which counsel summarised in LGSS’s final submissions as follows:

LGSS aimed to eliminate exposure to certain restricted companies through its overlay process. At [17] to [32] of his affidavit, Mr Pholsena gives a detailed explanation as to how that overlay process worked ...

The implementation of the overlay process to off-set exposure to a restricted company required LGSS to borrow shares from UBS [Prime Brokerage] in the particular restricted company for a fee. LGSS then sold those shares. It used the money from the sale of the restricted shares to buy unrestricted investments. When LGSS came to return the restricted shares, it sold the unrestricted investments and used the money to purchase the restricted shares, so that they could be returned to UBS. That process had the effect of “cancelling out” LGSS’s exposure to the restricted company during the period LGSS had borrowed the restricted shares.

That process could be expensive. The costs associated with the overlay process included the cost of borrowing stocks to short or swap, broker fees, and the costs of meeting a short if it was called on. It was also necessary to manage liquidity to fund margin calls when they arose.

Rather than keep cash sitting in a bank account for the purpose of meeting those costs, LGSS was able to generate higher, safe returns by holding:

- (a) a position in the ASX 200 Fund; and
- (b) a corresponding short position in a number of futures contracts with a notional value approximately equal to the market value of the long positions.

The purpose of this strategy was to receive quarterly distributions from Standard & Poor’s while minimising exposure to the ASX 200 Fund.

133 Counsel for LGSS relied on this passage from the cross-examination of Mr Pholsena in support of that submission:

MR HEWITT: Could you just answer, if you can, the question that I asked. Do you agree or disagree with the proposition that Active Super retained investment exposure to the distribution return in respect of each company in the ASX 200 fund?

MR PHOLSENA: We also have this exposure in the short position with ASX, you know, buys future. So that index is also referencing the ASX 200. The underlying index also have accumulated distribution in there as well. So, you know, I’m might (sic) misleading, you know, to say that we did not, thinking about that distribution that have

been factored into this by a future...

MR HEWITT: Mr Pholsena, it was no part of the purpose of the strategy that you describe in your affidavit to negate the investment exposure to the distributions from the ASX 200 fund, was it?

MR PHOLSENA: No. ... *but the future itself also accounted for dividend as well.* (emphasis added).

134 It was submitted that, by his answers, “Mr Pholsena confirmed ... that the value of the units in the ASX 200 Fund took into account any accumulated but unpaid distribution, and it was this value that LGSS sought to short by purchasing corresponding futures”. It was said that his “explanation was straightforward, and there is no reason it ought not be accepted.”

135 I do not agree.

136 First, I fail to understand how taking a financial position in the way Mr Pholsena explained it rectified or overcame an otherwise false or misleading assertion (for example) that there was “No way” LGSS would invest in gambling or tobacco stocks.

137 LGSS contended that the overlay process “cancelled out” LGSS’s exposure to gambling and tobacco companies because it:

- (1) borrowed shares in gambling and tobacco companies;
- (2) sold those shares;
- (3) used the money from the sale to buy unrestricted investments;
- (4) sold the unrestricted investments; and
- (5) then used the money to purchase the restricted shares, so that
- (6) the restricted shares could be returned to the person from whom Active Super borrowed the shares in the first place.

138 In my view, even if that explanation had been provided to ordinary and reasonable consumers of the relevant class (rather than the brief description of the overlay process contained in clause 10 of the SRI Policy set out at paragraph 95 above), they would have been left scratching their heads.

139 But secondly, and in any event, Mr Pholsena accepted in his cross-examination that the overlay process did not affect the distribution return (so the exposure to the restricted companies was not in fact off-set):

[MR HEWITT] Now I want to ask you, then, to come, please, over to page 3894. Do



you see there the words “fund performance”? And then if you come, please, over to page 3896, do you see there the heading S&P ASX200 Fund, and then do you see a table that identifies the performance of the ASX200 fund over various different time periods? Have you had occasion, in your role with Active Super, to review the performance of the ASX200 fund over the last set of periods described there – five years, three years, one year and so on?---Yes. I don’t – I don’t directly – reviewing this index, but, you know, we have the ASX200 – that could have a return similar to this STW.

But this is the – when you say a return similar, this is a description of the STW fund; do you accept that?---Yes. Yes.

So, when you say you have a holding that’s a return similar, do you agree that this actually is describing the fund that is held by Active Super?---Yes.

And what I was asking you is whether you were generally, as part of your work, familiar with the return that that investment has earned over recent periods?---Yes.

Can I just ask you to look at the table. Do you see that there’s three – the first three labels for the rows in the table are Fund Distribution Return, Fund Growth Return and Fund Total Return; do you see that?---Yes.

And then there’s “as of” – “as of date 31 January 2024”; do you see that? That’s the second column?---Column? Yes

...

Would you agree with this? That what’s being recorded on this document is that the performance of this fund that was held by Active Super in that three-year period was a distribution return of 5.43 per cent per annum; do you agree?---In theory, yes.

I’m sorry, what?---In theory, yes.

When you say “in theory”, what do you mean by “in theory”?---Well, we don’t – we don’t know. It be changing. If you are assuming that you’re constantly holding this investment - - -

Yes?---But we do changes from time to time, so I can’t tell you whether or not it would be exactly that number or not.

So, what you’re saying is – you – I mean, this information is being presented on the basis that it relates to the position for someone who was holding the investment on an uninterrupted basis- - -?---Yes.

- - - over this period of time; is that what - - -?---Yes.

All right. In any event, there’s the distribution return, and then the second part is the growth return; do you see that?---Mmm.

And that growth return was 4.06 per cent. Do you see that?---Yes.

And then the total return, do you agree, is the aggregate of the distribution return and the growth return?---Yes. Total return. Yes.

So that’s 5.43 plus 4.06 is 9.49 per cent. You see that?---Mmm.

So do you agree that, over the last three-year period, the return from distributions in the ASX 200 fund has exceeded the growth return?---Yes.

Now, what you’ve said at paragraph 40 of your affidavit – can I just ask you to look at

that, please, and just read paragraph 40 of your affidavit. You can put the document to the side, if you like, and then go back to your affidavit, please. What you say at paragraph 40 of your affidavit – do you see that paragraph?---Yes.

Is that:

*The purpose of the strategy was to receive quarterly distributions from [Standard & Poors] while negating or minimising equity exposure to the fund.*

Do you see that?---Yes.

So just coming back to the performance of the fund over the last three years, to translate what you're saying in paragraph 40 to that three-year period. Is this right? That what your evidence is, is that the purpose of the strategy was to receive the fund distribution return which, over that last three-year period, was 5.43 per cent per annum. Correct?--Yes.

And to negate, or minimise the growth return. Correct?---Yes. That's correct. Yes.

So you were – the purpose was to receive the distribution return, which was 5.43 per cent per annum over the last three years and to negate the growth return of 4.06 per cent over the last three years. Correct?---Yes.

And do you agree that, as a result of that approach, Active Super retained investment exposure to the distribution return in respect of each of the 200 companies in the ASX 200 index?---It's debatable.

Well, I'm not really asking you to comment on whether it's debatable or not. I'm just asking you to tell his Honour whether you agree or disagree with what I'm putting to you.

MR INSALL: I object, your Honour. He didn't agree or disagree, and he said it's debatable. It's an answer to the question.

MR HEWITT: Could you just answer, if you can, the question that I asked. Do you agree or disagree with the proposition that Active Super retained investment exposure to the distribution return in respect of each company in the ASX 200 fund?---We also have this exposure in the short position with ASX, you know, buys future. So that index is also referencing the ASX 200. The underlying index also have accumulated distribution in there as well. So, you know, I'm – I'm might (sic) misleading, you know, to – to say that we did not, thinking about that distribution that have been factored into this by a future. So that's why I say debatable here, because it's just - - -

Have you finished your answer?---Yes.

Mr Pholsena, it was no part of the purpose of the strategy that you describe in your affidavit to negate the investment exposure to the distributions from the ASX 200 fund, was it?---No.

The purpose of the strategy was to negate the equity exposure to the ASX 200 fund, wasn't it?---Yes, but the future itself also accounted for dividend as well.

So you receive additional dividends from the futures exposure?---It doesn't, but the future itself also accounted for dividend in there.

But there were - - -?---So they have to be discount back to the present while – before that.

But there was no part of the purpose of the futures position to negative exposure to the

distributions from the ASX 200 fund, was it?---Not directly.

And you agree that throughout the relevant period, Active Super retained exposure to the distributions from the ASX 200 fund?---We received distribution from STW, yes.

140 In my view, the gambling representations as alleged were conveyed and they were misleading and deceptive.

## **TOBACCO REPRESENTATIONS**

141 The statements made by LGSS during the relevant period regarding its investment in companies with exposure to the tobacco industry were as follows.

142 The first tobacco statements were published on the Active Super website on and from 25 May 2021, as follows:

- (a) the visual representation headed “Are we in? Or out?” indicating tobacco as in the “No Way” category (see paragraph 74 above);
- (b) a statement that Active Super stopped investing in tobacco over 20 years ago; and
- (c) a statement that “[t]here are some industries in which we will not invest any money because we believe the harm they cause is not worth any potential profit we could gain. These companies include those that derive revenue from controversial weapons — such as land mines, cluster bombs and nuclear weapons — as well as tobacco”.

143 The second tobacco statements were published by LGSS in Active Super’s 2021 Impact Report, which stated that tobacco investments are in the “No way” category of investment and Active Super’s negative screens will “eliminate” Active Super’s “exposure” to it as a high ESG risk industry.

144 The third tobacco statement was made in the SRI policy, where under the heading “Investment Restrictions”, it was said that Active Super “will not make investments in companies that derive any revenues” where the companies are “involved in the manufacture and/or production of tobacco products”.

145 The fourth tobacco statements were published by LGSS on social media pages:

- (a) on its Facebook page from 31 May 2022 until 2 June 2023, LGSS stated, “[d]id you know we were the first super fund to stop investing in Tobacco over 20 years ago?”;
- (b) on its Active Super LinkedIn account (and to similar effect on its Instagram page) from 31 May 2021 until 2 June 2023 that “Today is World No Tobacco Day ... this year we

celebrated 20 years since becoming the first Australian super fund to stop investing in tobacco.”

146 The fifth tobacco statements were made by the CEO of Active Super, Phillip Stockwell, and published on 19 January 2022 in *Investment Magazine* as follows:

- (a) “the fund was one of the first super funds in Australia to rule out investing in tobacco, a move it took 20 years ago”; and
- (b) “[Active Super] specifically excludes any investments in...tobacco...”

147 The sixth and seventh tobacco representations were contained within the sixth and seventh gambling statements, set out at paragraph 77 above. The sixth was published in the Responsible Investment Report 2021-2022 on 20 December 2022. The seventh was made in several PDS published on 1 July 2022, as follows: “[w]e eliminate investments that pose too great a risk to the environment and the community, for example nuclear weapons, **tobacco manufacturing**, oil tar sands and gambling ...” (emphasis added).

148 ASIC contended that contrary to each of the above statements, during the relevant period, LGSS made or held direct investments in five tobacco companies, being Amcor PLC, Transcontinental Inc Shs-A-Voting Subord, Stora Enso Oyj Clss R, Westrock Co and Smith (DS) PLC.

149 ASIC submitted that each of LGSS’s representations concerning the restrictions on tobacco investments were expressed in clear and unequivocal terms that conveyed to the intended audience a robust restriction on investing “any money” in companies that “derive revenue from ... tobacco”. The clear and unequivocal language included “No Way” and “eliminate” to convey that the effect of Active Super’s investment screens was to “eliminate ... exposure” to the tobacco industry.

150 ASIC contended that any investment that created exposure to the tobacco industry resulted in LGSS contravening s 12DB(1)(a) of the ASIC Act and that the identified statements were false or misleading because at the time the relevant statements were made, and throughout the relevant period until their removal, LGSS held investments in those companies, each of which derived revenue from tobacco.

151 LGSS did not dispute that, during the relevant period, the companies identified by ASIC derived revenue from tobacco and that it held investments in those companies.

152 LGSS submitted that it did not contravene s 12DB(1)(a) of the ASIC Act, for the following reasons.

153 It pointed first to the ordinary meaning of the word “tobacco” as referring to “nicotiana plants whose leaves are prepared for smoking or chewing or as snuff; the leaves so prepared; and any various similar plants of other genera, such as Indian tobacco”, citing the Macquarie Dictionary.

154 LGSS submitted that an ordinary and reasonable member of the public would understand a reference to “tobacco” to be to “this substance and products used to consume it, such as cigarettes, cigars and pipes” and that such a person “would not understand a bare reference to ‘tobacco’ or a targeted reference to ‘tobacco manufacturing’ to include service providers or suppliers separate from but necessary to the tobacco industry”. These examples of providers or suppliers were relied on:

- (a) an energy provider who provides electricity that powers tobacco manufacturing equipment;
- (b) a bank that provides necessary financial services to a tobacco company;
- (c) a transport company that provides shipment of tobacco products; or
- (d) a paper and packaging company that provides boxes in which tobacco products are stored for sale.

155 LGSS submitted that it did not act inconsistently with the tobacco representations alleged because the companies identified by ASIC are not “tobacco” companies and did not derive revenue from the manufacture or production of tobacco during the relevant period. It says that it made no representation that it would not invest in companies that supplied products (other than tobacco) and services to tobacco product manufacturers.

156 It said that it **would have**, but did not, invest in “tobacco” companies that derive revenue from the manufacture or production of tobacco if it had invested in, say, a company that owned and operated tobacco farms or a company that manufactured cigarettes or other products for which tobacco is the main (or a significant) constituent element.

157 But it said that what it in fact did was to invest in companies that were involved in the manufacture and sale of “packaging, but which derived no revenue from growing, manufacturing, or processing tobacco or tobacco products”.

158 LGSS contended that “ASIC mischaracterise[d] the nature of the business and revenue streams for the [investments alleged] by selecting extracts from annual reports and websites suggesting that these companies primarily produce tobacco-specific packaging and sell their products predominantly to the tobacco industry” and that this is inaccurate because the investments only derived between 1.5% and 11% of their revenue from selling packaging products to tobacco companies between 1 February 2021 to 27 March 2023.

159 LGSS adduced evidence about each of the relevant companies. The evidence was not disputed, and was to the following effect.

### **Amcor plc**

160 The evidence about Amcor was as follows.

161 Amcor sells “specialty cartons” to customers in the tobacco industry. They are one of many packaging products offered by Amcor. Between 2021 and 2023 Amcor derived 7.4% to 8.58% of revenue from them.

162 Amcor’s 2023 Annual Report states that 76% of its revenue was derived from flexible packaging products and 24% from rigid packaging products. When describing the nature of Amcor’s business, the Annual Report states Amcor developed and produced:

- (a) flexible packaging for food, beverage, pharmaceutical, medical, home and personal care, and other products; and
- (b) rigid containers and closures for food, beverage, spirits, home and personal care, and healthcare products.

### **Transcontinental Inc**

163 The evidence about Transcontinental Inc (**Transcontinental**) was as follows.

164 Transcontinental is a company that manufactured and produced packaging and provided printing and publishing services. During the relevant period, a percentage of the packaging products manufactured by Transcontinental were sold to tobacco companies.

165 Transcontinental’s 2022 Annual Report described the company as “a leader in flexible packaging in North America, and Canada’s largest printer”. In 2022, Transcontinental reported that it derived:

- (a) 56% of revenue from manufacturing “a variety of flexible plastic products, including rollstock, labels, die cut lids, shrink films, bags and pouches and advanced coatings.” Transcontinental produces packaging for “a variety of markets, including dairy, coffee, meat and poultry, pet food, agriculture, beverage, home and personal care products, industrial, consumer and medical products.”
- (b) 40% of revenue from providing printing services “for retailers, publishers and advertisers, including printing, premedia and distribution services.”
- (c) 4% of revenue from being the “leading Canadian French-language educational publishing group and the leader in strategic information for the different players in Québec’s construction sector.”

### **Stora Enso Oyj Clss R**

166 Stora Enso Oyj Clss R (**Stora Enso**) is a leading provider of renewable and sustainable solutions for packaging products, packaging materials, and building materials. It is an environmentally-focused company involved in the circular economy, seeking to minimise waste and reuse and recycle materials. During the relevant period, it serviced several industries, including food, beverage, construction, and pharmaceuticals.

167 Stora Enso’s 2022 Annual Report said that it derived revenue from five divisions:

- (a) Packaging materials – which provided low-carbon, renewable and recyclable packaging alternatives to food, beverage and transport customers.
- (b) Packaging solutions – which developed and sold high-end eco-friendly packaging products to brands across market sectors including retail and e-commerce.
- (c) Biomaterials division – which developed new solutions and novel applications of recycled biomaterials such as pulp and biomass oil.
- (d) Wood products division – which provided sustainable wood-based solutions for the global construction industry to support low-carbon construction.
- (e) Forest division – which engaged in wood supply and sustainable forest management.

### **WestRock Co**

168 WestRock Co (**WestRock**) is a sustainable, fibre-based packaging solutions company. During the relevant period it derived revenue from two types of products:

- (a) Corrugated packaging – used to provide protective packaging for shipment and distribution of food, paper, health and beauty, and other household, consumer, commercial and industrial products. Sales of corrugated packaging products accounted for 42.3%, 43.2% and 42.9% of WestRock’s net sales in 2022, 2021 and 2020, respectively.
- (b) Consumer packaging – being the sale of consumer packaging products such as folding cartons, interior partitions, inserts and labels. Sales of consumer packaging products accounted for 23.2%, 23.5% and 23.7% of WestRock’s net sales in 2022, 2021 and 2020, respectively.

169 WestRock supplied products to a wide range of industries, including food, paper, beverages, dairy products, confectionery, health and beauty and other household consumer, commercial and industrial products, primarily for retail sale. Tobacco companies are one of the many customers that purchase packaging products from WestRock. WestRock does not itself derive any revenue from the manufacture or production of tobacco.

#### **Smith (DS) PLC**

170 As indicated in its Annual Report, during the relevant period Smith (DS) PLC (**Smith**) derived revenue from:

- (a) producing sustainable fibre-based packaging for consumer products, e- commerce, promotion, transit and industrial packaging;
- (b) consulting on supply chain optimisation and creative design;
- (c) producing corrugated case material, which is the paper used for conversion into corrugated board; and
- (d) providing a full recycling and waste management service.

#### **Role of MSCI**

171 As explained at paragraphs 97 to 99 above, LGSS said that it relied on data provided by MSCI to identify whether companies met the criteria to be restricted investments.

172 MSCI’s methodology classified tobacco production and related activities as follows:

- (a) Tobacco Distributor – “Companies that distribute tobacco products to retailers and other distributors. This data point does not include a manufacturer that distributes its



own tobacco products, unless it also provides logistics or distribution services to other tobacco companies.”

- (b) Tobacco Licensor – “Companies that license its company or brand name to tobacco products.”
- (c) Tobacco Producer – “Companies that manufacture tobacco products, such as cigars, blunts, cigarettes, e-cigarettes, inhalers, beedis, kreteks, smokeless tobacco, snuff, snus, dissolvable and chewing tobacco. This also includes companies that grow or process raw tobacco leaves.”
- (d) Tobacco Retailer – “Companies that retail tobacco products.”
- (e) Tobacco Supplier – “Companies that manufacture and supply key products necessary for the production of tobacco products, such as tobacco flavoring, cigarette filters (acetate tow), tobacco roll paper, cigarette manufacturing machines, and tobacco packaging; specifically cigarette cartons, films, and aluminum [sic] foil.”

173 LGSS said that it relied only on the MSCI “Tobacco Producer” screen to identify companies that derived revenue from the manufacture of tobacco products, and that between 1 February 2021 to 27 March 2023, none of the investments in the companies listed above “were captured by the Tobacco Producer screen”.

174 LGSS submitted that the critical question was the meaning of “tobacco” and “tobacco manufacturing” as those terms appeared in the tobacco representations, and specifically whether those terms encompassed a packaging company which supplied packaging to cigarette manufacturers among many other customers.

175 ASIC, on the other hand, submitted that the meaning of “tobacco” and “tobacco manufacturing” upon which LGSS placed so much reliance was not to the point as “tobacco manufacturing” is not the way the restriction was described by the MSCI supplier screen. The definition of “supplier” in the MSCI screening document defines supplier as “companies that manufacture and supply key products necessary for the production of tobacco products, such as tobacco, flavouring, sorbitol, tobacco sauce, tobacco fragrance/aroma, cigarette filters (acetate tow), tobacco roll paper, cigarette manufacturing machines and tobacco packaging; specifically, cigarette cartons, films and aluminium foil”.

176 As to the statements that LGSS did not invest in “tobacco”, ASIC submitted that the ordinary and reasonable person would understand the expression “tobacco company” to extend “to all

companies that support the use of tobacco”, including tobacco manufacturing, but would “also include other critical companies within the tobacco industry, such as suppliers of key products”. It relied, for example, on “the importance of specialty packaging in this industry” as promoted by WestRock, on its website:

#### **TOBACCO AND NEXT GENERATION PRODUCTS**

We understand the increasingly important role tobacco packaging plays in helping brands connect with consumers. For more than 60 years, WestRock has partnered with tobacco industry leaders.

177 As to the claims of LGSS that it did not invest in “tobacco manufacturing” (the statements at item 7, 18 and 19 of Annexure A), ASIC submitted that an ordinary and reasonable member or prospective member of LGSS would regard the restriction of “companies involved in the manufacture and/or production of tobacco products” as extending to suppliers of “tobacco packaging.”

#### **Consideration**

178 I am unable to accept ASIC’s submissions with respect to the tobacco representations.

179 ASIC’s reliance on the MCSI definition of “tobacco supplier” is of no assistance. First, the relevance of that definition, given that LGSS’s undisputed evidence was that it used the tobacco “producer” screen to identify restricted companies, was not explained.

180 In any event, both ASIC and LGSS’s reliance on the MCSI definitions is misplaced. The relevant question is not how MCSI has defined a tobacco company or manufacturer, but what an ordinary reasonable consumer would understand those terms to mean as they appear in the tobacco statements relied upon by ASIC. And for similar reasons to those I have given at paragraphs 114 to 118 in relation to the gambling representations and the SRI Policy, nothing within the tobacco statements would indicate to an ordinary consumer that the terms “tobacco company” or “tobacco manufacturing” had to be read as subject to MCSI’s definitions and screening methodology.

181 In my view, the ordinary reasonable consumer would not regard an investment in a company that derived between 1.5% and 11% of their revenue from supplying packaging to tobacco companies as being a “tobacco company” or a company engaged in the manufacture or production of tobacco. Such a consumer, in my view, if asked about it would say, “no, they are packaging companies”.

## **RUSSIA**

- 182 It is a notorious fact that Russia invaded Ukraine in February 2022.
- 183 The first Russia representations were made by LGSS in the SRI Policy from 8 February 2023 to May 2023, namely that “the Fund will not make investments in Russia”. A similar statement appeared on Active Super’s website from 25 May 2022 and in a quarterly investment update emailed to members on that date.
- 184 The second Russia representations were made by LGSS in Active Super’s 2021-2022 Responsible Investment Report from 20 December 2022 to March 2023, which stated:
- (1) that one of the highlights for 2021-2022 was “RUSSIA OUT” based on a country exclusion following events in Ukraine; and
  - (2) under the heading “Russian investments out” that Active Super had recently held exposure to Russian stocks via investments in two Emerging Markets funds, but that following Russia’s invasion of Ukraine those funds began divesting of all Russian securities.
- 185 The third Russia representations were made by LGSS in an email to Active Super members in May 2022 which:
- (1) stated “Russian Investments out in the cold”;
  - (2) stated that Active Super had added Russia to its list of restricted companies in which the fund will not invest; and
  - (3) contained a statement in similar terms to that described at paragraph 184(2) above.
- 186 The fourth Russia representations were made by LGSS in Active Super’s PDS from 1 July 2022 to 1 May 2023 which stated that through Active Super’s negative screens, Active Super had “eliminated investments that pose too great a risk to the environment and the community” and that “[w]e also recently added Russia to our list of excluded countries following the invasion of Ukraine”.
- 187 ASIC contended that during the relevant period, LGSS held nine investments in Russia — Rosneft Oil Co, Etalon Group, Mail.ru, Transneft PJSC, Yandex NV, Sberbank of Russia and three investments in Gazprom PJSC) — through the Macquarie and Wellington Funds.
- 188 LGSS did not dispute that it held or had an investment exposure to those investments at different times during the relevant period.

189 Nor did it dispute that those companies derived revenue from Russia during the periods identified.

190 LGSS submitted first that the Russia representations were directed towards processes that had begun and commitments as to future investments decisions, and secondly that it did not hold investments in Russian entities because they were held through a pooled fund.

191 Subject to one exception which I will explain below, I reject the second point for the reasons I have already given (at paragraph 130 above) — that is, holding investments in a pool or managed fund is contrary to the unequivocal statements that “Russian investments” are “out”.

192 LGSS’s written submission on the first point was as follows:

The following context is relevant in considering the meaning conveyed by these statements:

- (a) The Russia Statements refer to “Russia” or “Investments in Russia”. By their nature, these statements refer to an investment by LGSS in a particular place, and would be understood as a reference to an investment in Russia, i.e. in Russian entities.
- (b) The SRI Policy stated that “[t]he Trustee has determined that the Fund will not make investments in Russia”. There is no evidence that the Trustee did not so determine. On the same page, the SRI Policy acknowledges that there are “situations where it is not possible to avoid indirect investment in restricted companies, for example because of ... investments made through pooled trusts”.
- (c) The Responsible Investment Report, in its introductory pages, contained the following statement in an infographic: “RUSSIA OUT – Now a country exclusion FOLLOWING EVENTS IN UKRAINE”. This statement cannot be taken in isolation, and must be read with the section of the report addressing that very topic. The Responsible Investment Report identified that Active Super’s exposure to Russia was through a pooled trust structure, and that it “had a very small amount of exposure to Russian stocks, via investments in two Emerging Market funds which equated to approximately 0.1 percent of our total funds under management”. There is nothing misleading in this. The Impact Report further explained that the pooled funds “moved quickly to begin divesting of all Russian securities” and that Active Super “will not” invest in Russia. The email and website publication at item 17 contained a substantially similar explanation.
- (d) The PDS Fact Sheet contains an infographic with the statement “We also recently added Russia to our list of excluded countries, following the invasion of Ukraine”. This infographic appears under the heading “RESPONSIBLE INVESTMENT” and text which identifies that Active Super’s SRI Policy “applies to our whole portfolio, across all asset classes” and “is available on our website and includes the following strategies”. The SRI Policy to which the reader is directed forms an important part of the context for this statement.

These statements are directed towards processes that had begun and commitments as to future investment decisions. Nothing in the content or context of the statements

supports a representation that Active Super did not at that time have an indirect exposure to Russian stocks.

Read in light of the immediate and surrounding context, these statements conveyed that:

- (a) Active Super would not make further investments in Russia;
- (b) Active Super had a small amount of indirect exposure to Russian stocks through pooled funds;
- (c) it is not always possible to avoid a pooled fund investing in restricted companies;
- (d) the pooled funds had begun the process of those funds divesting their Russian securities; and
- (e) the pooled funds process of divesting their Russian securities would continue.

### **Consideration**

193 I do not accept the submission that the Russia representations were directed towards processes that had begun and commitments as to future investments decisions, because that is not what LGSS said, or anything like it. Consumers were told that Russia was “out”, and 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”. Read together, or separately, that amounts to an assertion that the fund no longer had any exposure to Russian stocks. The words do not admit of the nuance (for want of a better word) LGSS contended for.

194 The position is different with respect to the Russia statement contained within the SRI Policy (item 12 in Annexure A). In my view, an ordinary reasonable member would read the statement that the “Trustee has determined that the Fund will not make investments in Russia” as being subject to the immediately surrounding context of the policy in which it appears. As LGSS submitted, on the same page as that statement, the SRI Policy acknowledges that there will be “situations where it is not possible to avoid indirect investment in restricted companies, for example because of ... investments made through pooled trusts ...”. I therefore accept that the specific Russia representation in the SRI Policy, when read in context, conveyed that LGSS may have indirect exposure to Russian investments through pooled funds.

195 It follows that, in my view, save for the representation at item 12 in Annexure A, the remaining Russia representations as alleged were conveyed and they were misleading and deceptive.

## OIL TAR SANDS REPRESENTATIONS

196 The first oil tar sands representation was published by LGSS in Active Super's 2021 Impact Report, and said that Active Super would "eliminate investments that pose too great a risk to the environment and the community, for example ... oil tar sands".

197 The second oil tar sands representation was published by LGSS in Active Super's SRI Policy from October 2021 to May 2023. Under the heading "Investment Restrictions", the policy said:

The Trustee has determined that the Fund will not make investments in companies that derive 33.3% (one-third) or more of their revenues in high carbon sensitive activities.

Companies assessed as being the most vulnerable from the sectors that are evaluated as being highly sensitive to the multiple investment risks associated with climate change. **This list will include companies which derive their revenue or assets** from coal mining, **oil tar sands** and coal fired electricity utilities. Active Super will reference external research to determine which companies are high carbon sensitive.

(emphasis added)

198 The third oil tar sands representation was made by LGSS in the 2021-22 Responsible Investment Report published on 20 December 2022, and was substantially the same terms as the first oil tar sands representation.

199 The fourth oil tar sands representations were published by LGSS in Active Super's PDS from 1 July 2022 to 1 May 2023 and said that through Active Super's negative screens, it had "eliminated investments that pose too great a risk to the environment and the community", and added as an example oil tar sands.

200 ASIC submitted that contrary to each of the oil tar sands representations, during the relevant period, LGSS held four direct investments in companies that derived revenue from oil tar sands; and one investment in a company that derived revenue from oil tar sands held through the Wellington Fund.

201 LGSS did not dispute that it held or had an investment exposure to the direct investments in ConocoPhillips, CK Hutchison Holdings Ltd, Shell Plc and TotalEnergies SE, but said that it did not know that it had exposure to PTT Exploration & Production Public Company Ltd through the Wellington Fund.

202 LGSS admitted that ConocoPhillips derived revenue from oil tar sands projects. However, LGSS said it did not know and could not admit whether the other companies derived revenue from oil tar sands projects.

203 The evidence was that each company derived some revenue from oil tar sands projects as it was one of its main business activities, as follows:

- (1) CK Hutchison Holdings Ltd had a significant shareholding in Cenovus Energy Inc, which derived revenue from oil tar sands in 2021. In 2022 this holding was reported by CK Hutchison Holdings Ltd within the segment “Finance & Investments and Others” and, in 2022, Cenovus Energy included revenues of approximately \$30.28 billion from reportable segments including oil tar sands for the 12 months ended 31 December 2022.
- (2) Shell Plc reported revenue from oil sands activities in 2021. The financial statistics in its 2021 Annual Report included the statement “[t]he Oil Products business also manage Oil Sands activities - the extraction of bitumen from mined oil sands and its conversion into synthetic crude oil”. The 2022 Annual Report noted the oil and gas production available for sale and included reporting of production of oil sands which were included as a part of the segment “Chemical and Products.” It further said that this segment had earnings of \$4.5 billion in 2022; and that the “Chemicals and Products” segment includes “... oil sands activities, which involves the extraction of bitumen from mined oil sands and its conversion into synthetic oil.”
- (3) TotalEnergies SE’s 2022 Annual Report recorded that its oil and gas production in Canada consisted of bituminous oil sands.
- (4) PTT Exploration and Production Public Company Ltd’s core business is the exploration and production of petroleum and as of 31 December 2021 and 31 December 2022, its petroleum exploration and production projects included the Mariana Oil Sands Project in Canada.

204 LGSS submitted as follows:

LGSS did not, at any time, represent that it would not make or hold investments in companies that derive *any* revenue from oil tar sands projects. As outlined above ... the SRI Policy stated, relevantly, that Active Super “will not” make investments in companies that “derive 33.3% (one-third) or more of their revenue” from “high carbon sensitive activities”, defined as including companies which derive the applicable proportion of their revenue from oil tar sands.

Item 13, published in versions of the SRI Policy dated between 8 October 2021 and 11 March 2023, expressly stated “The Trustee has determined that the Fund will not make investments in companies that derive 33.3% (one-third) or more of their revenues in high carbon sensitive activities... This list will include companies which derive their revenue or assets from... oil tar sands”.

As discussed above, the versions of the SRI Policy dated between October 2021 and 1 March 2023 did not commit to the perfect exclusion of restricted companies and identified relevant limitations to its investment approach. The SRI Policy dated in June 2023 expressly stated that:

- (a) Active Super will not “invest directly in” restricted companies, and defines this to mean:
- investment by the Trustee directly; and
  - investment in a portfolio managed by an external investment manager under a mandate;
- but does not include investment by an externally-managed fund that Active Super has invested in but does not control.
- (b) There are “situations where it will not be possible to avoid indirect exposure to restricted companies”. In those circumstances, LGSS stated that it would “aim to eliminate or reduce these exposures” by creating “offsetting” positions.

The remaining Oil Tar Sands Statements were made in documents that expressly referred to the SRI Policy, and should be read in that context. It is relevant that:

- (a) Item 6 was published in the Impact Report in a section titled “Active Super investment dos and don’ts” and under the sub-heading “Negative Screens”. Within this section, and on the same page as Item 6, it is explained that the SRI Policy “includes” “positive screens” and “negative screens” and “has restrictions that strictly limit investments in some areas”. Within this context, it is clear to an ordinary and reasonable reader that further detail in relation to each of the “negative screens” and “restrictions” is located in the SRI Policy.
- (b) Item 18 formed part of an infographic published in a Responsible Investment Report in a section titled “Our Investment Philosophy”. The text directly above the infographic referred to the SRI Policy, and stated that the SRI Policy was available on Active Super’s website. A later section of the Responsible Investment Report noted that the SRI Policy “applies to the Fund’s whole portfolio, across all asset classes”.
- (c) Item 19 formed part of an infographic published in the 1 July 2022 and 4 November 2022 PDS Fact Sheets and under the subheading “Responsible Investing”. The text directly above the infographic referred to the SRI Policy, noting that it “applies across our whole portfolio, across all asset classes” and was available on Active Super’s website. The SRI Policy to which the reader is directed forms an important part of the context for this statement, particularly in circumstances where limited detail is provided in the text of the infographic itself.

205 LGSS submitted that the oil tar sands representations were not conveyed. It was said that “[r]ead in light of all the context”, the oil tar sands statements conveyed that:

- (1) Active Super restricted investment in companies that derived 33.3% or more of their revenues from oil tar sands projects;
- (2) Active Super had a process of utilising external research from MSCI to identify whether companies met this definition;



- (3) if a company was found to derive more than 33.3% of their revenue from oil tar sands projects, Active Super would consider whether to divest the holding (though it may not do so); and
- (4) if Active Super considered it appropriate to divest the holding, it would do so within a reasonable period.

206 LGSS submitted that it did not act inconsistently with the oil tar sands representations because, with respect to the Wellington Fund investment it did not “make” or “hold” investments in pooled funds. And nor would the alleged representations have been understood to mean that LGSS would not invest in pooled funds which contained investments in oil tar sands companies. Save for the alleged representation made in the SRI Policy, I reject those contentions for the reasons I have already given (at paragraph 130 above).

207 LGSS’s only remaining submission was that each of the five companies identified did not derive more than one-third of its revenue from oil tar sands. It pointed to reports produced by MSCI which indicated that during the relevant period the five companies derived between 0-4.99% or 5-9.99% of revenue from oil tar sands.

### **Consideration**

208 I accept that the oil tar sands statement in the SRI Policy (item 13 in Annexure A) conveyed that Active Super restricted investments in companies that derived 33.3% or more of their revenue from oil tar sands.

209 Beyond that, I do not accept that the remaining oil tar sands statements were so qualified, or that anything LGSS said could be construed to mean that if a company was found to derive more than 33.3% of their revenue from oil tar sands projects, it “would consider whether to divest the holding”, within a reasonable period or otherwise.

210 To the extent that such submissions depended on what was said in the SRI Policy, I repeat what I said at paragraphs 114 to 118 above.

211 As ASIC submitted, LGSS said in terms that it would “eliminate investments in oil tar sands” and that its list of investment restrictions included “companies which derive revenue from oil tar sands”. In my view, such unequivocal language would convey to the ordinary and reasonable member or prospective member of LGSS that there was no investment in companies that derived any revenue from oil tar sands.

212 It follows that, in my view, the oil tar sands representations as alleged (with the exception of  
that at item 13 in Annexure A) were conveyed and they were misleading and deceptive.

### **COAL MINING REPRESENTATIONS**

213 The first coal mining representation was published by LGSS in Active Super's SRI Policy from  
October 2021 to May 2023 and is extracted at paragraph 197 above.

214 The second coal mining representation was published by LGSS in Active Super's PDS from  
25 May 2021 to 30 June 2022 which said that through Active Super's negative screens, it would  
not actively invest in companies that derive 33.3% or more of their revenue from coal mining.

215 ASIC alleged that contrary to the above representations, during the relevant period LGSS held  
three investments in companies (Coronado Global Resources Inc, New Hope Corporation Ltd  
and Whitehaven Coal Ltd) that derived more than 33.3% of its revenue from coal mining, via  
the ASX 200 Fund. There was also a direct investment in Coronado Global Resources Inc  
between 30 June and 31 December 2021.

216 LGSS did not dispute that it held or had an investment exposure to those investments. It also  
did not dispute that the companies derived more than one third of their revenue from coal  
mining during the periods identified.

217 LGSS's defence was as follows.

218 It pointed, first, to the fact that the coal mining statements were published in the SRI Policy,  
available on Active Super's website and in PDS Fact Sheets, and that the 25 May 2021 PDS  
Fact Sheets contained the following statements, "which form part of the direct context of the  
statement extracted by ASIC in Item 20", viz:

- (1) an explicit reference to the SRI Policy under the subheading "Active Super Sustainable  
and Responsible Investment Policy", stating that the SRI Policy "provides a formal  
framework for integrating ESG considerations" and is "[r]eviewed annually";
- (2) an identification of MSCI ESG Research as a service provider informing Active Super's  
analysis of ESG risk factors and performance; and
- (3) an explanation that investment restrictions are used to "limit" (as opposed to eliminate)  
exposure.

219 It was submitted that "[u]nderstood in light of this context", the coal mining statements  
conveyed that:

- (1) if Active Super became aware that it held an investment in a company that derived one-third or more of its revenue from coal mining, it would divest and no longer hold investments in that company;
- (2) it is not always possible to avoid a pooled fund investing in restricted companies; and
- (3) if Active Super had an indirect exposure to a restricted coal mining company, it would aim to offset that exposure.

220 They are, if I may say so, threadbare submissions. They fly in the face of the unequivocal statements and the undisputed evidence that each of the relevant companies in fact derived more than 33.3% of their revenue from coal mining.

221 LGSS also submitted that three coal mining investments were investments held by the ASX 200 Fund “and were the subject of corresponding futures positions offsetting the relevant equity exposure”. Accordingly, it was said that they were not an investment “held” or “made” by Active Super and that Active Super’s management of this indirect exposure was consistent with the SRI Policy. I reject those submissions for the reasons given above at paragraphs 122 to 140.

222 LGSS also submitted in relation to its direct holding in Coronado Global Resources Inc from 30 June to 31 December 2021, that Coronado was:

- (a) listed on 23 October 2018;
- (b) not included in the report provided by MSCI in 2020;
- (c) identified in the MSCI report provided on 26 July 2021 as deriving more than 50% of its revenue from coal mining.
- (d) subsequently added to the Investment Restrictions List.

223 It was said that “[s]imilar to PointsBet ... the investment in and divestment of [those] shares ... is an example of Active Super’s policies working to align its investment portfolio with the values identified in the SRI Policy.” I disagree, for the reasons given at paragraph 121.

### **Consideration**

224 It follows that, in my view, the coal mining representations as alleged by ASIC were conveyed and they were misleading and deceptive.

225 This includes the coal mining representation contained in the SRI Policy (item 13 in Annexure A). Even if it is accepted, for the reasons given at paragraph 194, that an ordinary reasonable

consumer would have read this statement as being subject to the acknowledgement in the policy that LGSS may still have indirect exposure to companies which derive more than 33.3% of their revenue from coal mining through pooled investment funds, the fact remains that LGSS held a direct investment in such a company during the relevant period.

## **REPRESENTATIONS AS TO FUTURE MATTERS?**

226 LGSS also contended that all of the representations alleged by ASIC were “plainly expressed” as representations as to future matters, because they were prefaced by the word “would”, as in (for example) “would not make or hold investments in companies that derive more than 10% of revenue from gambling”.

227 Section 12BB(1) of the ASIC Act provides that if a person makes a representation with respect to any future matter and the person does not have reasonable grounds for making it, the representation is taken to be misleading.

228 As I have already made clear, LGSS did not dispute that it made the express statements giving rise to the representations, but it disputed that they contravened ss 12DB and 12DF of the ASIC Act on the further ground that it had reasonable grounds for making them.

229 The submission was put this way:

The evidence of LGSS’s three lay witnesses will show that LGSS had a reasonable process for monitoring its investments to ensure they were aligned with its SRI Policy:

- (a) LGSS maintained an Investment Restrictions List, identifying companies that, consistent with section 9 of the SRI Policy, LGSS “will not make investments in”. This list was approved by the Investment Committee and Board.
- (b) To identify these companies, LGSS relied upon data provided by MSCI, an independent specialist ESG research provider, to provide the data relied upon by the Responsible Investment team in preparing and updating the Investment Restrictions List.
- (c) Whether a company was classified as “deriving revenue from” an activity was a decision made by MSCI, not LGSS. The definitions relied upon by MSCI when assessing this are contained in its own Research Methodology documentation. These definitions were prepared by, applied by, and the results of doing so were published by, an ESG industry expert.
- (d) The annual process of obtaining data from MSCI and analysing this data to identify companies which met the criteria for being placed on the Investment Restrictions List was a significant exercise.
- (e) LGSS engaged with specialist external portfolio managers to invest fund assets. These external specialists determined how those funds were invested. Under the Investment Management Agreement (IMA) entered into by LGSS and the manager, the manager was prohibited from making investments in

companies on the Investment Restrictions List.

- (f) LGSS provided the Investment 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 Investment Restrictions List.

When LGSS made statements that it “would not” invest in companies that derived revenue or a portion of revenue from prescribed activities, it did so in circumstances where:

- (a) it had a reasonable process, based on expert industry definitions and research, to identify companies meeting the criteria for restriction in the SRI Policy; and
- (b) its external investment managers, who managed 99.6% of Australian equity investments and 74.1% of international equity investments, were prohibited from investing in these companies.

### **Consideration**

230 Section 12BB(2) of the ASIC Act relevantly provides that in a proceeding concerning a representation made with respect to a future matter by a party to the proceeding, the party is taken not to have had reasonable grounds for making the representation, unless evidence is adduced to the contrary.

231 As Mr Hewitt said, and I agree with him:

[W]e say in that regard that LGSS has not adduced evidence to the contrary because they haven’t adduced any evidence as to the grounds that were relied upon for the making of the various statements. None of the witnesses who were called by the defendant addressed at all why the statement in annexure [A] of the concise statement were made, what the reason for them was, what the basis was. It was deliberately obviously a choice to remain silent about that, but that deliberate choice to remain silent has the consequence that LGSS, if they do seek to say that there are representations with respect to a future matter in these, comes up short in overcoming the effect of the deeming provision ...

232 Even accepting for the sake of the argument that some or all of the alleged representations were as to future matters, that is of no avail to LGSS for the reasons advanced by Mr Hewitt.

233 It follows that the relevant gambling, Russia, oil tar sands and coal mining representations identified above would still be relevantly misleading, even if they were characterised as having been made with respect to future matters.

### **THE INVESTMENT MAGAZINE ARTICLE**

234 The article in *Investment Magazine* relied on (item 11 in Annexure A) relevantly stated:

Stockwell [then CEO of Active Super] said Active Super sees its commitment to

ethical and sustainable investment as being a critical part of its offering in a competitive superannuation market, particularly with last year's introduction of new laws which mean employees are automatically "stapled" to their super fund when they change jobs, unless they specifically opt to make a change to another fund. The fund was one of the first super funds in Australia **to rule out investing in tobacco**, a move it took 20 years ago. "It was not mainstream back then," he said. "It is important, in a stapling world, to have a good brand and a competitive proposition," he said.

It now **specifically excludes any investments in gambling, tobacco, weapons manufacturer** and "certain investments which are carbon heavy."

(emphasis added)

235 As best I understood LGSS's case on this point, it sought to say that it did not make the statement. Presumably, it meant to say that the journalist who wrote it "made" it. But LGSS never suggested that Mr Stockwell did not utter the words attributed to him by the journalist, or that he did not say the words on behalf of LGSS. In those circumstances, I reject LGSS's submission that it did not "make" the representations contained in the article.

236 For reasons set out above, it was misleading and deceptive for LGSS to say that at or around January 2022 it had "rule[d] out investing in tobacco" and that it "now specifically excludes any investments in gambling [and] tobacco ..."

## CONCLUSION

237 ASIC is entitled to the declarations as to contraventions of the ASIC Act which it seeks in the originating application, other than those in respect of the alleged tobacco representations and those in respect of Russia and oil tar sands contained in the SRI Policy.

238 I will order that the matter be listed for further hearing, and hear the parties at that hearing on the appropriate form of declaratory relief in light of these reasons.


239 I will reserve the question of costs to the conclusion of the proceeding – that is, after I have considered ASIC's claims for pecuniary penalties, adverse publicity orders and injunctive relief.

I certify that the preceding two hundred and thirty-nine (239) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Callaghan.



Associate: 

Dated: 5 June 2024

**ANNEXURE A**  
**Representations**

No.	Representation	Location of Representation	Period Representation Made
1.	<p><i>...we will not invest in organisations that derive more than 10% of their revenue from armaments, <b>gambling</b>, [emphasis added] old-growth logging and uranium mining.</i></p>	Active Super website	<p>Published: 25 May 2021</p> <p>Removed: 28 February 2023</p>
2.	<p>A visual representation headed 'Are we in? Or out?' indicating examples such as tobacco, nuclear weapons and gambling as 'High ESG Risk' and 'No Way' to whether Active Super decides to invest in those companies.</p> <p><b>Are we in? Or out?</b></p> <p><small>Once assessed for both performance and ESG impact, companies generally fall into one of three categories. Then we decide whether to invest.</small></p> 	Active Super website	<p>Published: 25 May 2021</p> <p>Removed: 1 March 2023</p>
3.	<p><i>Over 20 years ago we were the first super fund in Australia to stop investing in tobacco.</i></p>	Active Super website	<p>Published: 25 May 2021</p> <p>Amended on 29 March 2023 to state:</p> <p><i>Over 20 years ago we were the first super fund in Australia to stop investing in tobacco <b>manufacturers</b> (emphasis added)</i></p>



4.	<p><i>There are some industries in which we will not invest any money because we believe the harm they cause is not worth any potential profit we could gain. These companies include those that derive revenue from controversial weapons — such as land mines, cluster bombs and nuclear weapons — as well as tobacco.</i></p>	Active Super website	<p>Published: 25 May 2021 Removed: 28 February 2023</p>
5.	<p>A similar visual representation to the one on the Website, above, is included in the Impact Report with an additional statement below ' <i>Negative screens eliminate our exposure to high ESG risk industries</i>'.</p> <p><b>We identify opportunities to make a difference</b></p> <p>Once assessed for both performance and ESG impact, investments generally fall into one of three categories. Then we decide whether to invest.</p> 	Page 12 of the Impact Report	<p>Published: 28 October 2021 Removed: 1 March 2023</p>
6.	<p><i>We eliminate investments that pose too great a risk to the environment and the community, for example: tobacco, nuclear weapons, oil tar sands, gambling.</i></p> <p><b>Negative screens</b></p> <p>We eliminate investments that pose too great a risk to the environment and the community, for example:</p> 	Page 16 of the Impact Report	<p>Published: 28 October 2021 Removed: 1 March 2023</p>

7.	<p><i>a. The Trustee has determined that Active Super will not make investments in companies that derive any revenues in the following areas of activity:</i></p> <p>...</p> <p><i>ii) Tobacco: Companies involved in the manufacture and/or production of tobacco products</i></p>	<p>Paragraph 9 of the SRI Policy version 7 dated December 2020, version 8 dated October 2021, version 10 dated October 2022 and version 11 dated March 2023.</p>	<p>Available: 1 February 2021 Removed: 31 May 2023</p>
8.	<p><i>Today is World No Tobacco Day.</i></p> <p><i>Did you know we were the first super fund to stop investing in Tobacco over 20 years ago? Learn more about our responsible investment approach here:</i> <a href="https://bit.ly/3qkAd9d">https://bit.ly/3qkAd9d</a></p> <p><i>#activesuper #worldnotobacco #responsibleinvesting</i></p>	<p>Facebook Page – Active Super</p>	<p>Published: 31 May 2022 Removed: 2 June 2023</p>
9.	<p><i>Today is World No Tobacco Day. Here at Active Super we've always had a strong commitment to responsible investment and this year we celebrated 20 years since becoming the first Australian super fund to stop investing in tobacco. Learn more here:</i> <a href="https://bit.ly/3vAXPGX">https://bit.ly/3vAXPGX</a></p> <p><i>Tobacco Free Portfolios</i></p> <p><i>#getactive #activesuper #worldnotobaccoday #tobaccofree #esg #responsibleinvestment</i></p>	<p>LinkedIn account – Active Super</p>	<p>Published: 31 May 2021 Removed: 2 June 2023</p>
10.	<p><i>Today is World No Tobacco Day. Did you know we were the first super fund to stop investing in tobacco over 20 years ago? Learn more about our responsible investment approach:</i> <a href="https://activesuper.com.au/making-a-difference">activesuper.com.au/making-a-difference</a> <i>#activesuper #responsiblefund</i></p>	<p>Instagram @activesuper_au</p>	<p>Published: 31 May 2022 Removed: 2 June 2023</p>

11.	<p><i>“Stockwell said Active Super sees its commitment to ethical and sustainable investment as being a critical part of its offering in a competitive superannuation market, particularly with last year’s introduction of new laws which mean employees are automatically “stapled” to their super fund when they change jobs, unless they specifically opt to make a change to another fund. The fund was one of the first super funds in Australia <b>to rule out investing in tobacco</b>, a move it took 20 years ago. “It was not mainstream back then,” he said. “It is important, in a stapling world, to have a good brand and a competitive proposition,” he said.</i></p> <p><i>It now <b>specifically excludes any investments in gambling, tobacco, weapons manufacturer</b> and “certain investments which are carbon heavy.””</i></p> <p><i>[emphasis added]</i></p>	Investment Magazine URL: <a href="https://www.investmentmagazine.com.au/2022/01/mid-sized-funds-can-go-where-bigger-ones-cant-actives-stockwell/">https://www.investmentmagazine.com.au/2022/01/mid-sized-funds-can-go-where-bigger-ones-cant-actives-stockwell/</a>	Published: 19 January 2022 Available as at 8 August 2023
12.	‘the Trustee has determined that the Fund will not make investments in Russia’	Paragraph 9(e) of the SRI Policy version 10 dated October 2022, and version 11 dated March 2023.	Published: 8 February 2023 Removed: May 2023
13.	<p><i>“The Trustee has determined that the Fund will not make investments in companies that <b>derive 33.3% (one-third) or more of their revenues in high carbon sensitive activities.</b></i></p> <p><i>Companies assessed as being the most vulnerable from the sectors that are evaluated as being highly sensitive to the multiple investment risks associated with climate change. <b>This list will include companies which derive their revenue or assets from coal mining, oil tar sands and coal fired electricity utilities.</b></i></p> <p><i>Active Super will reference external research to determine which companies are high carbon sensitive” (emphasis added)</i></p>	SRI Policy versions: 8 dated October 2021 10 dated October 2022 11 dated March 2023	Published: October 2021 Removed: May 2023

14.	<p><i>The Fund will not invest directly in shares in restricted companies. A company is a restricted company if the Trustee has received data from its ESG research provider confirming that the company meets one or more of the following restriction criteria....</i></p> <p><i>Coal and oil tar sands Companies that derive 33.3% (one-third) or more of their revenue directly from: • coal mining; • oil tar sands; and/or • coal-fired electricity utilities</i></p>	SRI Policy – current June 2023 (version 12) on website, section 9	Published June 2023 Available as at 8 August 2023
15.	<p><b><i>RUSSIA OUT</i></b></p> <p><i>Now a country exclusion FOLLOWING EVENTS IN UKRAINE</i></p>	Page 6 of the Responsible Investment Report 2021/22 under heading This Year's Highlights	Published: 20 December 2022 Removed: March 2023
16.	<p><b><i>Russian Investments out</i></b></p> <p><i>Until recently, Active Super had a very small amount of exposure to Russian stocks, via investments in two Emerging Market funds which equated to approximately 0.1 percent of our total funds under management.</i></p> <p><i>Following Russia's invasion of Ukraine, however, both these funds moved quickly to begin divesting of all Russian securities. Furthermore, Active Super has now added Russia to its list of restricted countries in which it will not invest</i></p>	Page 31 of the Responsible Investment Report 2021/22 under heading Divesting to Make a Difference	Published: 20 December 2022 Removed: March 2023

17.	<p><b><i>Russia investments out in the cold</i></b></p> <p><i>Following Russia's invasion of Ukraine, which runs counter to our responsible investment principles, Active Super has now added Russia to its list of restricted countries in which the fund will not invest.</i></p> <p><i>Furthermore, while Active Super did have a small amount of exposure to Russian investments via two Emerging Markets funds (which equated to 0.1% of our total funds under management), soon after the conflict began, these funds began divesting of any Russian stocks.</i></p>	<p>Emailed to members</p> <p>Active Super website</p>	<p>Published: May 2022</p> <p>Removed: April 2023</p>
18.	<p><i>We eliminate investments that pose too great a risk to the environment and the community, for example nuclear weapons, tobacco manufacturers, oil tar sands and gambling.</i></p>	<p>Page 10 of the Responsible Investment Report 2021-2022</p>	<p>Published: 20 December 2022</p> <p>Removed: March 2023</p>
19.	<p><b><i>Negative Screens</i></b></p> <p><i>We eliminate investments that pose too great a risk to the environment and the community, for example nuclear weapons, tobacco manufacturing, oil tar sands and gambling. We also recently added Russia to our list of excluded countries, following the invasion of Ukraine.</i></p>	<p>'How we invest your money' PDS Fact Sheet</p> <p>(Accumulation dated 1 July 2022)</p> <p>(Defined Benefit dated 1 July 2022)</p> <p>(Pension Product dated 1 July 2022)</p> <p>(Retirement dated 1 July 2022)</p> <p>(Defined Benefit dated 4 November 2022)</p>	<p>Published: 1 July 2022</p> <p>Removed: 1 May 2023</p>

20.	<p><i>Active Super will not actively invest in companies that derive 33.3% or more of their revenue from:</i></p> <ul style="list-style-type: none"> <li><i>High carbon sensitive activities: including coal mining, oil tar sands and coal fired electricity generation.</i></li> </ul> <p><i>Active Super will not actively invest in companies that are identified as:</i></p> <ul style="list-style-type: none"> <li><i>High ESG risk: Including poor governance and management of ESG risks.</i></li> </ul>	<p>'How we invest your money' PDS Fact Sheet</p> <p>(Accumulation dated 25 May 2021)</p> <p>(Defined Benefit Scheme dated 25 May 2021)</p> <p>(Pension Product dated 25 May 2021)</p> <p>(Retirement dated 25 May 2021)</p>	<p>Published: 25 May 2021</p> <p>Removed: 30 June 2022</p>
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## ANNEXURE B

### Active Super's investments contrary to representations

#### 1. Gambling investments

<b>Table 1: Gambling Investments</b>				
<b>No.</b>	<b>a. Company</b>	<b>b. Type of holding</b>	<b>c. First date held</b>	<b>d. Disposal date/Last date held</b>
1.	Skycity Entertainment Group Limited	Indirect (via the Colonial First State Wholesale Small Companies Fund)	1 February 2021	Held as at 31 May 2023
		Indirect (via SPDR S&P/ASX 200 ETF)	30 November 2016	21 March 2022
2.	PointsBet Holdings Limited	Indirect (via SPDR S&P/ASX 200 ETF)	4 February 2021	19 September 2022
		Direct	30 November 2016	23 December 2021
3.	Jumbo Interactive Limited	Direct	3 April 2019	6 June 2023
4.	Aristocrat Leisure Limited	Indirect (via SPDR S&P/ASX200 ETF)	30 November 2016	Held as at 23 May 2023
5.	The Lottery Corporation Limited	Indirect (via SPDR S&P/ASX200 ETF)	Added to the ASX200 24 May 2022	Held as at 23 May 2023
6.	Tabcorp Holdings Limited	Indirect (via SPDR S&P/ASX200 ETF)	30 Nov 2016	Held as at 23 May 2023
7.	Crown Resorts Ltd	Indirect (via SPDR S&P/ASX200 ETF)	30 Nov 2016	20 June 2022

8.	The Star Entertainment Group Ltd	Indirect (via SPDR S&P/ASX200 ETF)	30 Nov 2016	Held as at 23 May 2023
		Indirect (via the Colonial First State Wholesale Small Companies Fund)	31 March 2023	Held as at 31 May 2023

## 2. Tobacco investments

<b>Table 2: Tobacco Investments</b>				
<b>No.</b>	<b>a. Company</b>	<b>b. Type of holding</b>	<b>c. First date held</b>	<b>d. Disposal date/Last date held</b>
1.	Amcor PLC	Direct	30 November 2016	Held as at 3 July 2023
2.	Transcontinental Inc Shs-A-Voting Subord	Direct	30 November 2016	Held as at 3 July 2023
3.	Stora Enso Oyj Class R	Direct	30 November 2016	Held as at 3 July 2023
4.	Westrock Co	Direct	30 November 2016	Held as at 3 July 2023
5.	Smith (DS) PLC	Direct	30 November 2016	15 December 2022



### 3. Russian investments

<b>No.</b>	<b>a. Company</b>	<b>b. Type of holding</b>	<b>c. First date held</b>	<b>d. Disposal date/Last date held</b>
1.	Rosneft Oil Co	Indirect (Macquarie Emerging Markets Fund)	31 January 2021	Held as at 30 June 2023
2.	Etalon Group	Indirect (Macquarie Emerging Markets Fund)	31 January 2021	Held as at 30 June 2023
3.	Mail.ru	Indirect (Macquarie Emerging Markets Fund)	31 January 2021	Held as at 30 June 2023
4.	Transneft PJSC	Indirect (Macquarie Emerging Markets Fund)	31 January 2021	Held as at 30 June 2023
5.	Yandex NV	Indirect (Macquarie Emerging Markets Fund)	31 January 2021	Held as at 30 June 2023
6.	Sberbank of Russia	Indirect (Macquarie Emerging Markets Fund)	31 January 2021	Held as at 30 June 2023
7.	Gazprom PJSC	Indirect (Macquarie Emerging Markets Fund)	31 January 2021	Held as at 30 June 2023
8.	Gazprom PJSC	Indirect (Wellington Emerging Markets Fund)	30 June 2021	30 September 2022
9.	Gazprom PJSC	Indirect (Wellington Emerging Markets Fund)	31 October 2022	Held as at 30 June 2023

#### 4. Oil Tar Sands investments

<b>Table 4: Oil Tar Sands Investments</b>				
<b>No.</b>	<b>a. Company</b>	<b>b. Type of holding</b>	<b>c. First date held</b>	<b>d. Disposal date/Last date held</b>
1.	ConocoPhillips	Direct	30 Nov 2016	10 December 2021
2.	CK Hutchison Holdings Ltd	Direct	4 March 2021	Held as at 26 July 2023
3.	Shell Plc	Direct	30 Nov 2016	Held as at 26 July 2023
4.	TotalEnergies SE	Direct	30 Nov 2016	Held as at 26 July 2023
5.	PTT Exploration & Production Public Company Limited	Indirect (via Wellington Emerging Markets)	30 Nov 2016	Held as at 30 June 2023

## 5. Coal mining investments

<b>Table 5: Coal Mining Investments</b>				
<b>No.</b>	<b>a. Company</b>	<b>b. Type of holding</b>	<b>c. First date held</b>	<b>d. Disposal date/Last date held</b>
<b>1.</b>	Coronado Global Resources Inc.	Indirect (SPDR S&P/ASX200 ETF)	Added to the ASX200 20 June 2022	Held as at 23 May 2023
		Direct	30 June 2021	31 December 2021
<b>2.</b>	New Hope Corporation Limited	Indirect (SPDR S&P/ASX200 ETF)	Added to the ASX200 20 June 2022	Held as at 23 May 2023
<b>3.</b>	Whitehaven Coal Limited	Indirect (via SPDR S&P/ASX200 ETF)	30 Nov 2016	Held as at 23 May 2023

# ANNEXURE C

REPLAY WEB PAGE / LGS.0003.0002.0002.wacz / Ethical and Responsible Australian Superannuation Fund | Active Super

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	Defined Benefit Scheme	50+ retired
		60+ working
		60+ retired

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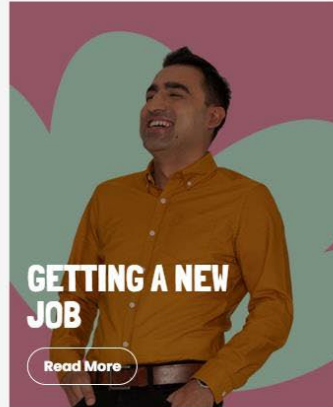
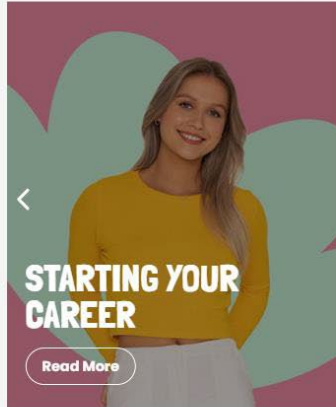
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Here you can find all of our latest reports, including our responsible investment and proxy voting policies, ESG audits and carbon footprinting reports:

### Responsible Investment Report

- [Responsible Investment Report 2021/2022](#)

### Policy

- [Active Super Sustainable and Responsible Investment Policy](#)
- [Active Super Active Ownership Policy](#)
- [2022 Modern Slavery Statement](#)
- [Active Super Stewardship Statement](#)

### Principles for Responsible Investment

- [Principles for Responsible Investment results, 2020](#)
- [Principles for Responsible Investment Transparency report, 2020](#)
- [Principles for Responsible Investment Assessment report, 2020](#)
- [Case Study: PRI – Active Super Approach to RI](#)

### Climate Change

- [Active Super TCFD Aligned Climate Transparency Report 2019](#)
- [Asset Owner Disclosure Project Response, 2017](#)
- [2 Degree Invest Award: Runner Up for Best Engagement Climate change risks and opportunities – 2015/2016](#)

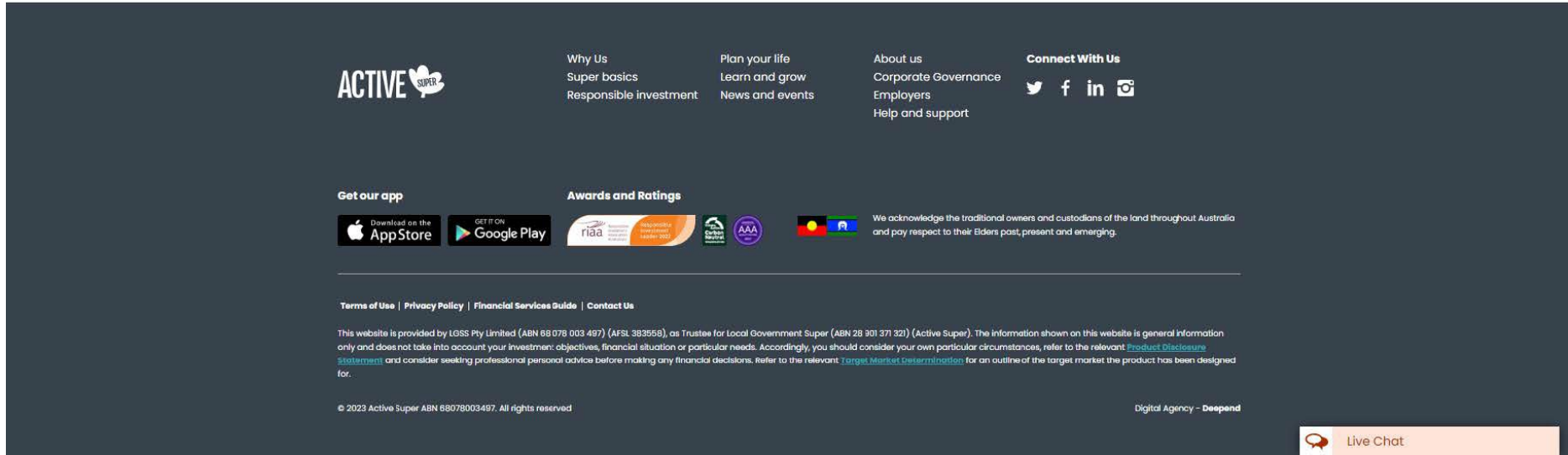
### ESG

- [ESG Risk report](#)
- [Carbon Footprint of Listed Equity Investments](#)



## Proxy voting

- [Proxy Voting FAQs](#)
- [Proxy Voting and Engagement report](#)



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