MASTER BUILDERS
AUSTRALIA

Submission to ASIC

Consultation Paper 384 Employee Redundancy Funds

31 July 2025

Introduction

On 24 June, ASIC released the Consultation Paper 384: Employee Redundancy Funds (Consultation Paper) which considers the ongoing operation of an exemption for employee redundancy funds, also known as Woker Entitlement Funds (WEFs) from a range of obligations under the *Corporations Act 2001* (Cth) (Corporations Act).

Master Builders Australia (Master Builders) takes this opportunity to respond to the Consultation Paper.

The Consultation Paper offers 4 Options in response to the relief currently granted which is due to expire on 1 April 2026 including:

- Option 1: Allow the relief to expire and require full compliance with the obligations that apply to managed investment schemes, including for example superannuation funds.
- Option 2(a): Grant relief from specific obligations.
- Option 2(b): Grant relief from the managed investment provisions and those provisions that result in practical compliance issues.
- Option 3: Remake the existing relief with additional conditions.

As outlined in the Consultation Paper, ASIC has granted relief to employee redundancy funds from the licencing, managed investment and associated provisions of the Corporations Act for the past 25 years on an interim basis that has been extended overtime.

Notably, the Consultation Paper points to several factors that support a reconsideration of this approach including:

- The growth in funds under management, from around $500 million in 2003 to $2 billion in 2015.
- Prior feedback that the exemption should be revoked based on findings of royal commissions and inquires, and the risks of the funds diminishing or collapsing due to mismanagement, misappropriation or abuse in the absence of regulations.
- The expanded range of activities being undertaken by funds beyond redundancy.

Master Builders agrees that these factors demand that the current approach by ASIC be reviewed.

Recommendations

- Action on Worker Entitlement Funds (WEF) is needed to address the current state of the culture within the building and construction industry.
- Within the current regulatory framework, the removal of the exemption is one of the only levers available to ensure greater regulatory oversight which the current arrangements, with the exemption in place, are lacking.
- WEF should be treated as financial institutions subject to the same rules. This ensures accountability and transparency.
- Master Builders supports the removal of the exemption but in practice how that is implemented and adopted will need adapting based on the risk profile and circumstances of each individual fund.
- The definition of WEF should be broadened as proposed in the Consultation Paper to capture other types of worker entitlements.

The Problem

The unique nature of Worker Entitlement Funds (WEF)

In recognition of the project-based nature of the work, employers in the building and construction industry are able to offset liability for particular employee entitlements through contributions to WEF this means that:

- In lieu of the conventional approach of employers accruing particular employee entitlements (commonly sick leave and redundancy pay) and then making payments directly to employees for those entitlements when or if they occur;
- building and construction employers can instead make regular contributions to WEFs that hold that money on the employees behalf; and then
- subject to satisfying certain eligibility criteria, the monies held are then made available to building and construction employees directly from the WEF instead of directly to their employer.

In addition, WEF are unique for a number of reasons including that:

- They are typically established as 'joint ventures' between industry parties (unions and employer organisations).
- WEF are operated by a trustee company, the directors of whom are associated with, and nominated by, the industry parties.
- The rules of the fund will be set out in a trust deed entered into between the corporate trustee and the industry parties. The trust deed can be, and often is, amended from time to time.
- The WEF must be 'approved' under the *Fringe Benefits Tax Assessment Act 1986* (Cth).
- WEF are free to invest monies held on behalf of employees and retain profits from those investments.

As noted in the Consultation Paper, over time, some WEF have also expanded their role to manage / incorporate other types of funds / arrangements that are common in the sector. These are usually categorised as:

- Redundancy
- Welfare/training funds
- Employee insurance schemes including sickness and accident insurance

A summary of those arrangements across the country is set out below:

	Name	Additional Entitlements
Qld/NT	Building Employees Redundancy Trust (BERT)	Construction Income Protection CIP - BERT | CIP Financial Services BERT Financial Services - BERT | CIP Worker Grants (Training) BERT Training Fund - BERT | CIP
NSW/ACT	Australian Construction Industry Redundancy Trust (ACIRT)	Nil
VIC/TAS	Incolink	Wellbeing and support services Victoria | Wellbeing & Support Services

SA	Building Industry Redundancy Scheme Trust (BIRST)	Emergency Ambulance cover, Funeral cover, journey accident cover Member Benefits - BIRST Links to support such as Drug & Alcohol Program and Mates in Construction SA
WA	ReddiFund	Income Protection Plus ReddiFund Income Protection Plus - ReddiFund Mutual Benefit Fund Mutual Benefit Funds | ReddiFund Private health corporate plans (HIF, HBF) Mates in Construction WA

This spectrum or arrangements raises two complex issues:

1. The current definition of 'employee redundancy funds' and terminology is inappropriate within this context. All arrangements of the types set out above should be subject to the same regulatory framework to ensure accountability and transparency with respect to all contributions and payment.

   The evolution of WEF to capture a broader set of entitlements means that Master Builders supports the proposed renaming of 'employee redundancy funds' as 'worker entitlement funds' and an expanded definition.

2. In reality this range of offerings means that funds will undoubtably have different risk profiles. This may require the consideration of a tailored approach to regulatory arrangements.

   It may be the case that the application of the complete gambit of regulatory arrangements that apply to managed investment schemes represents an attempt to fit a 'square peg in a round hole'. Master Builders sees this as a matter for funds to raise with ASIC to ensure the most appropriate approach can be taken.

The well-known history regarding the operation of WEF

The outcomes of three well known Royal Commissions revealed the inappropriate financial practices that accurately set the scene for the need for regulation of employee redundancy funds.

These Royal Commissions also highlight that the current lack of regulatory oversight and transparency provides fertile ground for the mismanagement of funds and illegal and inappropriate conduct in relation to the treatment of those funds.

As long ago as 2003, the Cole Royal Commission recommended that WEF be subject to appropriate governance standards and that legislation be enacted to prevent any earnings on the funds being "skimmed off" to unions:

> *"Employers make weekly contributions to redundancy funds for the benefit of their employees. However, with the exception of the Australian Construction Industry Redundancy Trust (ACIRT), the surpluses earned by these funds are enjoyed by employee and employer associations, or other bodies, none of which contributes to the fund. Income of the funds is also applied for purposes unrelated to the purpose for which contributions are made, namely redundancy. This is unwarranted and I make a recommendation that redundancy funds should be used only for*

the purpose of meeting employee redundancy entitlements. I also recommend that the surpluses be applied solely for the benefit of employees or to reduce the contributions required by employers."[1]

These recommendations were never implemented. Over two decades later, such legislation has never been passed. This has provided fertile ground for the mismanagement of these funds. Cole also concluded that:

"Those administering the funds appear to have lost sight of the fundamental premise that employer contributions are to fund redundancy entitlements. It follows that contributions, and returns on investments of the fund, should be held by the fund and distributed only for the purpose of paying redundancy entitlements."[2]

Despite being released over a decade ago, the findings of the 2015 Final Report of the Heydon Royal Commission[3] (Heydon Report) continues to offer several relevant observations regarding WEF. The Heydon Report captured the myriad of deficiencies that exist giving rise to inappropriate and improper conduct that are worthy of highlighting:

"…Another issue is the lack of transparency concerning the financial relationships between a relevant entity and the union with which it is associated. That issue is addressed in Part B of this Chapter.

Other more general problems include the fact that many relevant entities have poor or non-existent governance. Further, a relevant entity can be used in a way that subverts the democratic processes of a union. This can occur where a union official, often a secretary, has control of a relevant entity or 'slush fund' that allows the official to buy influence within the union. These issues are considered in Parts C to F of this Chapter." [4]

The Heydon Report also observed that:

"Despite their size, worker entitlement funds, unlike superannuation funds, have very little specific legislation regulating their activities."[5]

"The issues identified are not new. The same issues have been identified in reports of three separate Royal Commissions conducted over the past 40 years: the Winneke Royal Commission in 1982, the Gyles Royal Commission in 1992 and the Cole Royal Commission in 2003."[6]

The following extracts from Chapter 5 of the Heydon Report identify some of the major problems that need to be addressed:

"Problems with existing regulation

There are a number of problems with the existing regulatory framework surrounding worker entitlement funds.

[1] Final Report of the Royal Commission into the Building and Construction Industry (2003) – Volume 10 – Funds, 13
[2] Final Report of the Royal Commission into the Building and Construction Industry (2003) – Volume 10 – Funds, 281
[3] Royal Commission into Trade Union Governance and Corruption Final Report, December 2015
[4] Ibid p 273-274
[5] Heydon Report Vol 5 p 297-298
[6] Ibid

First, the startling consequence of Class Order [CO 02/314], which was initially intended to operate as an interim measure, is that worker entitlement funds are not subject to any mandatory disclosure requirements. For example:

(a) There is no requirement on worker entitlement funds to disclose the commissions and other payments made by the fund to unions and employer organisations.

(b) There is no required disclosure of the amounts deducted by the funds by way of fees and charges.

(c) There is no requirement to explain to workers the circumstances in which they will, or will not, be entitled to a payment from the fund. Further, there is no statutory requirement on worker entitlement funds to provide annual reports or accounts to persons with an interest in the fund.

Secondly, another consequence of Class Order [CO 02/314] is that the entities operating worker entitlement funds are not subject to the requirement in s 601FC(1)(d) of the Corporations Act 2001 (Cth) to treat members (for example, workers) who hold interests of the same class equally and those who hold interests of different classes fairly.

Thirdly, apart from ACIRT, worker entitlement funds invariably distribute the income generated on contributions received to industry parties (for example, unions and employer organisations) to be used for purposes they see fit.

There are a number of reasons why this is a problem.

One reason is that there is an inherent unfairness in taking contributions paid by employers on behalf of employees, generating substantial income from those contributions, and then distributing the money to other persons in circumstances where many employees will never receive the benefit, either directly or indirectly, of the income generated.

The point is starkly illustrated by the submission by ElecNet (Aust) Pty Ltd (ElecNet), the trustee of the Protect Severance Scheme, that:

> *Approved worker entitlement funds, such as Protect, do not share the purpose of managed investment schemes: producing maximum financial benefits for members of the scheme. Their aim is to protect workers' entitlement to ensure workers' financial security when faced with the insolvency of employers and cycles in the economy. Workers have no entitlement to financial benefits above the return of amounts contributed to the fund for them by their employer.*

It may be accepted that the purpose of a worker entitlement fund is to secure the payment of entitlements. Consequently, such funds might prudently adopt a risk adverse investment strategy. However, it does not follow that, because the generation of income is not the purpose of the fund, workers should not be entitled to any return which is made on the contributions. In fact, it is contrary to the underlying premise of such a fund – to operate solely for the benefit of employees – that the income should be used to benefit of employees – that the income should be used to benefit others.

It is also worth making the point that apart from 'genuine redundancy accounts', most so called redundancy funds are not limited to making a payment in circumstances of genuine redundancy: workers (or their estates) are commonly entitled to a benefit when they cease employment, retire, reach a particular age or die. Thus, the contributions paid by employers are, in effect, a deferred entitlement of the employees on whose behalf the contributions are

made. The consequence of the circumstances revealed in ElecNet's submission is that worker entitlements are subject to the effect of inflation, thereby reducing their value in real terms, whilst all returns generated from those entitlements are skimmed off to be used by unions and employer organisations.

Another problem is that the very substantial revenue flows to unions generate significant conflicts of interest and potential breaches of fiduciary duty on the part of unions and union officials negotiating enterprise agreements. The reasons for this are dealt with at length in earlier Volumes of this report. In short, the union and union officials owe a duty to act in the interests of union member employees when negotiating enterprise agreements. At the same time, there is a significant potential and incentive for the union to act in its own interests to generate revenue.

The substantial revenue flows to unions also lead to a greater potential for coercive conduct by unions who seek to compel employers in enterprise negotiations to contribute to funds from which the union will derive a financial benefit.

The weaknesses associated with this lack of regulation included that these funds are not:

- subject to mandatory disclosure requirements;
- required to disclose the commissions and other payments made by the fund to unions and employer organisations; and
- required to disclose the amounts deducted by the funds by way of fees and charges.[7]

Further, it was noted that there is:

- no requirement to explain to workers the circumstances in which they will, or will not, be entitled to a payment from the fund;
- no statutory requirement on worker entitlement funds to provide annual reports or accounts to persons with an interest in the fund; and
- no requirement to treat members, or classes of members, equally.[8]

Decades of deficiencies have enabled inappropriate and improper conduct demand a response. As outlined in the Consultation Paper WEF now manage billions of dollars and there is a clear need for financial transparency in the collection, management and use of these funds as well as a need to emphasise the benefit that these funds have for employees in the building and construction industry.

The current industry environment

The administration of the CFMEU lends further support to the requirement for regulation of WEF and the removal of the exemption. To that end, with the focus on corruption across the building and construction industry greater scrutiny over these funds could have a positive impact on industry culture.

Further, recent media reports, the size and growth of WEF and debate amongst stakeholders regarding the appropriate use of income generated by these funds gives a renewed life to the outcomes and findings of all previous Royal Commissions.

The expiry of this exemption provides the only real opportunity, within the current regulatory framework, to remove (or limit) one of the levers available to ensure greater regulatory oversight which the current arrangements are lacking.

[7] Ibid p 302-303
[8] Ibid p 303

The Solution

There is clearly a need to ensure that any money provided to a particular entity for a particular purpose is used for the purpose so intended. Greater transparency and accountability are critical to ensuring that WEF can legitimately and appropriately fulfil their unique purpose.

Master Builders supports the removal of the current exemption however notes that how the regulatory regime is implemented and adopted will need adapting based on the risk profile and circumstances of each individual fund.

While the removal of the current exemption is just a first step it will fill a much-needed legislative gap that has allowed funds to accumulate hundreds of millions worth of financial reserves and assets with comparatively little regulatory or other necessary (and elsewhere otherwise applicable) financial safeguards.

It may be appropriate at some future time for Government to consider broader legislative changes to ensure the regulatory framework that applies to WEF is fit for purpose.