

Submission: Review of the Australian Financial Complaints Authority

Australian Timeshare Holiday Ownership Council

The Australian Timeshare 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 and this submission is made on behalf of those members. These licensees are members of the Australian Financial Complaints Authority (**AFCA**) and have direct experience in dealing with AFCA in resolving consumer complaints.

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. Credit licensees are also members of AFCA and they have had experience in dealing with AFCA in the resolution of consumer complaints.

ATHOC appreciates the opportunity to provide feedback to Treasury on the operation of AFCA and ATHOC has consulted with a number of its AFS licensee members and makes the following submissions on behalf of those members.

Issue	Submission
<p>1 Delivering against statutory objectives? Is AFCA meeting its statutory objective of resolving complaints in a way that is fair, efficient, timely and independent?</p>	<p>ATHOC is concerned that AFCA is failing to meet its statutory objective of resolving complaints in a way that is fair, efficient, timely and independent. In particular, ATHOC is concerned that AFCA is regularly failing to resolve complaints in a way that is fair to both parties and independent and that AFCA has a strong complainant bias in its approach to resolving complaints.</p> <p>Examples of such bias experienced by ATHOC members include:</p> <p>(a) 'coaching' complainants in making a complaint – ATHOC members have experienced instances where AFCA has suggested to a complainant to change the substance of their complaint to increase the likelihood of AFCA finding in favour of the complainant. For example, a complaint referred to AFCA (after going through the financial service provider's (FSP) IDR process) related to a complainant being unable to reserve their preferred accommodation at their preferred time of year as such accommodation had been booked by other members. AFCA initially informed the complainant that AFCA did not have jurisdiction to hear the complaint as it related to the operation of the scheme. However, AFCA also advised the complainant that if representations were made to the complainant when they purchased the timeshare product that they would be able to book the accommodation they wanted for the period desired, then AFCA would be able to handle the complaint.</p> <p>Subsequently, the complainant revised their AFCA complaint to include allegations that such representations were made during the sales process and AFCA accepted the complaint. However, the member had not made any suggestion or implication during the IDR process or initial AFCA referral that such representations were made during the sales process or were relied on in making the purchase. The FSP was then required to demonstrate to AFCA that no such representations were made and pay the AFCA fees for AFCA determining the complaint (when the actual</p>

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	<p>compliant made by the complainant should not have been accepted).</p> <p>While ATHOC acknowledges that complainants are not financial services experts and it is appropriate for AFCA to determine the link between the nature of a complainant’s complaint and any misconduct or breach by a licensee, ATHOC considers there have been several instances of AFCA suggesting to the complainant the nature of a complaint they should make which, in ATHOC’s view, is conduct which is contrary to AFCA’s obligations of fairness and independence;</p> <p>(b) imposing standards or obligations on FSPs which are above and beyond their licensee and statutory obligations – ATHOC members have experienced circumstances where AFCA has sought to impose obligations on FSPs, which are in addition to the obligations applying under their AFSL or Corporations Act obligations, and then assesses FSPs against such standards in determining complaints. For example, AFCA considering whether an FSP has acted inappropriately by failing to provide financial hardship assistance to a timeshare member where no such obligation exists under the Corporations Act, AFSL conditions or the scheme constitution, and where no representation had been made to members that the FSP would offer or provide such assistance. Again, ATHOC submits that imposing standards or obligations on FSPs which are above and beyond the obligations applying to FSPs under the Corporations Act, AFSL conditions, scheme constitutions or otherwise adopted by the FSP via representations to consumers, and assessing FSPs against such standards or obligations in determining a complaint, is not consistent with AFCA’s obligations of fairness and independence;</p> <p>(c) bias in assessing evidence - AFAC’s Operational Guidelines provide that where conflicting information is provided by the parties, AFCA will need to decide the weight to give to the</p>

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	<p>various information, which will, in part, depend on the reliability of the information. Further, in assessing the reliability of information, AFCA notes that generally, and among other factors, contemporaneous notes are more reliable than an oral recollection.</p> <p>However, in practice, ATHOC members have found that AFCA gives the greatest evidential weight to complainant recollections of events and oral statements (which may have occurred years prior to AFCA’s consideration of the complaint and which are not supported by any contemporaneous notes or documents) and prefers such evidence to contemporaneously-created documentary evidence provided by the FSP (and often supported the recollection of events by FSP personnel).</p> <p>That is, ATHOC members frequently feel that the onus is on FSPs to disprove any assertions made a complainant rather than AFCA fairly weighting each party’s conflicted evidence based on the reliability of such evidence (and having regard to AFCA’s own operational guidelines). Again, ATHOC submits that such conduct is contrary to AFCA’s obligation of fairness and impartiality; and</p> <p>(d) accepting complaints outside jurisdiction – ATHOC members have reported circumstances of AFCA accepting complaints which are clearly outside its jurisdiction. While AFCA states that it can decide to accept complaints which are outside the scope of complaints which it is required to accept, ATHOC considers this discretion should only be exercised in exceptional circumstances (which has not been the experience of ATHOC members to date).</p> <p>Further, where AFCA accepts a complaint which is outside its jurisdiction, it should be required to explain to the FSP its reasons for doing so. Currently, AFCA provides no explanation</p>

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	<p>or gives any reason to an FSP where AFCA accepts a complaint outside the scope of its jurisdiction.</p>
<p>1.1</p>	<p>Is AFCA’s dispute resolution approach and capability producing consistent, predictable and quality outcomes?</p> <p>ATHOC members are concerned that AFCA’s approach to dispute resolution has produced inconsistent outcomes, with similar fact circumstances resulting in contrary outcomes. While AFCA cautions FSPs that previous determinations should not be treated as precedents, FSPs do take account of AFCA findings and determinations of complaints against the FSP in determining whether or not changes are required to documents, systems and processes and in dealing with subsequent similar complaints through the IDR process.</p> <p>ATHOC believes that factors which contribute to inconsistency of outcomes are high turnover of AFCA staff (at both analyst and manager level), lack of industry knowledge and expertise (for example, not understanding how timeshare schemes operate or the specific regulatory requirements and exemptions applying to timeshare) and a failure of the analyst to consider similar circumstances prior to making a determination (specifically, previous similar matters for the same FSP).</p> <p>In particular, ATHOC considers the complaint determination process and quality and consistency of AFCA’s decision making for timeshare-related complaints could be improved by AFCA having (and retaining) dedicated staff with timeshare experience and expertise who are responsible for dealing with any timeshare-related complaints made to AFCA.</p> <p>Further, if AFCA makes a determination that is contrary to a previous determination on the same or similar complaint issue, such decision should be reviewed by an ombudsman prior to being issued by an analyst and AFCA should clearly and comprehensively outline the factors explaining AFCA’s decision and change in approach.</p> <p>ATHOC submits a key foundation of AFCA’s credibility and effectiveness as a dispute resolution body for the financial services industry is the reliability of its decisions and FSPs having confidence in consistency of outcomes for similar complaints.</p>

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<p>1.2 Are AFCA's processes for the identification and appropriate response to systemic issues arising from complaints effective?</p>	<p>ATHOC believes AFCA's process for the identification and treatment of systemic issues is not effective as it can perpetuate and exacerbate the impact of AFCA incorrectly applying the law, preferring a complainant's recollections or oral evidence over the FSP's evidence or failing to act fairly and impartially in determining complaints.</p> <p>FSPs are bound to accept AFCA's decision (either at analyst or, if appealed, at panel or ombudsman level) as a requirement of membership even if they do not agree with the decision and FSPs frequently decide to settle a complaint or accept an analyst determination for commercial, rather than meritorious, reasons such as minimising fees payable to AFCA or avoiding any reputational damage if AFCA finds in favour of a complainant and publishes its decision (where the FSP does not have the ability to query or challenge the assumptions or position taken by AFCA prior to the determination being issued).</p> <p>While an FSP may disagree with AFCA's view or determination and have concluded that no breach of its obligations has occurred and no obligation to notify ASIC has arisen, the impact to an FSP of an erroneous or unfair AFCA determination in relation to a single complaint can still have a substantial financial impact for the FSP (particularly, post-COVID 19 as the significant reduction in sales has increased the adverse impact of unfair AFCA decisions on the operations and financial position of FSPs in the timeshare industry).</p> <p>In addition, where such determination is consequently treated as a systemic issue by AFCA there will be a significant detrimental impact on an FSP from a financial, resource utilisation and time perspective. This is because the finding of a systemic issue generally involves the FSP having to advise clients that AFCA considers a particular matter to be a breach of the FSP's licensee obligations, inviting consumers to contact the FSP if they have any concerns and resolving any such concern in the complainant's favour given the previous AFCA determination.</p> <p>While AFCA purports to undertake an investigation in a potential systemic issue without having a predetermined view, unless an FSP can demonstrate that the complaint relates to a particular factual circumstance, invariably</p>

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	<p>AFCA will conclude a systemic issue exists and there is a strong bias for AFCA to do so. This bias exists as for AFCA to determine that a systemic issue does not exist necessitates AFCA acknowledging that its original determination was incorrect (in the absence of the complaint which triggered the systemic issue investigation relating to a particular factual circumstance).</p> <p>Further, given the significant detriment to FSPs of a systemic issue finding (and rectification of such issue), ATHOC is concerned that AFCA does not possess sufficient expertise, experience and skills to make such findings as they usually involve an identification and interpretation of law and application of such interpretation to the facts or to an FSP's conduct. Such function is more appropriately handled by a regulator (such as ASIC) or the Courts.</p> <p>For example, circumstances have arisen where AFCA has made a systemic issue finding and required remediation to be undertaken where ASIC has not considered a breach of an FSP's statutory obligations or AFSL conditions has occurred or required any action from an FSP. Also, it is unreasonable for AFCA to impose higher standards upon an FSP than those applying at law and then make a systemic issue finding in relation to a failure to comply with such standards.</p> <p>ATHOC submits that given:</p> <ul style="list-style-type: none"> (a) the significant impact on and detriment to an FSP of a systemic issue finding; and (b) concerns about AFCA having the appropriate skills and expertise to determine whether an FSP has breached its licensee obligations, make a systemic issue finding and determine appropriate remediation, <p>that there should be a review mechanism which enables an FSP to appeal a systemic issue finding and/or a proposed AFCA remediation program for consideration by a person external to AFCA, such as the Independent Assessor.</p>
1.3	<p>Do AFCA's funding and fee structures impact competition? Are there enhancements to the funding model that should be considered by</p> <p>As AFCA is the only dispute resolution body of which ATHOC's AFSL members (and associated ACL holders) can be a member, AFCA's funding</p>

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<p>AFCA to alleviate any impacts on competition while balancing the need for a sustainable fee-for-service model?</p>	<p>and fee structures do not impact competition as there no competition to be impacted.</p> <p>However, AFCA’s fee structures do impact the efficacy and effectiveness of AFCA’s dispute resolution service as, in conjunction with AFCA’s strong bias in favour of complainants and lack of fairness (based on the experience of ATHOC members), they:</p> <ul style="list-style-type: none"> (a) act as a deterrent to FSPs enabling complaints referred to AFCA to be resolved through the AFCA process; and (b) encourage FSPs to settle complaints, including complaints determined in the FSP’s favour which the complainant then refers to the panel or ombudsman, even if the FSP has complied with its duties and obligations. <p>As there is no cost to a complainant in using the AFCA process, there is an incentive (and no disincentive) for complainants who do not receive a favourable preliminary assessment to refer the matter to a panel or ombudsman (as a majority of timeshare complaints to AFCA fall within the ‘Standard & Complex’ category).</p> <p>Given the high cost to FSPs of complaints proceeding to an ombudsman/panel and impact on subsequent year levies, FSPs are frequently forced to adopt the financially prudent approach of settling the complainant’s complaint, either once referred to AFCA or upon receipt of a favourable preliminary assessment, even if the likely outcome is that the panel or ombudsman will find in favour of the FSP.</p> <p>AFCA recommends the Government consider directing AFCA to review its fee structure as it is currently producing unfair and detrimental outcomes for FSPs. For example, if a preliminary assessment is in favour of the FSP and the complainant rejects the determination and it is referred to a panel or ombudsman, no fee should be charged to the FSP (and there should be no impact on their levy) if the panel or ombudsman finds in favour, or substantially in favour of, the FSP.</p>

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2	<p>Monetary jurisdiction in relation to primary production businesses</p> <p>Do the monetary limits on claims that may be made to, and remedies that may be determined by, AFCA in relation to disputes about credit facilities provided to primary production businesses, including agriculture, fisheries and forestry businesses remain adequate?</p>	<p>Not applicable for ATHOC members.</p>
3	<p>Internal review mechanism</p> <p>AFCA's Independent Assessor has the ability to review complaints about the standard of service provided by AFCA in resolving complaints. The Independent Assessor does not have the power to review the merits or substance of an AFCA decision.</p>	<p>ATHOC believes that the current limited scope and remit of the function of AFCA's Independent Assessor is not appropriate or effective for the following reasons:</p> <ul style="list-style-type: none"> (a) the key concern for an FSP is the outcome of the AFCA complaint and, in particular, whether the FSP considers AFCA was fair, impartial and correct in its decision-making and handling of the complaint. While AFCA's Independent Assessor can consider complaints about impartiality and fairness (as well as service standard related complaints such as timeliness, communication and AFCA staff performance) as the Independent Assessor assesses complaints after the particular matter is closed (except in exceptional circumstances), cannot make recommendations to re-open or change a determination, and remedies available through this process are limited (i.e. primarily an apology or compensation of up to \$5,000), this process is of little practical value to, and therefore not well utilised by, FSPs who are concerned that AFCA has not acted fairly and impartially in making a determination; and (b) for complaints about service standards, as the Independent Assessor will assesses complaints after the particular matter is closed (except in exceptional circumstances), the process provides limited assistance in holding AFCA to account for meeting its service standards during the course of a complaint. Consequently, an FSP will not generally be inclined to expend the time or effort in raising concerns with the Independent Assessor about poor service by AFCA after finalisation of the complaint to which those issues relate.

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<p>Is the scope, remit and operation of AFCA’s Independent Assessor function appropriate and effective?</p>	<p>For the reasons explained in the response to issue 4, ATHOC considers there should be a mechanism for the review of AFCA decisions and ATHOC submits that such mechanism could be implemented by expanding the scope and remit of the Independent Assessor’s role to include such function.</p> <p>Further, as AFCA decisions are binding on FSPs, ATHOC submits the recommendations of the Independent Assessor should be binding on AFCA. It undermines the efficacy, and FSP confidence in the integrity, of the Independent Assessor process if AFCA is not required to implement such recommendations (particularly given the limited remedies the Independent Assessor can currently recommend).</p>
<p>4</p>	<p>Is there a need for AFCA to have an internal mechanism where the substance of its decision can be reviewed? How should any such mechanism operate to ensure that consumers and small businesses have access to timely decisions by AFCA?</p>
<p>ATHOC strongly supports the necessity for a mechanism to review the substance of AFCA decisions. Such mechanism can be ‘internal’, in term of it not being ASIC, the Courts or external body, provide it is not an internal mechanism within AFCA where AFCA personnel review the decisions of other AFCA personnel. As mentioned at item 3, ATHOC supports the expansion of the role of the Independent Assessor to perform this review function.</p> <p>ATHOC acknowledges concerns with a review mechanism, particularly from a complainant’s perspective, as a review process may impact the goal of AFCA providing timely resolution of disputes.</p> <p>However, ATHOC submits that such review mechanism could be structured so as to ensure it is not misused by either FSPs or complainants to unreasonably prolong the resolution of disputes or seen as another ‘step’ in the AFCA process, and is only used in circumstances where a party has serious concerns with the correctness (for example, whether the applicable law has been interpreted correctly), fairness, impartiality or merits of AFCA’s findings, decision or remedy.</p> <p>For example, an upfront fee could be payable by an FSP or complainant who refers an AFCA determination for review with such fee refundable if the referrer’s concerns are fully or substantially upheld by on review. While the AFCA process is, and should remain, free to consumers, ATHOC considers that a fee should be payable by any party who refers a matter for review so the process is not misused.</p>	

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	<p>In addition, the review mechanism should also cover systemic issue findings by AFCA and the suitability and reasonableness of remedies imposed by AFCA to address such systemic issues (i.e. enable an FSP to refer such matters for review).</p> <p>As there is already an Independent Assessor, ATHOC submits that an efficient and cost effective means of introducing a review mechanism would be to expand the scope and ambit of the Independent Assessor to perform this function. ATHOC acknowledges that this would require an increase in resourcing for the Independent Assessor to examine complaints referred to it and a consideration of skills and expertise required to perform this expanded role. However, ATHOC believes that this approach is preferred to creating a new role or mechanism.</p> <p>Further, it would be necessary to ensure that the staff utilised by an Independent Assessor are independent from AFCA staff to protect the integrity and transparency of the process.</p>