

EXPLANATORY STATEMENT for
ASIC Corporations (Amendment) Instrument 2018/825

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes ASIC Corporations (Amendment) Instrument 2018/825 (the *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*).

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 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 operators of employee redundancy funds since 25 May 2000. Current relief is under ASIC Corporations (*Employee Redundancy Funds Relief*) Instrument 2015/1150. No substantive conditions have been imposed on this relief. The Instrument has the effect of amending ASIC Corporations (Employee redundancy funds relief) Instrument 2015/1150 so that it continues to have effect until 1 October 2021.

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*.

The Royal Commission into Trade Union Governance and Corruption (**Royal Commission**) examined trade union involvement in employee redundancy funds (among other matters).

The Royal Commission's Final Report recommended legislation either standalone or amending the Act, be enacted dealing comprehensively with the governance, financial reporting and financial disclosures required by worker entitlement funds.

The *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017* (the **Bill**) will amend the *Fair Work (Registered Organisations) Act 2009* (the **RO Act**) and the *Fair Work Act 2009* (the **FW Act**) to protect workers through greater governance and transparency of worker redundancy funds consistent with recommendations made by the Royal Commission.

If this Bill is passed, ASIC will have a stronger basis for recommending to the Australian Government that changes are made to the Corporations Act and *Australian Securities and Investments Act 2001* (**ASIC Act**) to permanently remove employee redundancy funds from the managed investment scheme regime.

ASIC has reviewed the operation of ASIC Corporations (*Employee Redundancy Funds Relief*) Instrument 2015/1150 which is due to expire ('sunset') on 1 October 2018.

ASIC has made the Instrument, which has the effect of continuing the relief underlying ASIC Corporations (*Employee Redundancy Funds Relief*) Instrument 2015/1150 until 1 October 2021, so that its ongoing effect is preserved without any disruption to the operators of employee redundancy funds that rely on it.

2. Purpose of the instrument

The purpose of the Instrument is to extend the interim relief provided to employee redundancy funds under ASIC Corporations (*Employee Redundancy Funds Relief*) Instrument 2015/1150 until 1 October 2021 to provide sufficient time for:

- the new regulatory regime for employee redundancy funds under the RO Act is in place; and
- for consideration to be given to changes to the Corporations Act and the ASIC Act to permanently remove employee redundancy funds from the managed investment scheme and associated provisions.

3. Operation of the instrument

Clause 1 provides that the Instrument amends clause 5 of ASIC Corporations (*Employee Redundancy Funds Relief*) Instrument 2015/1150 by omitting 1 October 2018 and substituting 1 October 2021. The effect is that the interim relief provided to employee redundancy funds

under ASIC Corporations (*Employee Redundancy Funds Relief*) Instrument 2015/1150 applies until 1 October 2021.

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.

In mid-2018 ASIC undertook targeted consultation with a number of employee redundancy funds, Treasury and the Department of Jobs and Small Business about the proposed rollover of ASIC Corporations (*Employee Redundancy Funds Relief*) Instrument 2015/1150 for 36 months. All were supportive of ASIC's proposal for the Instrument.

The Office of Best Practice Regulation has agreed with ASIC's assessment that ASIC Corporations (*Employee Redundancy Funds Relief*) Instrument 2015/1150 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 (Amendment) Instrument 2018/825

ASIC Corporations (Amendment) Instrument 2018/825 (the *Instrument*) is 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 Corporations (*Employee Redundancy Funds Relief*) Instrument 2015/1150 to extend the relief in ASIC Corporations (*Employee Redundancy Funds Relief*) Instrument 2015/1150 to 1 October 2021.

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.