

EXPLANATORY STATEMENT for
ASIC Corporations (Employee Redundancy Funds Relief) Instrument
2015/1150

and

ASIC Corporations (Repeal) Instrument 2015/1157

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes:

- ASIC Corporations (Employee Redundancy Funds Relief) Instrument 2015/1150 (the ***Instrument***); and
- ASIC Corporations (Repeal) Instrument 2015/1157 (the ***Repeal Instrument***).

The Instrument is made under paragraphs 601QA(1)(a), 926A(2)(a), 992B(1)(a) and 1020F(1)(a) of the *Corporations Act 2001* (the *Act*).

The Repeal Instrument revokes ASIC class order [CO 02/314] *Employee redundancy funds: relief*. The Repeal Instrument is made under paragraphs 601QA(1)(a), 911A(2)(l), 992B(1)(a) and 1020F(1)(a) of the *Act*.

Paragraph 601QA(1)(a) provides that ASIC may exempt a person from a provision of Chapter 5C of the Act.

Paragraph 911A(2)(l) provides that a person is exempt from the requirement to hold an Australian financial services (AFS) licence for a financial service they provide where the provision of the service is covered by an exemption specified by ASIC in writing and published in the *Gazette*.

Paragraph 926A(2)(a) provides that ASIC may exempt a person or class of person from all or specified provisions of Part 7.6 of the Act, other than Divisions 4 and 8 of Part 7.6 of the Act.

Paragraph 992B(1)(a) of the Act provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.8 of the Act.

Paragraph 1020F(1)(a) of the Act provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.9 of the Act.

Under subsection 33(3) of the *Acts Interpretation Act 1901* (as in force as at 1 January 2005 and as applicable to the relevant powers because of section 5C of the Act), where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

1. Background

Employee redundancy funds are entities established to accept contributions from employers in construction and allied industries on behalf of their employees. The contributions represent redundancy benefits which will be payable to the employee upon termination or cessation of employment, generally for any reason other than misconduct (**redundancy**).

Employee redundancy funds are operated as a trust with trustee boards comprised of trade union and employee association sponsors. Employee redundancy funds accept *contributions* made by employers on behalf of employees, which are *pooled* and invested. Generally, employees have *no day to day control* over the way the pooled contributions are used but stand to receive *benefits* as members of the employee redundancy fund, including the preservation and portability of their redundancy benefits, and payment of these benefits in the event of redundancy.

ASIC considers that employee redundancy funds are likely to meet the definition of a *managed investment scheme* and a *financial product* and that the operator of an employee redundancy fund is likely to be subject to the requirements to:

- hold an AFS licence with appropriate authorisations;
- register the employee redundancy fund as a managed investment scheme; and
- comply with the managed investment provisions contained within Chapter 5C of the Act and other associated provisions contained within the Act including product disclosure statement (**PDS**) and ongoing disclosure requirements and the anti-hawking provisions

(the **managed investment and associated provisions**).

It is unclear whether Parliament intended employee redundancy funds to be subject to the managed investment and associated provisions. Compliance with these provisions carries significant regulatory burdens for employee redundancy funds.

ASIC has provided interim class order relief to employee redundancy funds since 25 May 2000. No conditions have been imposed on this relief.

Class order relief was initially provided on an interim basis pending public consultation. ASIC subsequently formed the view that the regulation of employee redundancy funds was a matter for law reform instead and made submissions to the *Review of the Managed Investments Act 1998 (Turnbull Inquiry)* that the legal position should be clarified in relation to employee redundancy funds to either specifically exclude (or include) them within the definition of *managed investment scheme*. Similar recommendations were made in the Turnbull Report tabled in Parliament on 19 December 2001.

ASIC has continued to provide interim class order relief to employee redundancy funds, pending Government consideration about how employee redundancy funds should be regulated. This class order relief has been modified to reflect legislative changes introduced under the *Managed Investments Act 1998* and the *Financial Services Reform Act 2001*. Current relief is contained in ASIC Class Order [CO 02/314] *Employee redundancy funds: relief*.

The Royal Commission into Trade Union Governance and Corruption (**Royal Commission**) is examining trade union involvement in employee redundancy funds (among other matters). The Royal Commission referred its Interim Report to ASIC in which it recommended that ASIC consider whether the exemptions granted to employee redundancy funds by [CO 02/314], and in particular the exemptions from the PDS requirements, remain appropriate. The Final Report is due to be delivered by 31 December 2015.

[CO 02/314] is due to sunset on 1 October 2016. ASIC has reviewed the operation of this instrument and as a result of that review, made:

- a) the Instrument, which has the effect of continuing the relief underlying [CO 02/314] until 1 October 2018; and
- b) the Repeal Instrument, which repeals [CO 02/314] before its statutory sunset in 2016.

2. Purpose of the instrument

The purpose of the Instrument is to extend the interim relief provided to employee redundancy funds for a limited period to preserve its effect pending the release of the Final Report of the Royal Commission and Government consideration of this report.

The purpose of the Repeal Instrument is to discontinue relief from the managed investment and associated provisions provided by [CO 02/314].

3. Operation of the instrument

Clause 4 provides that in the Instrument, employee redundancy scheme 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.

Clause 5 exempts:

- (a) a person from complying with subsection 911A(1) of the Act (need for an AFS licence) where they provide financial services in relation to interests in an employee redundancy scheme;
- (b) a person who operates or promotes an employee redundancy scheme from complying with section 601ED (when a managed investment scheme must be registered); 992A (prohibition on hawking of certain financial products); and 992AA (prohibition on hawking of managed investment products); and Part 7.9 (financial product disclosure – issue, sale and purchase) of the Act in relation to:
 - i. making offers for the issue of an interest in; or
 - ii. making recommendations to acquire an interest in; or
 - iii. making offers to arrange the issue of interests in; or
 - iv. operating an employee redundancy scheme.

The exemptions in clause 5 apply until 1 October 2018.

The Repeal Instrument repeals [CO 02/314].

4. Consultation

ASIC released Consultation Paper 238 *Remaking ASIC class order on employee redundancy funds: [CO 02/314] (CP 238)* on 4 September 2015, seeking feedback from operators and promoters of employee redundancy funds, trade unions, and employee associations on our proposal to remake [CO 02/314] for a limited time into a new legislative instrument pending:

- (a) the release of the Final Report of the Royal Commission; and
- (b) Government consideration of the Final Report of the Royal Commission.

ASIC received four responses to CP 238 from, or on behalf of, employee fund operators. All of the respondents were supportive of employee redundancy funds continuing to be exempt from the managed investment and associated provisions in the Act, whether this was achieved by ASIC relief or law reform. One of the responses to CP 238 submitted that a longer extension was appropriate.

ASIC has also considered recommendations contained in the Interim Report of the Royal Commission that ASIC consider whether the exemptions (and in particular, the PDS exemptions) granted to employee redundancy funds by [CO 02/314] remain appropriate. ASIC considers it would be premature to commence this policy review, pending the release of the Final Report of the Royal Commission and Government consideration of this report.

The draft instrument consulted on with CP 238 included a subsection which exempted persons from complying with subsection 911B(1) of the Act where:

- (a) they provide financial services in relation to interests in an employee redundancy scheme on behalf of another person; and
- (b) the other person would not need to have a financial services licence if they provided the services because they were exempt under the instrument.

This subsection is no longer necessary as *ASIC Corporations (Effect of Licensing Exemptions) Instrument 2015/1115* inserts a new notional paragraph 911B(1)(da) into the Act which applies in relation to licensing exemptions granted by ASIC under subsection 926A(2) of the Act. The intended effect of the subsection is achieved by Instrument 2015/1115.

Interim relief for employee redundancy funds has been extended by 24 months to sunset on 1 October 2018 in consideration of the submissions received.

The Office of Best Practice Regulation has agreed with ASIC's assessment that [CO 02/314] is operating effectively and efficiently and will be remade or otherwise continued without significant changes and therefore no Regulatory Impact Statement is required.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

ASIC Corporations (Employee Redundancy Funds Relief) Instrument 2015/1150

and

ASIC Corporations (Repeal) Instrument 2015/1157

ASIC Corporations (Employee Redundancy Funds Relief) Instrument 2015/1150 (the *Instrument*) and ASIC Corporations (Repeal) Instrument 2015/1057 (the *Repeal Instrument*) are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

The Instrument amends ASIC class order [CO 02/314] *Employee redundancy funds: relief*.

[CO 02/314] provides interim relief to employee redundancy funds from the managed investment and associated provisions in the *Corporations Act 2001* (the *Act*), including the requirements to:

- (a) hold an Australian financial services (AFS) licence with appropriate authorisations;
- (b) register the employee redundancy fund as a managed investment scheme; and
- (c) comply with the managed investment provisions in Chapter 5C of the Act and other associated provisions, including those relating to Product Disclosure Statements (PDSs), ongoing disclosure requirements and the anti-hawking provisions.

The Instrument remakes [CO 02/314] into a new ASIC instrument and extends the relief to 1 October 2018.

The Repeal Instrument repeals [CO 02/314] that has been remade to preserve its effect beyond its sunseting dates.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.

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