Chapter 3

Timeshare as a managed investment

Introduction

3.1 A main contention in industry evidence to the inquiry is that timeshare is not a true investment product, and so should not be regulated as a financial product under Chapter 7 of the Corporations Act. This chapter evaluates that contention by making a broad assessment of the strengths and weaknesses of the current approach.

3.2 The chapter first tests assumptions that the inclusion of timeshare within the managed investments regime is an accident of history. The Committee referred to the review of the prescribed interests system undertaken in 1991 and a subsequent review which reflected upon the regulation of timeshare schemes.

3.3 Evidence before the Committee identified a number of advantages and also disadvantages for the timeshare industry and for consumers under the present regulation. These features, set out next in the chapter, introduce key themes which direct inquiry and recommendation in the body of the report.

3.4 The chapter then situates Australia's approach internationally by surveying timeshare regulation in the European Union, the United Kingdom and the United States. This reveals that Australia's focus on consumer protection is commensurate with other regulatory approaches and that this is true whether the product is dealt with as securities, real estate or under fair trade protection frameworks.

3.5 Corporations Act regulation is also shown to have a particular advantage, in providing a nationally consistent framework for regulation of the product which covers the now dominant holiday clubs and vacation timeshare schemes.

Background to the current approach

3.6 As noted in the previous chapter, timeshare has been regulated as a managed investment since the introduction of the Managed Investments Act (MIA) in 1998.

3.7 Its inclusion under the Act was decided on the basis of the findings of a comprehensive review of the regulatory framework for prescribed interests, conducted by the Companies and Securities Advisory Committee (CASAC)[1] and the Australian Law Reform Commission (ALRC) in 1991. The review was to determine:

- if the current regime provided a proper level of regulation of the various kinds of collective investment schemes; and

1 Now Corporations and Markets Advisory Committee (CAMAC)

- whether different systems of regulation should be provided for different kinds of such schemes.[2]

3.8 In 1993 the review report *Collective Investments: Other People's Money* was released. It concluded that there should be an overhaul of the existing regulation of collective investment schemes.

3.9 The proposed framework was largely adopted and introduced by the MIA. As part of this process, the old definition of 'time-sharing schemes' was directly incorporated in the new definition of collective investments; the definition was not changed by the MIA nor by any subsequent legislation.[3]

3.10 Later, in 2001, the Turnbull review of the MIA confirmed that timeshare schemes should remain within the purview of the Act. Amendments were recommended to ensure that loopholes would not allow timeshare schemes to escape regulation; for example, the definition of scheme property had expressly to include property that was timeshare-scheme related.[4]

3.11 In evidence to this inquiry ASIC stated that timeshare, as a deliberate act of Parliament, had been treated as a form of financial product for more than twenty years. The definition of a financial product under the prescribed interest system had a broad reach, as was intended by the legislation. This has been continued under the managed investments regime.[5]

3.12 Mr Malcom Rodgers, ASIC Executive Director, Regulation, explained that for consumer protection reasons the definition of financial products applies 'to a range of financial products which are considerably broader than investment products—a product where a consumer is asked to make a decision about the use of discretionary funds'. He stated that this immediately necessitates a requirement for up-front disclosure 'so that it is clear what rights and risks come with that decision'. ASIC, however, made no commitment to the future treatment of timeshare as part of the current regime, referring consideration of the matter to the Parliament.[6]

Some advantages

3.13 Evidence before the Committee canvassed the relative advantages and disadvantages of the current regulatory approach. Some of the advantages arising from treatment of timeshare as an investment product were: a Goods and Services Tax

2 CASAC/ALRC report, *Collective Investments: Other People's Money,* 1993, pp. xv-xvi.

3 See section 9 of the Corporations Act.

4 Malcolm Turnbull, *Review of the* Managed Investment Act 1998, para. 5.3.3, p. 98.

5 Mr Malcom Rodgers, *Transcript of evidence,* 28 April 2005 p. 12.

6 Mr Malcom Rodgers, *Transcript of evidence,* 28 April 2005 p. 12.

(GST) exemption; a national regulatory regime; and an enhanced consumer protection framework.

Good and Services Tax exemption

3.14 Timeshare schemes received concessions from the GST when amendments were made to the regulations for that purpose.[7] The industry was exempted on the grounds that timeshare schemes do not make real estate transactions, which would have attracted GST, but instead are selling investment or financial products.[8]

A consistent national regulatory regime

3.15 As financial products, timeshare schemes are captured by consistent federal regulation, with compliance overseen by ASIC. The national law makes for a more predictable operating environment for industry participants, most of whom operate across state borders and many of which are overseas based.

3.16 Inquiry evidence universally supported the need for a nationally consistent regime for regulation of timeshare. At hearings, RCI Pacific stated:

> …one thing that the forum, ATHOC [Australian Timeshare and Holiday Ownership Council] and all the industry participants are quite clear on after searching the world for legislation is that we are absolutely positive that we cannot allow this to be drilled down to state based legislation.[9]

3.17 Accor Premier Vacation Club (APVC) agreed that nationally consistent legislation was essential if Australian timeshare operators are to be globally competitive, but argued that some adjustment to current regulation is needed if this objective is to be realised:

> APVC is strongly supportive of the continued regulation and supervision of the timeshare industry by the Commonwealth government. We operate on a national scale and indeed aspire to operate on an international scale. We believe that stringent, consistent and nationwide regulation can only assist the timeshare industry in its quest to move from the category of a bought good into the mainstream world of commerce and be viewed as a sought good…However, like anyone else operating under legislative and prescriptive administrative regulation, we seek clarity of the existing law and modifications to the law so as to make it relevant to today's commercial marketplace, less burdensome where the law fails to achieve its purpose, and directive so as to clarify for the regulators the will of parliament in relation to regulations and policies.[10]

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7 A New Tax System Goods and Services Tax (Amendment Regulations 2000 No. 2)

8 See discussion, Senator Harris, *Senate Hansard*, 11 October 2001, p. 18343.

9 Mr John Schwartz, Manager Special Projects, RCI Pacific, *Transcript of evidence*, 13 April 2005, p. 42.

10 Mr Martin Kandel, Executive Officer, APVC, *Transcript of evidence*, 13 April 2005, pp. 35–36.

Enhanced consumer protection

3.18 The Committee heard that the introduction of financial services reform (FSR) had been beneficial to both consumers and industry participants: it had driven down the incidence of complaints against timeshare operators while raising standards and consolidating a more positive reputation for the industry.[11]

3.19 The Consumer Credit Legal Service (CCLS) and the Australian Consumers Association (ACA) reported a decline in complaints against timeshare operators under FSR. They considered that most matters dealt with by CCLS client advisers and ACA caseworkers had originated prior to the introduction, or during transition, to the new regime.[12] The CCLS stated that, in most situations, the matters dealt with related to timeshare marketing practices and to credit-related problems arising from timeshare vendors' use of linked finance arrangements.[13]

3.20 In support of the claimed improvement in industry standards, timeshare operators RCI Pacific and APVC affiliate Becton Group Holdings reported consumer benefits from operator compliance with the managed investments regime. They stated that the formation of statutory trusts and scheme operation by the Responsible Entity safeguards the integrity of the scheme while giving long-term security to scheme members.[14]

3.21 The FSR provisions add another layer of protection. The Australian Financial Services licence must be acquired on registration of the scheme. It sets out standards for provision of the financial service, requiring that consumers are dealt with by trained advisers and have full access to information about the product they are purchasing.[15] As Mr Brian Gillard of the Commercial Law Association of Australia (CLA) stated, the regime creates a 'cost for misbehaviour'—the potential loss of the licence to trade, making the business unviable.[16]

3.22 The FSR requirement for operator membership of an approved dispute resolution scheme was also considered to be an important element in the consumer protection framework. Mr Paul O'Shea, Lecturer at the Beirne School of Law, University of Queensland, commented on the outcomes achieved by ATHOC's

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11 ATHOC *Submission 10*, p. 18; Tourism and Transport Forum (TTF) *Submission 16*, p. [2].

12 Consumer Credit Legal Service, *Submission 5*, p. 2; Ms Catherine Wolthuizen, Senior Policy Officer, ACA, *Transcript of evidence*, 15 April 2005, pp. 1–2.

13 CCLS, *Submission 5*, p. 1.

14 RCI Pacific, *Submission 12*, p. 3; Becton Group Holdings, *Submission 13*, p. 1.

15 Associate Professor Mike Dempsey, Head of Finance Discipline, Department of Accounting, Economics and Finance, Griffith University, *Transcript of evidence*, 13 April 2005, p. 2; Mr Paul O'Shea, Lecturer at the Beirne School of Law, University of Queensland, *Transcript of evidence*, 28 April 2005, p. 2.

16 Mr Brian Gillard, Member, Legislation Reform Taskforce, CLA, *Transcript of evidence*, 15 April 2005, p. 2.

Consumer Complaints Resolution Committee, both on regulated and un-regulated matters, while the CCLS submission cited access to dispute resolution as a vital mechanism for consumer protection and a key achievement of financial services reform.[17]

And some disadvantages

3.23 However, evidence also raised questions about the effectiveness of the disclosure-based regime to protect consumers. Timeshare marketers and developers considered disclosure relatively ineffective as a consumer protection mechanism. They also stated that licence costs associated with compliance are excessive. Fully sold schemes reported that the regime made resort operation difficult, erecting significant impediments to the resale of timeshares.

Ineffectiveness of disclosure regime

3.24 There was some general consideration of the effectiveness of the disclosure regime to protect consumers. Mr O'Shea presented the Committee with an analysis of the effectiveness of disclosure requirements under the Consumer Credit Code. His research indicated that consumers rarely read documentation in full and were often confused about which items of information were important. This suggested a simplified and more transparent approach to disclosure is required.[18]

3.25 Industry operators, in particular large operators, considered the disclosure requirements attached to financial products have resulted in a duplication of information.[19] ATHOC suggested that disclosure of commissions and other payments are not relevant for timeshare. It also asked for a simplified approach to cooling-off disclosure.[20]

3.26 Fully sold schemes had the opposite problem. As exempt schemes, they are prohibited from giving timeshare owners, or other resort occupants, advice about availability of timeshare in their resorts or other product information.[21] Mr Clive Constance, Manager of Paradise Timeshare Club (trading as Port Pacific Resort) explained that this disadvantages the consumer who must rely on third party promoters to gain prices and other information about timeshare resales.[22]

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17 Mr Paul O' Shea, *Transcript of evidence*, 28 April 2005, pp. 2–3; Consumer Credit Legal Service, *Submission 5*, p. 3.

18 P.O' Shea and Dr C. Finn, 'Consumer Credit Code Disclosure: Does It Work?', *Journal of Banking and Finance Law Practice 5*, vol. 16, March 2005.

19 See for example, Trendwest Resorts South Pacific, *Submission 8*, p. 6.

20 ATHOC, *Submission 10*, p. 29.

21 Paradise Timeshare Club, trading as Port Pacific Resort, *Submission 4*, p. 3.

22 Mr Clive Constance, *Transcript of evidence*, 15 April 2005, p. 49.

3.27 Consumer groups expressed concerns that the volume of documentation was being used to conceal rather than reveal important information.[23] Mr O'Shea advised that 'too much disclosure can often be not nearly enough', this being indicated by reports that consumers continue to be misled by timeshare operators which are ostensibly complying with the disclosure requirements.[24]

3.28 Another concern was that timeshare purchasers, making a relatively small financial outlay, are both less likely to seek legal advice and less able to interpret the detail set out in a timeshare contract.[25] Linked finance arrangements made these consumers even more vulnerable. Ms Catherine Wolthuizen, Senior Policy Officer with the ACA reported:

> Caseworkers—and particularly the clients of casework agencies…financial counsellors and the like—report that they tend to see people who are drawn in by the idea that they can use linked finance to give them access to an interest in a property, whereas they could not otherwise participate in rising property values. Often these are people who really do not understand the nature of the legal obligations they are entering into, the nature of the interest that they are acquiring or the obligations that accompany the financing arrangement they have agreed to. These are the people least able to protect themselves in the absence of any effective regulatory framework.[26]

The costs of compliance

3.29 While it was acknowledged that more rigorous regulation has contributed to the improved reputation enjoyed by the timeshare industry, operators asserted that some aspects of the compliance framework are not appropriate for timeshare. These features are said to impose costs and inefficiencies which reduce industry competitiveness and diversity.

3.30 ATHOC argued that the regulation of timeshare as a financial product has brought with it obligations which are too onerous. It drew attention to what it maintains is a fundamental contradiction in the treatment of the timeshare as an investment. ATHOC asked for legislation better tailored to the timeshare product as a leisure or holiday service. Its submission stated:

> With the increasing complexity and compliance burden of the regulatory arrangements over time there has been a growing concern within the industry that [timeshare's] specific and unique characteristics have been somewhat overlooked within a body of laws designed and intended for the financial services industry. The result is that the industry now regards itself somewhat as a ‘square peg in a round hole’. A specific example of the

23 For example, Consumer Credit Legal Service, *Submission 5*, p. 2.

24 Mr Paul O'Shea, *Transcript of evidence*, 28 April 2005, p. 3.

25 See Consumer Credit Legal Service, *Submission 5*, p. 2.

26 Ms Catherine Wothuizen, ACA, *Transcript of evidence*, 15 April 2005, pp. 1–2.

> difficulties faced by the industry is the fact the ASIC Policy Statement 66 expressly forbids timeshare promoters to represent their product as an 'investment' while at the same time they must operate it as a 'managed investment scheme'. This is illogical and confusing for all stakeholders.[27]

3.31 International exchange operator RCI Pacific along with marketer/developers Trendwest Resorts South Pacific (Trendwest), APVC and Becton supported this view. Their market interest is in the sale of new timeshare offers, principally in the form of points-based ownership. These operators support the corporate structure set up under the MIA as suitable for their operations but argue that the compliance requirements —including licensing, training and disclosure—are excessive, costly and inappropriate to the product.

3.32 In its submission Trendwest estimated that, in 2004, it had spent $1 million on compliance including staff wages, compliance committee fees, audit fees, printing costs for product disclosure statements and financial services guides, training costs, advice surveillance mechanisms and regular training and monitoring. A further $10,000 went on training annually, and a total of $700,000 on licensing fees and associated administration costs in 2000–03.[28]

3.33 These costs were considered by Trendwest to reduce market diversity in the timeshare industry, concentrating the industry among large corporations.[29] Mr George Dutton, Financial Officer of APVC, thought that the costs attached to licensing also limited the entry of reselling businesses, like those operating in the United States. He stated:

> One major difference…between the USA and here is the licensing process whereby a reseller can get into the industry in the first place…one of the main reasons, I suspect, that there is no significant resales market in this country is that financial services licences and all of the attendant costs and complexities are simply way beyond the means of the average small business person or independent trader who might be the sort of person who would enter into such a business in this country. That is certainly a major factor in terms of non-liquidity.[30]

3.34 Tourism and Transport Forum Australia (TTF) took the view that the expense of compliance was overall detrimental to industry efficiency, competitiveness and growth:

> The significant compliance costs that are incurred by the industry are ultimately passed on to consumers. When combined with the complexity of the purchase process from a consumer perspective, a real threat to consumer demand emerges. The international competitiveness of the Australian

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27 ATHOC, *Submission 10*, p. 3.

28 Trendwest, *Submission 8*, pp. 5; 4.

29 Trendwest, *Submission 8*, p. 5.

30 Mr George Dutton, *Transcript of evidence*, 13 April 2005, p. 49.

> timeshare industry is endangered, and investment in the industry is potentially deterred.[31]

Re-sale problems: fully sold schemes

3.35 Fully sold timeshare schemes are exempt from the Corporations Act. However, scheme operators state that regulation of timeshare schemes under securities legislation places significant regulatory impediments on their capacity to conduct resale of timeshares. Witnesses told the Committee that many fully sold resorts have a percentage of owners who, due to age or other life changes, wish to exit their timeshare contracts. Under current regulations, timeshare resort managers are unable to help these owners. Specifically:

- the Corporations Act provides that any relinquished timeshares must be extinguished back into the timeshare scheme. As a result, resort managers cannot offer to buy back the owner's shares.[32]
- if resort managers advise owners or assist them with the resale, or purchasing of unwanted timeshares, the Corporations Act financial investment advice, disclosure and training requirements must be met.[33]
- ownership of timeshare in many older style resorts is based on a 99 year title. If owners cease to pay management fees and 'disappear' with the titles, resort owners may only recover these titles through expensive litigation.[34]
- when it comes to the wind up of the scheme it will be unclear whether the title owner or the share 'renter' is entitled to the funds held in the trust.[35]

3.36 Representatives from Paradise Timeshare Club, Kyneton Bushland Resort and Eastcoast Timeshare Group argued that these factors considerably impede the capacity of fully sold resorts to remain viable, while also disadvantaging the timeshare owner who may need to sell. The Law Institute of Victoria summed up the situation for fully sold operators in its submission:

> The LIV queries why such resorts and clubs should need to comply with these requirements if they are simply organising the use of the facility between their members and not selling time. It appears that the legislation was intended to address the problems that arise for consumers who fall for

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31 TTF, *Submission 16*, p. [3].

32 Paradise Timeshare Club, trading as Port Pacific Resort, *Submission 4*, p. 3.

33 Mr John Nissen, Resort Manager, Kyneton Bushland Resort Limited, *Transcript of evidence,* 15 April 2005, p. 44.

34 Kyneton Bushland Resort Limited, *Submission 14.*

35 Mr Dennis Grimes, Administration manager, Eastcoast Timeshare Group, *Transcript of evidence,* 28April 2005, p. 24.

> the traps of salespeople who are selling 'new' time but does not address the specific needs of resales of time or those needs of fully sold out resorts.[36]

Conclusion

3.37 The Committee concluded that while the timeshare industry has benefited from operating within the Corporations framework, industry participants are experiencing some operational difficulties because of the treatment of timeshare as an investment product. These include excessive costs, consumer confusion about the product, and resort management issues which affect both time share operators and owners. These problems suggest some adjustment to the current regulation of the industry may be warranted.

3.38 The Committee also notes the industry's request that any alternative regulatory arrangement considered by the Committee should be uniform and national.

International regulatory approaches

3.39 In its review of the regulatory arrangements applying to timeshare, the Committee wished to establish whether the Australian approach was consistent or had any particular merit relative to the type of legislation applying to timeshare in jurisdictions overseas.

3.40 The first obvious feature of other regulatory treatments was that the treatment depends on whether timeshare is considered primarily as a real estate or as a securities product. Mr Shin Siow, Senior Counsel of Trendwest, provided a useful overview of the treatment of timeshare in a number of countries. He explained that land is the security in all timeshare purchases, but that the legislation interprets this in different ways:

> When you buy into time share, you are buying an interest in land…I think this is perceived right through all the legislation around the world. If you have an interest in land, it [may] come under the securities regime. It is the same in Singapore and it would be the same in Hong Kong. In the United States they treat it as real estate. It is regulated as real estate in seven jurisdictions, but some states will regulate it as securities. In Malaysia, they see it as securities, but they overlay it with a bit of trade practice kind of control, so they say, 'If this is going to be a timeshare arrangement, these are the things that you need to do: you need to produce a disclosure document, you need to have a cooling-off period and you need to set aside some end-funds.' Those are the three things that they have prescribed in the legislation.[37]

3.41 In its evaluation, the Committee found that the last three requirements —disclosure, cooling-off and capital adequacy—are the foundations of international

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36 Law Institute of Victoria, *Submission* 3, p. 3.

37 Mr Shin Siow, *Transcript of evidence*, 13 April, p. 41.

compliance architecture for timeshare. This is true whether the framework for that treatment is carried by real estate, securities, trade practice or other consumer protection frameworks.

The European Union Timeshare Directive

3.42 The European Union Timeshare Directive 1994[38] demonstrates this trend. The directive is a harmonisation initiative for the regulation of timeshare. It provides a compliance template which imposes the following standards on any timeshare contract entered into in a member country or where property is in the European Economic Area (EEA):

- a right to a ten day cooling-off period. Buyers may cancel during the cooling-off period and are entitled to reimbursement of all costs incurred in the making the contract (such as fees for lawyer's witness signatures as required in some countries);
- sellers are strictly prohibited from seeking money during the cooling-off period;
- sellers must provide purchasers with a brochure on request. The brochure must contain specified information and this information must appear in the contract;
- sellers must provide a translation of the contract in an official language of the country where the timeshare is located; and
- any associated credit agreement is cancelled automatically when the buyer cancels the timeshare contract.[39]

3.43 Complying countries decide how they will effect the requirements in each jurisdiction. Only two member states—Spain and Portugal—created a specific legal framework for timeshare contracts, granting timeshare the status of real property rights.[40]

United Kingdom

3.44 The United Kingdom has dedicated timeshare legislation, the *Timeshare Act 1992* (amended by Timeshare Regulations 1997), which is enforced by UK Trading Standards. The legislation provides for a cooling-off period of 14 days, longer than the

38 *Directive 94/47 EC*, European Parliament and Council, 26 October 1994.

39 'Timeshare', EUROPA European Commission of Consumer Affairs, http: europa.eu.int/comm./consumers/cons_int/safe_shop/timsaher/index_en.htm (accessed 21 January 2005)

40 *Report on Application of* Directive 94/47/EC *of the European Parliament and Council of 26 October 1994*, SEC (1999) 1795 final, p. 9.

EU at 10 days, but otherwise imposes a set of compliance requirements commensurate with the EU Directive.[41]

3.45 In the UK, timeshare is specifically excluded from the ambit of financial services regulation. Further, timeshare cannot vest real property rights as it is not possible for more than four persons to register for a single property in the land register. Nor can it be considered as a long term lease, as leases of more than twenty one years cannot be registered.[42]

3.46 In 2003 a report based on an evaluation conducted by the Citizens Advice Bureau (CAB) called on the UK government to review timeshare law. Among other things, the CAB noted that the definition of timeshare under the *Timeshare Act 1992* had not captured some of the more flexible vacation plan arrangements dominating the timeshare market, and that pressure selling and deceptive conduct remained features of the industry. The report also suggested that the EU Commission should revise its Timeshare Directive to take into account holiday clubs and similar schemes and to extend the minimum cooling-off period from 10 to 14 days.[43]

3.47 Australia's approach, which captures all types of timeshare schemes, thus appears in some respects superior to the UK and European regulation of timeshare schemes.

United States: state and federal legislation

3.48 The Committee also heard that Australia's national regulatory system avoids the inconsistencies resulting from the state and federal statutory duplication which exists in the United States. Mr Martin Kandel, a former assistant Attorney-General of the state of Maryland and now Chief Executive Officer of APVC, reported:

> My unfortunate experience in the United States is that, in addition to federal regulation, there is regulation literally on a state by state basis. It runs the gamut. New York State requires a securities licence. Other states require real estate licences. Some states—Florida being the one that I am most familiar with—have enacted specific timeshare legislation with built-in consumer protections. There are licensing requirements, bonding requirements and disclosure requirements.[44]

3.49 Florida has been described as the 'timeshare a capital of the world'. Not only does it have a thriving market for new inventory but it also has a developed resale

41 ASIC, *Submission 9,* Attachment A, p. 13.

42 *Report on Application of* Directive 94/47/EC, p. 9.

43 Susan Marks, 'Key Recommendations' *Paradise Lost: CAB Clients Experience of Timeshare and Timeshare like Products,* The Citizens Advice Bureau, November 2003, p. 3.

44 Mr Martin Kandel, *Transcript of evidence,* 13 April 2005, pp. 39–49

market.[45] The Committee examined the Florida legislation as another example of dedicated timeshare legislation.

3.50 Florida regulates timeshare under Chapter 721 of the Florida Statute XL Real and Personal Property 2004.[46] As in Australia, the legislation is comprehensive in its coverage of products[47] and applies to all timeshare plans with a duration of least three years. The legislation affects all schemes located in the state of Florida or offered for sale in that state.[48]

3.51 The Florida statute specifically states that timeshare plans are not securities.[49] It is a prescriptive regime; it provides definitions of the different types of timeshare schemes and specifies requirements for their operation and upkeep. These cover lodgement of filing fees and disclosure made in the offering statements for each type of scheme.[50] Licensing requirements also apply to all timeshare operators. The statute requires that any seller of timeshare must be a licensed real estate broker or broker associate. Solicitors, subject to certain limitations, may also sell timeshare.[51]

3.52 As a comparison with the Australian approach, the Committee also examined the US federal regulation of timeshare as securities. Under the *Securities Act 1993* (US) and the *Securities Exchange Act 1934* (US), timeshare schemes may fall within the definition of securities if they have one of the following characteristics:

(a) an emphasis on the economic benefits that can be obtained from the management of renting the accommodation;

(b) an offer of a rental pool; or

(c) an offer of an arrangement that materially restricts the purchaser's right to occupy or rent the accommodation, for example a requirement to hold the property available for rental, or a requirement to use an exclusive rental management agent.[52]

3.53 The US Securities Exchange Commission (SEC) advises that in interpreting these requirements: 'substance should not be disregarded for form, and the

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45 Mr George Dutton, *Transcript of evidence*, 13 April 2005, p. 49.

46 *The 2004 Florida Statues*, The Florida Senate at www.flsenat.gov/statues/index.cfm (accessed 13 June 2005)

47 The legislation covers, but is not limited to, condominiums, cooperatives, undivided interest campgrounds, cruise ships, vessels, houseboats, recreational vehicles and other motor vehicles, and includes, vacation clubs, multi-site vacation plans, and multiyear vacation and lodging certificates. 721.02 (5).

48 721.02 (5).

49 721.23.

50 721.18.

51 721.20 (1).

52 ASIC, *Submission* 9, Attachment A, p. 13.

fundamental statutory policy of affording broad protection to investors should be heeded'.[53]

3.54 This approach is commensurate with Australia's current interpretation of timeshare within the managed investments regime. At hearings Mr John Price, ASIC Director of Financial Services Reform Legal and Technical Operations, compared Australia's approach:

> Some jurisdictions treat the regulation of timeshare a little differently to us. However, I think there is common ground in the sense that things that are actively managed or sold with an emphasis on the economic benefits that can flow from the purchase are generally subject to securities type regulation. It is important to point out as well that, with regard to some other jurisdictions, not only are timeshare schemes subject to federal legislation; they are also subject to myriad state legislation, and that is particularly the case in the United States.[54]

He concluded:

> …our treatment of the regulation of timeshare schemes is really influenced by what we perceive the consumer experience with time share to be. In our regulatory regime we use tools such as disclosure, cooling-off and, obviously, complaints resolution schemes.[55]

Conclusions

3.55 The Committee concluded that Australia's compliance system is commensurate, and in some instances superior, to the regulatory arrangements applying to timeshare in some other countries. Overseas regimes, in their diversity, are characterised by a focus on enhanced consumer protection, resulting in the implementation of mandatory requirements for disclosure and cooling-off periods. This is consistent with ASIC's regulation of the timeshare industry as an investment product.

3.56 The Committee also observed that the national regulatory framework established under the Corporations Act offers streamlining and consistency in the treatment of the timeshare product.

3.57 There was consensus in the evidence that nationally consistent regulatory and consumer protection framework is the bottom line for providing certainty to industry

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53 *SEC Release No. 33-5347*. ASIC notes that this is consistent with the decision in *SEC v WJ Howey*, 328 US 293, 329 US 819 (1946) where the United States Supreme Court emphasised the need to consider the purpose of securities laws rather than the substance of the form when deciding whether an interest is a security. ASIC, *Submission 9*, Attachment A, p. 13.

54 Mr John Price, *Transcript of evidence*, 28 April 2005, p. 12.

55 Mr Malcolm Rodgers, *Transcript of evidence*, 28 April 2005, p. 12.

and consumers. The Committee agrees with this view, and considers that a national regulatory system provides the most appropriate model for regulation of timeshare.

3.58 The Committee recognises, however, that the treatment of timeshare as an 'investment' product under the financial services regime poses problems for operators. Timeshare is prohibited from being sold as an investment, yet is regulated as an investment product. These same regulatory arrangements also appear actively to inhibit the development of a functioning market in resales.

3.59 The timeshare industry is therefore experiencing difficulties which may prevent its development into a well functioning market where the buying and selling of timeshare is conducted in a competitive environment.

3.60 In relation to the regulation of timeshare as securities, the Committee agrees with the view of the US SEC that an absolute fit of the product is not essential, but rather the significance of the legislation is in its capacity to adequately protect the consumer.

3.61 The Committee believes that ASIC currently applies this principle in good faith in its treatment of timeshare as a financial product. The overall effectiveness of the approach, given concerns about the costs of compliance and the adequacy of consumer protection relative to other possible treatments, will be assessed in the next chapter.