

ATHOC submission on Quality of Advice Review Issues Paper

Background to ATHOC

- 1 The Australian Timeshare and Holiday Ownership Council (**ATHOC**) 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.
- 2 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.
- 3 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.
- 4 ATHOC's members include several AFS licensees, in particular responsible entities of timeshare schemes and sellers of timeshare.

Regulation of timeshare products and timeshare consultants

- 5 In Australia, timeshare schemes are regulated as managed investment schemes and interests in timeshare schemes are financial products, though timeshare is sold (and marketed) as a lifestyle product, rather than an investment product (and is not represented as offering a financial return). Indeed, ASIC mandates that product disclosure statements for timeshare schemes display a consumer warning on the front page which includes the statement that '*Timeshares **are not an investment** and you should not expect any financial return from a timeshare. You are buying an interest in a managed investment scheme for recreational use.*' In addition, the same statement must be given as part of a verbal warning issued to all consumers before they purchase an interest in a timeshare scheme.
- 6 The sale of timeshare products by responsible entities and other timeshare sellers who hold AFSLs is undertaken by timeshare sales personnel (**timeshare consultants**) who are representatives of an AFSL holder. The sale of timeshare products by timeshare consultants can involve the provision of personal financial product advice, although such advice is limited to recommending the number and type of interests a particular consumer should acquire in a particular timeshare scheme (if any), based on their holiday needs, holiday preferences (such as preferred holiday location, standard and type of accommodation, facilities available, holiday duration and time of holiday) and anticipated spend.
- 7 However, unlike financial advisers who provide financial advice to clients on investments, superannuation and insurance, there is not an ongoing relationship between the particular timeshare consultant and the timeshare purchaser, rather simply the sale of a lifestyle product. The timeshare consultant recommends the consumer acquire an interest in a particular timeshare scheme (if appropriate for the consumer based on their holiday

needs, holiday preferences and holiday spend) and the consumer decides whether to proceed with the recommendation, purchase timeshare interests and become a member of the timeshare scheme.

- 8 That is, the nature of the relationship between a timeshare consultant and consumer is fundamentally different to the nature of the relationship between a financial adviser and client.
- 9 The relationship between a client and a financial adviser is one of trust and confidence with the client heavily reliant on the financial adviser to assist the client to achieve their goals and objectives and the client often lacking the knowledge and expertise to determine if the financial adviser is competent and is acting in the client's interests. The extensive modifications to the legislative framework regulating financial advice, which commenced with the FOFA reforms, has sought to address this imbalance and increase the standard of financial advice and improve consumer confidence in financial advisers. Conversely, the relationship between a timeshare consultant and client is not one of trust and confidence and is better described and understood by consumers as a marketing or sale presentation. A consumer would not assume or expect that a timeshare consultant would be providing investment advice or planning advice given the product they are acquiring, the clear notice they are provided that timeshare is not an investment (as mandated by ASIC), the absence of any discussion around investments or financial returns and the limited scope of advice provided is clearly explained within the Financial Services Guide.
- 10 As personal advice is provided as a result of the timeshare consultant taking into consideration the consumer's holiday objectives and needs when making recommendations, timeshare consultants give consumers a statement of advice, which details any recommendation to purchase (or not purchase) membership in the timeshare scheme along with a summary of the reasons underlying the recommendation, and are required to comply with the best interests duty. Timeshare consultants are also required to comply with the Code of Ethics by virtue of being 'relevant providers' under the Corporations Act, even though the Code of Ethics is tailored to, and designed, for financial advisers.
- 11 However, in recognition of timeshare's nature as a lifestyle product, the timeshare industry has obtained a number of exemptions from requirements applying to other types of managed investment schemes or applying to financial advisers who provide advice on other types of financial products, including:
 - (a) an exemption from the ban on conflicted remuneration for monetary benefits given for advice that relates to an interest in a timeshare scheme, which permits timeshare consultants to be paid commissions on sales of timeshare products; and
 - (b) an exemption for timeshare consultants from the professional standards requirements to have a relevant bachelor or higher degree (or equivalent qualification), pass an exam, meet annual CPD requirements and complete a professional year. Conversely, as timeshare consultants are not subject to these requirements, they cannot call themselves a 'financial adviser' or 'financial planner'.
- 12 The exemption granted for timeshare products from the ban on conflicted remuneration recognised that:
 - (a) timeshare products are lifestyle products, as they are not designed to generate a return on investment for consumers (and as noted above, this is emphasised by both a warning statement on the front cover of the PDS as well as via a verbal warning issued by the timeshare consultant) but are more closely aligned with other lifestyle or leisure products sold within retail environments;

- (b) while defined as a managed investment scheme under the Corporations Act, timeshare products are inherently different compared to the financial products which financial advisers typically advise their clients on and are not designed to provide a return or form part of a financial plan;
 - (c) timeshare consultants provide advice only in respect of a single timeshare product and do not provide any financial advice about other products. They do not provide advice about different ways of investing – only advice as it relates to purchasing a single timeshare product to meet a consumer’s holiday needs and objectives;
 - (d) timeshare interests are not distributed through dealer groups or advisers, but are sold directly through sales offices by representatives of the issuer or a related entity; and
 - (e) timeshare interests are in-house products and not provided by a financial product manufacturer.
- 13 The current regulatory approach of exempting timeshare products from various Corporations Act reforms, often at the behest of ATHOC in response to proposed changes, where such reforms are not applicable for, nor targeted at, timeshare products is problematic, time-consuming and costly for the timeshare industry.
- 14 In response to proposed changes, the timeshare industry has had to regularly, and in particular over the past 10 years, assess the impact of proposed legislative reform on the timeshare industry and then incur time and cost in liaising with the Federal Government and/or ASIC to seek exemptions on the basis that the problem or issue the reforms are proposed to address are not problems or issues applicable for the timeshare industry (but will have significant detrimental impact for timeshare operators if such reforms did proceed). In particular, timeshare consultants being caught under the umbrella of ‘financial advisers’ (on the basis of providing personal advice) has been problematic as a result of the large number of regulatory reforms designed to address the conduct and competency of financial advisers.
- 15 On behalf of its AFS licensee members and their timeshare consultants, ATHOC makes the following submission on the Quality of Advice Review Issues Paper (**Issues Paper**). As most of the questions raised in the Issues Paper are more relevant or applicable for financial advisers providing financial advice, in contrast to timeshare consultants selling timeshare products, ATHOC’s submission addresses the two key areas of concern for the timeshare industry, rather than responding to each stakeholder question.

Submission – undesirable unintended consequences

- 16 The Issues Paper draws a distinction between financial advice, being the focus of the Review, and financial product advice, being the activity regulated by the Corporations Act. In drawing the distinction, the Issues Paper poses the question as to what extent should the gap between financial advice and financial product advice be addressed in the regulatory framework and to what extent is it relevant to the purpose of the Review.
- 17 Further, paragraph 2.4 of the Terms of Reference acknowledges the Review will investigate:

'Whether parts of the regulatory framework have in practice created undesirable unintended consequences and how those consequences might be mitigated or reduced'.

- 18 ATHOC agrees there is a distinction between financial advice and financial product advice. ATHOC considers financial advice is commonly understood as general or personal advice provided by financial advisers or product issuers to consumers on investment products, superannuation products and insurance/risk products. Conversely, financial product advice has a broader application and also covers other financial products, including timeshare, in relation to which financial advisers would not generally provide advice and are not for investment, superannuation or insurance purposes. However, while such distinction exists and is valid, ATHOC notes that such distinction is generally not recognised in the regulatory regime under the Corporations Act.
- 19 In relation to timeshare, the last major Government review of the regulation of timeshare in Australia was undertaken in 2005 by the Joint Parliamentary Committee on Corporations and Financial Services (**Committee**) and culminated in the *Timeshare: The Price of Leisure* report (**Report**). The Committee recommended, at recommendation 2, that timeshare has its own separate chapter in the Corporations Act, because timeshare as a 'leisure product' is fundamentally different from other financial products, rather than being regulated as a managed investment scheme.
- 20 However, despite bi-partisan support, the then Howard Government did not support recommendation 2 as it considered that the Corporations Act had sufficient flexibility to enable requirements to be modified to provide for the unique characteristics of timeshare compared with other managed investment schemes. This approach has been followed by successive Federal Governments with legislative amendments impacting financial services providers and managed investment schemes being amended to, where considered appropriate by Government or ASIC, modify their application, or to exempt the application of such requirements, to the timeshare industry. This incurs substantial resource cost both to the timeshare industry and the Government.
- 21 ATHOC submits that the failure of successive Federal Governments to implement the Committee's recommendation 2 has resulted in undesirable unintended consequences for the sale and promotion of timeshare products by timeshare consultants including the regulation of a sale as financial advice. As detailed in Text Box 1 in the Issues Paper, there have been significant reforms impacting the provision, and regulation, of financial advice since the Federal Government's response to the Report in 2005 including the FOFA reforms, Professional standards reform and the reforms following from the Financial Services Royal Commission, and these reforms have (subject to some exemptions) applied to timeshare products as financial products and to timeshare consultants as providers of financial product advice.
- 22 The Issues Paper also poses the question on whether there is a practical difference between financial advice and financial product advice and should they be treated in the same way by the regulatory framework.
- 23 ATHOC considers that there is a clear practical difference between financial advice and financial product advice which supports a different regulatory approach to, and treatment of, the provision of 'advice' on timeshare products compared to investment, superannuation and insurance products, as evidenced by the factors listed at paragraph 12. Specifically, ATHOC submits:
 - (a) the nature of timeshare as a 'lifestyle' product and not an investment, superannuation, insurance or similar product intended for financial benefit or return;

- (b) the transactional and 'sales' nature of the relationship between a timeshare consultant and a consumer where the consumer attends a presentation on the timeshare product and understands that the purpose of the presentation is to encourage the consumer to purchase the timeshare product (if the timeshare consultant recommends the consumer to do so on the basis that it is appropriate for the consumer and meets the consumer's holiday needs and objectives) is fundamentally different from the nature of the relationship between a financial adviser and client (as explained at paragraph 9);
- (c) a consumer attending a presentation on a timeshare product would not expect to receive investment or planning advice from a timeshare consultant; and
- (d) a timeshare consultant cannot refer to themselves as a financial adviser and is not required to meet the education and training requirements of financial advisers,

demonstrates pronounced structural differences between timeshare products and other financial products, timeshare consultants and financial advisers, and the relationship between timeshare consultants and consumers and financial advisers and their clients, which justifies a tailored approach to regulation of financial product advice on timeshare products.

24 In particular, ATHOC recommends that:

- (a) timeshare consultants should not be subject to the best interests duty as consumers would not expect, based on the nature of their interaction with a timeshare consultant, such fiduciary-style duty to be owed to them by a timeshare consultant and a fiduciary-style duty is not appropriate for the transactional and sales nature of the relationship between timeshare consultants and consumers. Rather timeshare consultants should be subject to a duty similar to that which previously applied under section 945A of the Corporations Act prior to the FOFA reforms, namely that the advice is appropriate to the client's personal circumstances and the client is warned if the advice is based on incomplete or inaccurate information. The relevant personal circumstances that a timeshare consultant considers would be limited to the client's holiday history, preferred holiday locations, nature and size of holiday accommodation and future holiday requirements; and
- (b) timeshare consultants should not be subject to the FASEA Code of Ethics, as the Code of Ethics is specifically designed and tailored for financial advisers and is not appropriate for timeshare consultants who are not part of the financial adviser 'profession', are not subject to the education and training standards of financial advisers and have a fundamentally different relationship with consumers compared to the relationship between a financial adviser and its clients.

25 ATHOC considers such differential regulatory approach will adequately protect the interests of consumers (given the nature of their relationship and interaction with timeshare consultant, timeshare's purpose as a lifestyle product and other consumer protection measures in place including expanded disclosures, warning statements and cooling off period), reduce the considerable cost burden to timeshare consultants and timeshare licensees on complying with a regulatory regime designed for financial advisers and financial advice, and is consistent with the Federal Government's response to the Committee's recommendation 2 of the Report that the preferred approach for regulating timeshare (having regard to its unique characteristics) is to modify the Corporations Act to tailor its application to timeshare products in recognition of its unique characteristics. The implementation of ATHOC's

recommendation would address the undesirable unintended consequences which have resulted from timeshare consultants and advice on timeshare products being regulated in substantially the same manner as financial advisers and financial advice.

- 26 ATHOC appreciates its recommendation could be achieved by granting exemption for timeshare consultants from the applicable provisions of the Corporations Act. However, ATHOC recognises that such course of action represents a continuation of the current regulatory approach for timeshare (as originally espoused by the Federal Government in response to the Committee's Report) of 'regulation by exemption', and that such approach is inconsistent with the Financial Services Royal Commission's finding that regulation by exemption should be avoided as it causes uncertainty, confusion and complexity.
- 27 Accordingly, ATHOC submits that such concerns can be addressed and reconciled by the implementation of the Committee's original recommendation 2 – that timeshare has its own separate chapter in the Corporations Act which, among other matters, would regulate the provision of advice on timeshare products by timeshare consultants.

Submission – continuation of exemption from conflicted remuneration ban for timeshare

- 28 ATHOC acknowledges the Review is considering the continuation of exemptions from the ban on conflicted remuneration, including the exemption for monetary benefits given for advice that relates to a time-sharing scheme (regulation 7.7A.12C).
- 29 The final report from the Financial Services Royal Commission recommended, at recommendation 7.3, that as far as possible exceptions and qualifications to generally applicable norms of conduct in legislation governing financial services entities should be eliminated. In making this recommendation, the Financial Services Royal Commission noted that '*Removing exceptions and limitations encourages understanding and application of the law in accordance with its purposes*' and '*Like cases are more evidently treated alike*'.
- 30 As determined by the Committee in its Report, and evidenced by the various Corporations Act exemptions granted for timeshare schemes as outlined at paragraph 8, timeshare products are fundamentally different from and not 'like' other types of managed investment schemes and other financial products more generally. It should also be noted that timeshare and timeshare consultants did not form part of the products or advice reviewed by the Financial Services Royal Commission.
- 31 Accordingly, ATHOC submits that the rationale and factors which supported the grant of the timeshare exemption from the conflicted remuneration ban, as articulated at paragraph 12, continue to be applicable and justify the continuation of the exemption. ATHOC also considers such approach is consistent with the Financial Services Royal Commission recommendation – as timeshare products are not 'like' other managed investment or other financial products and should not be regulated as 'like' products. Timeshare products are unique and should be regulated as such.