Protect

24 September, 2015

Alex McCallum
CEO and Company Secretary
Protect Severance Scheme
Ground Floor, 200 Arden Street
North Melbourne VIC 3051

Ms Caitilin Hawkins
Senior Lawyer
Australian Securities and Investments Commission
GPO Box 9827
MELBOURNE VIC 3001

Dear Caitilin

RE: Consultation Paper 238: 'Remaking ASIC class order on employee redundancy funds: [CO 02/314]'

ElecNet (Aust) Pty Ltd (**ElecNet**) in its capacity as trustee of the Protect Severance Scheme (formerly the Electrical Industry Severance Scheme) (**Protect**) makes this submission in response to the Australian Securities and Investments Commission's (**ASIC**) Consultation Paper 238 — 'Remaking ASIC class order on employee redundancy funds: [CO 02/314]'.

ElecNet submits that ASIC should extend the relief provided under ASIC Class Order 02/314: *Employee redundancy funds: relief.*

Employee benefit funds (such as Protect) play an important role in the Australian economy by reducing the strain on an overburdened welfare system. If the relief provided by Class Order 02/314 is not extended it would drastically increase the costs associated with maintaining Protect and therefore reduce the security of vulnerable employees' severance and redundancy entitlements.

1 About Protect

Employee benefit funds provide workers with the financial security to survive cycles in the economy, and income stability. These funds have been established in recognition of the transitory nature of employment in certain industries, such as building and construction. The funds have been established to provide benefits to employees who would normally be entitled to benefits on termination of employment, in circumstances where the industry has largely transitioned to project-based work rather than permanent employment. The multiple industries that Protect members participate in are particularly prone to specific, and wider, economic instabilities.

Protect was established in 1998 and commenced operation in 2000. The fund was established in the context of an industry in transition where redundancies were becoming an increasingly regular occurrence and entitlements were at risk due to the high incidence of companies going into administration and liquidation. Employees' salary and other entitlements were either not being paid or their payment was being significantly delayed whilst the claims of other creditors were being considered. Protect and other employee benefit funds were established to ensure workers' entitlements were immediately available when these events occurred.

Since its origins, Protect has expanded across many diverse industries to include maritime, construction, service maintenance, manufacturing, rail, oil, petrochemical and power generation, supply and distribution. The fund currently provides severance and acts as an administrator for income protection insurance for approximately 32,404 members working for over 1200 employers. Employers contribute to Protect to offset their liability to make a payment to the worker upon termination or redundancy. Protect has paid over $210 million at an average of $4.9 million a month in severance entitlements to its employee members since January 2012.

2 ASIC Class Order 02/314

ASIC Class Order 02/314: *Employee redundancy funds: relief* exempts Protect and other employee benefit funds from:

- being regulated as managed investment schemes; and
- being required to hold an Australian financial services licence (**AFSL**).

ElecNet understands that ASIC Class Order 02/314 was issued in response to the significant cost and unnecessary burdensome requirements of the managed investment scheme legislation and financial services licencing requirements in relation to employee benefit funds. Although not in the same context, ASIC has confirmed that holding an AFSL and being registered as a managed investment scheme comes with significant costs.[1]

ElecNet submits that, if revoked, both of these outcomes would pose unnecessary governance and administrative burdens on employee benefit funds such as Protect. These burdens would be expensive and likely to cost Protect well over $100,000 each year. This would erode ElecNet's ability to provide services to Protect members and could jeopardise the ongoing viability of Protect.

3 Requirement to be regulated as a managed investment scheme

3.1 Background

The *Corporations Act 2001* (Cth) defines managed investment schemes as vehicles that pool investors' contributions, or invest contributions with a common purpose, to produce financial benefits for members.[2] The regulatory provisions for registered managed investment schemes in Chapter 5C of the Corporations Act were clearly enacted to protect investors in the managed investments industry, and not to protect members in employee benefit funds that secure workers' entitlements by focussing on capital preservation.

[1] Explanatory Statement accompanying ASIC Class Order 08/1, p8-9.

[2] Section 9, Corporations Act.

3.2 Preliminary Issue

Employee benefit funds do not share the purpose of managed investment schemes: producing maximum financial benefits for members of the scheme. Their aim (as noted above) is to protect workers' entitlements 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. Accordingly, although it is likely that Protect and other approved worker entitlement funds would meet the definition of a managed investment scheme because money is pooled, and invested for a common purpose, it is not the same purpose as that of the investment schemes that Chapter 5C intends to regulate.

3.3 Existing class order relief

Class Order 02/314 provides relief to people who operate or promote employee benefit funds from the managed investment and associated provisions of the Corporations Act. The relief allows those who make offers or recommendations for the issue of an interest in an employee benefit fund, as well as others who more generally operate these funds, to do so without having to comply with complex registration requirements.[3]

3.4 Consequences of removal

ElecNet submits that if the relief provided by Class Order 02/314 was not extended, and Chapter 5C of the Corporations Act applied to employee benefit funds, Protect will be required to:

- be registered as it has more than 20 members;
- form a compliance committee of external people which reviews the operation of the fund;
- make financial product disclosure (see paragraph 4 below); and
- ensure all officers comply with additional statutory duties.

These additional duties will affect ElecNet's ability to provide services to Protect members and are not relevant to the purpose for which Protect exists. The costs of meeting these additional duties and obligations will ultimately be borne by Protect members and may jeopardise the ongoing viability of Protect.

Protect and other employee benefit funds do not have the purpose of producing financial benefits and consequently should not be required to meet the governance requirements associated with this purpose.

4 Requirement to hold an AFSL

4.1 Introduction

The Corporations Act regulates the AFSL regime. The relevant provisions are located predominantly in Chapter 7 of the Corporations Act and regulate when an entity must hold an AFSL and what AFSL it must hold.

[3] Section 601ED, Corporations Act.

Under Chapter 7 of the Corporations Act, a person who provides financial services themselves or on behalf of another person must hold an appropriate financial services licence,[4] subject to an exemption applying. A financial service is a broad term, and given employee benefit funds will generally meet the definition of a 'managed investment scheme', it is likely that Chapter 7 will capture dealing in interests in an employee benefit fund.

4.2 Current relief

Class Order 02/314 provides an exemption from holding an AFSL for people who provide financial services in relation to an interest in an employee benefit fund. The relief also applies to people who provide the financial service on behalf of another person. On this basis, ElecNet is exempted from having to hold an AFSL to provide services to Protect members, including not being required to comply with:

- ongoing requirements to be maintained on ASIC registers[5];
- prohibitions against making unsolicited offers[6]; and
- financial product disclosure obligations[7].

4.3 Consequences of removal

Chapter 7 of the Corporations Act was introduced to ensure 'financial market integrity and consumer protection across the financial services industry'. Its object is to promote:

- confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services;
- fairness, honesty and professionalism by those who provide financial services;
- fair, orderly and transparent markets for financial products; and
- the reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities.

ElecNet submits that the stated objectives aim to remedy a mischief: fraud committed against consumers. This has not been an issue for Protect or its worker members. In particular, there have not been instances of fraud towards Protect's members.

ElecNet submits that there would be no benefit to Protect members, if Protect was required to hold an AFSL.

5 Concluding remarks

The regulatory framework within which ElecNet and Protect currently operate has been moulded over the last decade in recognition of the unique and valuable role employee

[4] Section 911A(1), Corporations Act.

[5] Section 922A, Corporations Act.

[6] Section 992AA, Corporations Act.

[7] Part 7.9, Corporations Act.

benefit funds play in the Australian industrial economy. The relief provided by Class Order 02/314 is one of the measures that allows these funds to operate efficiently and with the best interests of workers in mind. If the relief provided by Class Order 02/314 was withdrawn or not extended, there will be significant adverse consequences that are likely to follow.

Alex McCallum

Chief Executive Officer
ElecNet (Aust) Pty Ltd as trustee for the Protect Severance Scheme