

BERT Fund Ltd Response to ASIC Consultation Paper 384 – Employee redundancy funds

Background

ASIC has released a consultation paper seeking feedback from stakeholders on matters ASIC is considering for the future regulation of 'employee redundancy funds' (CP 384 Employee redundancy funds).

Historically, 'employee redundancy funds' have been able to rely (if, in fact, there was a need for them to do so) on the relief from the Australian financial services (**AFS**) licensing, managed investment scheme (**MIS**) and associated provisions of the *Corporations Act 2001* (Cth) (**Corporations Act**). The relief is currently provided by *ASIC Corporations (Employee Redundancy Funds Relief) Instrument 2015/1150*, which is set to expire on 1 April 2026.

BERT Fund Ltd is supportive of sensible, fit for purpose regulation which supports outcomes designed to give relevant stakeholders (including ASIC and the community) confidence that the funds held on trust are being managed appropriately and competently.

It is important to note, in this context, that in the 36-year history of the BERT scheme, the trustee is not aware of a single member who has not received payment of 100% of their benefit from the scheme in circumstances where their entitlement to that payment has been triggered. There is no need for urgent or seismic change given that these desirable economic, social and policy outcomes are all presently being achieved. The BERT Fund's performance since inception has been exemplary.

About BERT

BERT Fund Ltd is the trustee of the BERT Fund No 2. The trust deed creating the BERT Fund No 2 is dated 22 December 2003 (**BERT Trust Deed**).

BERT Fund Ltd

BERT Fund Ltd is a company limited by guarantee. Its members comprise a major employer association and two of the major employee trade unions operating in the building and construction industry in Queensland and the Northern Territory.

The current trade union members are the Construction Forestry Mining and Energy, Industrial Union of Employees, Queensland (**CFMEU (Qld)**) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Unions of Australia in respect of the Queensland Branch of its Plumbing Division (**Plumbers' Union**) (collectively, the **union members**). The former is entitled to 75% of the total available votes for all union members and the latter 25%.

The Queensland Master Builders Association Industrial Organisation of Employers (**QMBA** or **employer member**) is the employer association member.

Under BERT Fund Ltd's constitution, the union members (on the one hand) and the employer member (on the other hand) have equal voting and director appointment rights.¹ There are

¹ A quorum for a general meeting requires at least one employer member and one union member to be present. Likewise, a quorum for a directors' meeting requires at least one director appointed by each of the union members and the employer member.

currently 8 directors on the board of BERT Fund Ltd, comprised by 4 directors appointed by the employer member and 4 directors appointed by the union members.²

BERT funds

BERT Pty Ltd was originally established to act as trustee of an employee redundancy fund called the BERT Fund (**BERT Fund No 1**).

As a result of changes made to the *Fringe Benefits Tax Assessment Act 1986* (Cth) (**FBT Act**), the union members and the employer member agreed to establish a second employee redundancy fund, being the BERT Fund No 2. Whilst the BERT Fund No 1 continues,³ as from the date of creation of the BERT Fund No 2 in 2003, employer contributions have been paid solely into the BERT Fund No 2.

BERT Fund Ltd is the trustee of both the BERT Fund No 1 and the BERT Fund No 2. Each trust fund has its own trust deed.⁴ Separate audited financial statements are prepared for each trust.

BERT Fund No 2 is an ‘*approved worker entitlement fund*’ under section 58PB(2)(a) of the FBT Act. The benefit which flows from that designation is that employers may make qualifying payments into BERT Fund No 2 which are exempt from fringe benefits tax.

BERT scheme

The BERT scheme operates as follows:

- each of the *Building and Construction General On-site Award 2020* (**B&CG Award**) (in respect of the on-site building, engineering and civil construction industry) and *Plumbing and Fire Sprinklers Award 2020* (**P&FS Award**) (in respect of the plumbing and fire sprinklers contracting industry) sets out a redundancy clause for that relevant industry, which is an industry specific redundancy scheme.⁵ The provisions of Subdivision B —Redundancy pay of Division 11 of the National Employment Standards (**NES**) do not apply to employers and employees covered by the B&CG Award or P&FS Award;⁶
- under the terms of various enterprise bargaining agreements between employers of relevant construction and plumbing industry workers in Queensland and the Northern Territory (**Participating Employers**) and the CFMEU (Qld) or the Plumbers' Union, respectively, Participating Employers are obliged to pay a dollar amount per employee into the BERT Fund No 2 in compliance with, and to discharge, their obligations under the B&CG Award or P&FS Award (as applicable);⁷
- BERT Fund Ltd holds those monies on trust on the terms set out in the BERT Trust Deed;
- under the terms of the BERT Trust Deed, the principal sum that is paid into the fund for each nominated employee of those Participating Employers (**Nominated Employee**) is allocated, or credited, to a separate account (each a **Member Account**) for that Nominated Employee.

² The QMBA is entitled to appoint 4 directors to the board of BERT Fund Ltd, and the CFMEU (Qld) and Plumbers' Union between them are entitled to appoint an additional 4 directors.

³ As at 30 June 2025, BERT Fund No 1 held assets of approximately \$2 million.

⁴ Apart from various clauses in the BERT Fund No 2 Trust Deed in order to deal with the fringe benefits tax issues that justified its creation, the terms of each trust deed are substantially the same.

⁵ As defined in section 12 of the *Fair Work Act 2009* (Cth) (**Fair Work Act**). See Part 8 of each of the B&GC Award and P&FS Award.

⁶ in accordance with section 123(4)(b) of the Fair Work Act.

⁷ See, for example, clause 22.1 of the J Hutchinson Pty Ltd and CFMEU Enterprise Agreement 2018-2019 and clause 29 of the Axis Plumbing Qld Pty Ltd and CEPU Plumbing Division Union Collective Agreement 2023 - 2026.

With each payment into the fund for a Nominated Employee, the employee's Member Account balance increases. No interest is credited to Member Accounts;

- the BERT Trust Deed⁸ sets out the following circumstances in which payments out the credit balance in a Member Account may be made to the Nominated Employee (unless forfeited)⁹:
 - retirement on or after attaining the pension age (as defined in section 23 of the *Social Security Act 1991* (Cth));
 - suffering financial hardship;
 - death;
 - total and permanent disability;
 - being made Redundant;
 - permanently leaving the construction industry; or
 - permanently leaving Australia;
- the Nominated Employee's interest is, by virtue of the design of the scheme, limited to receiving an amount equal to the credit balance in their Member Account, if and when an event that triggers that entitlement occurs;
- as an '*approved worker entitlement fund*' for the purposes of section 58PB(2)(a) of the FBT Act, all income of the BERT Fund No 2 for each accounting period must be paid, applied or set aside by BERT Fund Ltd to, or for, one or more of the purposes mentioned in section 58PB(4)(d) of the FBT Act. Notably, however, none of the fund's income in any accounting period is allocated to, or otherwise paid, applied or set aside to, a Nominated Employee or a Member Account;
- the income of the fund is used to fund the operations of, and to pay distributions to, certain charitable or public educational institutions or funds established for charitable purposes which are registered as charities with the ACNC and endorsed by the ATO under subdivision 50-B of the *Income Tax Assessment Act 1997* (Cth) or the active sponsors of the fund, including the BERT Welfare Trust¹⁰ and BERT Training Fund;
- no administration, investment or collection fees are charged in respect of the BERT Fund.

As at 30 June 2025, the BERT Fund No 2 had assets of just over \$250 million under management. BERT Fund Ltd receives professional investment advice from Frontier Advisors which is one of Australia's leading asset consultants providing advice to clients with \$788 billion (AUD) in funds under management across superannuation, charity, public sector, insurance and higher education.

BERT Fund Ltd manages liquidity appropriately with approximately 76% of assets able to be turned into cash within 5 days, viewing investments in the lens of a liability driven investor. The

⁸ payments under clause 29 of the BERT Trust Deed may not be made where to do so would be inconsistent with, inter alia, section 58PB of the FBT Act.

⁹ An entitlement to any benefit is forfeited, for example, if the Nominated Employee becomes bankrupt or assigns, or attempts to assign, their entitlement under the trust to another.

¹⁰ Under clause 4 of the trust deed for the BEWT Welfare Trust, BEWT Fund Limited (as trustee) may apply all or any part of the contributions it receives to an entity that it determines will benefit the welfare of the construction industry. An example is an entity which will use the funds to assist or advance education and training in the construction industry.

BERT Funds operate under a rigorous risk management framework which includes external audits, audit and risk committees, policies and procedures and a risk register.

Feedback on proposed definition of 'employee entitlement schemes'

Proposal B1 of the consultation paper proposes to rename 'employee redundancy funds' as 'employee entitlement funds', and to adopt the following definition:

A scheme to which employers may make, or are required by an award or agreement to make, contributions where the primary objective of the scheme is to funds:

- a) *benefits payable on redundancy; and/or*
- b) *long-service leave entitlements, for employee of employers.*

The scheme may also fund other entitlements that are incidental to employment.

The BERT Fund generally agrees with ASIC's proposed definition but is concerned that a strict interpretation could unintentionally disrupt the fund's broader activities. The BERT scheme delivers significant public, social, and community benefits, including funding for training, suicide prevention, and welfare services in the construction industry. Instigating a regulatory regime which would curtail or inhibit these activities would be a poor outcome from a social, political and policy perspective.

The BERT Fund therefore suggests the below amendments:

'A scheme to which employers may make, or are required by an award or agreement (**relevant industrial instrument**) to make, contributions where the primary objective of the scheme is to fund:

- (a) benefits payable on redundancy (**as defined in the relevant industrial instrument**);¹¹ and/or

- (b) long-service leave entitlements,
for employees of employers.

The scheme may also:

- (c) fund other entitlements that are incidental to employment; **and**

- (d) **make payments:**

- (i) **if permitted by, or which are consistent with, section 58PB of the *Fringe Benefits Tax Assessment Act 1986* (Cth) (**FBT Act**) for an 'approved worker entitlement fund' (as defined in the FBT Act); or**

- (ii) **of amounts not covered by subparagraph 1.1(d)(i) to:**

- A **an institution or fund endorsed by the Commissioner of Taxation under subdivision 50-B of the *Income Tax Assessment Act 1997* (Cth); or**

- B **an entity covered by section 50-15 of the *Income Tax Assessment Act 1997* (Cth).'**

Feedback on options

ASIC seeks feedback on four options for regulation of 'employee entitlements schemes' being:

¹¹ **The term 'redundancy' is defined in the *Building and Construction General On-site Award 2020* (see clause 41.2) and *Plumbing and Fire Sprinklers Award 2020* (see clause 34.2) as meaning a situation where an employee ceases to be employed by an employer to whom the award applies, other than for reasons of misconduct or refusal of duty.**

- **Option 1** – Require 'full compliance' with the Corporations Act insofar as it relates to the AFSL, MIS and associated provisions (in reliance on the (questionable) assumption that all '*employee entitlements schemes*' are '*managed investment schemes*' the purposes of the Corporations Act).
- **Option 2(a)** - Grant relief from specific obligations under the Corporations Act including disclosure, design and distribution obligations and anti-hawking provisions (which again relies on the (questionable) assumption that all '*employee entitlements schemes*' are '*managed investment schemes*' the purposes of the Corporations Act).
- **Option 2(b)** – Grant relief from the MIS provisions and those provisions that result in practical compliance issues.
- **Option 3** – Remake the existing relief with additional conditions that provide additional transparency and impose some conduct standards on fund operators.

Options 1 and 2(a)

Both option 1 and option 2(a) assume that the BERT Fund and similar industry redundancy funds qualify as a '*managed investment scheme*' for the purposes of the Corporations Act, an assumption that remains uncertain and contentious. An analysis of that assumption is set out in **Appendix 1**.

Accordingly, options 1 and 2(a) are, in BERT's view, neither fit for purpose nor relevant to employee redundancy funds having regard to their purpose. Regulating the BERT scheme as a '*managed investment scheme*' (as contemplated by options 1 and 2(a)) would:

- impose unnecessary and costly governance and administrative burdens upon the BERT Fund without generating corresponding benefits; and
- erode the fund's ability to continue to provide public and community benefits in the form of the funding it provides for training, suicide prevention, and welfare services in the construction industry,

and could result in the forced consolidation of funds (and the centralising of power then within a small number of funds which may be remote from the communities which presently receive economic, social and policy benefits from those smaller existing funds).

ASIC rightly identified in the consultation paper "*that there are some provisions of the Corporations Act where strict compliance may not be practicable, given the nature of these funds and where the regulatory detriment of granting relief would be minimal*".

The requirements to produce product disclosure statements (under the disclosure provisions) and target market determinations (under the design and distribution obligations) are, for example, not well suited for this type of scheme and risk simply resulting in employees being given unnecessary and confusing information.

Further, funds would not be able to meet strict compliance with the hawking provisions due to the nature in which employees are enrolled as members of the fund.

Option 2(b)

Option 2(b) is a more practical solution compared to options 1 and 2(a). BERT accepts that the requirement to hold an AFS licence may assist to demonstrate to stakeholders generally that those managing the scheme have the relevant competencies to do so.

The efficacy of option 2(b), however, would depend on:

- **Dispute resolution scheme:** relief from the requirement under ASIC Regulatory Guide 104 (**RG 104**) to join an external dispute resolution scheme. AFCA is, in BERT's view, ill-equipped to act as an external dispute resolution scheme for these types of funds given the relatively small number of providers and limited knowledge of these funds.
- **Clarity of requirements for RMs:** ASIC assess an AFSL holder's compliance with its organisational competence obligation in section 912A(1)(e) of the Corporations Act by looking at the knowledge and skills of their 'responsible managers' (**RMs**).¹² Whilst the number of RMs that must be nominated by an AFSL holder depends on the nature, scale and complexity of their business, as a minimum, ASIC typically expects at least two RMs to be appointed. Many employee redundancy funds operate with small numbers of staff that may not meet a required threshold of educational requirements.

ASIC typically requires RM's to have formal qualifications in a relevant area. There is neither formal study in a relevant area of '*employee redundancy funds*' nor any applicable short courses that potential RM's could go and study.

RM's are required to meet ongoing professional development requirements. So far as BERT is aware, there is no specific '*employee redundancy fund*' courses, articles or conferences that would assist RMs in meeting these ongoing requirements.

The proposed timeline (effective 1 September 2026) may be achievable provided ASIC actively and productively engages with funds throughout the AFSL application process and considers the various unintended consequences and concerns, some of which are detailed further in this submission.

Option 3

Option 3 is a practical and balanced solution, particularly for small and mid-sized funds. This option provides appropriate disclosure and governance outcomes to ASIC and the community and reflects the enviable and stellar history of the industry's demonstrated ability to deliver the desired outcomes (including 100% payment of employee entitlements when triggered) mentioned earlier. It also allows ASIC to better understand and engage with redundancy funds.

The proposed timeline (effective 1 April 2026) should be achievable.

Potential unintended consequences and concerns

Potential changes to the definition may have unintended consequences such as but not limited to:

- Forcing competition on distribution and potentially investment returns. Funds hold assets to fund the liability for redundancy. By amending the definition of what an 'employee redundancy fund' is, could create an environment where funds potentially compete on investment returns, as opposed to meeting the core liability for redundancy. This could create a mismatch of investment risk objectives.
- Reducing the fund's ability to support the industry in welfare programs. Many funds, including BERT, proudly support endeavours that serve to provide social welfare benefits to the industry. One such example is MATES in Construction, which is a suicide prevention charity that has a primary goal in reducing suicide amongst Australian

¹² ASIC Regulatory Guide 105: AFS licensing: Organisational competence at RG 105.5 and RG 105.17–RG 105.18.

construction workers. Every year 190 Australians working in the construction industry take their own lives. Workers are eight times more likely to die from suicide than an accident at work. Their work is recognised by the World Health Organisation as best practise in suicide prevention. BERT provides direct funding for MATES in Construction.

- Reducing the fund's ability to support training benefits. Many funds, including BERT, invest in the workforce capability of the industry. As an example, BERT Training Fund makes investments that currently support over 730 apprentices in Queensland and Northern Territory. One such program provides support to indigenous trainees, completing civil works, in remote Northern Territory communities.

Over-regulation could lead to prohibitive costs, potentially forcing smaller operators to exit the industry due to financial pressure. This may be detrimental both to competition and to the delivery of the associated social and community benefits on a more diversified basis.

Those stakeholders who purport to support either option 1 or 2(a), may do so for reasons of, in effect, forcing an industry consolidation (based on their assessment that they may be better placed to absorb the expenses associated with burdensome regulation than others). That is, self-interest, rather than the delivery of benefits to employees, contributors, the construction industry or the communities which are presently being served may motivate such a response.

There is also concern that some may purport to support either option 1 or 2(a) for potential political reasons.

Additional costs

A breakdown of estimated additional costs that are expected to be borne by the BERT Fund in relation to each option is detailed in **Appendix 2**.

Conclusion

BERT Fund Ltd supports sensible, fit for purpose regulation that is designed to ensure that stakeholders (including ASIC and the communities which these funds serve) have confidence in the proper and competent management of the funds held on trust.

Any proposal adopted as a consequence of the ASIC review should be targeted to address the risks of the funds diminishing or collapsing due to mismanagement, misappropriation or abuse (noting these are the risks ASIC cites as support for its review).¹³ Relevantly, the performance of the BERT Fund over its the 36-year history has been exemplary.

Even though regulation cannot fix a problem that does not exist, BERT will be accepting of an outcome which:

- requires the trustee to hold an AFSL – as evidence of its competency to manage the scheme; and
- requires that the fund to report its audited financial results on a regular and transparent basis to ensure public and community confidence in the scheme's ongoing viability.

Outcomes which impose burdens upon the BERT scheme without generating any corresponding benefits (options 1 and 2(a) in the consultation paper) should be avoided.

¹³ See paragraph 11(b) of CP 384 Employee redundancy funds.

The BERT Fund thanks ASIC for the opportunity to engage in this manner and would welcome the opportunity to be involved in any future ongoing consultation.

Appendix 1

Definition of Managed Investment Scheme

A '*managed investment scheme*' is defined in the Corporations Act¹⁴ as a scheme that has the following features:

1. People contribute money (or money's worth) as consideration to acquire rights (**interests**) to benefits produced by the scheme (whether the rights are actual, prospective, or contingent, and whether they are enforceable or not).
2. The contributions are pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (**members**) who hold interests in the scheme, whether as contributors to the scheme or as people who have acquired interests from holders.
3. The members do not have day-to-day control over the operation of the scheme, whether or not they have the right to be consulted or to give directions.

When interpreting these elements, regard is had to the substance of the arrangement as a whole, and the definition is read broadly.

Does the BERT Fund satisfy all elements of the definition of a 'managed investment scheme'?

Scheme

The essence of a 'scheme' is a coherent and defined purpose, in the form of a '*program*' or '*plan of action*', coupled with a series of steps, or a course of conduct, in pursuit of that '*program*' or '*plan of action*'.¹⁵

The BERT Trust Deed should not be '*regarded as marking out the four corners of the relevant scheme*' for these purposes.¹⁶ The terms of the applicable industrial instruments which impose obligations upon the employers who make contributions and the operation of, and outcomes achieved by, the charities and other entities to whom distributions of the 'financial benefits' ultimately produced from the pooling of those contributions all contribute to the coherence and completeness which make a '*program*' or '*plan of action*' which comprise the relevant scheme.¹⁷

The members (being employees who may become entitled at a future time to receive a payment from the BERT Fund equal to the credit balance in their relevant member account, if an event that triggers that entitlement occurs) are not the persons who make the contributions to the BERT Fund.

Notably, the BERT Fund's operations do not require the employees (who, due to steps taken by their employers without any request, direction or involvement by them, may thereby become members) to have either any 'consciousness' of, or 'attachment' to, the BERT Fund's '*program*' or '*plan of action*' at the time those contributions are made by their employers.¹⁸ The Courts

¹⁴ See section 9 of the Corporations Act.

¹⁵ *ASIC v Takaran* (2002) 20 ACLC 1732 and *Premium Income Fund Action Group Incorporated v Wellington Capital Ltd* [2011] FCA 698 at [20].

¹⁶ See Barrett J in *Takaran* at [1739].

¹⁷ *ASIC v GDK Financial Solutions Pty Ltd* (2006) 236 ALR 699.

¹⁸ As to the relevance of the degree of consciousness of aspects of the scheme which members or contributors must possess, see Gilmour J of the Federal Court (with Spender J concurring) in *National Australian Bank Ltd v Norman* (2009) 27 ACLC 1744 at [141].

have, however, emphasised that the phrase '*contributions are to be pooled*', in paragraph (a)(ii) of the statutory definition of '*managed investment scheme*', requires an intention, objectively discerned, forming part of the 'scheme', prior to the making of the contribution, that the contributions are to be pooled. Further, in the absence of such intention that the contributions are to be pooled, the mere fact that monies are collected into one bank account will not, of itself, satisfy the definition of 'scheme' for the purposes of the statutory definition.¹⁹

An employee's entitlement to a redundancy payment, when they cease to be employed, is provided for, and protected, under the award, or industrial instrument, applicable to their employment, regardless of whether their employer contributes to the BERT Fund, or not.²⁰

A 'participating employer', by making contributions to the BERT Fund, obtains, in effect, an additional (and alternative) mechanism to discharge its obligation to make those redundancy payments to its employees. However, if the contributions are not made, the member's entitlement to receive a redundancy payment remains intact.²¹

The 'participating employers' do not acquire an interest in the BERT Fund or its trust property as a consequence of their contributing to the fund. Their contributions to the BERT Fund are not made for that purpose.

An individual member is not involved in selecting the fund to which contributions contemplated by the relevant award, or industrial instrument, are made. This is all the more so under the form of the enterprise bargaining agreement (**EBA**) promulgated by the CFMEU (Qld) or Plumbers Union.²²

The process for admission to the BERT Fund as a 'participating employer' is set out in clause 3.1 of the BERT Trust Deed. Their admission does not, however, involve any active involvement, or acquiescence, by their employees.

The '*program*' or '*plan of action*' that the BERT Fund may have for the 'financial benefits' which are, or which might fairly be regarded as having been, produced from the pooling of contributions made by the 'participating employers' does not involve, or directly include, either the members or the 'participating employers'. Under that '*program*' or '*plan of action*', neither the members nor the 'participating employers' have any prospect of receiving any distribution of those 'financial benefits'. The involvement of the members and the 'participating employers' in the BERT Fund, to the extent it exists at all, sits independent of, and separate from, the trustee's 'program' or 'plan of action' regarding these 'financial benefits'.

The 'participating employers' make their contributions to the BERT Fund to comply with, and to discharge, their employment law obligations. The members receive payments from the BERT Fund if, and when, their entitlement to do so is triggered. What, if any, 'financial benefits' may be produced from the pooling of contributions, and how those 'financial benefits' are then used or applied, happens external to, and beyond the scope of any involvement of, or direction or influence by, the members or the 'participating employers'.

¹⁹ *National Australian Bank Ltd v Norman* (2009) 27 ACLC 1744 at [152]–[153]

²⁰ See discussion regarding the operation of the B&CG Award and P&FS Award

²¹ Assuming, for example, that the B&CG Award or P&FS Award applies to them.

²² See, for example, clause 22.1 of the J Hutchinson Pty Ltd and CFMEU Enterprise Agreement 2018-2019 and clause 29 of the Axis Plumbing Qld Pty Ltd and CEPU Plumbing Division Union Collective Agreement 2023 – 2026.

Employees' membership of BERT Fund and its consequences with regard to redundancy benefits

Employees are, in effect, 'enrolled' (as ASIC correctly describes it)²³ as members, rather than as a consequence of them purposefully approaching the trustee of the BERT Fund to acquire an interest in the fund. This is all the more so where an EBA is place with their employer which is in the form promulgated by the CFMEU (Qld) or Plumbers Union.

An employee's entitlement to receive a redundancy payment on the termination of their employment is not created by, or acquired as a consequence of, their membership of the BERT Fund. This entitlement to receive a redundancy payment on termination of employment is the result of the relevant industrial instrument which applies to their employment with their employer. Therefore, if, for example, contributions are not made to the BERT Fund, the employee's entitlement to receive a redundancy payment from their employer (when that entitlement has been relevantly triggered under the terms of the industrial instrument) will not be thereby diminished or extinguished. Their entitlement to receive a redundancy payment on termination of their employment exists prior to, and independently of, contributions being made by their employer to the fund.

Of course, the fact the contributions have been made to the BERT Fund will assist their employer satisfy, and discharge, the employer's obligation to make that redundancy payment to them once an obligation to do so arises.

Nature or character of contributions

ASIC says²⁴ that the 'participating employers' make contributions 'on behalf of employees'. The basis for this conclusion is not, however, clear and it may not be accurate.

None of contributions are made at the request, direction, or with the involvement of their employees. An employer's motivation, or obligation, to contribute to the BERT Fund stems from the terms of industrial instrument²⁵ which apply to the member's employment with them, and their agreement to adhere to the terms of the BERT Trust Deed. The EBA promulgated by each of the CFMEU (Qld) and the Plumbers Union stipulates, for example, that an employer bound to it must utilise the BERT Fund to meet all of its liabilities for redundancy payments required under that EBA.

ASIC's purposed definition of an '*employee entitlement scheme*'²⁶ recognises that the source of the employer's obligation to make contributions arises from the relevant industrial instrument.

Relationship between the relevant industrial instrument and contributions to, and benefits from, the funds

The B&CG Award (in respect of the on-site building, engineering and civil construction industry) and P&FS Award (in respect of the plumbing and fire sprinklers contracting industry) set out a redundancy clause for the relevant industry, which is an industry specific redundancy scheme.²⁷ The provisions of Subdivision B—Redundancy pay of Division 11 of the NES do not apply to employers and employees covered by either award.²⁸

²³ See paragraph 35(d) in section D of the ASIC Consultation Paper 384.

²⁴ See paragraph 1 in section A of the ASIC Consultation Paper 384.

²⁵ See discussion about the relevant provisions of the B&CG Award) and P&FS Award.

²⁶ As set out on Proposal B1 of the ASIC Consultation Paper 384.

²⁷ As defined in section 12 of the Fair Work Act. See clause 41.1 of the B&CG Award and clause 34.1 of the P&FS Award.

²⁸ In accordance with section 123(4)(b) of the Fair Work Act.

Each of the B&CG Award and P&FS Award says that an employer may offset its obligation to pay an employee's redundancy entitlement (calculated in accordance with the relevant award), in whole or in part, by contributing to a 'redundancy pay scheme' (as defined).²⁹

The B&CG Award and P&FS Award also say that where a member's employment is terminated and he or she:

- receives a BERT Fund benefit, they will only receive the difference between the redundancy pay (as calculated in accordance with the relevant award) and the amount of the BERT Fund benefit received which is attributable to their employer's contributions. If the BERT Fund benefit is greater than the amount payable under the relevant award, then they receive no further redundancy payment pursuant to the award from their employer; or
- does not receive a BERT Fund benefit, contributions made by their employer will, to the extent of those contributions, be offset against its liability under the B&CG Award or P&FS Award (as applicable), and payments to them will be made in accordance with the rules of the BERT Fund, or any agreement relating thereto. They will be entitled to the BERT Fund benefit or the benefit of the relevant award, whichever is greater, but not both.

As a result of these provisions in the B&CG Award and P&FS Award, the member's entitlement to a redundancy payment on cessation of their employment (calculated in accordance with the relevant award) remains intact, even if no contributions to the BERT Fund are made. This may be relevant in assessing whether it is accurate (or not) to describe these contributions as being made 'on behalf of employees', when the most immediate and obvious advantage from doing so appears to be derived by the 'participating employer', rather than the member. This is all the more so where an EBA, in the form promulgated by the CFMEU (Qld) or Plumbers Union, is in place with the employee's employer.

Relevantly, ASIC has also identified,³⁰ that the members are neither making an investment decision nor applying to acquire an interest each time a contribution is made. ASIC describes the process by which contributions are made as occurring 'automatically' and acknowledges (correctly) that this is in response to the employer's obligations under the relevant award or EBA.³¹

Do members receive any benefits produced from the pooled contributions?

No. The profits, gains or accretions, which might fairly be regarded as being the benefits produced by the pooling of contributions made by others to the BERT Fund, are not (by virtue of the '*program*' or '*plan of action*' operated by the BERT Fund) distributed to its members.

To the extent that the scheme operated by the BERT Fund may produce benefits which are, or which might fairly be regarded as being, produced by the pooling of contributions, these are, by the design of the scheme, paid to certain charitable or public educational institutions or funds established for charitable purposes which are registered as charities with the ACNC and endorsed by the ATO under subdivision 50-B of the *Income Tax Assessment Act 1997* or the active sponsors of the fund.

Whether paragraph (a)(i) of the statutory definition of a '*managed investment scheme*' is satisfied requires an analysis of "...*what was the consideration for the contribution of money or*

²⁹ The BERT Fund is a 'redundancy pay scheme' for these purposes (that is, the BERT Fund qualifies as a 'redundancy pay scheme') because it is an '*approved worker entitlement fund*' under the *Fringe Benefits Tax Assessment Act 1986* (Cth)).

³⁰ See paragraph 35(a) in section D of the ASIC Consultation Paper 384.

³¹ *Ibid.*

money's worth?".³² Unless that consideration was the right (even if unenforceable) for the member to acquire benefits produced by the BERT scheme, this element of the statutory definition will not be satisfied. That is, the members must have a right to receive a 'financial benefit' from the BERT scheme which could relevantly be regarded as consideration for the contributions made to the BERT Fund, for the BERT scheme to qualify as a 'managed investment scheme'. That essential element of the statutory definition is clearly missing in respect of the BERT Fund. On that basis alone, the BERT Fund could not be regarded as a 'managed investment scheme'.³³

Absence of day-to-day control over the operations of the scheme by members

The member's interest is, by virtue of the design of the scheme, limited to receiving an amount equal to the credit balance in their relevant member account, if an event that triggers that entitlement occurs.

Members have, under the '*program*' or '*plan of action*' operated by the BERT Fund, no interest in, entitlement to, or prospect of benefiting from, any 'financial benefits' that may be produced from the pooling of contributions. How those 'financial benefits' are created and then are used or applied, happens external to, and beyond the scope of any involvement of, or direction or influence by, the members.

Given the members absolutely no interest in, and have no prospect of benefiting from, the operations of the scheme, insofar as they might be designed to produce any 'financial benefits', it naturally follows that they have absolutely no control over those operations (day-to-day or otherwise). To consider otherwise would be to misconceive, and misunderstand, the '*program*' or '*plan of action*' which forms the basis of the scheme operated by the BERT Fund.

Nature of a participating employer's interests in the BERT Fund

The 'participating employers' do not acquire an interest in the BERT Fund or its trust property. Their contributions to the BERT Fund are fully 'expensed' (for accounting purposes) in the financial year in which they paid and 100% of these contributions is claimable as a 'deductible expense' for tax purposes in that same period. Their contributions are not made in exchange for a right to have any funds paid to them.

The 'benefit' they derive from making their contributions is an ability to set off against an obligation to make redundancy payments (as calculated in accordance with the relevant award applicable to the member's employment with them) the sum of their contributions which are attributable to that member. This 'benefit' could not, however, be described as being something which is relevantly 'produced' from the 'pooling of contributions' made to the BERT Fund.

Character of those who do receive the benefits produced by the BERT scheme

The scheme operated by the BERT Fund is neither designed, nor seeks, to produce for the members any 'financial benefits' in the form of profits, gains or accretions derive from the pooling of the contributions made. Equally, members have no expectation of receiving any such distribution. The 'participating employers' do not make contributions in the expectation that distributions from that source would be made to their employees. Making distributions of that nature forms no part of the '*program*' or '*plan of action*' operated by the BERT Fund.

³² *ASIC v Great Northern Developments Pty Ltd* [2010] NSWSC 1087 at [76].

³³ *Ibid.*

The entities receiving the 'financial benefits' (i.e. the profits, gains or accretions) produced, or which might fairly be regarded as having been produced, from the pooling of contributions do not, themselves, hold any 'interest' in the BERT Fund.

These recipients, by virtue of the scheme operated by the BERT Fund, will be charitable or public educational institutions or funds established for charitable purposes which are registered as charities with the ACNC and endorsed by the ATO under subdivision 50-B of the *Income Tax Assessment Act 1997* or the active sponsors of the fund. They are, in effect, discretionary beneficiaries and, on that basis, their interest in the BERT Fund (and its property) is not proprietary in nature; it is a "mere expectancy".

These recipients do not have a direct or vested interest in the trust property of the BERT Fund or in its income, unless and until the BERT Fund trustee exercises its discretion to make a distribution in their favour. As a discretionary beneficiary they do not have an immediate entitlement to the income or capital of the BERT Fund and do not hold an 'interest' in the BERT Fund for the purposes of the definition of 'managed investment scheme' in the Corporations Act.

Conclusion as to whether the BERT Fund is a 'managed investments scheme'

Whether the BERT Fund is, or could correctly be characterised as, a '*managed investment scheme*' for the purposes of the Corporations Act is uncertain and is not without controversy, or conflicting views. This uncertainty has an observable history, of which ASIC is well aware, and which is reflected by a series of ASIC instruments — the most recent of which is ASIC Instrument 2015/1150.

In determining whether the BERT Fund is a '*managed investment scheme*' the following essential elements are missing:

1. The members making any contributions to the BERT Fund (noting the contributions are made by their employers and their obligation to do so arises out of an industrial instrument).
2. Any objectively discernible intention by the members that the contributions made to the BERT Fund are to be pooled.
3. Any involvement by members in selecting the BERT Fund or in the decision to make contributions to that fund (noting these decisions are made by the employer - perhaps in conjunction with the relevant union).
4. Any observable consciousness of, or attachment to, the BERT scheme by any of the members at, or prior to, the time contributions are made.
5. The members' entitlement to receive a redundancy payment being acquired as a consequence of the contributions made to the BERT Fund (noting this entitlement arises from the industrial instrument and exists regardless of whether the employer contributes or not).
6. The members acquiring any right to receive any benefit derived from the pooling of contributions in consideration for the contributions made (or at all).
7. The members making any 'investment decision' at the time a contribution is made.
8. The members applying to acquire an interest each time a contribution is made.

It is equally uncertain whether any interest acquired by an employee/member of the BERT Fund is a financial product under section 764A(1) of the Corporations Act.

Appendix 2

	Option 1		Option 2a		Option 2b		Option 3	
Costs	Upfront	Ongoing	Upfront	Ongoing	Upfront	Ongoing	Upfront	Ongoing
Legal Fees AFSL	\$200,000		\$200,000		\$200,000			
Legal Fees PDS	\$150,000							
Legal Fees DDO	\$65,000							
Legal Fees Trust Deed Amendments	\$25,000		\$25,000		\$25,000		\$25,000	
Legal Fees Disclosure materials on website	\$30,000		\$30,000		\$30,000		\$15,000	
Other Legal Fees for options	\$200,000		\$150,000		\$100,000		\$80,000	
Additional Risk Staff/ Responsible Manager		\$250,000		\$200,000				
Additional Auditing Requirements		\$30,000		\$30,000		\$30,000		\$5,000
Risk Management Software		\$40,000		\$40,000		\$40,000		
Other consultants (Risk, Compliance, Audit, Policy)	\$15,000	\$5,000	\$15,000	\$5,000	\$15,000	\$100,000	\$10,000	\$5,000
Other regulatory fees and charges	\$2,000	\$1,000	\$2,000	\$1,000	\$2,000	\$1,000		
Disclosure Document Production/ Printing/Posting	\$40,000	\$15,000						
Increased Insurance Costs		\$20,000		\$20,000		\$20,000		
Estimated Total	\$727,000	\$361,000	\$422,000	\$296,000	\$372,000	\$191,000	\$130,000	\$10,000

Please note these costs are estimates only and should not be relied upon as a reference. Estimates provided by experts in various fields. All costs are in addition to existing operating costs.