



**ASIC**

Australian Securities & Investments Commission

## CONSULTATION PAPER 238

# Remaking ASIC class order on employee redundancy funds: [CO 02/314]

September 2015

### About this paper

This consultation paper sets out ASIC's proposals to remake our class order on employee redundancy funds into an ASIC instrument. Under the *Legislative Instruments Act 2003*, this class order will expire ('sunset') if not remade.

We are seeking feedback from operators and promoters of employee redundancy funds, trade unions and employer associations on our proposal to remake, without significant changes, Class Order [CO 02/314] *Employee redundancy funds: relief*.

Note: The draft ASIC instrument is available on our website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under CP 238.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Document history

This paper was issued on 4 September 2015 and is based on the Corporations Act as at the date of issue.

### Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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# The consultation process

## Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy at [www.asic.gov.au/privacy](http://www.asic.gov.au/privacy) for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 2 October 2015 to:

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## What will happen next?

<b>Stage 1</b>	4 September 2015	ASIC consultation paper released
<b>Stage 2</b>	2 October 2015	Comments due on the consultation paper
<b>Stage 3</b>	November– December 2015	Commencement of remade instrument

## A Background

### Key points

Legislative instruments, such as class orders, are repealed automatically, or 'sunset', after 10 years, unless action is taken to exempt or preserve them. We will consult on all sunseting legislative instruments that have more than a minor or machinery regulatory impact.

### Purpose of 'sunseting' legislative instruments

- 1 Under the *Legislative Instruments Act 2003* (Legislative Instruments Act), legislative instruments cease automatically, or 'sunset', after 10 years, unless action is taken to exempt or preserve them. Section 50(1) repeals a legislative instrument on either 1 April or 1 October—whichever date occurs first on or after the 10th anniversary of its registration on the Federal Register of Legislative Instruments (FRLI). Repeal does not undo the past effect of the instrument.
- 2 To preserve its effect, a legislative instrument, such as a class order, must be remade before the sunset date. The purpose of sunseting is to ensure that instruments are kept up to date and only remain in force while they are fit for purpose, necessary and relevant.

### Our approach to remaking legislative instruments

- 3 If it is necessary to remake a legislative instrument, our focus is on making it clear and user friendly. We will also, where possible, simplify and rationalise its content and conditions. For example, we will remove or reduce an obligation or burden in a legislative instrument if we are able to do so without undermining ASIC's priorities of promoting investor and financial consumer trust and confidence and ensuring markets are fair, orderly and transparent.
- 4 We will consult affected stakeholders on all ASIC legislative instruments that have more than a minor or machinery regulatory impact, and are subject to sunseting, to ensure:
  - (a) we carefully consider the continuing regulatory and financial impact of the instrument; and
  - (b) the instrument retains its effectiveness in addressing an identified issue or problem.

- 5            Generally, a Regulation Impact Statement (RIS) is required for new and amended policy that has a significant regulatory impact: see the [Australian Government Guide to Regulation](#). We will review, including public consultation, all class orders that have a significant regulatory impact before the scheduled sunset date. Where our review finds that a class order is not operating effectively and efficiently, we will prepare a RIS to assess our proposed changes to the class order. Where the class order is operating effectively and efficiently, we will remake the class order without substantive changes.

## B Remaking of ASIC class orders

### Key points

We are proposing to remake Class Order [CO 02/314] *Employee redundancy funds: relief*, which sunsets on 1 October 2016.

We have formed the preliminary view that it is appropriate to extend this relief until 1 October 2017, pending the release of the final report of the Royal Commission into Trade Union Governance and Corruption (Royal Commission) and Government consideration of this report.

This class order has been redrafted using ASIC's current style and format, while preserving the current effect of the instrument. The draft ASIC instrument, which reflects the minor amendments proposed in this paper, is available on our website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under CP 238.

### Your feedback

- 6 You are invited to comment on our proposal to remake this ASIC class order, including whether the class order is currently operating effectively and efficiently and whether it is appropriate to extend this relief for a limited period. This proposal is only an indication of the approach we may take and is not our final policy.

### Class Order [CO 02/314] *Employee redundancy funds: relief*

#### Background

- 7 Employers in construction and allied industries are required to pay a redundancy benefit to their employees on termination or cessation of employment, generally if the employment ends for any reason other than misconduct. This requirement is set out in various awards and enterprise agreements entered into between employers and employees.
- 8 Employer contributions are made to an employee redundancy fund that is operated as a trust, with the trustee board generally composed of representatives from union and employer association sponsors. Employee redundancy funds may also accept voluntary contributions from employees.
- 9 [CO 02/314] defines employee redundancy funds as schemes 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 employer.

- 10 An employee redundancy fund is generally considered a managed investment scheme under the definition in s9 of the *Corporations Act 2001* (Corporations Act) and a financial product for the purposes of Ch 7 of the Corporations Act.
- 11 [CO 02/314] gives relief from the managed investment and associated provisions of the Corporations Act to people who operate or promote an employee redundancy fund, whether by:
- (a) making offers for the issue of an interest in the fund;
  - (b) making recommendations to acquire an interest in the fund;
  - (c) making orders to arrange the issue of interests in the fund; or
  - (d) operating the fund.
- 12 [CO 02/314] exempts a person who operates or promotes an employee redundancy fund from:
- (a) s601ED, which prescribes when a managed investment scheme must be registered;
  - (b) s992A and 992AA, which contain prohibitions on the hawking of certain financial products and managed investment products; and
  - (c) Pt 7.9, which contains financial product disclosure provisions and other provisions relating to the issue, sale and purchase of financial products. Part 7.9 includes requirements to issue a product disclosure statement and to provide ongoing disclosure.
- 13 [CO 02/314] also exempts a person who provides financial services in relation to interests in an employee redundancy fund from the requirement to hold an Australian financial services (AFS) licence.
- 14 Relief was initially provided on an interim basis on 25 May 2000, pending a public consultation process and finalisation of our approach to regulating such funds. After considering preliminary comments, we formed the view that the regulation of these funds may be an issue of law reform rather than through the use of ASIC powers, and relief continued pending Government consideration of the issue.
- 15 The Royal Commission is currently examining trade union involvement in employee redundancy funds, among other matters, and is due to hand down its final report on 31 December 2015.
- 16 We consider it appropriate to extend the relief under [CO 02/314] for a limited period to allow the final report of the Royal Commission to be released and for the Government to substantively consider whether employee



redundancy funds should be regulated by the managed investment and associated provisions in the Corporations Act.

### **Proposal**

**B1** To preserve its effect beyond the sunset date of 1 October 2016, we propose to continue the relief currently given by [CO 02/314] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Employee Redundancy Funds Relief) Instrument 2015/XX at Attachment 1 to this consultation paper. You can access the current instrument on [www.comlaw.gov.au](http://www.comlaw.gov.au) by clicking on the following direct link: [CO 02/314].

The only changes proposed are to:

- (a) specify that the relief will expire on 1 October 2017;
- (b) update the name of the legislative instrument;
- (c) reflect current drafting practice and update the format of the current document;
- (d) simplify the drafting to give greater clarity; and
- (e) correct any minor drafting errors.

### **Rationale**

17 We consider that it is appropriate to extend relief in substantially the same form as [CO 02/314] on an interim basis for 12 months (to expire on 1 October 2017), pending release of the final report of the Royal Commission and Government consideration of this report. This relief may be reviewed earlier on making of regulations by Government.

## Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services  Note: This is a definition contained in s761A.
Ch 7 (for example)	A Chapter of the Corporations Act (in this example numbered 7), unless otherwise specified
[CO 02/314] (for example)	An ASIC class order (in this example numbered 02/314)
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Legislative Instruments Act	<i>Legislative Instruments Act 2003</i>
Pt 7.9 (for example)	A Part of the Corporations Act (in this example numbered 7.9), unless otherwise specified
RIS	Regulation Impact Statement
Royal Commission	The Royal Commission into Trade Union Governance and Corruption, established on 13 March 2014
s601ED (for example)	A section of the Corporations Act (in this example numbered 601ED), unless otherwise specified
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect