

to a high standard. A penalty must be of sufficient size to not just deter it but to deter other major industry superannuation fund trustees from engaging in contravening conduct.

Effect of penalty on members

230 Section 1317G(6)(e) of the Corporations Act requires that, in the case of a contravention by a trustee of a registrable superannuation entity, the Court take into account the impact of the penalty on the beneficiaries of the entity. AustralianSuper is the trustee of a registrable superannuation entity.

231 Although AustralianSuper is the trustee of a fund run for members, AustralianSuper maintains a “trustee risk **reserve**”. The reserve, established by an amendment to the trust deed, does not form part of the assets of the Fund. It is funded by an annual fee payable out of the assets of the Fund in an amount determined by AustralianSuper in accordance with the trust deed.

232 To the extent that the penalty is paid from the reserve, a penalty will not affect members other than in respect of the need for future annual fees to replenish the Fund. This has the effect of spreading the impact of the penalty over the body of members over time.

233 The imposition of a pecuniary penalty in the amount of \$27 million is not expected to cause a material detriment to members of the Fund. It is noted that if the Fund had been run at a profit for shareholders and thus contributed to assets owned beneficially by either AustralianSuper or its shareholders, ASIC would have sought substantially higher penalties.

Correction and remediation

234 AustralianSuper has now fully recognised and rectified the failings which led to the contraventions. It has taken corrective action to significantly reduce the prospect of like contraventions occurring in the future.

235 AustralianSuper has undertaken an extensive remediation program to ensure that affected members have been fully remediated. Between December 2021 and May 2023, AustralianSuper expended significant time identifying the period for which remediation was required; identifying the affected members; engaging external consultants with specialised skills to advise on the methodology for remediating members to put those members, as closely as possible, in the position they would have been in had their accounts been merged as required by s 108A; engaging with ASIC, APRA and the ATO; engaging with service providers such