

Submission – Senate Economics Legislation Committee Inquiry
Corporations Amendment (Future of Financial Advice) Bill 2011 and
Corporations Amendment (Further Future of Financial Advice
Measures) Bill 2011

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Executive Summary

- Wyndham Vacation Resorts Asia Pacific (“Wyndham”), a subsidiary of Wyndham Vacation Ownership, Inc. which is the largest timeshare company in the world, has 23 resorts in the South Pacific and more than 44,000 owner families.
- Wyndham is one of the largest and most important businesses in the Australian tourism industry, employing more than 1200 staff and the company is one of the single largest employers on the Gold Coast, with 650 staff based in its corporate office.
- At a time when the tourism industry is facing a challenging trading environment, Wyndham is continuing to significantly invest in the industry and expects to spend around \$200 million on resort developments in Australia over the next five years.
- Wyndham, and the broader timeshare industry, provide holidays for members through a managed investment scheme structure, which means that the *vacation credits* provided to members are *financial products* for purposes of the *Corporations Act 2001* (Cth) (**Corporations Act**).
- This means that, although Wyndham provides a lifestyle product (which provides physical access to tangible assets, in the form of a vacation resort, for specified time periods) rather than a financial investment (which provides intangible benefits and the opportunity to participate in purely financial gains or losses), it is nonetheless regulated as a financial product.
- Consequently, Wyndham holds an Australian financial services licence and is regulated by the Australian Securities and Investments Commission under the Corporations Act 2001. This means that Wyndham, along with other participants in the timeshare industry, will be regulated under the amendments to the Corporations Act effected by the *Corporations Amendment (Future of Financial Advice) Bill 2011 (FOFA Bill)* and *Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (FOFA Further Measures Bill)* (together **FOFA Bills**).
- Wyndham, along with other companies in the timeshare industry, pay its sales staff commissions, including volume-based incentives on the following basis:
 - Sales staff provide personal advice only in respect to their employer’s (i.e. Wyndham’s) timeshare product and do not provide any financial product advice in respect of other timeshare products or other financial products in general;
 - Sales staff do not provide advice to customers and potential customers about different ways of investing their money, only advice as it relates to purchasing this single lifestyle product.
- Wyndham believes that it is an unintended consequence that the FOFA Bills capture Wyndham’s remuneration payments, as well as the broader timeshare industry, as conflicted remuneration. Wyndham believes that timeshare commissions are not “conflicted remuneration” as defined in the FOFA Further Measures Bill, because the payment of timeshare commissions has no influence on the choice of financial product recommended by the sales staff, nor on the advice given by the sales staff.
- Wyndham sells a lifestyle product – “vacation credits” – and not a personal financial investment. When Wyndham sells timeshare resort usage rights or vacation credits to consumers, its compliance plan (which is registered with ASIC) specifically prohibits it to communicate that the product is a financial investment. Independent research by Griffith University verifies that the reason almost all consumers who purchase timeshare do so

because it is a lifestyle product. Additionally, this research has verified that consumers do not purchase timeshare as a financial investment.

- Wyndham is seeking an exemption for the timeshare industry to clarify that timeshare commissions are not “conflicted remuneration” under the proposed FOFA Bills.
- Wyndham’s sales staff have no conflict of interest as they sell only one product, vacation credits and that product is a lifestyle product. Wyndham does not sell a range of products with different rates of commission.
- The timeshare remuneration model is comparable to the real estate and retail sales industries and no-one would suggest that a ban be imposed on commission-based sales in these industries.
- Volume-based remuneration is the norm in the industry for remuneration of timeshare sales staff and the property industry worldwide. Without it, the industry stands to lose its most effective sales people who will leave the industry for jobs that are commissions-based. Evidence shows that timeshare businesses that have trialled paying staff on a salaried basis have been unviable, both within Australia and overseas.
- Banning commissions paid to sales staff who are remunerated on a volume basis, as is the industry norm, will not result in improved consumer protection for timeshare retail customers or investor protection overall.
- Wyndham vacation credits are sold exclusively by Wyndham’s sales staff. Vacation credits are never distributed through dealer groups or financial advisers. As there are no third parties who sell vacation credits on behalf of Wyndham, our payment of commissions to our sales staff has no impact on the financial planning industry.
- Before a retail consumer acquires vacation credits, they are fully informed that sales staff sell only one product and will receive a commission for each vacation credit sold. The amount of commission received is clearly disclosed. This information is provided in Wyndham’s two-page Financial Services Guide.
- Sales of timeshare are analogous to the sale of basic banking products by Authorised Deposit-taking Institutions (ADIs) which will be exempt from the proposed FOFA laws.
- Banning timeshare commissions will have a substantial and material negative impact on Wyndham, its employees, the timeshare industry and the many suppliers that rely on the timeshare industry. It will harm the tourism industry in Australia at a vulnerable time for the industry when it is performing poorly and shedding jobs.
- If the legislation is passed in its current form, it will have a catastrophic impact on the timeshare industry and in particular, Wyndham’s Australian operations – it will have to drastically reduce its sales and corporate support operations in Australia and shift its investment focus to growth markets offshore, such as Asia where the business can operate under the worldwide industry norm of commission-based payments.
- Capturing the timeshare industry in the FOFA Bills will have no benefit to consumers and will not contribute to the Government’s objective to regulate conflicted remuneration arrangements in the financial planning industry.

A. Background

1. Who are we?

1.1 Wyndham is the developer, manager and promoter of the WorldMark South Pacific Club (the *Club*), a registered managed investment scheme in Australia established for the sole purpose of providing members with vacation opportunities, not financial returns. Wyndham is one of the largest employers in the Australian tourism industry, with more than 1200 employees in Australia.

Wyndham is a wholly-owned indirect subsidiary of Wyndham Vacation Ownership Inc, which is the world's largest vacation ownership company with more than 800,000 owner families worldwide.

1.2 Wyndham Vacation Resorts South Pacific Limited ("WVRSP") is the Responsible Entity for the WorldMark South Pacific Club ("Club") and holds an Australian financial services license (*AFSL*) (AFSL No. 225200). WVRSP acts as the Responsible Entity of the Club and contracts on behalf of the Club.

1.3 The AFSL held by WVRSP covers advice and dealing in vacation credits. WVRSP may appoint advisors or representatives, and WVRSP has appointed Wyndham as an authorised representative (under Chapter 7 of the Corporations Act) and in turn Wyndham has appointed its sales staff as authorised representatives.

2. What are vacation credits?

2.1 In order to holiday at Club resorts, consumers purchase interests in the Club, also known as "vacation credits" from WVRSP, through Wyndham.

2.2 Consumers are then able to choose where, when, how often and how long they wish to holiday at Club resorts each year, depending on the number of vacation credits they hold.

2.3 Other than a residual interest in the assets of the Club when the Club winds up, the only benefit or return that a holder of vacation credits receives is the right to holiday at Club resorts. There are no other returns to a timeshare member and, in particular, it is not the purpose of the Club to deliver financial returns or benefits.

2.4 Wyndham has only one product that its sales staff can sell to consumers, being the vacation credits. The consumer attends a presentation with full knowledge that the only product we sell is vacation credits.

3. What do representatives do?

3.1 The representatives are direct employees of Wyndham. WVRSP distributes solely through Wyndham and does not distribute vacation credits to be sold through other entities, such as dealer groups or other advisers.

3.2 Under its AFSL, WVRSP is authorised to provide financial product advice for interests in managed investment schemes, restricted to timesharing schemes.

3.3 Accordingly, sales staff do not provide personal financial investment advice to clients, only personal advice as it relates to the purchase of vacation credits, which is a lifestyle product.

4. How do we remunerate our representatives?

4.1 Volume-related bonuses or commission payments based on the amount of vacation credits sold make up almost all of the salesperson's remuneration packages. Our sales staff are paid

entirely on commission based on the number of vacation credits sold by them, but Wyndham ensures that as a minimum, all sales staff earn the award wage.

- 4.2 Sales managers and directors, as well as executive management, may also receive commission and/or bonuses linked to the sales performance of the company or specific offices or regions.

B. Why Timeshare Commission is not 'conflicted remuneration' as defined

WVRSP is seeking an amendment to the FOFA Further Measures Bill clarifying that the payment of commissions (including volume-based incentives) to Wyndham Sales Staff is not “conflicted remuneration” as defined in the FOFA Bills.

1. Definition of 'conflicted remuneration'

- 1.1 Under section 963A of the FOFA Further Measures Bill, conflicted remuneration is defined as:

any benefit (whether monetary or non-monetary), given to a financial services licensee, or a representative of a financial services licensee, who provides financial product advice to persons as retail clients that, because of the nature of the benefit or the circumstances in which it is given:

- (a) could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to retail clients; or
- (b) could reasonably be expected to influence the financial product advice given to retail clients by the licensee or representative.

- 1.2 Under section 963L of the FOFA Further Measures Bill, it is presumed that volumed-based benefits are conflicted remuneration, *unless the contrary is proved*.

- 1.3 The Explanatory Memorandum accompanying the FOFA Further Measures Bill, considers how the section 963L presumption that volumed-based benefits are conflicted remuneration may be rebutted —

At paragraph 2.18:

Where there are volume-based benefit structures that are not inherently conflicted, this will be peculiarly within the knowledge of those paying and receiving the benefits. It is therefore appropriate that those parties be required to demonstrate that the benefits are not conflicted.

At paragraph 2.19

However, if it can be proved that, in the circumstances, the remuneration could not reasonably be expected to influence the choice of financial product recommended, or the financial product advice given, to retail clients (section 963A), the remuneration is not conflicted and is not banned. This will depend on all of the circumstances at the time the benefit is given or received.

- 1.4 Because Wyndham’s sales staff sell only vacation credits, the payment of volume-based commissions to the sales staff cannot influence the *choice* of financial product they recommend to retail customers. Consequently, timeshare commissions cannot be conflicted remuneration under paragraph (a) of section 963A of the FOFA Further Measures Bill.

- 1.5 Further, because:

sales staff are limited to providing personal advice in relation to timeshare and are prohibited from and therefore do not provide personal or general financial advice about broader investments, the payment of commissions to sales staff cannot have a material influence on the financial product advice they give to retail clients.

- 1.6 It follows that the payment of timeshare commissions to Wyndham sales staff, in the circumstances in which it is given, will not be conflicted remuneration as defined in section 963A of the FOFA Further Measures Bill.
- 1.7 Nevertheless, to eliminate the risk of future uncertainty as to whether payments of commissions to timeshare sales staff may amount to “conflicted remuneration”, we seek an amendment to clarify that, despite section 963L, timeshare commissions are not conflicted remuneration where:
 - (a) the licensee or authorised representative provides general or personal timeshare product advice; and
 - (b) the licensee or authorised representative provides advice in relation to one product only.

C. Grounds for seeking exemption

Wyndham is seeking an exemption for the timeshare industry from the FOFA Bills to clarify that timeshare commissions are not “conflicted remuneration” under the proposed bills.

We suggest that we should be able to continue to be able to remunerate our representatives on a commission basis (above the award wage) for the following reasons:

- (a) The proposed ban does not achieve the desired result of better consumer protection through the removal of adviser conflicts of interest because our representatives do not experience this conflict to begin with as they only sell one product – vacation credits;
 - (b) The sale of vacation credits is a lifestyle product and not a personal financial investment.
 - (c) The sale of vacation credits by the timeshare sales representatives are analogous to the sale by ADI employees of basic banking products; and
 - (d) The vacation credits are never distributed by Wyndham through dealer groups or third-party advisers.
1. **No conflict of interests – Sales staff sell one product only rather than financial advisers advising on choices between products**
 - 1.1 The Explanatory Memorandum (EM) of the FOFA Bill states that product commissions on financial products may encourage financial advisors to sell financial products, rather than give unbiased advice that is focused on serving the interest of the clients. The EM continues that this causes conflicts of interest for the financial adviser who needs to choose between maximising his or her revenue from product sales and offering advice that is beneficial to clients¹. Our representatives do not provide personal financial investment advice.
 - 1.2 We submit that this kind of conflict of interest does not exist for Wyndham’s representatives or those of other timeshare companies in the industry because these representatives can only sell one product – vacation credits. As a result, these representatives are never in a position where they are able to choose from a range of products and only promote the products that deliver the highest commission payments for them.

¹ Paragraphs 1.3 to 1.6 of the EM.

- 1.3 Each customer is also fully informed beforehand that the representative is selling only one product and will earn a commission for each vacation credit sold. The amount of commission the representative will receive is also disclosed. This information is provided in a two page Financial Services Guide upon check-in to the sales presentation.
- 1.4 Representatives discuss the types of resorts available, how the system works and what kind of holidays clients can get. In addition, approximately 80% of the consumers that purchase vacation credits from Wyndham finance their purchase through Wyndham's non-recourse financing product which is subject to the National Consumer Credit Policy (NCCP). The NCCP requires the lender to conduct the appropriate due diligence to ensure the consumer can afford the product (vacation credits).
- 1.5 Therefore, we submit that as Wyndham's employees are not in a position of a conflict of interest, they should be allowed to continue to be remunerated on a commission basis.

2. Vacation credits are a lifestyle product and not a personal financial investment

- 2.1 While the sale of timeshare or vacation credits is regulated under the amendments to the Corporations Act as a financial product, it is not sold or purchased as such. Vacation credits are acquired by consumers as a lifestyle product and not as a financial investment. Purchasers are advised through written disclosures within the Product Disclosure Statement provided at the time of a sale that the product is a lifestyle product, which is acknowledged by the consumer prior to the purchase being finalised.
- 2.2 A 2008 study conducted by Associate Professor Gayle Jennings, Associate Professor Graham Bradley and Professor Beverley Sparks of Griffith University² examined the identifying motivations for purchasing timeshare. Investment did not feature in the top 10 reasons given by consumers for purchasing timeshare. Rather, the most strongly endorsed view of timeshare from consumers was that it "gives me a break from work or work-related activities" and timeshare "lets me visit different areas," which has no connection with personal financial investment.
- 2.3 Vacation credits are not bought with an intention of making a financial return, but rather to offer customers options for their holidays. Indeed, the various reliefs and exemptions granted to Wyndham and the timeshare industry by the Australian Securities and Investments Commission (ASIC) is on the basis that timeshare must not be promoted as an investment. Furthermore, 80 per cent of sales of Wyndham vacation credits are to existing owners or arising out of referrals from existing owners who are knowledgeable about the product.
- 2.4 The timeshare industry remunerates its sales staff on a commission basis for sales of this lifestyle product (i.e., vacation credits), just as the real estate industry does for its sales agents selling interest in property. As there is no basis to ban volume-based commissions for these other lifestyle based industries, there should not be for the timeshare industry.

3. Analogous to ADI

- 3.1 We note the Corporations Amendment (Future of Financial Advice) Bill 2011 provides a specific carve-out from the ban on conflicted remuneration for arrangements where employees of an Australian ADI advise on and sell basic banking products³. According to the 2011 Information Pack on the FOFA reforms, this carve-out came about because these products are

² Report 2.2b Study of New Owner's Perceptions of Timeshare, Professor Gayle Jennings, Professor Graham Bradley, Professor Beverley Sparks, Griffith University, 2008.

³ Schedule 1, item 11, subparagraph 963C(b)

“generally easier for consumers to understand and consumers more readily understand that the front-line employee of the ADI is in the business of selling the employer’s product”⁴.

- 3.2 We submit that a similar carve-out or other form of exemption should be available to the timeshare industry on the basis that this arrangement is analogous to a timeshare representative advising on and selling vacation credits.
- 3.3 Similar to basic banking products, vacation credits are generally well understood by retail customers. Despite being constituted as a managed investment scheme, it is not a complex, structured product.
- 3.4 As with ADIs, a retail customer who approaches a Wyndham salesperson readily understands that the salesperson will be selling Wyndham’s product only, the vacation credits. Each salesperson is also a direct employee of Wyndham, similar to the ADI example.
- 3.5 We submit that there is no material difference between the arrangement of the ADI employee giving advice on the basic products offered by their employer. We note that they even have a choice of investments from which to make a recommendation, which Wyndham does not have.

4. Potential adverse impact to timeshare industry is not in line with the intended policy

- 4.1 We note that not only will the FOFA Bills have no positive impact for retail customers purchasing timeshare, it will have a very detrimental effect on Wyndham, other timeshare companies, employees, the timeshare industry in Australia and the many suppliers that rely on the timeshare industry. These effects are detailed below.
- 4.2 Volume-related bonuses or commission payments based on the amount of vacation credits sold make up most of Wyndham’s employees’ remuneration packages. This model is widely used in the timeshare industry globally, which in most other jurisdictions, including the United States and Canada, is regulated as part of the real estate industry.
- 4.3 If these employees can no longer receive volume-related bonuses or commissions, Wyndham and the rest of the timeshare industry will stand to lose the vast majority of its salespeople. These employees are invaluable to our business as they have a strong connection to and understanding of the industry, as well as an excellent grasp of the product. This remuneration model is also used by the real estate industry, with which timeshare sales is more closely aligned, without harm to consumers.

5. Impact on business operations and timeshare industry

- 5.1 The implementation of fixed salary-based remuneration by other timeshare companies within the Asia Pacific region and through the United States and Europe has not yielded successful results and has not been ultimately viable for these businesses.
- 5.2 The specific impact of implementing fixed-based salary would be catastrophic for Wyndham.
- 5.3 If the legislation passes Parliament in its current form, Wyndham will have to drastically reduce its sales and corporate support operations in Australia and shift the focus of its investment to other locations offshore, such as Asia where our business can operate under the worldwide industry norm of commission-based payments.
- 5.4 Further, we submit that the ban on conflicted remuneration for the timeshare industry could potentially result in loss or limitation of the following (without achieving any positive impact on consumer protection):

⁴ Page 15 of the 2011 Information Pack

- (a) Future resort development ;
- (b) Direct timeshare-related jobs;
- (c) Indirect timeshare-related jobs (community marketing employment);
- (d) Other businesses that rely on the timeshare industry (suppliers, tourist attraction operators and other business that are supported by the timeshare industry) e.g. hospitality suppliers, such as cleaning services, linen suppliers and construction contractors;
- (e) Substantial taxable income and revenue lost; and
- (f) Substantial contributions to charities made each year.

We are also attaching to this submission a confidential document that provides further information in support of the above.

6. WVRSP does not distribute its vacation credits to or through any dealer groups or advisers

- 6.1 We note that the FOFA reforms seek to encourage fair competition and consumer protection by preventing the payment of volume bonuses to dealer groups or financial advisers⁵. While we support these intentions, we seek an exemption for the timeshare industry on the basis that WVRSP does not distribute vacation credits to or through other entities, such as dealer groups or financial advisers. WVRSP only sells vacation credits directly through Wyndham's own sales staff.
- 6.2 Any secondary market that exists in vacation credits is not as a result of distribution of the credits to dealer groups or financial advisers. No commission or volume-based fee is paid by Wyndham to any financial advisers employed by any third-party dealer groups.

D. Suggested amendments to the Bill

We suggest that our concerns above can be addressed if the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 is amended to exempt the timeshare industry from the ban on conflicted remuneration.

- 1.1 Specifically, Wyndham is proposing that Schedule 1, item 24, subparagraph 963B should be amended by inserting the following new paragraphs (e) and (f) and renumbering existing paragraph (e) as paragraph (g):

(e) the benefit:

- (i) is remuneration for work carried out, or to be carried out, by the licensee or representative as an employee of that employer; and
- (ii) is not of a kind mentioned in subsection 963L (volume based benefits); or
- (f) the benefit is remuneration for work carried out, or to be carried out, by the licensee or representative as an employee of that employer and:

- (i) the employer operates a timesharing scheme⁶ that is a member of the Australian Timeshare and Holiday Ownership Council;
- (ii) access to the benefit, or the amount of the benefit, is dependent on the licensee or representative recommending a timesharing interest;
- (iii) the licensee or representative does not, in the course of recommending that timesharing interest, give other personal financial product advice; and
- (iv) the licensee or representative does not, in the course of recommending that timesharing interest, give other financial product advice that does not relate to a timeshare interest.

1.2 An item should also be inserted in the Bill to add the definition of “timesharing interest” to section 761A of the Corporations Act. This phrase has been used by ASIC and we propose to use ASIC’s definition of the term found in its Regulatory Guide 160 as follows:

timesharing interest means an interest issued in a timesharing scheme.

E. Conclusion

- 1.1 Wyndham is strongly supportive of a regulated and responsible timeshare industry within Australia. Our timeshare product offering and authorised representatives are extensively regulated today by law and a stringent regulatory environment. As an example, we have embraced and adopted the National Consumer Credit Protection (NCCP) legislation into our policies and procedures. We believe these laws genuinely help to protect consumers from purchasing a product they cannot afford.
- 1.2 As noted above, our timeshare product has no direct or indirect connection to the provision of financial investment advice or financial planning services.
- 1.3 Without a carve-out for timeshare companies such as Wyndham that offer a single timeshare product and remunerate its sale representatives on a commission basis, the legislation as proposed could have the unintended consequence of causing uncertainty, limiting consumer choice, and decimating the Australian timeshare industry, adding to the difficulties of the tourism sector and the two-speed economy.
- 1.4 Serious consideration should be given to the potential adverse impact of the FOFA Bills on the timeshare industry should timeshare commissions be considered “conflicted remuneration”, particularly taking a broad-brush approach for issuers of vacation credits, such as Wyndham (which bases its entire remuneration structure around compensating its sales staff for sales volumes of its only product, a product which itself is not a financial investment product).
- 1.5 Wyndham looks forward to further engagement with the Committee on this critically important policy issue for the Australian timeshare industry.

⁶ “Time-sharing scheme” is defined in section 9 of the *Corporations Act 2011* (Cth) as “a scheme, undertaking or enterprise, whether in Australia or elsewhere:

(a) participants in which are, or may become, entitled to use, occupy or possess, for 2 or more periods during the period for which the scheme, undertaking or enterprise is to operate, property to which the scheme, undertaking or enterprise relates; and;

(b) that is to operate for a period of not less than 3 years.