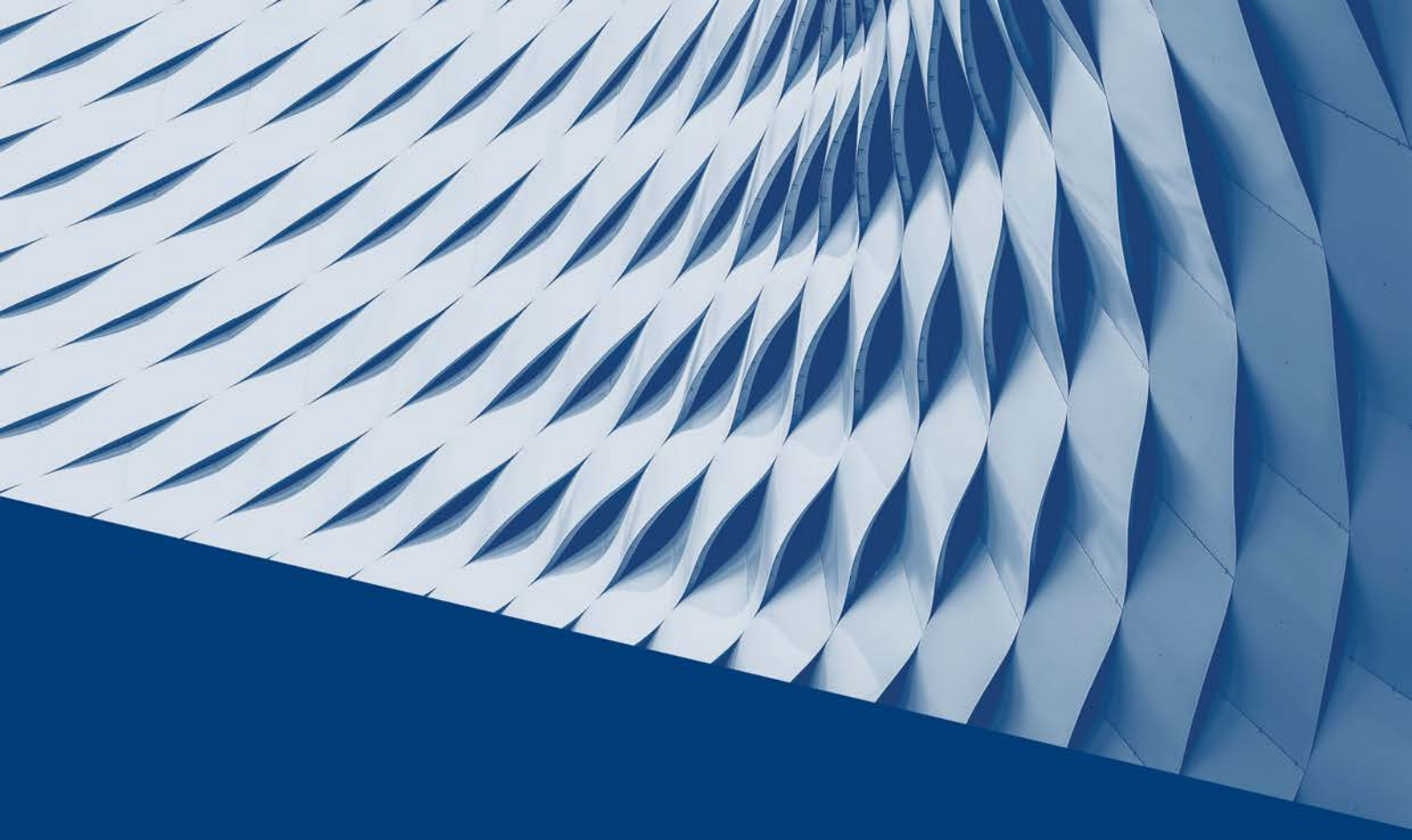

# ASIC Consultation Employee Redundancy Funds

Submission by the Australian Council of Trade Unions to the Australian Securities and Investment Commission

– 5 August 2025

ACTU Submission, 5 August 2025
ACTU D. No 21/2025

ACTU
australian council of trade unions

# Contents

Introduction ..... 1

Worker Entitlement Funds ..... 1

Broad ACTU Position Regarding Changes ..... 3

ACTU Position on Specific ASIC Proposals ..... 3

Conclusion ..... 5

Appendix 1 ..... 6

## Introduction

1. Since its formation in 1927, the ACTU has been the peak trade union body in Australia. There is no other national confederation representing unions. For over 90 years, the ACTU has played the leading role in advocating before the Fair Work Commission, and its statutory predecessors, for the improvement of employment conditions for employees. We have consulted with governments in the development of almost every legislative measure concerning employment conditions and trade union regulation over that period.

2. The ACTU consists of affiliated unions and state and regional trades and labour councils. There are currently 35 ACTU affiliates. They have approximately 1.6 million members who are engaged across a broad spectrum of industries and occupations in the public and private sectors.

3. The Australian Securities and Investments Commission (ASIC) is presently undertaking a consultation concerning the regulatory framework for employee redundancy funds. ASIC has released a consultation paper to gather feedback from various stakeholders, including operators of employee redundancy funds, employer associations and unions. The stated objective of the consultation is to seek feedback on the regulatory requirements that should govern employee redundancy funds under the *Corporations Act 2001* following the conclusion of the current relief period on 1 April 2026. ASIC has also indicated that beyond a first round of submissions, it will "also undertake further targeted consultation with relevant stakeholders, as needed". These submissions are made in response to the options in the consultation paper.

## Worker Entitlement Funds

4. Thousands of workers entrust their entitlements to worker entitlement funds (WEFs) and rely on them to operate fairly, in members' interests and to efficiently distribute that money when those entitlements are called upon. Worker entitlement funds subject to the current relief operate across construction, manufacturing, electrical and related industries and cover redundancy, annual leave, sick leave and long service leave entitlements. Many of the funds date back to the late 1980s and early 1990s and have been successfully, and effectively, managed for many decades.

5. The funds first arose in the construction industry, an industry notorious for high levels of company insolvency, phoenixing and a susceptibility to peaks and troughs in the broader

economy. One of the basic purposes for which the funds were established was to secure accrued worker entitlements from commercial risks, such as employer insolvency.

6. Another purpose of the funds was to provide a level of security and portability that might not otherwise exist, particularly in a project-based industry like the construction industry. Construction workers have limited security of employment, work for a large number of employers in the course of their career and often face extended periods of unemployment in between projects.

7. Award redundancy entitlements in the construction industry have a unique history which reflects the nature of the industry. The original Termination Change and Redundancy decision of the Australian Industrial Relations Commission in 1984 excluded the construction industry. As a consequence, a separate set of Commission proceedings arose which, ultimately led to the inclusion of a redundancy clause tailored for the industry, which was inserted into federal construction industry awards from October 1990. At the same time, industry parties created the early versions of WEFs to secure the redundancy contributions that employers were now required to make.

8. Regular contributions to a WEF make it more likely that employees will have access to these benefits in times of need. In those respects, WEFs serve a valuable role in ensuring that workers actually receive their lawful entitlements and that taxpayers do not have to 'pick up the tab' for employers who fail to meet their obligations to pay these entitlements through the Fair Entitlements Guarantee.

9. The WEFs have provided considerable security for workers' entitlements over many years in an industry which is plagued by company insolvencies and phoenix operators. They have paid out hundreds of millions of dollars' worth of employee entitlements since they were set up, a significant proportion of which would have otherwise been lost to workers through insolvency, mismanagement or fraud.

10. Notably, they have been successful in doing so while being afforded regulatory relief from the licensing, managed investment and associated provisions of the Corporations Act for the past 25 years.

11. In proposing regulations, ASIC should closely consider the fact these funds have met their promises to members for decades. Unlike commercial managed investment schemes which have often failed, WEF members have not suffered consumer or financial harm, investment returns have allowed these funds to be administered at low cost, and the Governance of

funds through boards with worker and employer voice has ensured they have been run for purpose.

12. Should regulations be imposed, they should allow the important role these funds play to allowed to continue; they must not be overly burdensome and detract from members' entitlements; they must address reasonably foreseeable risks in a proportionate way; and, they should not be duplicative of existing obligations WEF have to their members.

## Broad ACTU Position Regarding Changes

13. The ACTU believes that worker entitlement funds should operate in a transparent, fair and efficient way. Unions support changes that enhance transparency and improve the regulatory framework. However, at the same time, we seek to be very clear: given the clear long term success of the funds in meeting their primary purpose of protecting workers entitlements, the ACTU is vitally concerned that the ongoing viability of the worker entitlement funds is not unduly hampered. For that reason, any change in the regulatory approach that would unreasonably raise the administrative burden is strongly opposed by the ACTU.

14. The reality is that WEFs are not-for-profit funds and any regulatory burden imposed will be a cost to members. ASIC has a responsibility to members whose redundancy, leave and other entitlements are protected by these funds to ensure regulation is risk-appropriate and evidence-based. In that context, an appropriate model going forward would be one that, acknowledges the benefits of a principal-based, rather than a rules-based regulatory framework. We see little benefit, and much potential harm, arising from the application of overly prescriptive rules tailored for funds that do not operate in relevantly similar circumstances to WEFs nor share WEFs' key role in safeguarding members' entitlements.

## ACTU Position on Specific ASIC Proposals

### The Expanded Definition of Employee Redundancy Funds

15. The ACTU supports the proposed definition being capable of covering funds that have in good faith relied upon the existing definition. The ACTU is not opposed to the proposed extension of that coverage. Further, there are some funds who are capable of handling more than just redundancy and long service leave. There would appear no sound policy reason why the proposed definition should not be broadened further, to cover a fund whose primary objective is not redundancy and/or long service leave but other forms of leave or non-superannuation workplace entitlements that may be paid by an employer for the benefit of a worker.

## Option 1

16. The ACTU is strongly opposed to Option 1. In particular, we note, and agree, with the observation in ASIC's Consultation Paper at page 14, that the regulatory impact of Option 1 would impose the "highest cost burden on these funds and their operators". Such a burden could not reasonably be justified given the purpose, operation and history of the funds. The unworkability of the funds under those conditions is manifest. For example, under the *hawking* obligations, breaches may provide a complainant with a right to 'return' the product. If a member of a WEF were to exercise this right, in the common circumstances where an employer is obliged to make payments under a binding industrial instrument, the situation would rapidly become untenable.

17. We further agree with the observation, or suggestion, in ASIC's Consultation Paper on page 17 that there are "provisions of the Corporations Act where strict compliance may not be practicable, given the nature of these funds and where the regulatory detriment of granting relief would be minimal". In particular, the ACTU agrees that those matters identified in paragraph 35 are not appropriate.

18. The ACTU also adopts the proposition in ASIC's Consultation Paper on page 19 that Option 1 is unduly burdensome:

> "given the existing fiduciary obligations of the fund operator where assets are held on trust, the proposed overlay of obligations as an AFS licensee and the purpose of these funds. ... The purpose of these funds differs from traditional managed investment schemes that are selected by members based on the underlying investment opportunity. Certain investor protections under the managed investment provisions may be viewed as less relevant for members of these funds—such as procedures for withdrawing from the scheme and holding member meetings."

19. We also note the previous feedback that the ASIC Consultation Paper describes on page 22 to the effect that:

> "We have previously received feedback from industry that allowing the relief to expire and requiring strict compliance with the AFS licensing, managed investment and associated provisions in the Corporations Act would cause hardship and risk disadvantage to the members of funds and their operators."

### Option 2(a) and 2(b)

20. The ACTU considers Option 2(a) to add unnecessary regulatory burdens to funds which are intended to address risks arising in managed investment schemes that WEFs address in other ways. Most WEFs are constructed so that the trustee is required to act in the best interests of members, which is reinforced by the representative board structure. Additional regulations contained in 2(a) over 2(b) would be duplicative of existing obligations present on directors, as previously noted.

21. The ACTU is however, supportive of Option 2(b). The ACTU recognises that a number of the proposals would appear capable of assisting in ensuring transparency and accountability – a positive outcome for all stakeholders. As major WEFs steadily increase towards, or even outgrow, $1 billion in funds under management on behalf of members, demonstrating compliance appears not an unreasonable condition. The requirement to hold an AFSL and ensure that clear policies and procedures are in place for the benefit of members is similarly substantially reasonable. As we understand what is proposed, Option 2(b) contains relief from duplicative and unworkable regulations but is unlikely to increase significantly the compliance costs for the operation of WEFs.

### Option 3

22. The ACTU also sees merit in Option 3 and would support its implementation. In our view, the approach contained in Option 3, including the concomitant obligations appear reasonable and proportionate in the context of no WEF having failed to pay out its obligations to an eligible member, nor any evidence that they have suffered from systemic prudential risk.

## Conclusion

23. In summary, the ACTU strongly advocates for regulatory approaches that are tailored to the specific design and function of worker entitlement funds. We support measures that reinforce transparency and accountability, provided they do not impose unnecessary complexity or duplication. Of the options presented, Option 2(b) appears to offer a sensible and balanced framework, safeguarding members' interests while recognising the unique governance structures of WEFs. Subject to appropriate consultation with other stakeholders, not least the funds, we encourage ASIC to give serious consider to adopting this model as an effective means to achieve both robust oversight and practical operation of these important funds.

## Appendix 1

### ASIC Question Regarding Definition

**B1Q1 Do you agree with our proposed new term and definition? Please provide reasons.**

Broadly, yes.

**B1Q2 Are there other employee entitlements (beyond redundancy and long-service leave) that should be included as primary objectives in our new definition? Please provide details.**

Yes, see paragraph 15.

**B1Q3 Is there an alternative definition that you consider is preferable? For example, should we require that an 'employee entitlement scheme' is an 'approved worker entitlement fund', as defined under s58PB of the Fringe Benefits Tax Assessment Act 1986 (FBT Act)? Please provide reasons.**

N/A

**B1Q4 Do you consider that our definition should include any further limitations on the objectives of the fund, or are there any specific arrangements that should be excluded from the definition (with the requirements that apply to these excluded arrangements instead considered on a case-by-case basis)? If so, please provide details.**

No, those limitations should be a matter for Government.

**B1Q5 For existing fund operators, will changing the definition as proposed affect the operation of the fund? If so, please provide details of the impact.**

N/A

### ASIC Questions Regarding Option 1

**C1Q1 Please provide your feedback on this option, including reasons in support of your views.**

The ACTU is strongly opposed to Option 1 for the reasons provided in our submission.

**C1Q2 Is this your preferred option for the regulation of employee redundancy funds? If so, please explain why you prefer it over Option 2 and Option 3.**

N/A

**C1Q3 Do you foresee any practical difficulties with this option?**

Yes, as ASIC notes in the consultation paper, of the options it results in the "highest cost burden on these funds and their operators" and thereby, we submit, endangers their important role and legitimate operation.

**C1Q4 For existing fund operators, what additional compliance costs do you expect to incur if this option is adopted? Please provide specific details and dollar estimates.**

N/A.

## ASIC Questions Regarding Option 2

*Option 2(a)*

**D1Q1 Please provide your feedback on this option, including reasons in support of your views.**

**D1Q2 Do you agree with the provisions from which relief would be granted? If not, why?**

Option 2(a) is superior to Option 1, as the partial relief given to provisions that are unworkable is welcome. Option 2(a), however, still contains additional regulations which are unreasonably burdensome in the context of the operation of the funds.

**D1Q3 Do you consider the relief should be subject to any additional conditions? Please give reasons. For example, should we impose a condition for tailored information to be provided to employers and employees about the fund?**

N/A

**D1Q4 Do any of the other provisions in Table 1–Table 4 in the appendix also result in compliance issues that require relief? If so, please provide details.**

**D1Q5 Is this your preferred option for the regulation of employee redundancy funds? If so, please explain why you prefer it over Option 1, Option 2(b) and Option 3.**

**D1Q6 Do you foresee any practical difficulties with this option?**

Yes.

**D1Q7 For existing fund operators, what additional compliance costs do you expect to incur if this option is adopted? Please provide specific details and dollar estimates.**

N/A.

*Option 2(b)*

**D2Q1 Please provide your feedback on this option, including reasons in support of your views.**

**D2Q2 Do you agree with the provisions from which relief would be granted? If not, why?**

Yes, the relief granted under Option 2(b) appears reasonable.

**D2Q3 Do you consider the relief should be subject to any additional conditions? Please give reasons. For example, should we impose a condition for tailored information to be provided to employers and employees about the fund?**

No

**D2Q4 Do any of the other provisions in Table 1–Table 4 in the appendix also result in compliance issues that require relief? If so, please provide details.**

**D2Q5 Is this your preferred option for the regulation of employee redundancy funds? If so, please explain why you prefer it over Option 1, Option 2(a) and Option 3.**

**D2Q6 Do you foresee any practical difficulties with this option?**

Complying with regulations under Option 2(b) will increase administration costs that will ultimately be borne by members, as all WEFs are not-for-profit.

**D2Q7 For existing fund operators, what additional compliance costs do you expect to incur if this option is adopted? Please provide specific details and dollar estimates.**

## ASIC Questions Regarding Option 3

**E1Q2 Please provide feedback on each of the conditions in proposal E1(a)–E1(e), including whether you consider it would be a reasonable and practicable condition of relief. If you believe there should be no conditions on the relief, please explain why each proposed condition would not be reasonable or practicable.**

Option 3 would also constitute an appropriate change.

**E1Q3 Are there are any additional or alternate conditions that would be reasonable and practicable?**

**E1Q4 Is this your preferred option for the regulation of employee redundancy funds? If so, please explain why you prefer it over Options 1 and 2.**

N/A

**E1Q5 Do you foresee any practical difficulties with this option?**

Yes, to the extent they will increase the administrative burden on funds.

**E1Q6 For existing fund operators, what additional compliance costs do you expect to incur if this option is adopted? Please provide specific details and dollar estimates, including for each individual proposed condition.**

**address**

ACTU

[redacted]

[redacted]

**phone**

[redacted]

**web**

actu.org.au

ACTU Australian Unions