

# Chapter 2

## Regulation of timeshare schemes

### Introduction

2.1 The introduction of a new management structure and uniform compliance regime for managed investment schemes was intended to reduce institution risk and enhance consumer protection. The regime was put in place to improve the international competitiveness of the Australian financial services industry.

2.2 Timeshare operators assert that the regulatory framework imposed under the Corporations Act has erected unnecessary and expensive administrative hurdles for industry. Further, it is argued that the regime has the effect of decreasing the international competitiveness of the timeshare industry without improving consumer protection.

2.3 This chapter provides a context for consideration of the issues raised by the timeshare operators and other evidence to the inquiry. It begins with a definition and brief overview of the timeshare industry before setting out the main features of the regulatory arrangements which currently govern timeshare schemes.

### Industry definition and profile

2.4 The legal definition of timeshare is provided under the *Corporations Act 2001* (Corporations Act), which specifies that a timeshare scheme is 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 two 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 three years.<sup>1</sup>

This captures the variety of timeshare schemes operating in Australia, including those featuring holiday exchange arrangements.

2.5 The timeshare industry is a hybrid of the property development, tourism, and hospitality industries, and as such involves four principal groups of service providers:

- developers who build resort complexes;
- marketers and promoters who sell units to consumers;

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<sup>1</sup> Section 9. The definition is carried over from the same section of the old Corporations Law.

- exchange companies which facilitate the bartering of units between locations; and
- networks of participating resorts.<sup>2</sup>

2.6 Timeshare schemes traditionally operated as title-based schemes in which a purchaser became a tenant in common with a right to share in the ownership of real property. The timeshare contract secured the owner a holiday at the same timeshare property for a specified period, at a designated time once a year.

2.7 Timeshare operators now offer more flexible 'holiday club' or vacation exchange schemes. These allow for time in resort or hotel accommodation to be exchanged between members using mechanisms such as the 'points' system. Owners purchasing under title-based schemes can convert their investment into points to purchase any number of days accommodation, plus extra services, at any time of the year at another participating resort. New clients buy a certain number of points to achieve the level of service they require, and can upgrade by purchasing additional points.<sup>3</sup>

2.8 To invest in timeshare the purchaser must sign a timeshare contract. This is a complicated document involving management and trust arrangements and setting out the obligations of a number of parties. The price of an average contract is between \$12,000 and \$25,000.<sup>4</sup> Timeshare contracts apply for a pre-determined period of up to 80 years duration.<sup>5</sup>

2.9 The resale market for timeshare in Australia is undeveloped compared with Europe and some states of the United States. If the owner wishes to exit the contract they may receive between 50 or 60 percent of the paid price for points products, title-based products in older resorts may realise only 10 per cent of the original price.

2.10 Most new-offer timeshare schemes are structured as share-based schemes or unit trusts. At the end of the contract, the scheme must determine whether the timeshare operation will be wound up and the funds distributed between the owners or whether the contracts will be reinstated. As with other trust-based systems, all property is held and managed by the operator until the scheme expiry date.<sup>6</sup>

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2 'Timeshare in Australia', *FocusOn*, Jones De LaSalle Hotels at [www.joneslanglasallehotels.com](http://www.joneslanglasallehotels.com) (accessed 10 December 2004).

3 'Timeshare in Australia', *FocusOn*, Jones De LaSalle Hotels website (accessed 10 December 2004).

4 Entry price for one week annually. The total contract price is conditioned by a number factors such as season booked and size of accommodation. *ATHOC Submission 10*, p.7; 10B, p. [2].

5 *ATHOC, Submission 10*, p. 7.

6 Mr John Reghenzani, Corporate Counsel, Accor Premier Vacation Club (APVC) and Mr John Robinson, Trendwest Resorts South Pacific (Trendwest), *Transcript of evidence*, 13 April 2005, p. 42.

## *Evolution of the product*

2.11 The Swiss company Hapimag originated the idea of timeshare in the 1960s. It sold ski resort units on the basis of one set month or one week's annual usage, for a fixed number of years or in perpetuity.<sup>7</sup> After the oil crisis in the 1970s, tourism slumped and American resort owners began offering seasonally adjusted prices on a timeshare basis to encourage high year-round occupancy rates. In 1974 the development of global 'ownership pools' allowed for members to exchange their holiday entitlements for another member's entitlement in other resort locations.<sup>8</sup>

2.12 In the 1980s the global timeshare market began to attract large international hotel management and hospitality groups which offered higher standards of accommodation and focussed delivery on the more flexible vacation arrangements.<sup>9</sup> This foreshadowed the revival of the global timeshare industry in the 1990s, as the table below shows.<sup>10</sup>

**Table 1: Growth of global timeshare industry 1980 to 1998**

	1980	1985	1990	1994	1998
Owners	155 000	805 000	2 048 804	3 144 000	5 498 000
Resorts	506	1 774	2 357	4 145	5 487
Intervals sold per year	100 000	245 000	405 000	560 000	778 000

2.13 The World Tourism Organisation now rates timeshare as the fastest growing segment of the world tourism and leisure industry.<sup>11</sup> Statistics indicate that the volume of global timeshare sales has grown by an average of 15 per cent over the last ten years, with sales in 2003 estimated at A\$15 billion.<sup>12</sup>

## *Timeshare in Australia*

2.14 The 1980s saw a proliferation of timeshare schemes, particularly on Queensland's Gold Coast, but the questionable marketing practices of property entrepreneurs soon led to an industry downturn. In 1990 the collapse of the unlisted

7 Susan Marks, *Paradise Lost: CAB Clients Experience of Timeshare and Timeshare-like Products*, The CAB Service UK's European Consumer and European Extra-Judicial Network, November 2003, p. 5.

8 'Timeshare and Holiday Ownership at A Glance', ATHOC [www.athoc.com.au/m30/m30.htm](http://www.athoc.com.au/m30/m30.htm) (accessed 20 December 2004).

9 'Timeshare History', Marriott Vacation Club International at [www.vacationclub.com/en-us/vc/about/history.asp](http://www.vacationclub.com/en-us/vc/about/history.asp) (accessed 10 December 2004).

10 Table: ATHOC website (accessed 20 December 2004).

11 ATHOC website (accessed 2 December 2004).

12 Statistics from Interval International quoted in *FocusOn*, Jones De LaSalle Hotels.

property trust market further reduced investor confidence.<sup>13</sup> By 1995, there were fewer than five resorts actively selling timeshare in Australia.<sup>14</sup>

2.15 In 1994 the Australian Timeshare and Holiday Ownership Council (ATHOC), the timeshare industry's peak body, was formed to improve the image of the industry. It developed an industry code of practice and provided training and dispute resolution services. Corporations law reform in the late 1990s raised industry standards and provided more protection for consumers.

2.16 ATHOC and industry submitters maintain that the now buoyant timeshare industry results from the entry of large internationals into the Australian market. For example, international exchange arrangements offered by large operators like RCI Pacific are said to support high year round occupation rates in resorts, which contribute to stable employment and regional economic growth. According to the 2002 timeshare survey *Resort Timesharing in Australia and New Zealand* (the Ragatz report), timeshare owners in Australia spend about \$116 million annually at resort communities, while timeshare resorts spend about \$39.7 million on maintenance, staff and purchase of goods and services a year.<sup>15</sup>

2.17 The ATHOC submission reports that the Australian timeshare industry recorded over \$300 million in timeshare sales in 2004, with over 130,000 households owning rights to about 160,000 timeshare weeks. There are at present approximately 110 timeshare resorts in Australia.<sup>16</sup> A list of major participants in the timeshare industry in Australia is at **appendix 3**.

2.18 Yet despite this positive picture, the Committee has been petitioned by major timeshare operators over a number of years about the negative pressures placed on the industry by its regulation under the Corporations Act.

2.19 In 2003 the Committee surveyed industry opinion to obtain a better understanding of these issues. Respondents maintained that the regulatory framework imposed on timeshare is not appropriate, principally because timeshare is a tourist product not a financial product. They considered that the present approach imposes unnecessary restrictions and high compliance costs on the industry, while also affecting consumer perceptions of timeshare. As a result, the Committee was told, the Australian timeshare industry remains underdeveloped. In particular:

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13 The collapse of Estate Mortgage trusts prompted a review of the regulation of the collective investments system covering timeshare schemes. See discussion of the Companies and Securities Advisory Committee (CASAC) and the Australian Law Reform Commission (ALRC) report *Collective Investments: Other People's Money* (1993) in Chapter 3 below.

14 Interval International in *FocusOn*, Jones De LaSalle Hotels.

15 'Key Findings' *Resort Timesharing in Australia and New Zealand*, Ragatz Associates, RCI, April 2002, p. [2]; submitted by ATHOC.

16 *Submission 10*, p. 9.

- timeshare does not have the domestic market presence it has overseas; and
- timeshare operators cannot meet the high level of international demand for resort accommodation in Australia.<sup>17</sup>

2.20 The main features of the regulatory regime applying to the establishment and operation of timeshare schemes in Australia are set out below.

### **Corporations Act reforms and the timeshare industry**

2.21 Section 9 of the *Corporations Act 2001* specifically defines a 'time-sharing scheme' as a type of 'managed investment scheme', where:

- (i) people contribute money or money's worth as consideration to acquire rights (*interests*) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);
- (ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the *members*) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);
- (iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions).

2.22 Traditional financial assets schemes predominate among managed investments schemes but the legislation also covers a number of property, primary production, mortgage and master fund schemes. Timeshare schemes, along with film, derivative and strata schemes, are relatively low in number. In 2003 less than four percent of managed investment schemes were timeshares schemes.<sup>18</sup>

2.23 As managed investments, timeshare schemes are regulated principally by Chapter 5C of the Corporations Act, although other provisions of the Act apply where relevant. Chapter 5C was inserted into the Corporations Act by the *Managed Investments Act 1998* (MIA) with effect from 1 July 1998.

2.24 The MIA completely revised the regulation of managed investment schemes. Under the previous prescribed interest system, schemes were operated under a dual trustee/fund manager structure. Under the MIA, there is no independent trustee. Instead, sole responsibility for custodianship of funds and scheme operation lies with

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17 Correspondence to the Committee, May 2003.

18 *Australian Corporations and Securities Legislation 2003*, CCH Australia Limited, vol. 1, 2003, p. 8. Timeshare schemes are a subset of the 'other' category.

the fund manager, the single responsible entity which must set up the compliance structure, register with ASIC and meet new licensing requirements.

2.25 These requirements are contained in the regulatory framework introduced by the *Financial Services Reform Act 2001* (FSR Act), which applies to managed investment schemes regulated under Chapter 5C.

2.26 The definition of a financial product, found in Part 7.1 Division 3 of the Act, includes managed investment schemes, and any form of interest in these schemes.<sup>19</sup> Subsection 763A (1) provides the general definition that a financial product is a facility through which, or by the acquisition of which, a person makes a financial investment, manages financial risk or a makes non-cash payments, although exemptions also apply.<sup>20</sup>

2.27 Under former regulation as 'prescribed interests' any scheme offering timeshare rights on the basis of shares in a title to real property had to provide a registered prospectus to potential investors. The prospectus was expected to disclose the nature of the scheme and set out the protections offered to investors. However, there were no statutory requirements or administrative guidelines for the content of the prospectus, nor was there a registration and licensing regime.

2.28 Under the amendments introduced by the FSR Act any promoter involved in the advertising, marketing, selling or promoting of interests in a managed investment scheme is operating a financial service business<sup>21</sup> and must hold an Australian Financial Services (AFS) licence for the type of product sold by the business.<sup>22</sup> The obligations of the financial services licence are clearly enumerated<sup>23</sup> and have the effect of significantly increasing disclosure and transparency requirements for providers of managed investments products, which includes timeshare schemes.

2.29 The following sets out the key requirements for timeshare managed investment schemes under the *Corporations Act 2001*.

### ***Registration with the Australian Securities and Investments Commission (ASIC)***

2.30 To register with ASIC a timeshare scheme must:

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19 *Corporations Act 2001*, s 764A.

20 Excluding certain financial products that might otherwise be considered managed investments products, see s762A(3).

21 s 911D.

22 s 911A(1).

23 s 912A.

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- have a responsible entity which is a public company that holds the appropriate AFS licence ‘to operate the scheme and perform the functions conferred on it by the scheme’s constitution and [the Corporations Act]’;<sup>24</sup>
  - ensure that the RE holds scheme property on trust for scheme members;
  - have a constitution setting out matters such as:
    - the costs of investing in the scheme;
    - the responsible entity’s powers and rights, if any, to be paid fees out of scheme property;
    - a complaints resolution mechanism;
    - winding-up arrangements; and
    - procedures for making and dealing with withdrawal requests.<sup>25</sup>
  - have a compliance plan setting out ‘adequate measures that the responsible entity is to apply in operating the scheme to ensure compliance with [the Corporations Act] and the scheme’s constitution’;<sup>26</sup>
  - appoint a registered company auditor to audit the compliance plan and advise ASIC of any suspected breaches which the auditor believes has not been or will not be adequately dealt with by the responsible entity;<sup>27</sup>
  - lodge the auditor’s compliance report with ASIC together with lodgements of the responsible entity’s financial reports and directors’ reports;<sup>28</sup> and
  - have an in-house compliance committee to monitor the activities of the responsible entity.<sup>29</sup>

### *Australian Financial Services licence obligations*

2.31 To obtain and hold an AFS licence the operator of a managed investment scheme must ensure compliance with the following general obligations, such that:

- the financial services covered by the licence are provided efficiently, honestly and fairly;
- adequate financial technological and human resources are available to deliver these services;

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24 s 601FA and s 601FB(1).

25 See ss 601GA(1) to (4).

26 s 601HA(1).

27 s 601HG.

28 s 601HG.

29 s 601JA to 601JJ.

- representatives of the business are adequately trained, competent to provide the financial services pertaining to the licence, and are adequately supervised for compliance with the law;
- an internal dispute resolution system is in place which complies with the standards and requirements determined by ASIC and covers complaints made against the licensee by retail clients; and
- the scheme is a member of one or more external dispute resolution schemes that are approved by ASIC's regulations and cover complaints about the licensee made by retail clients (other than those that can be dealt with by the Superannuation Complaints Tribunal).<sup>30</sup>

2.32 In addition, a financial services licensee must report to ASIC breaches which might affect the licensee's capacity to deliver the financial service.<sup>31</sup> Financial service licensees must also provide the required disclosure document, statement or prospectus, for the type of financial service they provide.<sup>32</sup>

### ***Disclosure requirements for licensees***

2.33 Section 710 of the Corporations Act sets out the general content requirements for a prospectus which must contain 'all the information that investors and their advisers would reasonably require to make an informed assessment'. Managed investment schemes must disclose:

- the rights and liabilities attached to the offer, including any detail the purchaser might 'reasonably be expected to know', such as the nature of the scheme and any risks, or fees, commissions or charges attaching to the offer; and
- assets and liabilities, financial position, performance and prospects of the scheme, including details about the scheme operator, and financial licensee.

2.34 Section 714 also states that any product issuer must lodge and declare lodgement of a copy of the profile statement with ASIC, and give any other information required by regulations under ASIC.<sup>33</sup>

2.35 ASIC's Policy Statement 175 *Licensing: Financial Product Advisers—Conduct and Disclosure* (PS 175) describes how the disclosure and conduct obligations set out in Part 7.7 of the Corporations Act apply to the provision of financial service product advice to retail clients. The required information must be set out in a Product Disclosure Statement, a Financial Services Guide, and/or a

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30 s 912A.

31 s 912D.

32 s 705.

33 s714 (1)E.



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Statement of Advice. The adviser must also ascertain the financial situation of the client, to meet the 'know your client' rule.

2.36 ASIC's role in applying additional statutory requirements and providing relief from the effect of the Corporation Act for timeshare operators in particular is discussed below.

### **ASIC's regulation of timeshare schemes**

2.37 ASIC's responsibilities in overseeing the managed investments regulatory framework are quite extensive. ASIC assesses and approves scheme registration and licence applications. It is the body which the compliance plan auditor and compliance committee are required to advise in certain circumstances where there are actual or suspected breaches of the law. The responsible entity's annual financial reports must be lodged with ASIC, as must copies of disclosure documents appropriate to the type of service being offered and type of scheme.

2.38 ASIC has the power to undertake surveillance checks of schemes and is equipped with a range of enforcement options. It also has powers under section 601QA to modify or exempt a person from the application of Chapter 5C. ASIC has used these powers to exempt certain timeshare schemes from the requirements of the Act or otherwise to modify their application.

2.39 To clarify its expectations of the industry, ASIC issued its first policy statement on timeshare schemes, PS 66, in 1993. The statement set out the types of schemes subject to regulation and provided exemptions from certain aspects of their regulation as 'prescribed interests'. PS 160: *Time-Sharing Schemes* was an update issued in 2000 after the introduction of the *Managed Investments Act 1998*. It sets out both concessions and additional requirements ASIC has determined for the industry.

2.40 Relief from the requirement to register as a managed investment scheme is provided under various pro forma instruments according to the particular type of timeshare. The three main categories of timeshare schemes eligible for relief are:

- schemes that were previously not required to comply with the prescribed interest regime under state laws (PS 160, Pro forma 205);
- substantially sold out title-based schemes (PS 160, Pro forma 207); and
- schemes where the responsible entity relinquishes control to member owned clubs (PS 160, Pro forma 206).<sup>34</sup>

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34 ASIC, *Submission 9*, p. 9.

***Exemptions under state laws and for fully sold title-based schemes***

2.41 PS 160 offers exemptions for schemes that were previously not required to comply with the prescribed interest regime under state laws (Pro forma 205). The relief is offered on the condition that such schemes:

- make no primary offers after 31 May 2000; or
- belong to an approved external complaint system or become a member of an approved industry supervisory body before 1 October 2000 (extended to 31 March 2006).<sup>35</sup>

2.42 PS 160 provides that, on application to ASIC, sold out title-based schemes are also eligible for exemption from the managed investment provisions if:

- planned buildings specified in the prospectus had been built or substantially completed, or would not be built without affecting the interests of members;
- a minimum of 90 percent by value or number of all the interests in the scheme were held on 1 June 2000 by persons who were not associated with the scheme operator, manager, promoter or developer;
- any further issue of sale of interests in the scheme be conducted by a licensed securities dealer, and that the offer must comply with conditions for licence as if the scheme were a registered scheme; or
- other conditions relating to issue of membership certificates, member voting rights, membership of an external complaints system or an approved industry body and the application of cooling-off rights to purchasers of scheme interests are satisfied.

2.43 ASIC's submission records that, as at September 2004, there were four operators relying on relief under formerly exempt state laws and 26 operators relying on relief as title-based schemes.<sup>36</sup>

***Exemptions for owner operated clubs***

2.44 Some timeshare schemes are run as 'clubs' by a board representing timeshare co-owners. Clubs that have taken over management of scheme property from the responsible entity are entitled to relief from Chapter 5C in certain instances.<sup>37</sup> These are that:

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35 Australian Securities and Investments Commission (ASIC), *Submission 9*, p. 10, and see ASIC Class Order 04/1204, *Time-Sharing Schemes—Extension of Time until 30 June 2005 to belong to an ASIC Approved Industry Supervisory Body*, 30 September 2004; and Instrument 05/403, *Time-Sharing Schemes—Extension of Time until 31 March 2006 to belong to an ASIC Approved Industry Supervisory Body*, 22 April 2005.

36 ASIC, *Submission 9*, p. 4.

37 PS 160: 12.

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- there are certain controls on the club's expenditure;
  - the club has a veto over all decisions that materially affect members' best interests;
  - the club is a public company;
  - the property is held on trust for members or members hold title (and the relevant title documentation) to the scheme property, and members hold membership certificates in the club;
  - scheme buildings are completed or substantially completed and at least 90 percent of the interests have been issued to persons other than the scheme promoter, developer, manager, responsible entity or an associate of theirs;
  - the club holds a trust account audited twice yearly by a registered company auditor;
  - any agreement between the club and another party to supply management services must provide members with voting rights to dismiss the person providing the service and without any additional payment;
  - the club is a member of an approved industry supervisory body;
  - all sales of scheme interests are subject to a minimum of five business days cooling-off period; and
  - the responsible entity does not operate a rental pool.

2.45 Notably, if the club offers any new or secondary (resale) interests the operator must take out a financial services licence for dealing and advising, and comply with its conditions, as though the scheme were a registered managed investment scheme.<sup>38</sup>

2.46 ASIC reports that, at September 2004, there were only two timeshare schemes relying on this relief.<sup>39</sup>

### ***Exemption as prescribed interest schemes***

2.47 The *Managed Investment Act 1998* was introduced with transition provisions which allowed the prescribed interests regulatory framework to continue to apply to certain scheme operators for two years.<sup>40</sup> PS 135: *Managed Investments: Transitional Issues* sets out ASIC's policy on transitional arrangements for managed investment schemes of various types, providing relief from registration and other requirements. Under PS 135 ASIC may extend transition provisions for timeshare operators.<sup>41</sup>

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38 PS160:12 (f) and see discussion of transitional arrangements below.

39 ASIC, *Submission 9*, p. 10.

40 ASIC, *Submission 9*, p. 5.

41 PS 135: 13.

2.48 In March 2003, ASIC announced a further extension of relief from registration requirements for non-transitioning exempt schemes until 30 June 2010. Extensions will only be awarded, however, if it is clear to ASIC that scheme property will be properly managed. ASIC has advised that still further extensions may be allowable.<sup>42</sup>

2.49 ASIC reported that, at February 2005, there were 18 timeshare schemes still operating as prescribed interest schemes.<sup>43</sup>

### ***Exemptions from net tangible asset requirements***

2.50 Among other concessions<sup>44</sup> provided to timeshare schemes, ASIC provides an exemption from the minimum net tangible assets (NTA) requirements applying to financial services licence holders.

2.51 As mentioned, a responsible entity must hold such a licence to provide the relevant services. Under the Corporations Act, licensees must have 'adequate financial resources' to provide the licensed services and carry out supervisory arrangements. Part C of ASIC's Policy Statement 166 *Licensing: Financial Requirements* relating to managed investment schemes and custody services states that a licensed responsible entity holding scheme property and assets itself must have a minimum of \$5 million NTA.<sup>45</sup>

2.52 PS 160:5 provides that a responsible entity of a timeshare scheme is not required to have NTA of \$5 million if it holds scheme assets consisting of:

- scheme levies held in a trust account that is audited twice annually by a registered company auditor who reports to the responsible entity;<sup>46</sup> and
- title to land to which a timeshare scheme relates.

### ***Class orders***

2.53 Class orders are offered extensively by ASIC to provide relief to timeshare scheme operators on a case by case or issue basis. In its submission to the Turnbull review of the Managed Investment Act in 2001, ASIC reported that of the 137 Class Orders issued during the two year transitional period for the legislation, a

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42 ASIC Media and Information Release IR 03-05, *ASIC Grants Further Extension of Interim Relief for Non-Transitioning Managed Investment Schemes*, 5 March 2003.

43 ASIC, *Submission 9*, p. 5.

44 Other exemptions in PS 160 were relief from valuation requirements, the exemption of rental pools, subject to certain conditions, and of non-accommodation based timesharing schemes.

45 Where the responsible entity has appointed a suitably qualified custodian to hold scheme property, it must have a minimum of 0.5 per cent of the value of the scheme assets and other scheme property. The minimum NTA is \$50,000 and the maximum \$5 million.

46 These levies must not be more than the responsible entity reasonably considers necessary for maintaining, refurbishing or improving scheme property or meeting expenses required by law.

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disproportionate number of 81 related to non-mainstream products, including timeshare schemes.<sup>47</sup>

### ***Introduction of the cooling-off period***

2.54 ASIC may also modify the law to apply additional restrictions on licensees dealing in timeshare schemes. PS 160:11 provides that, to obtain a licence, timeshare operators must ensure that each sale has a cooling-off period of:

- five business days, if the applicant is a member of ATHOC; and
- ten business days in other cases.

2.55 Sale documentation must prominently advise of this and purchasers must be given a separate dated statement to this effect. A record of the statements is to be kept by the responsible entity of the scheme. If a prospective member decides not to proceed, all consideration, including administration and any other fees, must be refunded.

### ***Approved dispute resolution and an industry supervisory body membership***

2.56 Access to class orders and the exemptions allowed under PS 160, as outlined in this section, are contingent on the applicant belonging to an ASIC approved external complaints system or holding membership with the approved industry supervisory body (ISB).

2.57 Many timeshare operators are members of the Financial Industry Complaints Service (FICS) which is an approved external complaints body. ATHOC operates a complaints resolution committee (CRC) but ASIC withdrew interim approval for it to deal with regulated matters in March 2004.<sup>48</sup> ATHOC has appealed against this decision and the matter is now before the Administrative Appeals Tribunal (AAT). The ATHOC CRC now deals only with unlicensed, unregulated complaints about maintenance and management of resorts.<sup>49</sup>

2.58 ATHOC has also made application to ASIC to become the ISB but to date has been unsuccessful.<sup>50</sup> Given the lack of an approved ISB, ASIC has permitted interim modification of the requirements so that schemes may hold membership of ATHOC instead. In September 2004, ASIC issued Class Order 04/1204 which gave

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47 Malcolm Turnbull, *Review of the Managed Investment Act 1998*, 2001, p. 19.

48 Mr Paul O' Shea, Lecturer at the Beirne School of Law, University of Queensland, *Transcript of evidence*, 28 April 2005, p. 4.

49 Mr O'Shea, *Transcript of evidence* 28 April 2005, pp. 4-5, and See ATHOC *Submission 10*, p. 34.

50 ATHOC, *Submission 10*, p. 34.

an extension of time until June 2005 for timesharing schemes to belong to ATHOC. A further extension, to March 2006, was offered in April 2005.<sup>51</sup>

2.59 ASIC has advised that it is considering revising the PS 160 requirement for membership of an ISB, and potentially reviewing PS 160 more comprehensively, given that no ISB has yet been appointed.<sup>52</sup>

## Conclusions

2.60 The new obligations imposed on timeshare schemes by the introduction of the *Managed Investments Act 1998* and the *Financial Services Reform Act 2001* are very significant. Timeshare schemes are among a small sliver of untypical managed investments schemes which attract a disproportionate number of applications for relief from Chapter 5C.

2.61 Given the nature of the timeshare industry, with its diverse range of products and service providers, the obligations imposed under Corporation Act reform have seemed onerous to timeshare operators compared with some other managed investment providers.

2.62 The industry effectively operates as two tiers: timeshare marketers and developers attract the full legislative effect of financial reform. As operators of a managed investment scheme they must register the scheme, obtain an appropriate financial service licence and meet disclosure, training and other requirements. For fully sold clubs the position is more ambiguous. While exempt from meeting scheme management and compliance structures, they are prohibited from assisting with resale or advising owners about their timeshares. If they do, extensive and costly compliance requirements must be met.

2.63 For industry players such inconsistencies cause operational problems and increase costs, raising questions about the credentials of the present regime effectively and comprehensively to regulate the timeshare industry. For consumers, lack of clarity about the legal status of timeshare may diminish awareness of rights and protections; may make them vulnerable to loopholes in a timeshare contract.

2.64 The next chapter of the report will look more closely at some of the strengths and weaknesses of the current approach.

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51 INS 05/403, *Time-Sharing Schemes—Extension of Time until 31 March 2006 to belong to an ASIC Approved Industry Supervisory Body*, 22 April 2005.

52 ASIC, *Submission 9*, p. 9.