



ASIC

Australian Securities & Investments Commission

REPORT 463

Response to submissions on CP 238 Remaking ASIC class order on employee redundancy funds: [CO 02/314]

December 2015

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 238 *Remaking ASIC class order on employee redundancy funds: [CO 02/314]* (CP 238) and details our responses to those issues.

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.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy.

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A Overview/Consultation process

- 1 Class Order [CO 02/314] *Employee redundancy funds: relief* has provided interim relief to employee redundancy funds from the managed investment and associated provisions in the *Corporations Act 2001* (Corporations Act) since 25 May 2000, pending Government consideration about how employee redundancy funds should be regulated. The relief in [CO 02/314] is not subject to any conditions and has not yet been the subject of full consultation. [CO 02/314] is due to sunset on 1 October 2016.
- 2 In Consultation Paper 238 *Remaking ASIC class order on employee redundancy funds: [CO 02/314]* (CP 238), we consulted on our proposal to remake [CO 02/314] to extend the interim relief for 12 months (to expire on 1 October 2017). We consider it is inappropriate to commence a full policy review about the regulation of employee redundancy funds pending:
 - (a) the release of the final report of the Royal Commission into Trade Union Governance and Corruption (Royal Commission), which is due to be delivered by 31 December 2015; and
 - (b) Government consideration of the final report of the Royal Commission.
- 3 Our view is that it is necessary to extend the interim relief for a limited period to preserve its effect. CP 238 sets out our proposal to remake [CO 02/314] for a limited period into a new legislative instrument.
- 4 Following the CP 238 consultation process, we have formed the view that a 24-month extension of the interim relief is appropriate in the circumstances. We have remade [CO 02/314] into a new ASIC instrument—ASIC Corporations (Employee Redundancy Funds Relief) Instrument 2015/1150—to extend the relief to 1 October 2018. We have also made ASIC Corporations (Repeal) Instrument 2015/1157 to repeal [CO 02/314] because this class order has been remade into a new instrument.
- 5 Before ASIC Corporations (Employee Redundancy Funds Relief) Instrument 2015/1150 is due to sunset, we anticipate that we will conduct further consultation on any proposal to remake the instrument. Additionally, we will prepare a Regulation Impact Statement (RIS) if this proposed legislative instrument will have a significant regulatory impact and we are proposing substantive changes, and we will decide on a final policy position based on feedback from consultation and the RIS (if a RIS is required).
- 6 This report highlights the key issues that arose out of the submissions received on CP 238 and our responses to those issues.
- 7 This report is not meant to be a comprehensive summary of all responses received. We have limited this report to the key issues.

- 8 For a list of the non-confidential respondents to CP 238, see the appendix. Copies of these submissions are currently on the ASIC website at www.asic.gov.au/cp under CP 238.

Responses to consultation

- 9 We received three non-confidential submissions and one confidential submission to CP 238 from, or on behalf of, employee redundancy fund operators. We are grateful to respondents for taking the time to send us their comments.
- 10 The main issues raised by respondents related to:
- (a) whether employee redundancy funds are likely to meet the definition of a ‘managed investment scheme’ in the Corporations Act;
 - (b) whether employee redundancy funds should continue to remain exempt from the managed investment and associated provisions in the Corporations Act and, if so, whether this should be achieved through ASIC relief or law reform; and
 - (c) what the appropriate period should be for the extension of the interim relief in [CO 02/314].
- 11 All of the respondents were supportive of employee redundancy funds continuing to be exempt from the managed investment and associated provisions in the Corporations Act, whether this was achieved by ASIC relief or law reform.

B Extension of interim relief in [CO 02/314]

Key points

This section outlines the key issues raised by respondents—and our response to those issues. It covers:

- the application of managed investment and associated provisions to employee redundancy funds;
- the exemption from the managed investment and associated provisions; and
- the appropriate extension period for interim ASIC relief.

Application of managed investment and associated provisions to employee redundancy funds

- 12 We consider that employee redundancy funds are likely to meet the definition of a ‘managed investment scheme’ and a ‘financial product’ because employee redundancy funds accept contributions from employers made on behalf of employees, which are pooled and invested. 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 their redundancy.
- 13 This means that the operators of employee redundancy funds are likely to be subject to the managed investment and associated provisions in the Corporations 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 Ch 5C of the Corporations Act and other associated provisions, including those relating to Product Disclosure Statements (PDSs), ongoing disclosure requirements and the anti-hawking provisions.
- 14 There was a general consensus among respondents that employee redundancy funds are likely to meet the definition of a managed investment scheme because money is pooled and invested for a common purpose, but that they should generally be distinguished from typical managed investment schemes because they are not, and should not be regarded as, primarily investment related.

- 15 It was submitted that employee redundancy funds do not share the purpose of producing maximum financial benefits for members of the scheme that is common to typical managed investment schemes. Instead, employee redundancy funds aim to secure workers' redundancy entitlements through capital preservation. Additionally, members generally have no entitlement to financial benefits beyond the amounts contributed on their behalf.
- 16 Some respondents submitted that the managed investment and associated provisions were enacted to protect investors in the managed investment industry and not to protect members in employee redundancy funds.
- 17 One respondent submitted that the report of the *Review of the Managed Investments Act 1998* (Turnbull review), and our submissions to this review, expressed the view that it was uncertain whether employee redundancy funds meet the definition of a managed investment scheme. The respondent submitted that this remains uncertain because:
- (a) contributions are made by employers on behalf of members (not by members); and
 - (b) employee redundancy funds do not satisfy an essential component of the definition of a managed investment scheme (i.e. that they are investment related) because members are only entitled to benefits in the event of redundancy (or certain specified events) and fund income is not applied for the benefit of members.

ASIC's response

In the period since the introduction of the *Managed Investments Act 1998* and our submissions to the Turnbull review, the concept of what constitutes a managed investment scheme has become clearer.

We consider that employee redundancy funds are likely to meet the definition of a managed investment scheme and a financial product, even when payments are made to the fund by employers on behalf of members or when the benefits received by members are the portability or preservation of their redundancy benefits, and not a share in the income of the fund.

We therefore consider that employee redundancy funds are likely to be subject to the managed investment and associated provisions.

Before ASIC Corporations (Employee Redundancy Funds Relief) Instrument 2015/1150 is due to sunset, we intend to conduct further consultation and invite submissions about various matters, including whether, and in what circumstances, employee redundancy funds fall outside the definition of a managed investment scheme.

Exemption from the managed investment and associated provisions

- 18 There was a general consensus that employee redundancy funds should continue to remain exempt from the managed investment and associated provisions, with most respondents supporting the extension of ASIC relief.
- 19 Most respondents submitted that if the exemption from the managed investment and associated provisions was revoked, this would result in:
- (a) unnecessary and costly governance and administrative burdens that would not be relevant to employee redundancy funds, having regard to their purpose; and
 - (b) the erosion of an employee redundancy fund's ability to provide services to its members.
- 20 Some respondents submitted that it is unclear what imperative there is for extending the managed investment and associated provisions to employee redundancy funds because there have been no instances of fraud or default, nor any apparent appetite for review of this exemption from participating employers or members of employee redundancy funds.
- 21 One respondent submitted that exemption from the managed investment and associated provisions should be achieved by law reform instead of ASIC relief. Some respondents supported the extension of class order relief but also recommended amending the definition of managed investment scheme to specifically exclude certain employee redundancy funds.

ASIC's response

In providing interim relief since 2000, we have had regard to various considerations, including the impact that not extending relief would have on employee redundancy funds, pending Government consideration about how these funds should be regulated.

Law reform in the area of employee redundancy fund regulation is unlikely to occur before 1 October 2016, when [CO 02/314] is due to sunset.

Pending release of the final report of the Royal Commission and Government consideration of the Royal Commission's final report, we consider it is:

- inappropriate to commence a full policy review about the regulation of employee redundancy funds; and
- necessary to extend the interim relief for a limited period to preserve its effect.

Before ASIC Corporations (Employee Redundancy Funds Relief) Instrument 2015/1150 is due to sunset, we intend to conduct further consultation and invite submissions about various matters,

including whether, and in what circumstances, it is appropriate to exempt employee redundancy funds from the managed investment and associated provisions.

The appropriate period for extension of interim ASIC relief

22 In CP 238, we proposed a 12-month extension to the relief in [CO 02/314]. One respondent submitted that a 12-month extension is unworkable and that any legislative response is unlikely to result before 1 October 2017. This respondent submitted that the relief should be extended for a longer period.

ASIC's response

We agree that it is unlikely that any law reform resulting from Government consideration of the recommendations made in the final report of the Royal Commission will occur before 1 October 2017.

We are mindful that the interim relief in [CO 02/314] has never been subjected to full consultation and has been provided without any conditions. Any extension to the interim relief should be made on a limited basis only, having regard to the absence of full consultation and to the potential risks associated with continuing the exemptions on this basis.

We consider that a 24-month extension to the interim relief provides a sufficient but limited period of time for the Government to consider and respond to any recommendations on employee redundancy funds made by the Royal Commission and for ASIC to:

- consider any Government response to the final report of the Royal Commission;
- conduct further consultation on any proposal to remake ASIC Corporations (Employee Redundancy Funds Relief) Instrument 2015/1150; and
- undertake any other procedural steps associated with the making or remaking of legislative instruments.

Subsequent extensions to this interim relief can be considered by ASIC if policy settings remain unclear after this 24-month period.

Appendix: List of non-confidential respondents

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- ACIRT Pty Limited, as trustee of the Australian Construction Industry Redundancy Trust (ACIRT)
 - ElecNet (Aust) Pty Ltd, as trustee for the Protect Severance Scheme
 - The Redundancy Payment Central Fund Ltd, trading as Incolink, as trustee for The Incolink Redundancy Funds
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