



ASIC
Australian Securities &
Investments Commission

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and Investments Commission

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Mr Wayne Poels
Executive Director
Office of Best Practice Regulation
Department of the Prime Minister and
Cabinet
1 National Circuit
BARTON ACT 2600

Our Reference: 13195/18
Your Reference: ID 24188

By email: Helpdesk-OBPR@pmc.gov.au

12 September 2018

Dear Mr Poels

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

I am writing to the Office of Best Practice Regulation (**OBPR**) regarding the following Australian Securities and Investments Commission (**ASIC**) legislative instrument: ASIC Corporations (*Employee Redundancy Funds Relief*) Instrument 2015/1150 (**ASIC Instrument 2015/1150**).

Effect and purpose of ASIC Instrument 2015/1150

Employee redundancy funds

Employee redundancy funds are established to accept contributions from employers in the construction and allied industries, on behalf of their employees. The contributions represent prospective 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 structure, 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* under the *Corporations Act 2001* (the **Corporations Act**) 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 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**).

ASIC Instrument 2015/1150 provides relief to the operators of employee redundancy funds from the managed investment and associated provisions of the Corporations Act. In light of the industrial relations character and the practices and objectives of these funds which diverge so fundamentally from conventional managed investment schemes it is not clear that the funds should be caught by the managed investment scheme framework of the Corporations Act. This framework imposes considerable compliance burdens.

ASIC has provided relief since 2000 under a series of relief instruments. None of these have ever imposed substantive conditions. As such, employee redundancy funds have not been subject to any form of regulation, other than under State based trust law.

The Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017

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 entitlement funds consistent with recommendations made by the Royal Commission into Trade Union Governance and Corruption.

If this Bill is passed, ASIC is likely to decide to recommend to Government that changes are made to the Corporations Act and *Australian Securities and Investments Act 2001* (**ASIC Act**) legislation to permanently remove employee redundancy funds from the managed investment scheme regime.

Temporary extension of the relief in ASIC Instrument 2015/1150

ASIC Instrument 2015/1150 will sunset on 1 October 2018. The passage of the Bill and amendments to the Corporations Act and ASIC Act will not occur before 1 October 2018. For this reason, ASIC is proposing to rollover the relief in ASIC Instrument 2015/1150 to provide for certainty and clarity while the Bill proposing amendments to RO Act is currently still under consideration.

ASIC considers a 36-month extension to the relief provided by ASIC Instrument

2015/1150 is necessary to allow sufficient time for the passage of the Bill before the Senate and the necessary consequential amendments to the Corporations Act and ASIC Act be made to carve out worker redundancy schemes from regulation under these Acts.

If the Bill is not passed by the Senate then it will provide ASIC with sufficient time to consult further on whether the relief in ASIC Instrument 2015/1150 should continue to apply.

ASIC certifies that ASIC Instrument 2015/1150 is operating efficiently and effectively, and therefore a Regulation Impact Statement is not required for ASIC Instrument 2015/1150 to be remade for a further 36 months. This certification has been informed by:

- (a) a review of ASIC's records concerning reports of misconduct;
- (b) targeted consultation with a number of employee redundancy funds about the proposed rollover of ASIC Instrument 2015/1150 between the April and August 2018; and
- (c) responses to Consultation Paper 238 *Remaking ASIC class order on employee redundancy funds: [CO 02/314] (CP 238)* setting out ASIC's proposal to remake the former class order [CO 02/314] into ASIC Instrument 2015/1150. All of the submissions to CP 238 were supportive of employee redundancy funds continuing to be exempt from the managed investment and associated provisions, whether this was achieved by class order relief or law reform.

ASIC has been in constant consultation with Treasury and the Department of Jobs and Small Business about the passage of the Bill through the Senate and both are supportive of ASIC's proposal to extend (rollover) the relief provided in ASIC Instrument 2015/1150 by 36 months.

I acknowledge that OBPR will publish this letter for transparency purposes.

If you have any queries about this advice, please contact Elizabeth Korpi on (02) 9911 2481, or Elizabeth.Korpi@asic.gov.au.

Yours sincerely



Jane Eccleston
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Investment Managers and Superannuation