Australian Securities and Investments Commission

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JOSEPH LONGO
CHAIR

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8 February 2022

Jason Falinski MP
1238 Pittwater Rd
NARRABEEN NSW 2101

Dear Mr Falinski

I refer to your letter of 24 January 2022 seeking clarification of certain issues in relation to the recent decision in *Australian Securities and Investments Commission v Statewide Superannuation Pty Ltd* [2021] FCA 1650 (**Statewide Decision**). Using your headings, we address your questions below.

Clarifying ASIC's position in relation to the final outcome achieved

ASIC's penalty position in the Statewide Decision

You have asked that we confirm what fines and penalties ASIC sought in the Statewide matter, and to outline our reasoning in arriving at these amounts.

Paragraph [32] of the Statewide Decision sets out the penalty amounts sought by ASIC. We have attached a copy of the decision with this letter and have extracted para [32] below:

> *"(1) ASIC seeks pecuniary penalties in the aggregate amount of $9 million in respect of Statewide's contraventions of s 12DB(1)(g) and (i) of the ASIC Act. Statewide contends that a penalty of $3 million is appropriate with respect to these contraventions; and*
>
> *(2) ASIC seeks a pecuniary penalty in the amount of $1 million in respect of Statewide's contravention of s 912D(3) of the Corporations Act. Statewide contends that a nominal amount is appropriate for this contravention."*

As in all matters where ASIC is seeking the imposition of pecuniary penalties in civil penalty litigation, in the Statewide matter, ASIC carefully considered the following non-exhaustive factors:

a) the nature and extent of Statewide's contraventions and the circumstances in which they took place;
b) the nature and extent of loss or damage suffered by members;
c) the impact of the penalties on fund members;
d) deliberateness of the contraventions (whether there was any intention or profit motivation);

e) whether the contraventions arose as a result of the conduct of senior management;
f) Statewide's corporate culture;
g) Statewide's co-operation with ASIC throughout the investigation and proceedings;
h) pecuniary penalties ordered in prior similar matters;
i) changes in the legislation underlying Statewide's contraventions; and
j) the deterrent effect of the proposed penalties.

ASIC will also seek the advice of the external counsel team acting for ASIC in the matter. This occurred in relation to the Statewide proceedings.

We refer you to paragraphs [43], [46]-[77], [86]-92], [103]-[105], [109]-[110], and [113]-[120] of the Statewide Decision where Besanko J discusses ASIC's submissions in relation to the penalty amounts and Statewide's arguments against. These paragraphs discuss in more detail a number of the factors listed above and ASIC's reasoning in relation to each.

Whilst ASIC provides submissions on the appropriate penalty amount, ultimately, determination of penalty is a matter for the court; the regulator's views are relevant but not determinative.

In *Australian Energy Regulator v Snowy Hydro Limited (No 2)* [2015] FCA 58, Beach J summarised (at [131]) the relevant propositions regarding the Court's approach to penalty, which include:

(a) It is for the Court to determine the appropriate penalty.

(b) Determining the quantum of a penalty is not a precise "science".

(c) The view of the regulator, as a specialist body, is relevant but not determinative. Further, the views of the regulator on matters within its expertise (such as [the regulator's] views as to the deterrent effect of a proposed penalty) will usually be given greater weight than its views on more subjective matters.

(d) In determining whether the proposed penalty is appropriate, it is necessary to examine all the circumstances of the case.

Media release 22-001

You have suggested that ASIC's media release on Tuesday 18 January 2020, *22-001MR Statewide Superannuation to pay $4 million penalty for misleading correspondence to members*, appears to endorse the Statewide Decision outcome.

When court decisions involving ASIC are handed down, we will generally publish a media release about the outcome. Information Sheet 152 (INFO 152) explains when and why ASIC may comment publicly on our regulatory activities. ASIC has a strong policy of transparency and we are committed to communicating publicly about our regulatory activities. We ensure that our reporting is accurate, objective,

balanced and fair, and consistent with the objectives of ensuring public understanding of our regulatory activities.

We consider that 22-001MR provides factual information about the Statewide Decision and neither supports nor rejects the court's decision.

StatePlus Super (Aware Financial Services Australia Limited)

You have asked us about our penalty approach in our proceedings against StatePlus Super and "*whether we intend to take a similarly lenient approach in relation to the penalty*" sought.

We reject the suggestion that the penalty ASIC sought in the Statewide matter, was lenient.

Fines are imposed by courts in criminal and civil proceedings, and it is for the court to determine what is an appropriate amount. We will, in accordance with our approach to penalty outlined above, assist the court in determining the appropriate penalty. In doing so, we do not seek to be lenient or otherwise.

We refer you to *20-189MR ASIC commences civil penalty proceedings against StatePlus Super for charging fees for no service* for our available public commentary on these proceedings. As the proceedings are ongoing, it is not appropriate that we provide detail on the penalties we may seek in the event we are successful in establishing our case.

Clarifying ASIC's position in relation to statements of the Court

- **Section 56(2)**

You have asked our view on the effect of s56(2) of the *Superannuation Industry (Supervision) Act 1993* (**SIS Act**) and whether a trustee can use member reserves to pay a penalty, and in particular a comment by Besanko J in this regard.

The amendment to s56(2) of the SIS Act to include an express limitation on a trustee's right of indemnity from trust fund assets for a "*liability for an amount of a criminal, civil or administrative penalty incurred by the trustee of the entity in relation to a contravention of a law of the Commonwealth*" (s56(2)(b), SIS Act) came into effect on **1 January 2022** (not 1 January 2020 as stated in your letter). From 1 January 2022, it is clear that a trustee has no right of indemnity from trust fund assets to pay a penalty under any Commonwealth Act.

In the Statewide matter, Besanko J made orders, (including the imposition of the $4m penalty) on 22 December 2021 (**the Orders**), with the full written reasons released on 17 January 2022. As the Orders were made prior to the changes described above coming into effect, the Statewide Decision was considered on the basis of the previous version of s56(2), which did not contain the express limitation that is now in s56(2)(b).

You have referred specifically to paragraph 83 of the Statewide Decision. We consider that this comment needs to be read in light of the legal position noted above, as the Orders were made prior to the implementation of the new s56(2)(b). In any event, as the penalties imposed were within the sub-limit covered by Statewide's insurance policy (see paragraph 85) Besanko J did not consider the

impact of the penalty on members on the basis that recourse to member reserves would not be needed to pay the penalties.

◆ Action of funds that do not have assets

You have asked what actions we consider trustees should be taking given the changes to s56(2) of the SIS Act, where the trustee does not have its own capital reserves.

ASIC would expect trustees to engage with this issue as it has implications for the potential stability of the operation of the fund. This is an issue that affects each trustee differently based on their own circumstances and is something that all trustees should be considering.

As you are aware, some trustees are seeking to deal with the risk that they may face insolvency if a penalty is awarded against them by charging a risk fee to the fund that will be used by the trustee to create its own capital reserve. The varying approaches that trustees have taken have been the subject of a number of recent court decisions.

At its core, the continued operation of the fund goes to prudential matters which is the focus of APRA's remit. We also note the discussion paper released by APRA in November 2021, "*Strengthening Financial Resiliency in Superannuation*". The purpose of this is to:

> *support a deeper understanding of how RSE licensees not only fund day-to-day costs and strategic initiatives, but also the range of funding mechanisms and approaches to address contingency expenditure now and into the future. It also outlines recent APRA insights across relevant industry practices, in particular where APRA considers there is an opportunity for RSE licensees to improve their practices.*

Submissions to APRA's discussion paper are due in March 2022 and you may be interested in any findings that follow.

◆ Appropriateness of risk fee approach

You have also asked ASIC's view on whether it is appropriate for superannuation trustees to charge a fee to members for the purpose of paying a penalty and whether this is consistent with s56(2) of the SIS Act.

It is not ASIC's role to determine the effect of s56(2) and appropriately this issue has now been the subject of nine court decisions[1] all of which have found that, in principle, a risk reserve fee is not inconsistent with s56(2) of the SIS Act.

We refer you specifically to the judgement of Blue J in *AustralianSuper Pty Ltd v McMillan* [2021] SASC 147 (**AusSuper Decision**), being the most recent decision and in which Blue J usefully summarises the conclusions of each of the earlier decisions on this point (see paragraphs [114] – [119] and [135] – [142]). Justice Blue concludes at para [145] that the proposed risk fee in that case "*would not be rendered void by subsection 56(2) or 57(2) [of the SIS Act]*".

[1] We understand that, while Hostplus also brought proceedings in December last year, a decision is pending.

◆ **Other options for trustees?**

Finally, you have asked whether trustees have other options in terms of funding a penalty, including seeking additional capital.

Usefully, Blue J addresses this question in the AusSuper Decision. We refer you to paragraphs [149] – [185] in which he discusses risk management policies and practices, liability insurance, both ordinary and captive, the possibility of share capital from existing shareholders and the possibility of share capital from the fund itself. He concludes that none of these options would sufficiently mitigate the risk of insolvency (at least at this time) and so considers that "*there is good reason to vary the Trust Deed and it would be in the best interests of beneficiaries to vary the Trust Deed to empower the Trustee to charge a risk fee*" (paragraph [185]).

As far as we are aware, this discussion covers the other options being considered by trustees. Again, you may wish to see APRA's discussion paper which highlights these options (see para 2.2).

We trust this provides you with the assistance sought.

Yours sincerely,

JOSEPH LONGO
CHAIR