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**COMMONWEALTH GOVERNMENT RESPONSE
TO THE
PARLIAMENTARY JOINT COMMITTEE ON
CORPORATIONS AND FINANCIAL SERVICES
REPORT ON**

TIMESHARE: THE PRICE OF LEISURE

GOVERNMENT RESPONSE TO THE REPORT OF THE PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES – *TIMESHARE: THE PRICE OF LEISURE*

BACKGROUND

On 8 December 2004, the Parliamentary Joint Committee on Corporations and Financial Services (PJC) agreed to conduct an inquiry and report on the regulation of the timeshare industry. The report, entitled *Timeshare: The Price of Leisure*, was tabled in the Parliament on 5 September 2005.

The report contains 19 recommendations, the main one being that timeshare schemes should no longer be regulated as managed investment schemes under Chapter 5C of the *Corporations Act 2001* (the Corporations Act), but should be given their own chapter. The report also recommends that the new chapter should contain a number of consumer protection provisions.

Other substantial recommendations of the report are that contracts for the purchase of timeshare interests be required to include a minimum buy back amount and that an Australian Government agency (and possibly agencies in the States and Territories as well) be established to acquire compulsorily the interests of delinquent members in older 'title-based' timeshare schemes.

The Government's response to each of the report's recommendations is outlined below.

THE GOVERNMENT'S RESPONSE TO THE COMMITTEE'S RECOMMENDATIONS

RECOMMENDATION 1

The Committee recommends that timeshare should continue to be regulated under the *Corporations Act 2001*.

The Government **supports** this recommendation.

Regulation of timeshares under the *Corporations Act* is appropriate and works effectively to control the operations of the industry and its conduct.

RECOMMENDATION 2

The Committee recommends that:

- **Timeshare should be removed as a definitional element of the managed investment funds under s.9 of the *Corporations Act 2001*; and**
- **A separate chapter be inserted into the *Corporations Act 2001* to deal specifically with timeshare.**

The Government **does not support** this recommendation.

Timeshare schemes share all the basic elements of managed investment schemes and therefore warrant regulation as such. Where timeshare has unique characteristics compared with other managed investment schemes, the *Corporations Act* contains sufficient flexibility such that the requirements can be modified. Indeed, ASIC has used its power in this area to grant concessions and 'relief' to various timeshare schemes.

Inclusion of a new chapter of various consumer protection measures would replicate existing provisions in the ASIC Act and *Corporations Act* which already apply to financial products such as timeshare interests (as managed investment schemes, timeshare schemes are also financial products.)

RECOMMENDATION 3

The Committee recommends that the Australian Competition and Consumer Commission (ACCC) establish and maintain a watching brief on the level of concentration of the Australian timeshare market.

The Government **does not support** this recommendation.

The ACCC is the independent statutory authority responsible for enforcing and administering the *Trade Practices Act 1974* (TPA). In undertaking this role, the ACCC considers and investigates information regarding potential breaches of the TPA. Relevantly, subsection 29(1A) of the TPA prohibits the Minister from giving directions to the ACCC about the performance of its functions or exercise of its powers under Part IV of the Act (prohibition of anti-competitive conduct).

The ACCC carries out these functions in accordance with its statutory obligations and is resourced sufficiently to do so. The ACCC will continue to make appropriate decisions regarding monitoring, in the light of complaints it receives and other information it gathers.

RECOMMENDATION 4

The Committee recommends that the proposed chapter in the *Corporations Act 2001* include specific provisions proscribing pressure selling tactics in the sale of timeshare. These provisions should include the remedy of a full refund to any customer who can reasonably show that their decision to enter a timeshare contract was procured by physical, psychological, social or economic threat or intimidation.

The Government does not support this recommendation.

Existing financial services regulation in the Corporations Act and ASIC Act already deals with this issue. Specifically, sections 12DB and 12DC of the ASIC Act which deal with false representations and other misleading or offensive conduct have a wide application. Additionally, sections 12DJ and 12CB prohibit certain activities, including harassment and coercion and unconscionable conduct, and section 992AA of the Corporations Act addresses anti-hawking practices.

As a condition of their licence, cooling-off provisions apply to Australian financial services licensees who sell timeshare - the length of that cooling off period depended on the nature of the scheme and whether the parties were members of ATHOC. ASIC's revised policy statement extends this cooling off period across the board to 14 days, effective on 30 September 2007. This will provide added protection for consumers against pressure selling.

Implementing this recommendation would involve the introduction of additional regulation, which would duplicate existing provisions, with little demonstrated benefit.

RECOMMENDATION 5

The Committee recommends that the Australian Timeshare and Holiday Ownership Council (ATHOC) produce a detailed statement of practice outlining the types of behaviour which should be regarded as pressure selling in timeshare.

The Government supports this recommendation but notes that this is a recommendation for which it is not responsible as it is directed to a specific industry body.

The Government recognises the significance and importance of industry bodies in assisting with the co-regulatory process, including providing their industry members with relevant standards and codes of practice to regulate industry behaviour. Codes offer an efficient and flexible method for encouraging good practices.

ATHOC has indicated its strong support for a co-regulatory role with ASIC.

RECOMMENDATION 6

The Committee recommends that future training courses provided to timeshare sales personnel should include specific training on the avoidance of pressure selling.

The Government **supports** this recommendation.

The selling of financial products such as timeshares is regulated under the Corporations and ASIC Acts and includes obligations to ensure staff are trained appropriately. Legislation already regulates pressure selling issues (as set out in the response to recommendation 4 above) and provides a full suite of provisions to regulate how timeshare advice is provided. The legislation also includes appropriate penalties for breaches.

The Government would support further emphasis on training on this issue but notes that in relation to managed investment schemes, such as timeshare, training already exists on misleading or deceptive conduct and unconscionable conduct practices, which would encompass the issue of pressure selling. Again, the industry codes of conduct will help address this issue.

The Government supports training packages that ensure that those selling timeshare schemes are made aware of their obligations under the law and how to comply.

In the context of the Government's Corporate and Financial Services Regulation Review Proposals Paper, ASIC has committed to undertake a review of its training requirements under Policy Statement 146. Changes suggested and strongly endorsed include providing specific training for specific services, such as timeshare.

RECOMMENDATION 7

The Committee recommends that the proposed timeshare chapter in the *Corporations Act 2001* state any approach to a potential timeshare customer, whether by a timeshare company, a marketing company, or any other agency, must make it clear that:

- **The purpose of the approach is, or includes, selling an interest in timeshare; and**
- **Any inducement offered is premised on attendance at such sales seminars.**

The Government **does not support** this recommendation.

Existing financial services regulation in the Corporations Act and ASIC Act already deals with this issue (misleading and deceptive, and unconscionable conduct). Again, industry codes of practice and conduct would also satisfactorily police this issue without the need for further regulation. We note that ATHOC sets out in its codes for members that all its members who market to consumers must state to their clients that they are being sold a financial product, such as a timeshare or holiday ownership.

RECOMMENDATION 8

The Committee recommends that the proposed timeshare chapter in the *Corporations Act 2001* mandate that:

- Any term of any offer made in the course of selling timeshare should be available for one week after the term is offered; and
- Such terms should not be offered on the basis that the customer can only obtain the term by signing the contract immediately.

The Government **does not support** this recommendation.

Cooling off provisions already apply to sales of timeshares by Australian financial services licensees and allow the consumer the option to notify the seller that they want to rescind the contract and obtain a full refund. This will be further enhanced by ASIC's extension of the cooling off periods to 14 days (refer recommendation 4 above).

The provisions in the ASIC Act relating to unconscionable conduct and harassment also offer consumer protection against such practices. Further, ATHOC's industry codes of practice and ethics reflect the need to ensure that operators do not intimidate or threaten consumers to sign contracts.

Any further regulation would mean duplication and be unnecessarily burdensome.

RECOMMENDATION 9

The Committee recommends that timeshare sellers be required to disclose to consumers that an interest in timeshare does not involve any form of ownership of real property. This disclosure should be:

- made prior to contract information;
- made in clear language; and
- included in the relevant Schumer boxes.

The Government **does not support** this recommendation.

The Corporations Act sets out the information which must be provided in a product disclosure statement which needs to be issued for the sale of a financial product such as timeshare. This includes information about any significant characteristics or features of the product or of the rights, terms, conditions and obligations attaching to the product. Further, there is an existing requirement that this information be presented in a clear, concise and effective manner.

The corporations legislation also contains provisions to prohibit false or misleading conduct.

RECOMMENDATION 10

The Committee recommends that the proposed timeshare chapter in the *Corporations Act 2001* should contain anti-hawking provisions similar to those contained in s.992A of the Corporations Act, and should make it clear that those provisions apply to unsolicited contact intended to procure attendance at sales seminars.

The Government **does not support** this recommendation.

The Corporations Act already prohibits hawking in relation to the offer of financial products (section 992A and 992AA). Section 992AA generally prohibits the offer of interests in managed investment schemes for issue or sale in the course of, or because of, an unsolicited meeting or telephone call.

RECOMMENDATION 11

The Committee recommends that the current requirement for Tier 1 level training for timeshare sales personnel should remain, but that training courses should be developed specifically for timeshare.

The Government **supports** this recommendation.

Legislation already allows the setting of minimum training standards for financial product advisers.

As noted in recommendation 6 above, training requirements are being reviewed in the context of the Government's current Corporate and Financial Services Regulation Review. The issue of appropriate training requirements was raised in the context of avoiding a "one size fits all" approach and allowing for training requirements to provide greater recognition of different skills and competencies relevant to the different streams of business.

RECOMMENDATION 12

The Committee recommends that the proposed timeshare chapter in the *Corporations Act 2001* should include mandatory cooling-off periods of 10 business days for all timeshare sales, regardless of whether the timeshare company is a member of the Australian Timeshare and Holiday Ownership Council (ATHOC) or not.

The Government **does not support** the recommendation that there be a new chapter of the Corporations Act devoted to timeshare.

Cooling off periods do not apply under the Corporations Act (as timeshares are not considered to be liquid assets Reg 7.9.64(1)(e)), but do apply under ASIC licensing conditions for timeshare licensees.

RECOMMENDATION 13

The Committee recommends that the proposed timeshare chapter in the *Corporations Act 2001* should require that timeshare customers be advised of their entitlement to a cooling-off period by:

- a document of one page approved by ASIC for this purpose; and
- advice of the entitlement and the length of the cooling-off period in the contract's Schumer box.

The Government does **not support** the recommendation that there be a new chapter of the Corporations Act devoted to timeshare. However, any industry initiatives to provide focussed information to customers about the cooling-off period would be welcomed by the Government.

The Corporations Act already sets out the information which must be provided in a product disclosure statement, which includes that clients be advised of their entitlement to a cooling-off period (para 1013D(1)(i)). The product disclosure statement must present this advice in a clear, concise and effective manner.

ASIC revised Policy Statement 160, which was recently released, enhances these requirements.

RECOMMENDATION 14

The Committee recommends that the cooling-off period for a timeshare sales contract be suspended during the interval between the customer asking for further information, and that further information being provided.

The Government **does not support** this recommendation.

The cooling-off period generally begins on the day when all required documents (including the cooling-off statement) are given to the consumer and they have acknowledged in writing that they have received them.

It would be inappropriate to suspend the period when the customer asked for information beyond that which was required to be provided.

RECOMMENDATION 15

The Committee recommends that the proposed timeshare chapter in the *Corporations Act 2001* should require timeshare contracts to have, on their front cover, a prominent disclosure box with the heading 'Important Disclosure Information' and the information detailed in paragraph 5.83 of this report.

The Government **does not support** this recommendation.

The Government considers that the existing disclosure requirements under the Corporations Act, particularly in relation to product disclosure statements, are appropriate and effective.

RECOMMENDATION 16

The Committee recommends that the proposed timeshare chapter in the *Corporations Act 2001* should require timeshare contracts to include a minimum guaranteed buy back amount.

The Government **does not support** this recommendation.

The terms by which an interest in a timeshare is bought back is a commercial decision between the parties. Individuals are best placed to determine what they require.

RECOMMENDATION 17

The Committee recommends that fully sold schemes should be able to sell interests in their own timeshare scheme without holding an Australian Financial Services Licence.

The Government **supports** this recommendation, provided that relief is restricted to the older style fully sold schemes only.

Fully sold schemes are those schemes which are exempt under state law, exempt title based time-sharing schemes or member controlled schemes. ASIC has previously provided relief from the need to hold a licence to a number of participants after individual applications have been received. As part of its revised policy statement on time-sharing schemes, ASIC has formally recognised that this relief is available on a case-by-case basis subject to certain conditions, including less than 5% of the interests are resold in any year and that the 14 day cooling off period applies.

RECOMMENDATION 18

The Committee recommends that the Treasurer consult with appropriate state and territory ministers with a view to outlining a scheme outlined in paragraph 6.17 of this report.

The Government **does not support** this recommendation.

This recommendation relates to the re-acquisition of the interests of 'delinquent' members of a few older schemes. These members have failed to keep up payments in relation to their time-sharing interests - the numbers of delinquent members are relatively low. The Government considers that compulsory acquisition would be a disproportionate solution to the problem and the cost of this solution does not justify the benefits.

The operators of such schemes may wish to consider other means, including the possibility of amending the constitution of these schemes, to address this problem.

RECOMMENDATION 19

The Committee recommends that any new regulatory scheme should make clear that the board of a fully-sold scheme can dismiss the resort manager if the board is unsatisfied with the performance of the manager.

The Government **does not support** this recommendation.

Fully sold schemes may be eligible for relief or modification orders (s601QA) from certain managed investment provisions of the Corporations Act as they often have unusual structures (the older schemes tend to be title based rather than points based systems) because they were set up under old legislation.

When providing relief under the managed investment provisions, ASIC imposes conditions requiring that the schemes provide certain protections which allow for dismissal of management. This relief provides that the decision on dismissing the manager is one for the members, not the board.

It is appropriate that the members make this decision and that the mechanism remain flexible.