

Submission: Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Power) Bill 2018

Australian Timeshare and Holiday Ownership Council

The Australian Timeshare and Holiday Ownership Council (**ATHOC, we, our, or us**) is the industry body for the timeshare industry. ATHOC is a not-for-profit industry body established in 1994 to represent all interests involved in the Australian timeshare industry, and to work toward national industry best practice.

ATHOC operates nationally with an elected board representing a range of membership categories covering resorts, timeshare owners, developers and promoters, marketers, exchange companies and organisations providing professional advice to the timeshare industry.

ATHOC aims to foster a high standard of ethics and adherence to industry best practice amongst its members and to maintain good standing with all stakeholders (by requiring its members to abide by a code of ethics and a code of practice), to continually promote the benefits of the industry and to protect the goodwill of both members and consumers, and to assist members to achieve growth and profitability.

ATHOC's members include several AFS licensees, in particular responsible entities of timeshare schemes and sellers of timeshare.

Timeshare schemes which are registered with ASIC and involved in sales to new members are, by reference to ATHOC's responsible entity members, points-based schemes. The schemes involve the timeshare scheme acquiring various accommodation properties (such as resorts, apartments, hotels rooms, etc) and allocating a points value to each property. This points value determines the number of points or memberships which can be issued to new or existing members.

Consumers who acquire points/ a membership typically receive an annual allocation of credits or use points which can be exchanged to book accommodation (or for other benefits of or acquired via the scheme). By purchasing additional points, existing members increase their annual allocation of credits or use points and therefore the amount of accommodation which can be booked (or other benefits which be obtained through the club). The sale of timeshare to consumers is undertaken by timeshare sales agents, being authorised representatives of either the responsible entity or a related Australian financial services licensee. Timeshare sales agents provide personal advice to the consumer as they take into consideration a consumer's holiday needs, preferences and objectives when deciding whether to recommend the consumer acquire membership/points in the timeshare scheme, and consequently give the consumer a statement of advice and are subject to the best interests duty and related obligations.

Consumers who acquire timeshare products from a responsible entity may obtain a loan to assist fund such purchase. The lender will hold an Australian credit licence and while such entities are not members of ATHOC they are related to, or work in conjunction with, a responsible entity of a timeshare scheme.

ATHOC has consulted with a number of its AFS licensee members and makes the following submissions on the draft *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Power) Bill 2018 (Bill)* on behalf of those members.

Matter	Submission
Product intervention power	
<p>1</p> <p>The draft Bill provides that ASIC may only intervene in relation to products that are made available after commencement of the new power and that an order cannot apply to a product that has already been acquired or where a contract for the acquisition of the product has already been entered into.</p> <p>Further, ASIC can use its intervention power for a product, even if the person has complied with all applicable disclosure requirements and with the design and distribution obligations in relation to the product.</p>	<p>ATHOC's responsible entity members operate registered timeshare schemes. A majority of these registered schemes have been operating for more than a decade (and some much longer), have a substantial number of members and are engaged in ongoing sales.</p> <p>Each responsible entity's intention, as promoted to prospective and existing members, is to continue to grow the scheme through the scheme acquiring additional accommodation which facilitates the sale of further memberships. The growth of the scheme is for the benefit of all members as it provides a wider variety of holiday accommodation types, sizes and locations for members to use.</p> <p>ATHOC submits that ASIC's product intervention power should not apply to managed investment schemes, where interests in the scheme had been issued prior to commencement of the new power. That is, the product intervention power should not apply to issues of interests in such schemes which occur after the commencement of the new power.</p> <p>ATHOC considers that a circumstance where a responsible entity, who has operated a registered scheme and issued interests in the scheme in compliance with the disclosure and other requirements of the Corporations Act, could be prevented by ASIC from issuing further interests of the same kind to new members, and from issuing further interests to existing members, for up to 18 months is unreasonable and is also adverse and detrimental to both the members (who, in the context of timeshare schemes, have an expectation that the responsible entity intends to acquire further properties and issue further interests) and the responsible entity (who has established and operated the scheme, often for a significant period of time, in accordance with the disclosure, registered scheme and other provisions of the Corporations Act).</p> <p>ATHOC appreciates that prohibiting the issue of a product is only one of a range of orders which ASIC could make and that the draft Bill does not specify or limit the range of orders ASIC can make under an intervention order.</p>

Matter	Submission
	<p>However, ATHOC considers, particularly having regard to the examples of the possible types of orders the draft Bill and draft Explanatory Memorandum identify, that the existing regime provides adequate protections for existing and prospective members of timeshare schemes as:</p> <ul style="list-style-type: none"> (a) part of ASIC's update of its regulatory approach to timeshare products which is currently in progress, including revision of Regulatory Guide 160, timeshare products will be required to include a warning statement of the cover of the PDS; (b) the sale of timeshare products involves the provision of personal advice and therefore consumers have the benefit of the best interests and related obligations and the requirement to be given a statement of advice; (c) ASIC has the power to issue stop orders on offer documents; (d) consumers have access to a responsible entity's internal dispute resolution procedure and an external dispute resolution scheme if the consumer considers the sale or operation of the timeshare product has not been undertaken in compliance with the Corporations Act; and (e) a responsible entity is subject to fiduciary and statutory obligations in operating a registered scheme. <p>Accordingly, ATHOC submits that the above requirements adequately protect the interests of consumers and, for the reasons identified above, it would be unreasonable, and detrimental and adverse to the interests of both existing members and the responsible entity, if ASIC were able to prohibit the issue of interests in existing schemes to new members and the issue of further interests to existing members.</p> <p>Consequently, the draft Bill should be amended to specify that the product intervention power does not apply to managed investment schemes, where interests in the scheme had been issued prior to commencement of the new power.</p>

2	<p>ASIC must consult with people or entities that are likely to be affected by the order. Further, ASIC is taken to satisfy this requirement if it:</p> <ul style="list-style-type: none"> (a) makes a proposed order, or a description of such order, available on ASIC’s website; and (b) invites public comment on the proposed order. 	<p>ATHOC submits that section 1023F should be amended to expressly require ASIC to notify the person to whom the order will apply (which will typically be the product issuer) as part of the consultation process. As currently drafted, ASIC could post the proposed order on its website for public consultation and not specifically advise the person to whom it will apply of the proposal. If the person does not frequently check ASIC’s website, they may not be aware of the proposed order until a final order is served upon them in accordance with proposed section 1023L. A requirement to specifically notify the person affected is consistent with principles of natural justice, whereas the current draft is inconsistent with those principles.</p> <p>While ATHOC appreciates that a person would generally be aware that ASIC was considering making an intervention order prior to such order being released for public consultation, given the significant detriment to a person of an order being made against them and the importance of having the opportunity to make a submission on the proposed order, ATHOC recommends an obligation on ASIC to specifically notify a person of the proposal to make an intervention order against them be enshrined in legislation.</p>
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