Ai GROUP SUBMISSION

Australian Securities & Investments Commission Consultations

CP384 – Options for regulation of employee redundancy funds

July 2025

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1.0 INTRODUCTION

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission to the Australian Securities & Investments Commission (**ASIC**) in response to Consultation Paper 384 – *Employee redundancy funds* (**Consultation Paper**).

It is an appropriate time to re-assess the relief currently provided to employee redundancy funds from various provisions in the *Corporations Act 2001* (Cth) (**Corporations Act**), including the Australian Financial Services licensing and managed investment provisions. The relief is due to expire on 1 April 2026.

Ai Group strongly concurs with the following view expressed in ASIC's media release of 24 June 2025, announcing the consultation:

> *ASIC considers it is an appropriate time to re-assess the relief afforded to employee redundancy funds and the requirements suitable for fund operators given the:*
>
> - *significant growth in funds under management*
> - *range of activities now undertaken by fund operators beyond redundancy entitlements, and*
> - *feedback received during prior consultation in 2024.*

In 2015, employee redundancy funds had more than $2 billion in funds under management.[1] Presently, the two largest funds, Incolink and the Australian Construction Industry Redundancy Trust (**ACIRT**), have collectively around $2 billion in funds under management, and these are only two of several major redundancy funds. Other major funds include: Protect; the Building Employees Redundancy Trust (**BERT**); the Mechanical & Electrical Redundancy Trust (**MERT**); the Building Industry Redundancy Trust – South Australia (**BIRST**); and ReddiFund.

The inappropriate practices of most employee redundancy funds, and the need for increased regulation, have been identified by three Royal Commission:

- The Royal Commission into Productivity in the Building Industry in New South Wales (1990-1992) (**Gyles Royal Commission**);
- The Royal Commission into the Building and Construction Industry (2001-2003) (**Cole Royal Commission**); and
- The Royal Commission into Trade Union Governance and Corruption (2014-2015) (**Heydon Royal Commission**).

[1] *Royal Commission into Trade Union Governance and Corruption*, Final Report, Volume 5, December 2015, p. 298.

The only valid question is what form the necessary regulation should take.

As stated in the Cole Royal Commission final report (see section 2.2 of this submission), it is the Government's role, through agencies such as ASIC, to put in place safeguards against the problems that are occurring and which have been widely recognised.

As identified by the Heydon Royal Commission (see section 2.3 of this submission), the "startling consequence" of the relief granted by ASIC is that employee redundancy funds are not subject to any mandatory disclosure requirements, any requirement to publish financial reports, or any requirement to treat fund members fairly.

ASIC is particularly well placed to protect the community's interests (including the interests of employee members of redundancy funds), and to address the highly inappropriate practices that are occurring, through implementing a suitable outcome from its current consultation process.

Any decision by ASIC to continue the relief in the current form would be manifestly unsatisfactory, clearly against the interests of fund members, and clearly against the public interest.

The Consultation Paper identifies the following options for the regulation of employee redundancy funds:

1. allow the relief to expire and require full compliance with the Corporations Act;
2. grant relief from specific obligations in the Corporations Act; or
3. remake the existing relief with additional conditions.

This submission discusses these options and identifies why Option 1 is the best option.

None of the Options would directly address the existing inappropriate practices of employee redundancy funds (except for ACIRT) of:

- Siphoning off the investment earnings on employee fund members' entitlements by treating these as 'profits' or 'surpluses' and transferring them to the sponsoring unions and employer groups; and
- Discriminating unfairly between fund members.

However, these practices can (and should) be addressed by ASIC using its product intervention powers under Part 7.9A of the Corporations Act. Each of these practices *"has resulted in, or will or is likely to result in, significant detriment to retail clients"* (s 1023D(1)(b) of the Act).

Option 1 would not impose excessive compliance costs on employee redundancy funds. The amounts transferred by the funds (except for ACIRT) each year to their sponsoring unions and employer associations dwarfs the compliance costs that would be involved.

Ai Group and its members have a substantial interest in employee redundancy funds:

- Two of the board members of ACIRT are nominated by Ai Group. ACIRT is one of the largest employee redundancy funds in Australia.

- Ai Group has hundreds of member companies that contribute to employee redundancy funds (including ACIRT, Incolink, Protect, BERT, MERT, BIRST, ReddiFund, and others. Employers typically contribute more than $100 per week, per employee into these funds as a result of enterprise agreements (many of which are pattern agreements imposed on the employers by construction unions).

- Many thousands of employees of Ai Group member companies are adversely impacted by the inappropriate financial and other practices of most employee redundancy funds (not ACIRT). These inappropriate practices have been allowed to continue due to the current lack of regulation of such funds, including through the relief that ASIC has granted.

2.0 THE INDISPUTABLE AND OVERWHELMING CASE FOR REFORM

The case for regulating employee redundancy funds is indisputable and overwhelming. The problems have been analysed in detail by the Gyles Royal Commission, the Cole Royal Commission; and the Heydon Royal Commission. Each of the Royal Commissions has identified a need for increased regulation.

2.1 Gyles Royal Commission (1990 – 1992) and the establishment of ACIRT

The Gyles Royal Commission analysed the unacceptable practices of the Construction Employees Redundancy Trust (**CERT** – the predecessor to ACIRT) and recommended that the Trust be wound up (page 109 of Volume 7 of the Final Report of the Gyles Royal Commission):

3. Even if the only adherents to CERT were truly voluntary, it involves a huge pool of money, most of which was obtained illegitimately. Control of that pool of money gives power and the opportunity for the abuse of it, which should not be tolerated. I read in the press recently that those administering the BUS scheme — a similar imposition — had purchased very expensive art works and were perambulating them through New South Wales under the guise of educating workers. That conduct is at the more benign end of the profligacy which control of this sort of money can bring. I have no doubt that the CERT scheme should be unwound, if it is possible to do so. It does not concern me whether the moneys which are the subject of the CERT scheme are returned to the employers or to the workers. If those moneys are to remain where they are, they should be subject to a statutory trust for the purpose for which they were intended and not left to the whim of the AFCC and the BTG.

I recommend that the papers on this matter, including my Report, be referred to the State Crown Solicitor for his advice as to the appropriate form of legislation or other action to wind up the trust.

An analysis of the inappropriate practices of CERT and its sponsors (the Australian Federation of Construction Contractors (**AFCC**)[2] and the Building Workers Industrial Union (**BWIU**)[3]) is found at pages 77 – 112 of Volume 3 of the Final Report of the Gyles Royal Commission.

The following extracts highlight some of the unacceptable practices; the most significant being that the employees who were members of CERT received none of the investment earnings on the funds under management. The so called 'surpluses' were distributed to the AFCC and BWIU.

Extract from p.77 (Volume 3, Gyles Royal Commission Final Report):

> The campaign involves a great deal more than simply illustrating how a combination of industrial muscle from the BWIU and commercial muscle from leading AFCC members can combine to force uniform outcomes on much of the industry, important as that may be. The net result of the campaign is that that which purports to be a private trust, controlled by the AFCC and the BWIU, already holds assets well in excess of $50 million, an amount which is increasing exponentially and, on any view, will be hundreds of millions of dollars in the not too distant future. The evidence shows that the surplus income available for distribution in the last two years, after payment of all appropriate outgoings, was $9 395 320. It is said that this cannot be paid either to workers or employers for taxation reasons, and is thus available for general largesse, restrained only by some very wide provisions in an industrial agreement. The trusts are vague in the extreme, may, in any event, be altered at will, and are uncertain, if not illusory, in operation. They go far beyond indemnifying employers against award redundancy obligations. Indeed, the weekly impost of $41.50 per week per employee is far in excess of the award provision except in a very limited class of case. The opportunities for patronage, power and corruption are obvious. The first two are well illustrated to date. Fortunately, there has been no evidence of the latter so far. It is notorious that the administration of pension funds is a major source of corruption in the United States.

Extracts from pp.100-101 (Volume 3, Gyles Royal Commission Final Report):

> It thus appears by implication that the contributions are notionally credited to a worker's account, although the Deed is clear that no worker has any right to the moneys save for the express provisions for payment out. In other words, the intention is that no worker shall have any vested interest in the

[2] After the Gyles Royal Commission, the AFCC was wound up. A new organisation, the Australian Constructors Association (ACA), came into operation in 1994 to represent major contractors in the construction industry.

[3] A predecessor to the CFMEU.

fund.

Income is dealt with by clause 26. That part of it which deals with application is as follows:

A. The Trustee may in its absolute discretion increase any workers account by some proportion of the net income of the fund referable to the contributions in that account as decided by it from time to time. Any tax liability of the Trustee which arises because of such a distribution to a worker account may be paid out of the monies so distributed to the worker account.
B. Subject to the provisions of the deed, the net income determined under 26.1 shall be vested and indefeasibly distributed equally between those sponsors representing members and those sponsors which are unions, and, as between sponsors representing members, in the same proportion to the number of workers in the fund who are employed by the members the sponsors represent bears to the total number of workers in the fund and, as between sponsors which are unions, in the same proportion to the number of workers in the fund who are members of each union bears to the total number of workers of the fund.

It should also be noted in this connection that clause 31 provides:

In circumstances where a payment is payable on death of a worker pursuant to Clause 29

(a) if, at the expiration of the period of twelve months from the date of the worker's death, the Trustee is of the opinion, after reasonable inquiry, that it is unlikely that a legal personal representative of the worker will be appointed, the amount which would otherwise be payable as a death benefit shall be forfeited and paid to the sponsors;
(b) if a legal personal representative is subsequently appointed the Trustee may in its absolute discretion pay the whole or part of the forfeited amount to the legal personal representative.

Furthermore, in the circumstances set out in clause 13 the Trustee may determine to terminate the fund, in which event the fund is dissolved and any surplus is distributed to the sponsors in such shares and proportions as the Trustee shall determine.

Thus it is that the sponsors have not only a right to distribution of income but have a very substantial interest in corpus. Having in mind the experience of other funds, it is very likely that the forfeiture provisions will be very significant and also that the surpluses will grow at a very fast rate.

Extract from p.102 (Volume 3, Gyles Royal Commission Final Report):

In fact, no allocations of income to workers' accounts have been made.

Clause 14, which deals with discontinuance of the fund, also seems to me to have an ultimate operation which vests surplus in the sponsors.

Extract from p.105 (Volume 3, Gyles Royal Commission Final Report):

Counsel Assisting raised, both during the course of the hearing and in final submissions, certain questions of validity of these arrangements. Those submissions have been virtually ignored by the other parties in their submissions. Time did not permit a close examination of the very important and complex legal questions which arose during the course of the hearing, and my reporting deadline leaves me in a similar position. My provisional view, subject to the further research and consideration which would be necessary before coming to any concluded view, is that, when properly understood, the arrangements cannot properly be described as a trust, and that the trust obligations which they purport to impose are, in truth, illusory.

Whatever the precise legal and equitable obligations which arise from this scheme, it is clear that they are hopelessly inadequate, even to safeguard the interests of members of the AFCC who may adhere, and their workers. This might be thought to be something between the parties not involving any issue of public interest. Whether that be so or not, the reality that almost all of these moneys are contributed by non-AFCC members, as a result of commercial and industrial duress, makes the arrangements unacceptable on any view.

Extract from p.107 (Volume 3, Gyles Royal Commission Final Report):

3.16 A FLAWED SCHEME

Whilst the proposed amendments tidy up some aspects and remove the possibility of direct enrichment of the AFCC and the building unions from the operation of the arrangements, they do not change their essential features. The AFCC and the building unions maintain the power to set contributions virtually at will, or at least taking into account criteria which could justify virtually anything, and the distribution of moneys going far beyond the purposes of funding the award redundancy/severance provisions or anything like them are permitted. The potential for maladministration, patronage and corruption remains. The lack of prudential control is just as great. There are not even the most basic safeguards, such as the provision of audited accounts to members. Above all, supported as it is by express and implied industrial and commercial pressure, the arrangement is, in effect, a tax upon the employers of the industry for ill-defined purposes, decided by a small part of the industry with radically different objectives than the majority of employers. To suggest that subcontractors and contractors generally would willingly contribute funds to the AFCC and the building unions for them to spend for the benefit of the industry as they see fit is, of course, fantasy. Furthermore, the notion that this elaborate structure is to cover the situation that an employer might not be able to pay the award severance pay is equally absurd. The notion that employers generally favour it because it gives them certainty of costs could hardly survive the most rudimentary test of commonsense, let alone the necessity for the long and bitter campaign of industrial and commercial pressure which was necessary to enrol employers.

Extract from p.108 (Volume 3, Gyles Royal Commission Final Report):

3.17 FINANCIAL IMPLICATIONS

The financial implications are, even now, disturbing.

As we have seen, the fund was not established until July 1989. Despite the strong resistance which ensued, by 30 June 1990 the net assets stood at $21 612 714 with a net income available for distribution totalling $3 283 429. Twelve months later the comparable figures were net assets of $48 655 947 and net income available for distribution of $6 111 891.

An actuarial projection on assumptions which I regard as very conservative estimates that by 1995 the investments of the fund will stand at $350 297 000 with investment income of $33 474 000 and a surplus for distribution of $29 163 000.

The above extracts show that:

- The transfer of fund 'surpluses' to unions and employer groups results in patronage, power, potential maladministration and potential corruption; and
- The lack of regulation and prudential control is hopelessly inadequate in protecting the interest of fund members.

CERT was wound up after the Gyles Royal Commission. From 1994, it was replaced by ACIRT.

An essential feature of the ACIRT Trust Deed is that "*only the reasonable administrative expenses of the Fund may be paid out of contributions to the Fund and fund income*" (clause 9.1A(c)). Also, the following clause 18.4 requires that any surplus is paid to fund members or former members:

> *18.4 Surplus*
>
> *If after providing benefits for Participating Employers or Members under the provisions of this deed a surplus remains, such surplus shall be paid to Members or former Members by way of further benefits in such share or shares as the Trustee determines.*

No surpluses are distributed to unions or employer organisations. To do so would be unlawful under the ACIRT Trust Deed.

ACIRT has distributed more than $380 million in annual payments to employee members since the fund was established in 1994. In the 2023/24 financial year **$27.51 million** was paid to employee members of the fund, in the 2022/23 financial year **$24.76 million** was paid to employee members of the fund, and in the 2021/22 financial year **$19.11 million** was paid to employee members.[4]

ACIRT typically makes distributions to employee fund members in November each year.

The value that employees place on these annual payments is highlighted by the following extract from the Cole Royal Commission's Final Report. Frank Chambers was the Australian Workers' Union's Queensland Branch Secretary at the time:

> 193 The 2000-01 annual report states that for that financial year '25 805 members received between $50 and $5475 depending on their account balance. …Total member distributions equalled $6.74 million'. Mr Frank Chambers, a member of the ACIRT Board, stated:
>
> *With ACIRT, the interest goes back to members – members love that cheque once a year.*

The CFMEU is currently attempting to coerce employers in New South Wales to contribute into Incolink (which has largely operated in Victoria), rather than ACIRT, through the terms of its NSW construction industry pattern enterprise agreement.

[4] Financial Reports of ACIRT, as obtained from ACIRT's website.

If it is successful, thousands of employees who currently receive annual distributions of investment earnings from ACIRT will no longer receive these funds. Instead, the investment earnings will be transferred to the CFMEU and the other unions and employer associations that sponsor Incolink.

Given that ACIRT has distributed over $70 million in investment earnings to workers in the last three years, the detrimental effect on workers if contributions are paid into Incolink instead is obvious.

2.2 Cole Royal Commission (2001 – 2003)

Volume 10 of the Final Report of the Cole Royal Commission provides a comprehensive analysis of the inappropriate financial and other practices of most of the major construction industry redundancy funds in Australia and their sponsoring unions and employer groups; inappropriate practices that have continued to this day.

Foremost amongst these inappropriate practices is that (with the exception of ACIRT), employee members of the funds receive none of the investment earnings on the funds under management. The so called 'surpluses' are transferred to the sponsoring unions and employer groups, resulting in vast sums being transferred each year.

The following extracts from the Cole Royal Commission Final Report are relevant:

Extract from pp.205-208 (Volume 10, Cole Royal Commission Final Report):

Recommendations

231 It is apparent that, with the exception of ACIRT, employers contribute to redundancy funds ostensibly for the benefit of their employees and yet neither they nor their employees obtain any meaningful benefit from any operating surplus arising from investment of the fund. Surpluses are instead distributed to employee and employer associations or to other bodies chosen at the direction of the funds' administrators, none of which contributes to the fund.

232 In the *Royal Commission Report into Productivity in the Building Industry in New South Wales*, Commissioner Gyles stated in relation to the (then) Construction Employees' Redundancy Trust (CERT):

> *The AFCC and the building unions maintain the power to set contributions virtually at will, or at least taking into account criteria which could justify virtually anything, and the distribution of moneys going far beyond the purposes of funding the award*

redundancy/severance provisions or anything like them are permitted. The potential for maladministration, patronage and corruption remains. The lack of prudential control is just as great. There are not even the most basic safeguards, such as the provision of audited accounts to members. Above all, supported as it is by express and implied industrial and commercial pressure, the arrangement is, in effect, a tax upon the employers of the industry for ill-defined purposes, decided by a small part of the industry with radically different objectives than the majority of employers. To suggest that subcontractors and contractors generally would willingly contribute funds to the AFCC and the building unions for them to spend for the benefit of the industry as they see fit is, of course, fantasy. Furthermore, the notion that this elaborate structure is to cover the situation that an employer might not be able to pay the award severance pay is equally absurd.

…

In the result, a vast amount of money has been channelled from employers to a fund which has already become a monster with a life of its own at a cost far greater than was necessary to give an over-award payment to workers. I have no doubt the money contributed would have been far better off in the pockets of either the employers or the workers rather than in the clutches of these scheme Trustees.[221]

…

I have no doubt that the CERT scheme should be unwound, if it is possible to do so. It does not concern me whether the moneys which are the subject of the CERT scheme are returned to the employers or to the workers. If those moneys are to remain where they are, they should be subject to a statutory trust for the purpose for which they were intended and not left to the whim of the AFCC and the BTG.[222]

233 It is a matter of history that CERT was subsequently wound up and ACIRT established, which provides for distribution of surpluses to employee members. It appears to me that other funds have not followed suit because of the vested financial interests that sponsors would lose by doing so.

234 It is plain that redundancy funds now operate for purposes well beyond funding redundancy entitlements. Large sums of money are provided for training, insurance, education and other purposes. Often employee and employer associations have interests in those other concerns.[223] Excepting ACIRT, the funds provide substantial income streams to employer and employee associations in the form of surplus distributions. There is an incentive for those bodies to negotiate or agree to increases in employer contributions in the course of pattern EBA negotiations.

235 Employers' contributions finance these funds and yet employers derive negligible if any benefit from them. They are paying for benefits and activities well beyond the purpose of meeting their potential redundancy obligations to their employees.

236 As the CFMEU observed in the statement from its National Secretary, Construction and General Division quoted above, 'the fundamental purpose and function of the construction industry redundancy funds is to provide a safe and efficient means for employers to fund their

employees' redundancy entitlements'. I agree. These funds should be used for the purpose for which they were intended, and no other. I hold the same view in relation to long service funds, as explained in that chapter.

237 How this could or should be achieved is uncertain. There is no legislation requiring contributions to redundancy funds, as exists in the case of superannuation and long service funds, to which a suitable condition could be added. The funds are administered by private trustee companies in accordance with trust deeds drafted in the broadest terms. The directors of those companies are appointed by the employer and employee associations which (excepting ACIRT) are the primary beneficiaries of surpluses generated by the funds. Those associations have vested interests in maintaining the status quo. Employers and employees alike are locked into the nominated funds by the pattern EBA process.

238 In my view, the initiative lies with government.

Issue

Redundancy funds were set up for the benefit of employees to ensure payment of entitlements in the event of redundancy. They should operate solely for the benefit of employees. With the exception of the Australian Construction Industry Redundancy Trust (ACIRT), they instead provide significant income streams for others. Other funds distribute surpluses for training, or to sponsors or their nominees.

At present, surpluses from ACIRT are distributed annually as additional income to employee members irrespective of redundancy. Surpluses should either be credited to member employees' accounts to be applied towards meeting redundancy entitlements and payable only in the event of redundancy or, if funds held are sufficient to meet redundancy obligations, used to reduce any contributions required.

Recommendation 168

(a) Surpluses in redundancy funds either be credited to the employee members' accounts to be payable only in the event of redundancy or, if funds held are sufficient to meet redundancy obligations, used to reduce any contributions required; and

(b) The distribution of surpluses in accordance with this recommendation should be a prerequisite for a redundancy fund being prescribed as a fund exempt from fringe benefits tax.

239 It is anomalous that superannuation and long service leave funds are subject to prudent and appropriate regulation, yet redundancy funds are not. Redundancy funds have matured throughout Australia to become a significant component of the industry's financial structure. Approximately $500 million is currently under management. The repercussions would be enormous should any of these funds diminish or collapse for reasons of mismanagement, misappropriation or abuse. The opportunities for any of these events to occur are manifest. Governments' role, through agencies such as ASIC, APRA and the ATO, to put in place

safeguards against such events is apparent. Government would be exposed to unarguable criticism should any of the principal redundancy funds considered in this chapter misapply funds and the employees for whom the funds are ostensibly established be left without recourse.

240 The manner in which appropriate safeguards should be implemented requires consultation with industry to achieve acceptance by industry

241 Compliance with prescribed accounting, auditing and reporting requirements can properly be incorporated into criteria to be met in order for a redundancy fund to be prescribed as a fund exempt from fringe benefits tax.

Issue

Redundancy funds have matured throughout Australia to become a significant component of the industry's financial structure. Approximately $500 million is currently under management yet they function without any prudential control. The repercussions would be enormous should any of these funds diminish or collapse for reasons of mismanagement, misappropriation or abuse. The opportunity for any of these events to occur is manifest.

Recommendation 169

Legislation be enacted to implement a uniform system of financial reporting, external auditing, actuarial assessment and annual reporting to a prudential authority for redundancy funds. The systems presently applying for superannuation and long service leave funds should be points of reference. Documents produced, in compliance with the legislation, be public documents.

Recommendation 170

Compliance with those requirements be a prerequisite to a redundancy fund being prescribed as a fund exempt from fringe benefits tax.

Extract from p.281 (Volume 10, Cole Royal Commission Final Report):

195 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.

As stated in the above extracts:

- It is a matter of history that CERT was wound up and replaced by ACIRT, which distributes surpluses to employee members. Other redundancy funds have not followed suit because of the vested financial interests of the sponsoring unions and employer groups.
- Redundancy funds should be used for the purpose for which they were intended, i.e. the funding of employees' redundancy entitlements.

- Contributions and returns on investments should be held and distributed only for the purposes of paying redundancy entitlements.
- Redundancy funds have matured throughout Australia to become a significant component of the construction industry's financial structure.
- It is anomalous that superannuation and long service leave funds are subject to prudent and appropriate regulation, yet redundancy funds are not.
- **The repercussions would be enormous should any of these funds diminish or collapse for reasons of mismanagement, misappropriation or abuse. The opportunities for any of these events to occur are manifest**.
- **It is the Government's role, through agencies such as ASIC, to put in place safeguards against such events**.

2.3 Heydon Royal Commission (2014 – 2015)

Volume 5 of the Final Report of the Heydon Royal Commission provides yet another analysis of the inappropriate financial practices of the major construction industry redundancy funds in Australia (except for ACIRT) and their sponsoring unions and employer groups. The Royal Commission was critical of the relief that ASIC has granted to employee redundancy funds, given the inappropriate practices of many of the funds and their sponsoring unions and employer groups.

Once again, the inappropriate practice of the funds (with the exception of ACIRT) distributing 'surpluses' to the sponsoring unions and employer groups rather than to the employee members of the funds was highlighted.

The following extracts from the Final Report are relevant:

Extract from pp.302-307 (Volume 5, Heydon Royal Commission Final Report):

Problems with existing regulation

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

64. *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.

65. Further, there is no statutory requirement on worker entitlement funds to provide annual reports or accounts to persons with an interest in the fund.

66. *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[38] (for example, workers) who hold interests of the same class equally and those who hold interests of different classes fairly. The BERT case study illustrates the potential for worker entitlement funds under current law to give preferential treatment to union members over non-union members with the aim of generating union membership.[39] In circumstances where there is no difference of interest between union and non-union members of the funds, there is no justification for differential treatment.

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[38] Meaning persons who have a right to benefits produced by the scheme: *Corporations Act* 2001 (Cth), s 9.

[39] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 5.2.

67. *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.

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

69. 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:[40]

> 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

[40] ElecNet Pty Ltd Law Reform Submissions, undated (received 21/8/15), p 13 (emphasis added).

such a fund – to operate solely for the benefit of employees – that the income should be used to benefit others.

70. It is also worth making the point that apart from 'genuine redundancy accounts',[41] 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.

71. 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.[42] 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

[41] These are accounts established by funds which are only paid out in case of a genuine redundancy. Unlike many other payments made to a worker in consequence of termination of employment, 'genuine redundancy payments' are tax-free up to a certain amount: see *Income Tax Assessment Act* 1997 (Cth), ss 83-170, 83-175 and TR 2009/2.

[42] See Vol 3, chs 6.6 (CFMEU ACT), chs 7.1, 7.6 (CFMEU NSW), Vol 4, ch 10.4 (AWU, Paid Education Leave), for a discussion of the problems, not limited to redundancy or other worker entitlement funds.

significant potential and incentive for the union to act in its own interests to generate revenue.

72. 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. Circumstances in which this has occurred are explored in the case studies relating to Universal Cranes[43] and the ACT CFMEU.[44]

73. *Fourthly*, as explained in detail in the Chapter of this Report concerning Incolink,[45] although on a proper construction of s 58PB of the *Fringe Benefits Tax Assessment Act* 1986 (Cth) 'approved worker entitlement funds' are not permitted to distribute income to persons other than to the employers who make contributions and the employees on whose behalf those contributions are made, many 'approved worker entitlement funds' avoid this limitation in practice.[46] They do this by treating the income generated in a prior financial year as capital, and they then distribute the capital to industry parties.

74. The Commissioner of Taxation has given his imprimatur to this state of affairs. On one view the Commissioner is adopting an open interpretation of an ambiguous statutory provision. The preferable

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[43] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.7.

[44] See Vol 3, ch 6.3 of this Report.

[45] Vol 4, ch 11 of this Report.

[46] ElecNet Pty Ltd Law Reform Submissions, undated (received 21/8/15), pp 11-12.

view is that the Commissioner is maladministering the law. Either way, the law needs clarification.

75. *Fifthly*, the absence of any requirement for one or more independent directors on the board of directors of companies operating worker entitlement funds can lead to significant deadlocks where, as is commonly the case, unions and employer organisations have equal representation. The deadlock in the board of BERT provides a good example of the dysfunctional results that can arise in the absence of independent directors.[47]

76. *Sixthly*, although the *Fringe Benefits Tax Assessment Act* 1986 (Cth) has the effect of imposing some minimum governance requirements on worker entitlement funds, these requirements are by no means comprehensive. For example, there is no requirement that directors and managers involved in the fund be of good fame and character.[48] Another example is that, as exemplified in the Chapter concerning Incolink,[49] the absence of legislative provisions dealing specifically with the forfeiture of workers' interests leads in practice to the substantial forfeiture of entitlements.

77. *Seventhly*, it is not usual to impose indirect regulation on an entity through taxation legislation such as the *Fringe Benefits Tax Assessment Act* 1986 (Cth).

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[47] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, pp 779-780.

[48] Cf *Corporations Act* 2001 (Cth), s 913B(3)-(4).

[49] Vol 4, ch 11 of this Report.

As stated in the above extracts:

- ASIC's relief was initially intended to operate as an interim measure.
- The 'startling consequence' of ASIC's relief is that employee redundancy funds are not subject to any mandatory disclosure requirements, including no requirements to:
    - disclose the commissions and other payments made by the fund to unions and employer organisations;
    - disclose the amounts deducted by the funds by way of fees and charges;
    - explain to workers the circumstances in which they will, or will not, be entitled to a payment from the fund; or
    - provide annual reports or annual accounts to employee members or contributing employers.
- Another consequence of ASIC's relief is that employee redundancy funds have no requirement to treat employee members equally or fairly. For example, the funds are free to give preferential treatment to union members over non-union members when providing benefits or services.
- The value of the entitlements of an employee member in a redundancy fund decreases over time due to the effects of inflation, whilst (with the exception of ACIRT) the returns generated from the employees' entitlements are skimmed off to be used by the sponsoring unions and employer groups.
- The substantial revenue flows to unions (and employer groups) generates significant conflicts of interest and potential breaches of fiduciary duty.

Two other highly inappropriate practices of an employee redundancy fund were uncovered by the Heydon Royal Commission. Evidence was given at the Royal Commission that BERT:

- Paid strike pay to workers who went on strike, under the guise of 'hardship payments'; and
- Paid compliance fees to the CFMEU for collecting payments for the fund.

The Heydon Royal Commission recommended the establishment of a specific scheme of regulation for worker entitlement funds. The recommended scheme would have been implemented had the *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019* been passed by Parliament.

The failure of the Bill to be passed by Parliament is no reason for ASIC to allow the current unacceptable situation to continue by extending the relief currently provided to employee redundancy funds.

ASIC is particularly well placed to protect the community's interests (including the interests of employee members of redundancy funds), and to address the highly inappropriate practices that are occurring, through implementing a suitable outcome from its current consultation process.

Any decision by ASIC to continue the relief in the current form would be manifestly unsatisfactory, clearly against the interests of fund members, and clearly against the public interest.

2.4 Necessary reform elements

In Table 1 below, several necessary reform elements are identified, with reference to relevant materials from the Gyles, Cole and Heydon Royal Commissions.

Table 1: Necessary reform elements

No.	Necessary reform elements	Description and reference materials
1	Unions and employer associations must not be allowed to siphon off the investment earnings on employee fund members' entitlements by treating these as 'surpluses'.	As discussed in sections 2.1, 2,2 and 2.3 above, the most important problem that needs to be addressed is the inappropriate practice of employee redundancy funds (except ACIRT) of treating investment returns on employee entitlements (after the deduction of expenses) as 'surpluses' and transferring these to the unions and employer associations that sponsor the fund. This practice is grossly unfair to fund members. Without the investment earnings, the value of an employee's existing entitlements diminishes over time due to the effects of inflation. Employee redundancy entitlements are, as the name implies, the entitlements of employees. The entitlements are the result of contributions by employers for the benefit of their employees. They do not belong to unions or employer associations. Also, the investment earnings on the employees' redundancy entitlements do not legitimately belong to unions or employer associations. A comparison to the regulation of superannuation funds highlights the unfairness. Who would accept the ludicrous proposition that employees should receive no investment returns from employer contributions to their superannuation fund? Noone would. It is a preposterous idea. Why, then, should employee redundancy funds be any different? Some union branches now receive significantly more revenue from employee redundancy funds than they do in subscriptions from their members.

No.	Necessary reform elements	Description and reference materials
		Reference materials: • Gyles RC Final Report, Volume 7, p.109. Recommendation to wind up CERT (see section 2.1 of this submission). • Gyles RC Final Report, Volume 3, pp.77, 100-108 (see section 2.1 of this submission). • Cole RC Final Report, Volume 10, pp.205-208 (see section 2.2 of this submission). • Heydon RC Final Report, Volume 5, pp.302-307 (see section 2.3 of this submission).
2	Funds should not be allowed to discriminate unfairly between fund members.	**Reference materials:** • Heydon RC Final Report, Volume 5, paragraph [76], p.307 (see section 2.3 of this submission).
3	Funds should be required to publish annual reports and audited annual accounts and make these available to fund members and contributing employers.	**Reference materials:** • Heydon RC Final Report, Volume 5, paragraph [65] and [78], pp.303 and 308 (see section 2.3 of this submission).
4	Funds should be required to have a compliance plan and compliance committee.	**Reference materials:** • Heydon RC Final Report, Volume 5, paragraph [56], p.299 (see section 5.0 of this submission).
5	Funds should be required to disclose to fund members: • the amounts deducted by the funds by way of fees and charges; and • the eligibility of fund members to make a claim for a payment from the fund and how to make such a claim; through a Product Disclosure Statement.	**Reference materials:** • Heydon RC Final Report, Volume 5, paragraph [64], pp.305-306 (see section 2.3 of this submission). • Heydon RC Final Report, Volume 5, paragraph [56], p.300 (see section 5.0 of this submission).

No.	Necessary reform elements	Description and reference materials
6	Officers of the fund should be required to be of good fame and character.	**Reference materials:** • Heydon RC Final Report, Volume 5, paragraph [66], p.303 (see section 2.3 of this submission). • Heydon RC Final Report, Volume 5, paragraph [56], p.300 (see section 4.0 of this submission).
7	Officers of the fund should be required to maintain certain competency requirements, including undertaking appropriate training.	**Reference materials:** • Heydon RC Final Report, Volume 5, paragraph [56], p.299 (see section 5.0 of this submission).
8	Funds should be required to be registered.	**Reference materials:** • Heydon RC Final Report, Volume 5, paragraph [56], p.299 (see section 5.0 of this submission).
9	Funds should be required to maintain an Australian Financial Services Licence.	**Reference materials:** • Heydon RC Final Report, Volume 5, paragraph [56], p.299 (see section 5.0 of this submission).

2.5 Relevant media articles

The inappropriate financial practices of various employee redundancy funds have been widely reported upon in the media, particularly the siphoning off of the investment earnings by sponsoring unions and employer groups, through treating these as 'profits' or 'surpluses'.

The text of the following selection of media articles is included in **Attachment A** to this submission:

- Simon Benson, *The Australian*, 'Unions skim $130 million from worker funds', 7 September 2017.
- Brad Norington, *The Australian*, 'Electrical Trades Union takes $16.9m 'profit' from workers' entitlement fund', 1 April 2019.
- Brad Norington, *The Australian*, 'Bid to block raids on worker funds', 3 April 2019.
- Ewin Hannan, *The Australian*, 'Transfer of money from workers' fund 'theft of wages'', 25 July 2019.

- David Marin-Guzman, *Australian Financial Review*, 'Porter slams employer group over union fund payout', 25 July 2019.
- David Penberthy, *The Australian*, 'CFMEU chief John Setka's plan to turn Incolink into national fund', 22 May 2023.
- David Marin-Guzman, *Australian Financial Review,* 'CFMEU push to end workers' returns under redundancy fund', 27 May 2024.
- David Marin-Guzman, *Australian Financial Review,* 'CFMEU redundancy fund push sparks call for worker choice', 28 May 2024.
- David Marin-Guzman, *Australian Financial Review,* 'How CFMEU wields control of a $1.2b workers' redundancy fund', 18 November 2024.
- David Marin-Guzman, *Australian Financial Review,* 'How builders got captured by the CFMEU's $1.2b redundancy fund', 6 December 2024.
- David Marin-Guzman, *Australian Financial Review,* 'Builders lobby 'entirely reliant' on CFMEU millions', 6 December 2024.
- David Marin-Guzman, *Australian Financial Review,* 'CFMEU redundancy fund 'misuse' of worker money sparks regulation call', 4 February 2025.

3.0 THE DEFINITION OF AN 'EMPLOYEE REDUNDANCY FUND'

ASIC's current definition of an 'employee redundancy scheme', as set out in ASIC Instrument 2015/1150, is:

> *"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 fund redundancy entitlements and other entitlements, incidental to employment, for employees of the employers".*

Ai Group proposes the following amendment to the 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 fund redundancy entitlements ~~and other entitlements, incidental to employment~~, for employees of the employers".*

The above amendment is consistent with the following view expressed in the Final Report of the Cole Royal Commission (Volume 10, p.282), which Ai Group concurs with:

> 195 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.

The reference to 'primary objective' in the definition provides sufficient flexibility to funds. There is no need for the inclusion of the very wide concept of *"other entitlements, incidental to employment"*.

The Consultation Paper proposes to rename 'employee redundancy funds' as 'employee entitlement schemes' and 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 fund:*
>
> *(a) benefits payable on redundancy; and/or*
>
> *(b) long-service leave entitlements, for employees of employers.*
>
> *The scheme may also fund other entitlements that are incidental to employment.*

Ai Group does not support ASIC's proposed definition.

There is a fundamental difference between employee redundancy funds and portable long service leave funds. Portable long service leave schemes / funds operate:

- In the coal mining industry, under specific Commonwealth legislation;
- In the construction industry, under specific State and Territory legislation in every State and Territory; and
- In some other industries (e.g. community services, contract cleaning and security), under specific State and Territory legislation.

Given the legislation that is in operation to regulate each of the industry portable long service leave schemes, there is no need for these schemes to be regulated through any ASIC instrument that replaces ASIC Instrument 2015/1150.

The inappropriate financial and other practices of most employee redundancy funds need to be urgently addressed. The long service leave funds are not engaging in these practices and would be unable to do so due to the legislation that governs their operation.

Including long service leave funds within the scope of any ASIC instrument that replaces 2015/1150 would unnecessarily complicate the necessary reforms.

4.0 'APPROVED WORKER ENTITLEMENT FUNDS' UNDER THE FBT ACT

Question B1Q3 in the Consultation Paper asks whether ASIC should require that an 'employee entitlement scheme' is an 'approved worker entitlement fund', as defined under section 58PB of the *Fringe Benefits Tax Assessment Act 1986* (**FBT Act**)? This issue would be of most relevance if Option 3 is adopted (which is not the option that Ai Group recommends).

4.1 Background to, and the importance of, the FBT exemption

During 2002/2003, Ai Group played a leading role in a coalition of construction industry organisations which convinced the Federal Government to legislate to retain an FBT exemption for approved worker entitlement funds following the issue of an ATO tax ruling that would have had the effect of imposing a huge cost impost on contributions by an employer to a worker entitlement fund because FBT would have been payable on the contributions. Employers in the construction industry faced millions of dollars per annum in additional costs.

Legislation providing for the FBT exemption was enacted in 2003, i.e. the *Taxation Laws Amendment Bill (No 4) 2003*. Subsequently, a number of ATO private rulings were released in which the ATO interpreted the requirements of the new legislation in a very narrow manner. Ai Group was concerned that contributions made under many construction industry awards and agreements might not comply with the legislative requirements. To address industry's concerns, the *Tax Laws Amendment (2005 Measures No 2) Bill 2005* was introduced into Parliament and subsequently passed.

The FBT exemption is very important to employers. Without it, an employer would need to pay FBT on the contributions made to an employee redundancy fund.

4.2 The FBT exemption does not address the problems identified by the Gyles, Cole and Heydon Royal Commissions

Requiring that an 'employee entitlement scheme' be an 'approved worker entitlement fund', as defined under section 58PB of the FBT Act in any instrument that replaces 2015/1150 would do nothing to address the lack of appropriate governance standards for redundancy funds. The exemption was designed for a different purpose, as outlined above.

The criteria for being an 'approved worker entitlement fund' can be readily met by any employee redundancy fund, regardless of whether it has appropriate governance standards.

All of the main employee redundancy funds, and many other funds, are 'approved worker entitlement funds' under the FBT legislation. This is necessary to avoid employers being required to pay FBT on the contributions made to the fund for their employees.

Section 58PB requires that an 'approved worker entitlement fund' only make payments from contributions to the fund for the purposes prescribed in subsection 58PB(4)(c) and only make payments from the income of the fund for the purposes prescribed in subsection 58PB(4)(d). **However, these requirements do not prevent employee redundancy funds (other than ACIRT) treating the investments earnings on contributions as 'surpluses' or 'profits', rather than income.**

Pages 25-28 of the 2023-24 annual accounts of the Protect redundancy fund highlight this inappropriate financial practice:

- As at 30 June 2024, funds under investment were $408.2 million.
- Investment revenue of $26.7 million and other income of $622,000 was earned during the 2023/24 year.
- Operating expenses of $11.2 million were incurred during the year, including various payments totalling over $1 million to the sponsoring unions and employer association (i.e. the ETU, AMWU and NECA) for directors' fees and industry sponsorship fees.
- Profit after tax was $10 million.
- From the profit: $4.43 million was transferred to the ETU, $1.48 million to NECA and $741,000 to the AMWU.

5.0 OPTION 1: ALLOW THE RELIEF TO EXPIRE AND REQUIRE FULL COMPLIANCE

5.1 Ai Group strongly supports Option 1

Option 1 is to allow the ASIC Instrument 2015/1150 to expire, and for fund operators to comply with all applicable requirements under the Corporations Act. A transition period would apply until 1 September 2026.

Ai Group strongly supports Option 1. Employee redundancy funds are major providers of financial services and it is appropriate they are regulated as such.

The problems identified by the Gyles, Cole and Heydon Royal Commissions have been allowed to continue due to inadequate governance standards being imposed, and this has resulted in major financial detriment to members of these funds (with the exception of members of ASIC).

Option 1 would implement the following requirements for employee redundancy funds, each of which is reasonable and appropriate:

- The maintenance of an Australian Financial Services Licence, which would require the funds to:
    - have a compliance plan and compliance committee;

    - meet capital requirements;
    - meet audit requirements;
    - maintain certain competence requirements and ensure that its representatives are adequately trained and competent; and
    - ensure responsible officers are of good fame and character;
- A requirement to register the scheme;
- A requirement to comply with the disclosure obligations in Pt 7.9 of the Corporations Act, including issuing Product Disclosure Statements;
- A requirement to comply with the hawking prohibition in Pt 7.8 of the Act.

ASIC's proposed transition period up to 1 September 2026 is appropriate. It provides ample time for the funds to ensure compliance.

5.2 The additional measure that needs to be taken by ASIC in conjunction with Option 1 (or any other Option implemented)

Option 1 would not directly address the existing inappropriate practices of employee redundancy funds (except for ACIRT) of:

- Siphoning off the investment earnings on employee fund members' entitlements by treating these as 'profits' or 'surpluses' and transferring them to the sponsoring unions and employer groups; and
- Discriminating unfairly between fund members.

These inappropriate practices are discussed in detail in sections 2.0 and 4.2 of this submission.

However, these practices can (and should) be addressed by ASIC using its product intervention powers under Part 7.9A of the Corporations Act. Each of these practices *"has resulted in, or will or is likely to result in, significant detriment to retail clients"* (s 1023D(1)(b) of the Act).

5.3 Option 1 would not impose excessive compliance costs or unworkable provisions on employee redundancy funds

The compliance costs would not be excessive

Option 1 would not impose excessive compliance costs on employee redundancy funds. The amounts transferred by the funds (except for ACIRT) each year to their sponsoring unions and employer associations dwarfs the compliance costs that would be involved.

Once a fund has implemented systems to ensure ongoing compliance, the annual compliance costs will be much lower than those incurred in order to achieve compliance for the first time.

None of the provisions are unworkable

On page 17 of the Consultation Paper, the following provisions in the Corporations Act as identified as 'arguably' not suitable for employee redundancy funds:

- The disclosure provisions (Part 7.9 of the Act);
- The design and distribution obligations (Part 7.8A of the Act); and
- The hawking provisions (s 992A of the Act).

Ai Group's views on these provisions are set out below.

The Disclosure Provisions (Part 7.9 of the Act)

It is appropriate that members of employee redundancy funds receive a Product Disclosure Statement (**PDS**) at the time when the join the fund.

Even though the requirement for an employer to contribute to an employee redundancy fund typically arises from an enterprise agreement clause, an employee only becomes a member of a redundancy fund when the relevant fund onboards the employee, allocates a member number to the employee, establishes an account for the employee, etc.

Ai Group has identified no valid reason why administrative arrangements could not be put in place by each employee redundancy fund ensuring that each employee:

- receives a PDS before being enrolled as a member of the fund; and
- gives their written consent to becoming a member of the fund, after receiving the PDS, and before being enrolled as a member of the fund.

To the extent that the above practical and beneficial administrative process might conflict with clauses that are currently being included in enterprise agreements, the wording in such clauses could be amended for future agreements if the disclosure provisions in the Corporations Act became applicable.

A similar situation has occurred with superannuation clauses in enterprise agreements. Once enterprise agreements were no longer permitted to oust an employee's choice of superannuation fund, enterprise agreements clauses were drafted to align with the new requirements.

Under s 192 of the *Fair Work Act 2009*, the Fair Work Commission is empowered to refuse to approve an enterprise agreement if compliance with the terms of the agreement may result in a person committing an offence, or being required to pay a pecuniary penalty, under a Commonwealth law. This power will assist in ensuring that clauses in future enterprise agreements align with the new obligations on employee redundancy funds.

The Design and Distribution Obligations (Part 7.8A)

Ai Group has identified no reasons why employee redundancy funds could not comply with the design and distribution obligations in Part 7.8A of the Corporations Act.

The Hawking Provisions (s 992A of the Act)

The administrative process that we have proposed above, relating to the disclosure provisions, would also address various issues associated with the application of the hawking prohibition in s 992A of the Corporations Act.

If there are any additional complications that need to be addressed, this is best achieved by the Federal Government amending Regulation 7.8.21A (Exceptions to prohibition on hawking of financial products) in the *Corporations Regulations 2001*, rather than by ASIC not implementing Option 1.

We anticipate that, if ASIC requested that the Federal Government make a relevant amendment to Regulation 7.8.21A prior to 1 September 2026 (the date that ASIC has proposed for the implementation of Option 1), there is a high likelihood that this would occur.

6.0 OPTION 2: GRANT RELIEF FROM SPECIFIC OBLIGATIONS

Option 2 is for ASIC to grant partial relief to fund operators from certain obligations.

Ai Group is not convinced that any of the obligations that would be imposed under Option 1 are not reasonable or appropriate, as discussed in section 5.0 above. Therefore, we are not convinced that Option 2 is preferable to Option 1.

If Option 2 is implemented, as discussed above for Option 1, ASIC should use its powers under Part 7.9A of the Corporations Act to address the existing inappropriate practices of employee redundancy funds (except for ACIRT) of:

- Siphoning off the investment earnings on employee fund members' entitlements by treating these as 'profits' or 'surpluses' and transferring them to the sponsoring unions and employer groups; and

- Discriminating unfairly between fund members.

Each of these practices *"has resulted in, or will or is likely to result in, significant detriment to retail clients"* (s 1023D(1)(b) of the Act).

7.0 OPTION 3: REMAKE THE EXISTING RELIEF WITH ADDITIONAL CONDITIONS

Option 3 is for ASIC to remake ASIC Instrument 2015/1150 with additional conditions.

Ai Group is not convinced that any of the obligations that would be imposed under Option 1 are not reasonable or appropriate, as discussed in section 5.0 above. Therefore, we are not convinced that Option 3 is preferable to Option 1.

If Option 3 is implemented, despite Ai Group's preference for Option 1, ASIC should ensure that the conditions that are imposed address all of the inappropriate financial and other practices of employee redundancy funds identified by the Gyles, Cole and Heydon Royal Commissions. The conditions should include:

- Prohibiting unions and employer groups from siphoning off the investment earnings on employee fund members' entitlements by treating these as 'profits' or 'surpluses';
- Requiring that fund operators hold the fund property on trust for the members and separately from the property of the operator and any other scheme;
- Requiring that funds disclose to fund members and contributing employers any agreements under which money may be paid from assets of the fund to related parties or affiliates of the fund operator;
- Prohibiting funds from discriminating unfairly between fund members;
- Requiring that the funds publish annual reports and audited financial statements, in a format that is consistent with relevant Accounting Standards;
- Requiring that funds have a compliance plan and a compliance committee;
- Requiring that funds have arrangements in place to manage conflicts of interest;
- Requiring that funds disclose to fund members: the amounts deducted by way of fees and charges; and the eligibility of fund members to make a claim for a payment from the fund and how to make such a claim;
- Requiring that officers of the fund maintain certain competency requirements, including undertaking appropriate training;
- Requiring that funds maintain an Australian Financial Services Licence; and
- Requiring that funds be 'approved employee entitlement funds' under the FBT Act.

With regard to the first dot point above, it would be extremely inadequate to simply require funds to disclose *"any agreements under which money may be paid from assets of the fund to related parties or affiliates of the fund operator".* Such disclosure is important, but this will not stop employee redundancy funds (except for ACIRT) siphoning off the investment earnings from employee entitlements.

This problem cannot be addressed simply through a disclosure requirement.

Unions ‘skim’ $130m from worker funds

SIMON BENSON
September 07, 2017

The peak trade unions have been accused of skimming more than $130 million from unregulated worker entitlement trusts — funded by employers to cover redundancies, training and sickness benefits for workers — to expand their industrial and political war chests with large sums of tax-exempt income.

Disclosures to the Australian Electoral Commission have revealed that, in the past five years, an average of $25m a year has been paid in total to 14 unions from the interest earnings of employee-entitlements funds, which combined have an - estimated value of more than $2 billion.

Employer and industry groups represented on the funds’ boards have also received millions of dollars in annual payments from the funds, which cover redundancy payments, training funds, and income-protection schemes for millions of workers.

The AEC documents supplied through the office of Employment Minister Michaelia Cash show the Construction Forestry Mining and Energy Union was by far the largest beneficiary, receiving $75m between 2011-12 and 2015-16. The metal workers union, the AMWU, was paid $25m over the same period and the Australian Workers Union received a total of $7.9m.

Senator Cash has described the payments as “secret rivers of gold” following the disclosure that they have contributed to the growth in union wealth.

Yesterday *The Australian* revealed combined union wealth now totalled $1.5bn in assets and $900m in income.

PAYMENTS FROM FUNDS TO UNIONS 2011-12 TO 2015-16

Union	Redundancy funds ($)	Income protection and other insurance funds ($)	Training funds ($)	Charity and welfare funds ($)	Other funds ($)	TOTAL ($)
CFMEU	44,088,677	4,549,535	22,445,026	3,579,588	345,813	75,008,639
AMWU	4,398,096	19,349,374	1,743,277		12,161	25,502,908
NUW		448,464	714,032			1,162,496
United Voice		1,429,410	114,722		101,054	1,645,186
TWU	25,036	31,350	15,000			71,386
AWU	3,613,682	4,161,848	181,960			7,957,490
SDA					33,526	33,526
ASU			12,499			12,499
HSU		56,103	144,344			200,447
CEPU	3,720,022	422,272	11,210,803	181,500		15,534,597
ETU	2,420,788	14,795	660,648			3,096,231
MEAA				134,035		134,035
Tram & Bus			854,043			854,043
CPSU		227,419	35,745		117,482	380,646
TOTALS	58,266,301	30,690,570	38,132,099	3,895,123	610,036	131,594,129

Source: AEC

The discovery of the annual payments partly explains the growth in union finances as its traditional source of income is drying up, due to a steady decline in membership which is now just 10.4 per cent of the private-sector workforce.

The worker entitlement funds are largely unregulated. There is little transparent accounting of how the union recipients use the payments.

Redundancy funds paid $58.2m to 14 associated unions while $38.3m was paid from training funds. A further $30m was from insurance and income-protection schemes designed to pay income streams to employees who could not earn.

The boards of the funds are typically made up of union representatives and associated company and industry groups. Distribution payments are made at the board's discretion.

They are often paid through complex trust and company structures.

The Cole royal commission into the building and construction industry in 2002 found that the investment value of the various funds was about $500m but these operated with little prudential control. These funds have since grown in value to be worth as much as $2bn.

The funds are financed through employer contributions — which are exempt from fringe benefits tax — typically at rates of between $50 and $100 a week per employee. Some companies pay $500,000 a year into the funds. The compulsory payments from employers are usually established through enterprise agreements.

AEC records show that interest earned on these contributions was typically paid to unions and employer associations every year rather than re-invested into the funds for the benefit of workers.

The royal commission into trade union governance and corruption conducted by Dyson Heydon investigated the misuse of some of these funds, including alleged payments to unions to finance illegal strikes and in some cases payments for fake redundancies. In 2015, it made wide-ranging recommendations for significant reform to the management and use of the funds.

Payments from one CFMEU-controlled fund, which holds $130m in managed funds, were alleged to have been used to make redundancy payments to workers who were not made redundant.

Other unions that were significant beneficiaries of such payments over the five years included the Communications, Electrical and Plumbing Union ($15.5m), the Electrical Trades Union ($3.1m), United Voice ($1.6m) and the National Union of Workers ($1.1m).

The Turnbull government is likely to adopt several recommendations of the - Heydon royal commission.

“It is increasingly clear that union wealth is expanding rapidly at a time when union membership has declined significantly,” Senator Cash said. “Trade unions are acting in their own financial interests at the expense of the Australian workers.

“There is a significant problem when one category of large profit-making enterprises are not subject to the same level of transparency as others, and are not even subject to paying tax.

“Bill Shorten is intimately aware of arrangements where unions profit at the expense of workers — his union has regularly engaged in this practice.”

The ACTU declined to comment on the issue but ACTU secretary Sally McManus said, in response to the growing wealth of the unions, that unions were fighting for their political survival.

“Unions are regularly under political attack, and this makes inequality worse,” Ms McManus told *The Australian* on Tuesday. “It is in the best interests of our members that we plan for the future.

“Currently we are waging a huge campaign to address inequality which has been allowed to reach record levels over decades of failed neoliberal policies.”

Electrical Trades Union takes $16.9m ‘profit’ from workers’ entitlement fund

BRAD NORINGTON
April 01, 2019.

The Electrical Trades Union in Victoria took a windfall $16.9 million “profit share” from a workers’ redundancy protection fund in a bid to beat the introduction of Coalition government legislation intended to stop such payments and regulate all entitlement funds.

An investigation by *The Australian* has found the extraordinary payment — more than double the amount raised annually by the union branch in membership dues — was made directly to the ETU by “joint venture” company Protect, which has ETU officials on its controlling board.

The $16.9m came from investment returns on Protect’s assets that total at least $245m, according to financial reports. All contributions made to Protect come from employers, based on agreed sums negotiated during enterprise bargaining with the ETU.

ETU Victorian secretary Troy Gray said the Protect payout to his union was made in a hurry before the possible introduction of federal laws.

Legislation to clamp down on worker entitlement funds was recommended by former High Court judge Dyson Heydon in his final report of the 2016 royal commission into union governance and corruption. Mr Heydon said that, unlike industry superannuation, entitlement funds operated with no requirement for annual reports, accounts to interested parties, or disclosures of fees, commissions and charges.

Mr Gray defended the $16.9m payout in the face of criticism that Protect had become a “cash cow” for the ETU while its income from membership dues declined.

He said the money, which shows up as an extraordinary revenue item in the ETU’s late-published 2017 financial report, had been placed in a separate trust and “could not be used by the union for political or industrial purposes”.

The trust’s rules, Mr Gray said, made it clear the money would be spent on member services, including ambulance and funeral insurance, training, and drug and alcohol counselling.

Protect is a 50-50 joint venture between the ETU and an employer group, the National Electrical Contractors Association. The union makes no contributions to the employer-funded scheme, which was set up in 1998, but has received millions

over the years from company directors' fees, management fees, administrative fees and trust distributions.

The $16.9m trust distribution is far in excess of previous payments ranging from $200,000 to $1.5m.

A key figure in establishing Protect, former Victorian ETU secretary Dean Mighell, remains on Protect's eight-member board as one of four union representatives. Protect has two directors from NECA, plus an independent director and independent chairman. Its field team includes former union militants Craig Johnston and Gary Robb.

Mr Gray, who is close to militant Victorian CFMEU boss John Setka, confirmed NECA had also received a Protect profit share.

The Australian understands that, despite NECA's 50-50 partnership in Protect, and employers paying 100 per cent of Protect's premiums, the NECA received a 25 per cent profit share split or $5.6m in 2017.

With three Senate sitting days due before Scott Morrison calls the expected May election, the Coalition has only a short time to win passage of legislation to crack down on entitlement funds that has passed through the House of Representatives but been held up in the Senate. If elected, Labor would abandon the legislation.

Mr Gray said services funded by his separate ETU trust would end if the legislation was passed. Senior government officials disagree, claiming that a lack of disclosure hid trust funds funnelled back to the union as fees or commissions for "training".

Stephen Smith, the Australian Industry Group's head of workplace relations policy, said governance standards for worker entitlement funds were long overdue. "Employers make contributions to worker entitlement funds for the benefit of their employees, not for the benefit of unions and employer associations," he said.

The legislation is also intended to regulate other rich joint-venture union entitlement schemes including IncoLink, with assets totalling $714m in 2015, ACIRT ($594m), BERT ($130m), MERT ($125m) and CIRT ($67m). Unlike Protect, ACIRT disallows distribution of trust funds.

According to its most recent (2017) financial report, the ETU's Victorian branch received $8.1m from membership dues.

Bid to block raids on worker funds

BRAD NORINGTON
April 03, 2019

The Morrison government is making a last-ditch effort during the final week of parliament before the election to persuade a Senate majority to back legislation that would end the practice of unions skimming millions of dollars in profits from unregulated worker entitlement funds.

Industrial Relations Minister Kelly O'Dwyer appealed for Labor support yesterday, with just two Senate sitting days left, saying "workers' money" paid by employers and held in income protection funds should not be raided by unions to boost their income.

With Labor so far unwilling to upset unions that are its main election campaign donors, Ms O'Dwyer's next step will be to lobby crossbenchers such as Derryn Hinch, Pauline Hanson and Fraser Anning.

The Australian revealed earlier this week that the Electrical Trades Union in Victoria took a much higher than usual $16.9 million "profit share" from the investment returns of a workers' severance insurance fund called Protect, instead of reinvesting the money in the fund.

The ETU's Victorian branch also reaps millions of dollars annually from Protect in management fees that union royal commissioner Dyson Heydon said in 2016 was a "misleading" description for a 20 per cent union "surcharge" that was "not separately disclosed" when it came from employers who paid workers' fund premiums.

A company called ATC Insurance Solutions, which has a supply agreement with the Victorian ETU and has contracted former branch secretary Dean Mighell to "open up doors" for Protect with other unions, was paid $14m a year, according to Mr Heydon's report.

Protect has since widened its reach, signing up the United Firefighters Union and the Maritime Union of Australia to its income protection fund. While the UFU and MUA are not entitled to "profit shares", because Protect's sole owners are the Victorian ETU and the Victorian chapter of the employers' National Electrical and Communications Association, there appears to be scope for the two unions to charge Protect millions of dollars in management and administrative fees, as the ETU's Victorian branch does.

Protect has $245m in assets but its financial details remain opaque, with none published in annual reports. Entitlement funds modelled on Protect include BERT, MERT, CIRT and ACIRT.

Protect is at the centre of threatened MUA strike action because stevedoring employer DP World wants to end further participation in the fund as part of a new enterprise pay deal.

Protect was started in 1998 as part of wage bargaining, with the Victorian ETU demanding that employers contribute to it on top of pay rises granted to workers.

A temporary halt to MUA strike action has been reached in the past 24 hours at all ports except Sydney's Port Botany after DP World agreed to continue paying employer premiums to Protect for the next three months during pay negotiations.

Meanwhile, the NECA's role on the board of Protect and a $5.6m "profit share" it received as a 50-50 partner while entitled to a 25 per cent share of income has stirred anger among electrical contractors. David Hammond has complained in writing to NECA, asking why money from a fund set up to protect worker entitlements was paid to the ETU and NECA, and why such large payments were made compared with past handouts.

Victorian NECA executive director Pawel Podolski did not return *The Australian*'s call yesterday. His group, which has 1200 employer members, received its $5.6m Protect profit share on top of $1.4m from membership subscriptions and $1.1m from "other income" in 2017.

The Coalition will make it an election policy to pass legislation banning payments to sponsors of entitlement funds if the bill fails to pass the Senate this week. Labor, if elected, is expected to abandon it.

In his interim royal commission report, former High Court judge Mr Heydon said management fees charged by the Victorian ETU were "not an insignificant matter" because they were not disclosed separately to employers in the insurance premiums they paid to Protect as required under enterprise agreements negotiated between the ETU and NECA.

With the fee set at $4 a week per apprentice and $5.50 a week per trades worker, the ETU branch's fee amounted to 20 per cent of the cost of insurance premiums for employers. The fees covered 17,000 ETU members.

Victorian ETU secretary Troy Gray has confirmed that the higher $16.9m "profit share" for 2017 was a deliberate move to beat the possibility of new federal laws blocking such payments in future.

The government's legislation, introduced in September 2017, has been stalled in the Senate.

Transfer of money from workers' fund 'theft of wages'

EWIN HANNAN
July 25, 2019

An employer group used a $10.4 million profit share from a workers entitlement fund to improve its bottom line, getting in ahead of proposed Coalition laws that would restrict unions and employers removing profits from funds.

Attorney-General Christian Porter highlighted the millions of dollars removed from the Protect fund by the Victorian branch of the Electrical Trades Union, at a time the government is subject to scrutiny over its proposed response to wage theft by employers.

Protect, which is jointly run by the ETU and the National Electrical Contractors Association, would be affected by proposed proper use of workers benefits legislation that would impose strict financial governance on registered organisations.

Mr Porter said Protect, which was meant to hold money for severance payments to workers, transferred $32m back to the ETU "for no reason".

He said the "theft of wages" by chef George Calombaris was "deplorable" but: "Then why is it OK for a union-set-up fund meant to hold workers' entitlement money to transfer $32m back to the union without any explanation?

"That is the theft of wages of hardworking Australians, sent back to a union with no reason, in a system where there's no regulation."

The ETU and NECA said $27m had been transferred from the fund because of concern about the proposed laws, and the union's profit share was $17m, not $32m, that was held in trust and unable to be used for political or industrial purposes.

However, NECA's latest financial report shows the $10.4m it received from the fund helped "turn around" a $600,000 operating loss into a $9.79m profit.

NECA did not respond to a request for comment.

Mr Porter reiterated his belief, first reported by *The Australian* on Sunday, that the $200,000 "contrition payment" made by Calombaris as part of a deal with the Fair Work Ombudsman was "light", given the sheer quantum of the underpayments and the six-year period they occurred.

Mr Porter, who is also the Industrial Relations Minister, was yesterday promoting the workers benefit bill as well as the ensuring integrity Bill that proposes giving the Federal Court greater scope to deregister unions and ban union officials.

He denied ACTU claims that the ensuring integrity bill was harmful to workers, undemocratic and inconsistent with international law. “The international legal conventions that apply to the freedom of association always say subject to the laws of the land, and the reality is that we have rogue elements of the union movement in Australia who don’t see themselves as subject to the law of the land and, sadly, behave accordingly,’’ he said.

Labor’s industrial relations spokesman, Tony Burke, said the ensuring integrity bill, if passed, would allow employer groups to apply for unions to be deregistered.

He said if members of the nurses union took unprotected industrial action in support of better staff ratios, “it could lead to the union being deregistered”.

CFMEU chief John Setka's plan to turn Incolink into national fund

DAVID PENBERTHY
May 22, 2023

CFMEU chief John Setka has revealed plans to transform the Victorian workers entitlement fund Incolink into a national entity amid furious claims it will hike the cost of construction and send businesses outside Victoria broke.

The expansion of Incolink also represents a cash bonanza for the Victorian branch of the Master Builders Association which builders outside of Victoria are labelling "sellouts" due to its closeness to the Victorian CFMEU.

At a time of immense pressure in the building sector, the move doubles the cost to employers in the building industry outside Victoria from $81 to $160 per week per employee to cover the cost of redundancy and retirement benefits which will now be paid into Incolink.

Both Incolink and Mr Setka insist the transition of Incolink to a national model is a win-win for workers and employers and refute any lack of transparency over its disbursement of funds to the CFMEU and MBAV.

Incolink is Australia's biggest worker entitlement scheme, holding $885m in funds under management, and gave $20.5m in the last financial year to the CFMEU and MBAV for "industry-based training".

It is hailed by many in construction for its important work on safety, training, mental health, and its role in Victoria in delivering Covid vaccinations to building workers during the pandemic.

Others outside Victoria label it a "cash cow" for the CFMEU and the MBAV and are angry that non-Victorian firms and subcontractors will now have to pay twice the rate of payments to a wholly Victorian-managed entity.

The Incolink board includes Mr Setka, national Plumbing Trades Employees union boss Earl Setches and representatives from MBAV, Master Painters and Master Plumbers.

Its chief executive officer is Erik Locke, a former state secretary of the Victorian ALP and a senior figure in the party's Socialist Left.

The former CEO of MBAV, Rebecca Casson, left the MBAV last December to become the new president of Incolink and was lauded by Mr Setka as "a highly skilled visionary on all aspects of construction operations".

The first state to be absorbed into Incolink will be South Australia, where from July every new CFMEU-approved EBA in SA's 82,000-strong construction sector

stipulates that workers must now be covered by Incolink, a move which will kill the state entitlements scheme BIRST which has covered South Australian building workers since 1989.

The Australian understands that Mr Setka – who took over as secretary of the SA CFMEU last year – has a long-term goal of Incolink taking over other workers entitlement funds in WA and the NT as well as SA.

The move is causing huge friction within the Master Builders Association but, as a federated organisation, none of the states will comment, with SA chief executive Will Frogley saying only that he was aware that members in SA had "serious concerns" after individual businesses spoke to this newspaper.

Builders in SA have become increasingly alarmed about the conduct of the CFMEU since Mr Setka became its SA secretary last year, and are now also accusing the MBAV of "betrayal" in championing Incolink over BIRST.

"The more the CFMEU pressures employers to pay into Incolink, the more the CFMEU gets back for themselves," one builder said. "So of course they are going to drive it up. Same goes for Master Builders Victoria – what a bunch of sell outs."

Another SA builder said: "We don't want Incolink here. But we're damned if we do, damned if we don't. We'll be shut out of work if we don't sign up to the union EBA."

Another said the historically calm SA construction industry had been served well by its own redundancy scheme and there was no need to change.

"A redundancy scheme is a good thing if it benefits workers directly and money is only used for these purposes. This is pretty much how BIRST has operated for many years," the builder said.

"I have a problem with my business effectively funding the Victorian CFMEU and having no idea what they spend it on."

Mr Setka told The Australian the builders' fears were "baseless" and "parochial", and urged them to recognise the benefits they would receive shifting to Incolink.

"It's going to become the biggest national redundancy fund and while it might be organised from Victoria in the end we are all Australians," Mr Setka said.

"BIRST cannot compete because of its size.

"SA workers and employers deserve all the same bells and whistles that we enjoy in Victoria.

"It is all very clean with very heavy-duty auditing. We have been through two royal commissions and they haven't been able to lay a finger on us.

“We have to spend the money we get on union members and we do that. Most of it goes on training. It’s made the industry safer.”

Mr Setka dismissed as “whingeing” SA business fears about the doubling of the weekly payments to $160.

“We would love to replicate Victorian wages and conditions in SA but we recognise that the economy is different there,” he said.

“But people need to stop whingeing and be realistic. We are in the middle of a cost-of-living squeeze everywhere.

“Every time we go for a pay rise you hear people say it’s going to be Armageddon, the end of the world.”

While MBAV declined several requests for comment, Incolink CEO Erik Locke said Incolink wanted to “work with” BIRST as it moved into SA.

“Incolink SA will be able to deliver services to employers and members that Incolink is renowned for: industry skills training; onsite health services; 24/7 counselling and an award-winning suicide prevention program,” he said.

“We have made a commitment to fund industry training in SA. All of this means that when our members face gaps in employment they not only have the financial supports available, but they re-enter the workforce faster and better prepared.

“We are happy to talk to any South Australian builder to reassure them, and introduce them to the thousands of satisfied employer members we have, many in South Australia.”

The federal opposition is demanding greater clarity around how money is distributed and spent, in line with calls from the 2016 Royal Commission into union governance and corruption for legislation to clamp down on worker entitlement funds.

Royal Commissioner Dyson Heydon said that unlike industry superannuation, entitlement funds operated with no requirement for annual reports, accounts to interested parties, or disclosures of fees, commissions and charges.

The Australian revealed earlier this year that Australian Electoral Commission data showed that union-linked entitlement funds have paid an average of $32m per year to unions between 2011-12 and 2021-22. This includes a whopping $189m to the CFMEU over the past 10 years.

Earlier this year the CFMEU was also forced to declare a direct $15m payment from Incolink to the Australian Prudential Regulation Authority.

Senate Economics Committee chairman Liberal Senator Senator Andrew Bragg said he feared the lack of scrutiny over entities such as Incolink.

“Industry estimates over $1bn is locked away in redundancy funds,” Senator Bragg told The Australian.

“They are unregulated and face no prudential supervision. In coming weeks I will be looking at how we can increase transparency and governance of the redundancy funds.”

The CFMEU has also spent a vast sum in SA promoting itself through a radio and display advertising campaign, now that the union is under Mr Setka’s control.

Mr Setka spent much of the past five years ousting the formerly moderate leadership of the SA branch whom he labelled “weak c...ts” who “deserved a good f..king” after he learnt that some SA construction workers were working over the Christmas-New Year period on a building project in the Adelaide CBD.

The arrival of Incolink in SA is a test for Premier Peter Malinauskas who has promised to watch closely any economic impact in SA caused by the CFMEU now being under Victorian control.

SA Labor was last year embarrassed into repaying a $125,000 donation it received on election eve from Mr Setka’s Victorian branch after CFMEU supporters vandalised cars at the state’s MBA headquarters.

Porter slams employer group over union fund payout

David Marin-Guzman
Workplace correspondent

Jul 25, 2019

Industrial Relations Minister Christian Porter has raised suspicions over an employer group's refusal to explain its $10.4 million profit share from a redundancy scheme as he pushes through laws to regulate such funds.

Income insurance scheme Protect has faced scrutiny for dealing out $27 million to its founders, the Electrical Trades Union and National Electrical Contractors Association Victoria, in 2017 as part of a strategy to avoid the government's proposed restrictions on the fund's use of surpluses.

But while the ETU says its $16.9 million profit share is in a trust dedicated to members' welfare and barred from industrial, political or operational spending, NECA's financial report said its cut went to improving its bottom line.

NECA Victoria, headed by Pawel Podolski, has not responded to repeated requests to explain its use of the money over the past two days.

NECA national chief executive Suresh Manickam, a Liberal party member and former adviser to Liberal senator Marise Payne, has also refused to comment.

Mr Porter said NECA's lack of response was a "clear indication of why we need the legislation that is currently before Parliament to protect workers' entitlement funds".

"This is union members' money – and they deserve to know what is happening to their money," he said. "If it is all above board, why can't NECA say so?

"The fact that NECA is refusing to provide details of funds provided to it by Protect – a workers' entitlement fund establish to 'protect' workers money – simply raises suspicions about the nature of the transfer."

According to NECA Victoria's 2018 financial report, the $10.4 million "helped to turn around" the branch's $600,000 operating loss and create a $9.7 million profit.

The payout contrasted to NECA's surplus share the previous year of just $432,000 and is almost double initial estimates of what its 2017 split was at $5.6 million.

A spokesman for Protect declined to comment on how NECA's 2017 share was calculated.

Mr Porter said "in the interests of transparency to members and employers who make contributions to Protect on behalf of workers, some transparency is necessary".

"The absence of transparency and safeguards for worker's entitlements runs the risk of precisely the consequences that have now been found to exist – secret cash deals between bodies with little or no transparency so workers know what's happening to their money."

'Non-union members excluded'

The ETU has said it traditionally spends Protect's surplus on members' welfare, such as ambulance and funeral cover, while NECA has said it spends on training and safety.

However, Australian Industry Group chief executive Innes Willox said that this meant non-union members were excluded.

"Not all fund members are members of a union, and unions don't provide services to non-members, so money transferred to unions is obviously not going to spent to the benefit of all fund members."

He said there was a conflict of interest in ETU and NECA's appointed board representatives voting to transfer millions of dollars to the organisations that appointed them.

"Once the money is transferred, there are no laws to stop the money being spent on whatever the organisation chooses to spend it on."

Following the 2017 payout, the ETU and NECA agreed to facility arrangements to guarantee Protect's liabilities in the event of any shortfall.

However, while the ETU's arrangement expires in 2022, NECA's expires in 2020. It is not clear why NECA's date is earlier.

The Coalition is seeking to push its bill imposing strict financial governance on worker entitlement funds through the lower house.

ETU state secretary Troy Gray said Protect allowed the union to "protect the entitlements of tens of thousands of working people, as well as provide potentially life-saving benefits to them and their families".

"I urge Christian Porter to take a detailed look at the impact of the Worker Entitlements Bill, because with this bill the government is set to steal funeral cover, ambulance cover, suicide prevention and more from those families."

CFMEU push to end workers' returns under redundancy fund

David Marin-Guzman
Workplace correspondent

May 27, 2024 – 1.23pm

The CFMEU is pushing to oust a NSW industry redundancy fund that gave construction workers thousands of dollars in cash every year and replace it with a John Setka-backed fund that will instead pass profits to union-related entities.

The Construction, Forestry and Maritime Employees Union NSW branch has backed Victorian-based Incolink, which counts CFMEU Victorian chief Mr Setka as a director, to be the state's mandated redundancy fund in its latest industry draft agreement.

The move would end the practice of individual worker dividends from the Australian Construction Industry Redundancy Trust (ACIRT), where payouts averaged about 4 per cent to 6 per cent of monies accrued, or about $2000 to $6000 per worker a year.

Incolink instead can choose to distribute profits as grants to union and employer representatives, and it disbursed $21 million last financial year to the CFMEU's new "Training and Wellbeing Centre" in Victoria.

Master Builders NSW executive director Brian Seidler said there needed to be transparency about where the surplus monies were going.

"The union is going to have to explain why they're not giving their members 4-6 per cent every year," he said.

Asked about its reasons for doing so, the CFMEU declined to comment. But CFMEU NSW secretary Darren Greenfield posted on LinkedIn that "the NSW MBA is lying to people again it happens every three years".

"This EBA has been negotiated with builders in NSW and they have refused to allow the irrelevant MBA any involvement in negotiations. Attacking their members once again," he wrote.

No builders have publicly confirmed a deal with the CFMEU.

Incolink chief executive Erik Locke, a former Victorian Labor Party secretary, said the fund's success in attracting workers and employers was "based on our industry-leading employee entitlement offering".

"We generate strong, secure returns, which allow us to fund industry-best services and training," he said.

He said “returns on investment are reinvested back into creating a stronger local industry with training, health and other services to NSW workers”.

The fund had NSW members for years and had invested more than $130 million over the past five years into local NSW property construction projects, he said.

ACIRT, whose directors hail from CFMEU NSW and the Australian Workers Union, has $803 million in funds under management and 85,000 members - 43,000 of which are active members - according to its 2022-23 financial report. It distributed $25 million to workers in that same period.

Setka’s national push

Incolink had $1.18 billion under management and 50,000 members as of April, according to a spokesman. Its CFMEU directors include Mr Setka, Victorian president Robert Grauuwmans and political liaison officer Elizabeth Doidge. Employer directors are nominated by Master Builders Victoria.

The two funds are understood to be the biggest in the unregulated redundancy fund sector, with other state schemes managing far less money.

In recent years, Incolink has been seeking to become a national fund by using the industrial muscle of the CFMEU.

However, Mr Setka’s recent push for Incolink to replace South Australia’s redundancy fund attracted controversy over claims it would send money to Victoria.

MBA South Australia chief executive Will Frogley argued Incolink’s services replicated services already available in SA.

“This model has provided long-term success for both employers and employees and outsourcing this to a Victorian-run, for-profit model offers no benefit to SA employees or employers,” he told *The Australian Financial Review*.

“Why should a worker entitlement fund be run as a profit-run model to benefit CFMEU in Victoria and MBA Victoria?”

The CFMEU NSW’s latest proposed industry agreement specifies monies will go to a redundancy fund subject to a trust deed whose parties are CFMEU Victoria and an Incolink entity.

The agreement also replaces long-standing income protection fund Uplus – which uses broking services from Coverforce, where former CFMEU NSW secretary Andrew Ferguson had been managing director – with Incolink-related entity IPT Agency.

Employers will have to almost double their premiums for trauma and journey insurance under the IPT arrangement, up from $110 a month per worker to almost $200.

They will also have to make weekly payments towards a recently established union entity Construction and Building Industries Training (CABIT), which will be collected by Incolink.

CABIT was registered on May 10 with the same address as the CFMEU NSW headquarters and its directors drawn from the branch executive, including Mr Geenfield and his son, assistant secretary Michael Greenfield.

Industry sources believe the CFMEU NSW has set up the company to receive grants from Incolink.

The company's constitution says its purpose is to provide training, education and development and promote "ideas and practices" relevant to that. It can provide grants or funds to "any organisation that has similar objects".

CFMEU redundancy fund push sparks call for worker choice

David Marin-Guzman

Workplace correspondent

May 28, 2024

Builders are calling for workers to have the right to choose their own redundancy fund in response to a CFMEU push to oust a fund that returned thousands of dollars to workers and mandate a John Setka-backed one that sends profits to union entities.

The Master Builders Association accused the Albanese government of "turning a blind eye" to the lack of accountability around the unregulated billion-dollar worker entitlement funds and urged it to align the sector's obligations to that of superannuation.

CFMEU NSW is seeking to dump the long-standing Australian Construction Industry Redundancy Trust and require workers to use Victorian-based Incolink in its latest industry agreement.

The union's move is understood to have angered some workers, who could lose out on annual ACIRT dividends averaging 4 to 6 per cent of accrued monies or $2000 to $6000 a year.

Master Builders chief executive Denita Wawn said that "just like superannuation, individual workers should have the power to choose who manages their entitlement fund contributions and what happens with monies held on their behalf".

"Workers should be able to choose the fund they want based on transparent and clear information which allows them to make sure income generated from funds held on behalf on their behalf isn't used improperly."

She said the MBA had long called for better regulation around worker entitlement funds, following concerns raised by The Royal Commission into Trade Union Governance and Corruption in 2015 to ensure workers and employers know the money is properly invested.

Redundancy funds unregulated

Unlike superannuation funds, the construction industry's billion-dollar redundancy funds are unregulated, even though both types of funds rely on statutory entitlements.

While laws that took effect in 2021 allow workers to opt for their preferred super fund when a union agreement mandates a particular fund, the same right does not apply to redundancy funds.

Incolink, which boasts $1.18 billion in funds under management and a broader set of benefits, is making a push to become a national fund by using the industrial muscle of the CFMEU.

However, instead of worker dividends, the fund chooses to distribute profits to unions or employer bodies and last year gave $21 million to the CFMEU Victoria's training centre.

Under Incolink's trust deed, workers' funds will also be forfeited to "distributable capital" if the worker cannot be located after two years following reasonable steps.

Decision will 'destabilise the fund'

The CFMEU has declined to comment on why it is switching to Incolink.

However, an Australian Council of Trade Unions spokesman said: "Employers and unions should be free to negotiate whatever they wish in agreements, as is the case in most successful economies."

Civil Contractors Federation chief executive Nicholas Proud, whose organisation also has a director on the ACIRT board, said the union's decision would "destabilise the fund" and its returns to members.

"In nearly 30 years of trusted industry-led ACIRT operation, it is in the middle of a 2024 cost-of-living crisis where this surplus is potentially being redirected away from a direct payment to the worker, which seems incomprehensible," he said.

He suggested the decision would erode existing funds because the trustee of ACIRT, which has more than $800 million under management, has to determine if it is appropriate to debit member accounts in light of total fund income and expenses.

ACIRT chairman Peter Glover said workers would have the right to keep their existing funds with ACIRT but could not stay for new contributions, potentially splitting monies.

"I think if they [the CFMEU] were going to change their EBA they would give workers a choice," he said.

"The CFMEU in the past four decades has been quite happy for ACIRT to be the only choice. I don't understand why it would take that away unless there's some benefit to the union."

How CFMEU wields control of a $1.2b workers' redundancy fund

David Marin-Guzman

Workplace correspondent

Nov 18, 2024

The head of a billion-dollar redundancy fund warned its employer group directors the CFMEU could deprive them of tens of millions of dollars in disbursements if they did not approve the union's controversial expansion plans, in comments that raise serious governance questions for the sector.

Sources familiar with the matter told *The Australian Financial Review* that Incolink chief executive Erik Locke, a former ALP Victoria secretary, wrote to Master Builders Association Victoria late last year advising it not to block a push into NSW as the CFMEU could move to mandate a different fund for workers or even sideline the employer group from the board.

Mr Locke said such moves would significantly reduce the amount Incolink had to distribute to its union and employer sponsors, highlighting that MBAV received $17 million in grants from the fund in 2022-23 alone, according to the sources.

The comments raise questions about Incolink's governance by suggesting its employer directors face threats to cut off their profit distributions if they disagree with demands from CFMEU board directors.

Industry sources said Mr Locke's comments mirrored a similar alleged threat that then-CFMEU Victorian secretary John Setka made in 2018 to the MBAV directors if they did not back the union getting an increased proportion of the fund's profit disbursements.

The Fair Work Commission was asked to investigate MBAV over alleged conflicts of interest with Incolink in a complaint by three break-away MBAV board directors last week.

An Incolink spokesman did not comment about the warning but said the board had backed changes to the trust deed to expand into NSW.

"After obtaining external legal advice, in line with good governance procedures, the trust deed was amended and approved unanimously by the Incolink board," he said. "All major business decisions are powers reserved for the board – which has representation from both employer groups and unions."

The MBAV did not respond to requests for comment about the warning.

Unlike superannuation, the portable redundancy fund sector is unregulated. The CFMEU mandates through its enterprise agreements that workers can only use a certain redundancy fund – a requirement that would be unlawful if it involved super – and sets the rates employers must contribute to it.

The Victorian-based Incolink is the sector's biggest fund at $1.2 billion in assets. But while union and employer groups sit on its board, it is arguably the CFMEU that wields the power to make or break the fund through its EA mandates.

Incolink's annual profit distributions have been a major source of funding for both the CFMEU Victoria and the MBAV. In 2022-23, Incolink paid CFMEU Victoria $21 million in training grants, which the union is using to expand its Melbourne headquarters under the promise of a "Training and Wellbeing Centre".

MBAV is doing the same to its offices with its $17 million for a "Collaboration and Innovation Centre" – a figure that dwarfs the $6 million in annual membership dues it receives.

Split among Master Builders Victoria

The dissenting MBAV directors – Greg Cole, Lisa Hollingsworth and Raymond French – advised members last week they had complained to FWC over their concerns about the employer group's relationship with Incolink.

"MBAV is acting against the interests of its members for its own financial benefit by way of its involvement with Incolink, specifically when it comes to the negotiation of EBAs with the CFMEU and other unions," they claimed in an open letter.

In the past four years, employers' contributions to Incolink have doubled under CFMEU Victoria agreements, rising from $80 a week per worker to $160 a week – and so increasing the fund's available profit disbursements.

MBAV chief executive Michaela Lihou, an Incolink director, was part of the latest enterprise agreement negotiations with the CFMEU earlier this year.

An MBAV spokesman said its board had backed the EBA talks with the CFMEU on behalf of a group of members, was updated on its progress, and endorsed the final deal.

"The group was made aware of any potential perceived conflicts, and they were managed appropriately," the spokesman said.

MBAV president Geoff Purcell said, “Our members can rest assured that to protect the reputation of our association and our members, we are seeking all appropriate advice on how the MBAV should respond to the unsubstantiated claims which have been made.”

“We will, of course, co-operate fully with any investigation. We want to reassure everyone that we remain committed to the MBAV, our management, and, most importantly, our members.”

‘Massive slush funds’

In recent years, the CFMEU has pushed Incolink to go national and displace other state funds by mandating it in EBAs in South Australia and NSW.

The NSW expansion this year proved particularly controversial because that state’s long-time default fund, the $800 million Australian Construction Industry Redundancy Trust, returns its profits to individual workers.

Master Builders NSW and SA branches, and even some workers, strongly opposed the Incolink push. Recently, a majority of the ACIRT board moved to block members from transferring their money to Incolink.

Sources said when the CFMEU first started advocating adding NSW late last year, Mr Locke advised MBAV that the CFMEU NSW, then headed by Darren Greenfield, was considering setting up its own redundancy fund if Incolink did not approve the addition of the state branch.

Mr Locke cautioned that Mr Setka’s CFMEU Victorian branch may also pick another redundancy fund in its next enterprise agreement, which he said threatened to significantly deplete Incolink’s funds, the sources said.

Mr Setka’s branch could also seek to set up a new trustee on grounds the current one was not acting in sponsors’ best interests, Mr Locke warned, and so stop MBAV from appointing directors to that trustee’s board.

Sources with knowledge of an Incolink directors meeting in Hobart in April 2018 alleged Mr Setka, who was invited to the meeting, similarly threatened that the CFMEU would replace Incolink with the Electrical Trades Union’s redundancy fund, Protect, if MBAV directors did not back a higher surplus distribution to the CFMEU.

Mr Setka would become an Incolink director in 2022 but departed in July after quitting as CFMEU secretary following allegations that linked his Victorian branch to bikies and underworld figures in the Building Bad investigation by the *Financial Review* and other Nine newspapers.

MBASA executive director Will Frogley said that “any payments to unions and industry associations should be banned”.

“Redundancy funds shouldn’t be massive slush funds for industry associations or unions,” he said. “It’s a blatant conflict of interest and way overdue for proper regulation. If there are any dividends to be paid, our strong view is they should be paid to workers and no one else.”

The MBASA is represented on the South Australian redundancy fund Building Industry Redundancy Scheme Trust. However, Mr Frogley said in the four years he has headed the MBASA the only money it received was director fees and $10,000 sponsorship for an awards night. “We could have taken out more but we’ve chosen not to.”

Builders lobby ‘entirely reliant’ on CFMEU millions

David Marin-Guzman

Workplace correspondent

Dec 6, 2024

The key employer group for builders in Victoria relies on multimillion-dollar grants from the CFMEU’s redundancy fund to stay afloat, creating potential conflicts of interest for its bargaining with the union and for large bonus policies for senior executives, a whistleblower complaint alleges.

The Fair Work Commission is inquiring into claims by three directors of the Master Builders Association of Victoria that it is only profitable due to grants from the CFMEU’s $1.2 billion Incolink fund, sources familiar with the investigation said.

The complaint alleges potential conflicts of interest with MBAV chief executive Michaela Lihou acting as an Incolink board director awarding the grants while also representing the MBAV in enterprise agreement talks with the CFMEU on the rates that employers contribute to Incolink.

It alleges that an MBAV bonus policy for executives, which makes the CEO eligible for a 10 to 25 per cent bonus, is also problematic as bonuses are only given if the employer group is in surplus – a condition reliant on Incolink grants.

The MBAV recorded a $2.6 million surplus in its most recent 2023-24 financial report. But without its $11 million in Incolink grants, the employer group would be operating at a loss of at least $8 million.

MBAV board director Greg Cole, who is one of the three whistleblowers, said the reliance on Incolink grants for solvency had been “a concern for me for years, essentially since the date I became involved with the governance of the MBAV”.

“In my view, the MBAV is entirely reliant on grants from Incolink in order to function, which is really dangerous as it leaves us beholden to third parties such as the CFMEU,” he said.

“I do not understand how the MBAV, whose membership is comprised of employers, can reasonably advocate in the best interest of its members when it is in bed with parties whose interests are essentially opposed to the financial interests of our members. It has never made sense to me.”

Boutique Lawyers partner Imran Fatah, representing the whistleblowers, said, “Having reviewed the material provided to me by my clients, it seems clear to me that we have a situation where the tail is wagging the dog.”

“The MBAV should be in firm control of Incolink given that it is entitled to appoint four directors to its board,” he said. “Yet, because of the dependence on monies from Incolink, the MBAV is somewhat beholden to Incolink and the vested interest in the same.”

Ms Lihou, who wrote the bonus policy in 2022 when she was the MBAV human resources executive, is understood to have been awarded a $70,000 bonus last year or about 17 per cent of her salary.

Asked about the perceived conflict with Incolink and the bonus policy, MBAV president Geoff Purcell said, “Master Builders Victoria strongly refutes the claims and inferences in your email”.

“Our primary concern and priority right now is to work collaboratively with the Fair Work Commission to clarify its concerns, rather than engage in a debate with the media.”

The MBAV previously said it had made members aware of any potential conflicts during enterprise bargaining with the CFMEU.

As the FWC made its inquiries in the past week, MBAV staff said the employer group’s entire senior executive team outside of the CEO – including senior legal counsel and its head of training – took extended leave, including some for four to six months.

The inquiry was announced as CFMEU administrator Mark Irving, KC, revealed he was making his own inquiries into the Incolink fund.

A report tabled with a Senate estimates hearing last month shows that Mr Irving repeatedly wrote to Incolink in October with notices for the fund to provide him with information and to assist his inquiries.

How builders got captured by the CFMEU's $1.2b redundancy fund

David Marin-Guzman

Workplace correspondent

Dec 6, 2024

late 2022 when the chief executive of Incolink, Erik Locke, made an offer that he must have thought was too good to refuse.

The Victoria-based billion-dollar redundancy fund – controlled by the Victorian CFMEU and Master Builders – was kicking off a John Setka-led mission to go national and about to make its first incursion into South Australia.

Locke, a former Victorian Labor Party secretary, had flagged with SA's industry redundancy fund BIRST that Incolink could make a takeover worth quite a lot for the fund's employer sponsor.

Portable redundancy funds are designed to allow people who work for different employers, such as in the construction industry, to have access to redundancy payments. Employers pay an amount per week to funds such as Incolink and BIRST, which were owned by union and employer sponsors – in this case the CFMEU and the state Master Builders Association. The funds would hold and invest the money like an insurer, and distribute it when needed.

But in driving Incolink's expansion out of Victoria, sources familiar with the offer say Locke had a pitch that was simple and, he expected, persuasive. BIRST was a $50 million fund, but it was sitting on what some estimated as more than $6 million in funds nominally belonging to members who were now inactive – their accounts hadn't been paid into for two years.

If BIRST agreed to the deal, Incolink would distribute all that money to the fund's sponsors – Master Builders SA and CFMEU SA. It would be for the "benefit of the industry".

The MBA SA directors would also get three seats on an Incolink state advisory board – with no actual powers – that would meet four times a year picking up board fees of $30,000 each.

The employer group's response must have come as a surprise. Not only did the MBA SA directors reject the offer, but they flagged that they thought such distribution of inactive accounts could be illegal under BIRST's trust deed.

In the months that followed, Incolink went from a fund that few in the broader public understood or even cared about to the focus of the media spotlight. Attention was thrown on the tens of millions of dollars that it distributed to the CFMEU Victoria and MBA Victoria every year.

SA Premier Peter Malinauskas was forced to publicly oppose the idea of a Victorian fund taking over SA workers' benefits.

The CFMEU's subsequent push for Incolink into NSW this year sparked further controversy as it threatened to replace a state fund that distributed surpluses to individual workers rather than unions and employer groups.

On Thursday, the Fair Work Commission confirmed it had launched an inquiry into the Master Builders Victoria and its alleged conflicts of interest with Incolink after three MBAV board directors complained in an explosive whistleblower report.

However, the FWC investigation threatens to expose just how captured the employer group has become by Incolink and the millions of dollars it dishes out every year.

"It's like a drug addict," one industry observer said. "They've become dependent on it."

Whistleblower and MBAV board director Greg Cole, the head of Nuform Steel Fabrications, told *AFR Weekend* that in his view "the MBAV is entirely reliant on grants from Incolink in order to function".

"That is really dangerous as it leaves us beholden to third parties such as the CFMEU," he said. "This problem has gotten worse as time has gone on."

Lawyer Imran Fatah, acting for the three MBAV board directors, after viewing the material from his clients, said, "it seems clear to me that we have a situation where the tail is wagging the dog".

The MBAV said it would fully co-operate with the investigation.

A spokesman for Incolink said: "Our operations are underpinned by the highest standards of governance, always putting members first, and in compliance with state and federal laws. Statements to the contrary are unfounded."

Since its inception more than 30 years ago in 1989, Incolink has grown from an acorn to a behemoth.

Originally established as a portable redundancy fund for the construction industry, it is now a financial institution with $1.2 billion in funds under management. Yet, unlike industry funds in superannuation, it is operating in a space that is unregulated.

“Incolink was originally set up to solve an industrial relations problem,” veteran IR adviser and former MBAV legal counsel Lawrie Cross said. “It was to solve the problem of itinerant workers who would be waiting weeks or months for the next construction job to start. The idea was they needed something to survive between jobs – an account to draw on essentially.”

Employers embraced the union proposal. Bosses contributed a dollar figure per week per worker, which meant any time the worker finished a project they would be entitled to a payout. Soon portable sick leave was included. Then a separate fee for income insurance.

The CFMEU mandated Incolink in its enterprise agreements, forcing workers to use the fund even if they had money in another – a requirement that would be illegal if it was superannuation.

By the end of the 2010s, Incolink was servicing far more than redundancy. Its rates paid for funerals, ambulance and dental cover for their families, health checks, training, injury management and top-ups for workers’ compensation. It even paid out money if workers were late on their bills.

In some cases, the benefits doubled up on employers’ compulsory WorkCover premiums and separate EBA levies for training. Bosses were effectively paying twice.

Meanwhile, the rates continued to go up. After decades of rising in line with CPI, the CFMEU and MBAV agreed to double Incolink rates from $80 a week per worker to $160 a week over five years from 2020.

The surplus handed out to unions and employer groups grew in parallel.

Sources have said Incolink gave $17 million to the MBAV in grants in 2022 and 2023. The CFMEU is understood to have received $21 million for the same period.

The amounts contrast to the roughly $6 million a year both groups were receiving from 2011 to 2015. According to information provided to the Heydon trade union royal commission, the CFMEU received $34 million in total from Incolink over that period while MBAV got $31 million.

A major part of those handouts is money from workers’ funds that Incolink deems inactive after two years of no contributions.

According to its trust deed, all Incolink has to do to forfeit the accounts is make “reasonable” attempts to locate the worker. Who determines if such attempts are reasonable? The Incolink trustee board.

From 2011 to 2015, Incolink forfeited almost $34 million in funds, an average of $6.7 million a year, according to data given to the trade union royal commission.

That amount is likely to have grown substantially in the decade since as Incolink doubled in size, growing from $700 million in assets under management in 2015 to $1.2 billion.

Incolink says publicly the grants are for training or the benefit of the industry. But critics point out Incolink's trust deed includes no conditions for how the grants should be spent. There do not appear to be any Incolink audits to ensure the money is spent on training.

The CFMEU is using its money to expand its Melbourne headquarters, under the promise of a "training and wellbeing centre". The MBAV is doing the same to its offices for a "collaboration and innovation centre".

With the growth in grants, critics say the potential for conflict has grown.

While Incolink grants to Setka's CFMEU branch are dwarfed by the union's $40 million a year in membership fees, the MBAV's Incolink grants far exceed its annual membership dues of $6 million.

According to the MBAV financial reports, the employer group received $63.5 million in grants from 2016 to 2023. Insiders estimate Incolink equates to at least $55.5 million of this amount or about $8 million a year.

In its most recent 2023-24 financial report, the MBAV recorded a $2.6 million surplus. But without the $11 million in grants it recorded for that year it would have been operating at a loss of about $8 million.

The reliance on Incolink grants has puzzled Mr Cole since he first started getting involved in MBAV governance in 2018.

"All other states seem to be able to operate without grants from Incolink, I don't see why the MBAV has to be any different," he said.

Unlike its interstate counterparts, the MBAV has a reputation as close to the CFMEU. The relationship grew after certain Victorian builders revolted in 2017 against the former chief executive Radley de Silva for being too close to the Liberal Party.

His replacement, Rebecca Casson, who was Incolink president from 2022-2024, introduced a collaborative relationship with the CFMEU and Setka.

The relationship arguably worked well during the pandemic when the industry was facing a shutdown and the MBAV negotiated modest wage rises with Mr Setka of 3 per cent a year from 2020 to 2024.

However, that same deal oversaw the doubling of Incolink rates – and the resultant turbocharging of Incolink grants to the CFMEU and MBAV.

In 2023, the MBAV CEO Michaela Lihou was appointed as CEO with the backing of MBAV chair and Kane Constructions director Geoff Purcell. Her referees included John Setka.

A spokeswoman for MBAV points out that Setka was “one name amongst 11 industry people” used to show Lihou’s broad industry experience. “Her understanding is that he wasn’t actually contacted.”

Key to the FWC investigation will be whether Incolink has created a problem for MBAV executives bargaining with the CFMEU.

The MBAV’s bonus policy is understood to allow for bonuses of 10 to 25 per cent to the CEO. Last year, Ms Lihou is believed to have been awarded a bonus of about $70,000, or 17 per cent of her salary.

A condition for distributing any bonuses is that the MBAV is in surplus. Whistleblowers allege that this represents a conflict for the MBAV CEO given that the MBAV is reliant on Incolink for its solvency.

Under the bonus policy, the CEO could be incentivised to agree to high Incolink rates in CFMEU agreements to ensure MBAV gets grants and remains in surplus and so bonuses are paid.

Lihou is not only an Incolink director but involved in negotiating the CFMEU template industry agreement that sets the employers’ Incolink rates. To compound matters, Lihou herself wrote the bonus policy in 2022 when she was MBAV HR executive (and an Incolink board director).

Current MBAV HR executive Giovanni Abelardo – who is also an Incolink director and helps negotiates the CFMEU EBA – is understood to assess the CEO’s performance. This masthead is not suggesting that Lihou in fact acted in conflict, only that this structure creates a perceived conflict.

The MBAV has previously said that members involved in EBA negotiations were “made aware of any potential perceived conflicts, and they were managed appropriately”.

Mr Cole said the MBAV’s relationship with Incolink “has never made sense to me”.

“I do not understand how the MBAV, whose membership is comprised of employers, can reasonably advocate in the best interest of its members when it is in bed with parties whose interests are essentially opposed to the financial interests of our members.”

In response to detailed questions about the bonus to Ms Lihou and the MBAV, MBAV president Purcell said that association “strongly refutes the claims and inferences in your email”.

“Our primary concern and priority right now is to work collaboratively with the FWC to clarify its concerns, rather than engage in a debate with the media.”

In the past week, as the FWC made its inquiries, staff say the employer group’s entire senior executive team outside the CEO – including Mr Abelardo, senior legal counsel and its head of training – took extended leave, including some for four to six months.

Part of the problem for Incolink’s governance is that the CFMEU wields the true power through its mandating of the fund in its agreements.

Late last year, sources familiar with the matter say that Locke wrote to the MBAV and warned that if it refused to back the expansion, it could find itself deprived of grants, noting it had received $17 million in the past year.

He warned that the CFMEU could mandate a different fund for workers in its agreements or even sideline the employer group by setting up a new trustee.

An Incolink spokesman said “in line with good governance procedures” the Incolink board unanimously agreed to change its trust deed to expand into NSW.

Setka is alleged to have made similar threats to the MBAV at an Incolink meeting in Tasmania in 2018 when the CFMEU was fighting for a large share of the surplus distributions.

The FWC investigation and the spotlight turned on Incolink raise the prospect that worker benefit schemes may finally be regulated – a move that unions and Labor hotly opposed in 2019 when the Coalition proposed laws to do so.

Before the last election, the Albanese government promised to develop the country’s portable entitlement schemes. The government has since deferred the promise until after the next election. But any move is arguably going to include a push to nationalise schemes and even regulate them.

For Incolink’s part, now the dominant fund in the sector, its spokesman said it has “long advocated for appropriate regulation of worker entitlement funds”.

But as the fund becomes the centre of controversy, it could be a case of be careful what you wish for.

CFMEU redundancy fund ‘misuse’ of worker money sparks regulation call

David Marin-Guzman

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Feb 4, 2025

Building industry directors are calling for the regulation of union redundancy funds to be an election issue after accusing the CFMEU’s Victorian fund of unlawfully misusing millions of dollars in workers’ money and arguing the union uses the fund to strongarm employer groups.

Master Builders Victoria directors Raymond French, Lisa Hollingsworth and Greg Cole last week wrote to opposition workplace spokeswoman Michaelia Cash to ask her to lead “systematic change” in the unregulated space due to concerns over the CFMEU’s $1.2 billion fund Incolink.

The directors allege Incolink is unlawfully counting workers’ contributions in “inactive” accounts as funds it can distribute to the CFMEU or MBAV and claim the fund has compromised MBAV because the employer group is reliant on Incolink’s multi-million dollar grants to maintain its operations.

Despite trying to effect change within the Victorian employer group, the directors, who lodged a whistleblower report against MBAV late last year, say they “hit road blocks at every turn”.

“The senator’s help is really a last resort for us,” Mr Cole told *The Australian Financial Review*. “From what we have seen, the senator seems to be one of very few voices who are advocating for what is needed to fix this issue, that being systematic change and the introduction of an enforcement body with real powers.”

The letter prompted Senator Cash to call for an investigation and a detailed audit into Incolink and challenge Labor to bring forward legislation to ensure transparent and responsible management of workers’ funds.

“The Coalition’s firm belief is that workers’ entitlement funds are run for the benefit of workers, not anyone else,” she said.

“Given these serious allegations, it is important that the CFMEU administrator immediately steps in to stop the further payment of workers’ entitlements to Incolink.“

The CFMEU has pushed the Victorian-based Incolink as its national fund by mandating it in new agreements, despite some members’ preference for state funds that distribute their surplus to workers rather than the union.

In their letter, the MBAV directors allege Incolink unlawfully forfeits members' money if they make no contributions for two years and then distributes it to the CFMEU and MBAV as grants for safety or training.

In 2015, Trade Union Royal Commissioner Dyson Heydon found a significant risk Incolink's practices were breaching Victoria's unclaimed money laws, which require parties to transfer such monies to a central state fund. Incolink argued that the money, which was $33 million from 2011 to 2015, could not be "claimed" as it was only accessible if a worker left their job.

According to its 2023-24 annual report, MBAV received $11.2 million in grants last year, making up 45 per cent of its total revenue. The vast majority of those grants are understood to be from Incolink.

"How can the MBAV negotiate favourable terms for its members … with the CFMEU Vic when it is effectively reliant on the same pool of monies from which both organisations derive tens of millions of dollars every year," the directors asked.

"One must wonder whether the CFMEU Vic would be able to act in this militant fashion if it did not have these tens of millions of dollars to rely upon".

Senator Cash said "the misuse of workers' entitlements funds is completely unacceptable and anyone found to have used funds improperly should face severe penalties".

"There needs to be transparency about where the funds have gone and that individual employees who are owed money are promptly repaid."

A spokeswoman for Assistant Treasurer Stephen Jones pointed to an ASIC review into the regulatory framework of redundancy funds, which the watchdog announced in September after extending the funds' 25-year exemption from financial licensing and investment requirements until 2026.

"We will respond to the outcomes of their review to ensure settings are fit-for-purpose," the spokeswoman said.

A spokesman for Incolink defended the fund as "having the highest standards of governance and regulation of any fund".

"Incolink believes that measures we have in place such as a capital adequacy targets, developed systems, external audit, risk management frameworks, the provision of audited financial statements to members, and an appropriate management and governance architecture form the basis of any regulatory model for worker entitlement funds."

The Morrison government introduced a bill to regulate union entitlement funds in 2019. However, Labor and unions opposed the laws at the time.