
EXPLANATORY STATEMENT for

ASIC Corporations (Amendment) Instrument 2021/767

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes ASIC Corporations (Amendment) Instrument 2021/767 (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 **Corporations Act**).

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

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 Corporations 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 Corporations Act.

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

The Instrument is a disallowable legislative instrument. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is in the [Attachment](#).

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 would be payable to the employee in the event of termination or cessation of employment, generally for any reason other than misconduct (**redundancy**).

Each employee redundancy fund is operated as a trust with a trustee board, 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 with ASIC as a managed investment scheme; and
- comply with the managed investment provisions contained within Chapter 5C of the Corporations Act and other associated provisions contained within the Corporations 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.

ASIC Corporations (Amendment) Instrument 2018/825 amended ASIC Corporations (Employee Redundancy Funds Relief) Instrument 2015/1150 to extend the date the relief is due to expire (**'sunset'**) to 1 October 2021.

The Instrument has the effect of amending ASIC Corporations (Employee Redundancy Funds Relief) Instrument 2015/1150 so that the relief, which was extended by ASIC Corporations (Amendment) Instrument 2018/825, continues to have effect until 1 October 2024.

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 this relief to employee redundancy funds, pending Government consideration about how employee redundancy funds should be regulated. This 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 Corporations Act, be enacted dealing comprehensively with the governance, financial reporting and financial disclosures required by worker entitlement funds.

If passed, Schedule 2 of the *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019 (2019 Bill)* will introduce a new regulatory framework for worker entitlement funds. The 2019 Bill amends the FW Act and the RO Act. The 2019 Bill was introduced in the Senate in September 2019. Parliament is currently considering the 2019 Bill. The 2019 Bill's passage is a matter for Parliament.

If the 2019 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 sunset on 1 October 2021.

ASIC has made the Instrument, which has the effect of continuing the relief in ASIC Corporations (Employee Redundancy Funds Relief) Instrument 2015/1150 until 1 October 2024, 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 relief provided to employee redundancy funds under ASIC Corporations (Employee Redundancy Funds Relief) Instrument 2015/1150 until 1 October 2024 to provide sufficient time for:

- the new regulatory regime for employee redundancy funds proposed under the 2019 Bill to be put in place; and

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- consideration to be given to changes to the Corporations Act and the ASIC Act to permanently remove employee redundancy funds from the managed investment and associated provisions.

3. Operation of the instrument

Section 4 of the Instrument and item 1 of Schedule 1 provide that section 5 of ASIC Corporations (Employee Redundancy Funds Relief) Instrument 2015/1150 is amended by omitting 1 October 2021 and substituting 1 October 2024. The effect is that the relief provided to employee redundancy funds under ASIC Corporations (Employee Redundancy Funds Relief) Instrument 2015/1150 continues to apply until 1 October 2024, after ASIC Corporations (Employee Redundancy Funds Relief) Instrument 2015/1150 is due to sunset. The Instrument will commence on the day after it is registered on the Federal Register of Legislation.

Legislative instrument and primary legislation

The policy implemented by this Instrument is more appropriate for a legislative instrument rather than primary legislation because it extends the duration of an existing legislative instrument which would otherwise sunset on 1 October 2021. The Instrument will have the effect of continuing to provide relief from the managed investment and associated provisions of the Corporations Act which would otherwise apply to employee redundancy funds pending the implementation of the new regulatory regime envisaged for employee redundancy funds in the 2019 Bill.

Duration of Instrument

ASIC has considered whether the duration for the operation of the Instrument should be three years or a shorter period. After consultation with the Department of the Treasury (**Treasury**) and the Attorney-General Department (**AGD**), ASIC determined that a three-year period would be appropriate.

ASIC considers that a duration shorter than three years would not allow sufficient time for:

- Parliament consideration and enactment of the 2019 Bill;
- the legislative framework for employee redundancy funds to be settled.

Future amendments to primary legislation

ASIC notes that with the enactment of the 2019 Bill, consequential amendments to the Corporations Act are expected to remove employee redundancy funds from the managed investment scheme regime permanently.

4. Consultation

2015 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.

2018 Consultation

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 a three-year duration. All were supportive of the proposed rollover.

2021 Consultation

In 2021, ASIC consulted with Treasury and the AGD and consulted informally with some employee redundancy funds. The informal feedback received from employee redundancy funds was consistent with submissions made to CP 238 that the relief in ASIC Corporations (Employee Redundancy Funds Relief) Instrument 2015/1150 should continue in the same form. Treasury and the AGD were supportive of rolling over the relief for an additional three years to maintain the status quo pending consideration and enactment by Parliament of the 2019 Bill.

ASIC also consulted with the Office of Best Practice Regulation (**OBPR**) who noted that, if ASIC is intending to remake ASIC Corporations (Employee Redundancy Funds Relief) Instrument 2015/1150 without significant changes, then it will need to certify that the instrument has been reviewed and found to be effective and efficient. ASIC has completed this certification.

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

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Overview

1. This 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 2024.

Human rights implications

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

Conclusion

3. This 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*.