

## Submission to the Joint Committee on Corporations and Financial Services

### Corporations Amendment (Future of Financial Advice) Bill 2011 and Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011

December 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 Australia 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 invest substantially in resort developments in Australia over the next five years.
- Wyndham, and the broader timeshare industry, provide vacations to 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 pure 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 license 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 (“Sales Staff”) commissions, including product sales incentives on the following basis:
  - The Sales Staff provide only general product advice (and do not provide personal financial product advice); and
  - The Sales Staff provide 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).
- Wyndham believes that it is an unintended consequence that the FOFA Bills capture Wyndham’s remuneration payments 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 financial product 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 (Registered with ASIC) specifically prohibits it to communicate that the products are a financial investment. Under no circumstances do Wyndham’s Sales Staff provide personal financial advice to consumers. 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 an 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, that 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.
- Commission-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 product sales 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 through 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 the Sales Staff sells 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 would be made 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 Bill 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 that 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 interest in managed investment schemes, limited to timesharing schemes. Under section 766B(3) and (4) of the *Corporations Act* WVRSP is limited to providing *general* financial product advice in respect to vacation credits only.

3.3 Accordingly, representatives are restricted under the AFSL to providing *general* financial product advice to retail clients *only* in relation to the vacation credits.

#### **4. How do we remunerate our representatives?**

- 4.1 Product sales-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 product sales-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 volume-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 volume-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 a product sales 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:

- (a) Sales Staff provide *general* product advice only (are prohibited from and do not provide *personal* financial product advice); and
- (b) that general product advice relates to *one product* only — namely, vacation credits

the payment of commissions to the 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 Time Share 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 product advice only; 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 to clarify that timeshare commissions are not "conflicted remuneration" under the proposed FOFA 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 – the 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 choice between products**

1.1 The Explanatory Memorandum (EM) of the FOFA Bill states that product commissions on financial products may encourage financial advisers 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 need to choose between

maximising its revenue from product sales and offering advice that is beneficial to clients<sup>1</sup>. Our representatives do not provide personal financial advice.

- 1.2 We submit that this kind of conflict of interest does not exist for Wyndham's representatives or those of other timeshare company's 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.
- 1.3 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 WVRSP's Australian Financial Services (AFS) licence only permits the representatives to give *general* financial product advice. This means that representatives can only give general product information on the vacation credits that is not tailored to any particular consumer. Representatives discuss the types of resorts available, how the system works and what kind of holidays clients can get. Under the terms of the AFS licence, and the manner in which Wyndham complies with the Act, our Sales Staff are restricted from providing *personal* financial advice, which is financial advice that considers the client's objectives, personal financial situation or needs. In addition, approximately 80% of the consumers that purchase Vacation Credits from Wyndham finance their purchase through Wyndham's nonrecourse 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 personal 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 finalized.
- 2.2 A 2008 study conducted by Associate Professor Gayle Jennings, Associate Professor Graham Bradley and Professor Beverley Sparks of Griffith University<sup>2</sup> 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.

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<sup>1</sup> Paragraphs 1.3 to 1.6 of the EM.

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

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. Similarly, the travel/leisure industry pays commissions to its travel agents who assist consumers in booking flights, hotel accommodations, and other holiday packages. As there is no basis to ban 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 products<sup>3</sup>. According to the 2011 Information Pack on the FOFA reforms, this carve-out came about because these products are “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”<sup>4</sup>.

3.2 We submit that a similar carve-out or other form of exemption should be made for 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 Bill 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 Product sales-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 product sales-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

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<sup>3</sup> Schedule 1, item 11, subparagraph 963C(b)

<sup>4</sup> Page 15 of the 2011 Information Pack

remuneration model is also used by the real estate industry, with which timeshare sales is more closely aligned.

## **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):
  - (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 product sales-related bonuses to dealer groups or financial advisers<sup>5</sup>. While we support these intentions, we seek an exemption 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 advisors. No commission or product sales-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.

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<sup>5</sup>Page 9 of the 2011 Information Pack.

1.1 Specifically, Wyndham is proposing that Schedule 1, item 24, subparagraph 963B should be amended by inserting the following new paragraphs (e), (f) and (g) 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 time-sharing scheme<sup>6</sup> 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 “time-sharing 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:

**time-sharing interest** means an interest issued in a time-sharing 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 personal financial 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

<sup>6</sup> “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.

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 Bill 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 product sales 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.