

Chapter 5

Issues for regulation

Introduction

5.1 In previous chapters the Committee has expressed the view that timeshare should continue to be regulated by a national scheme and that this scheme should operate under the *Corporations Act 2001*. In this chapter, the Committee considers particular issues which have been raised in evidence, and the ways in which the proposed regulatory regime could accommodate them.

5.2 It should be apparent that the Committee does not seek to devise a new regulatory regime from scratch. The regulatory regime for timeshare should be consistent with the regulatory approach for other financial products and services and, for the reasons discussed in Chapter 4, consistent particularly with that applied to managed investment funds. The purpose of this chapter is to draw attention to exceptional characteristics of timeshare which may require a deviation from the current regulatory approach.

5.3 Issues to be discussed are:

- the price of timeshare and its impact on how timeshare is marketed, and sold;
- solicitation and sales techniques used while selling timeshare;
- training of sales and management staff;
- cooling-off periods;
- disclosure requirements; and
- resales and the absence of a secondary market.

The price of timeshare

Entry pricing

5.4 For consumers, entry into a timeshare scheme involves a considerable financial outlay. Initial entry prices in the primary market appear to commence in the order of \$16,000, and new clients who wish to enter higher categories of membership (so as to receive entry into exchange schemes, more exchange points, and higher priority in bookings) can pay considerably more. Buying into a timeshare scheme is therefore approximate in scale to buying a small to medium sized new motor vehicle.

5.5 The Committee does not, of course, propose any regulatory approach to the initial pricing of timeshare; it supports the free operation of markets in setting the appropriate pricing for products and services. However, the relatively high entry price

of timeshare appears to have serious implications for the way timeshare is marketed and sold.

5.6 The price of timeshare creates a significant barrier to entry for many new customers who may have to borrow thousands of dollars to enter a scheme. The barrier amounts to paying upfront for rights which can then be exercised over a period of up to 80 years:

Timeshare is a form of pre-paid holiday plan, which entitles purchasers to holiday accommodation for a pre-determined period (up to 80 years). Purchase of the timeshare interest typically costs between \$12,000 and \$25,000.¹

5.7 In addition, the Committee heard that there is not a high demand for timeshare within the community. Consumers, even consumers with a significant amount of discretionary income, are not sufficiently attracted by timeshare to seek it out on their own:

The product is not a product for which people wake up in the morning and say, 'I'm going to buy a time share today'...so they are telemarketed or whatever means is used to get them to attend a presentation so that the product can be explained to them.²

5.8 Timeshare sellers must therefore solicit leads from an initially disinterested public and then encourage them to overcome a very significant immediate financial hurdle. This is a difficult task indeed. In the Committee's view, this pricing structure, together with remuneration for salespeople which is based substantially on commissions³ sets the scene for the pressure selling and other questionable marketing practices discussed below.

5.9 Furthermore, this pricing structure starts a vicious circle. Because the entry price to timeshare is so high, and because of the enticements required in order to gain the interest of potential customers, the marketing costs associated with each sale are very high. These costs must then be realised, resulting in the maintenance of high prices:

Part of the problem that you have heard is that people do not get up and buy time share. People do not go to presentations to buy; they are there for the gift—they are there for the free holiday, the television or the DVD player. That is why sales and marketing costs in this industry can run upwards of 50 to 60 per cent. That is where some of that money you are hearing about comes from. We are not ready to mass-market. As we get more owners and as customer satisfaction grows and people talk about it, the day will come when people will walk in our door. That is very rare today. The people who

1 Australian Timeshare and Holiday Ownership Council (ATHOC), *Submission 10*, p. 7.

2 Mr Ramy Filo, ATHOC President, *Transcript of evidence*, 13 April 2005, p. 18.

3 Associate Professor Mike Dempsey, Head of Finance Discipline, Griffith University; Mr Ramy Filo, *Transcript of evidence*, 13 April 2005, pp. 11; 33.

walk in our door are already members or friends of members or referrals from members who know the product works. But we are not yet mainstream. That is why the sales and marketing costs are high and why we operate as we do.⁴

5.10 A simple economic approach might suggest that if the market for timeshare was operating efficiently, and there was insufficient demand at the current price, then the price should be bid down until the market meets demand. That this has not occurred may be evidence of market failure within the timeshare industry.

Financial obligations after entry

5.11 After entry into the scheme, members are required to pay annual fees based on the size of their membership. Those with less points or weeks pay less, and those with a larger interest pay more. These fees cover the management and operation of the resorts in the scheme, and (for the larger schemes such as Accor Premier Vacation Club and Trendwest Resorts South Pacific) expansion of the scheme by either building new resorts or acquiring interests in existing resorts. This obligation remains in place for the full term of the contract (up to 80 years). The management fees do increase from time to time, and this appears to be at the unilateral discretion of the timeshare companies, but the Committee accepted evidence that these price rises are kept to a minimum and are not a source of profit:

[the maintenance fee] is non-profit based. It is the actual costs for the year, which are then divided. Tomorrow we are going to show you examples of a 20-year-old resort and a brand-new resort. Both operate side by side and at no profit. There is a non-profit sort of operating budget—whatever the costs are of running that resort divided by the number of owners.⁵

5.12 In addition, timeshare schemes may periodically call on members to contribute a 'special levy' to cover a one-off project, though many prefer careful planning to avoid this need:

You can operate with no sinking fund provisions and after 10 years you need to paint the building, so you then instigate a special levy, a one-off payment, for all the owners, who might have to pay \$150 each and who collectively agree, 'We will paint this building'.⁶

Potential for anticompetitive behaviour

5.13 The Committee accepted the evidence that the entry price for timeshare schemes is high partly because of the costs of marketing the scheme and operating a timeshare business. However the Committee is unconvinced that these marketing fees,

4 Mr Martin Kandel, CEO, Accor Premier Vacation Club (APVC), *Transcript of evidence*, 13 April 2005, p. 40.

5 Mr Ramy Filo, *Transcript of evidence*, 13 April 2005, p. 29.

6 Mr Ramy Filo, *Transcript of evidence*, 13 April 2005, p. 18.

combined with other legitimate costs associated with a new membership, justify the price that is being asked. It seems at least plausible that timeshare companies are obtaining substantial rents from the current pricing structure. While disadvantageous for customers, this is not in itself a sign of an anticompetitive market (although it may be a sign of market failure).

5.14 The Committee is concerned, however, that the market for timeshare is becoming concentrated, as large overseas companies adopt substantial positions in Australian timeshare. There is potential for collusive or oligopolistic behaviour in these markets which may result in unnecessarily high prices.

5.15 It should be emphasised that the Committee is not alleging that collusive behaviour is taking place in the Australian timeshare market. However the Committee calls on the large industry players, along with the Australian Tourism and Holiday Ownership Council (ATHOC) and the Australian Competition and Consumer Commission (ACCC), to maintain a very careful awareness of the potential for anticompetitive behaviour to occur in this industry.

Recommendation 3

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

Value associated with timeshare membership

5.17 Before leaving the question of pricing, it should be noted that for some customers, particularly those whose income and lifestyle allow for frequent holidays, timeshare can be a viable exercise which results in savings on accommodation and intangible values such as a sense of community and camaraderie with fellow club members:

The difference between staying at a timeshare resort and a traditional hotel significantly relates to the activities they have. The resorts that I have managed in the past have had waterskiing and jet skiing, and they have three or four activities people who run karaoke nights and activities such as scarf tying. There is just no end to the activities, so the owners who come there do not have to worry about how they are going to entertain themselves. There is much to do at those resorts and we have childminding so that parents can go out during the day if they wish. It is quite unique. I think those are a lot of the things that people really enjoy about the timeshare industry. The majority of the activities are cost free—that is part of the enjoyment of the holiday.⁷

7 Mrs Marie Robbie, Immediate Past President, Southern Gold Coast Chamber of Commerce and Human Resource Manager, Classic Holidays, *Transcript of evidence*, 13 April 2005, p. 58.

Sales and marketing

Pressure selling

5.18 Pressure selling is the process whereby social, psychological, economic, and even physical pressure and intimidation are used to secure a client's agreement to a contract without allowing them to carefully consider their position.

5.19 Pressure selling is perhaps the most sensitive issue associated with timeshare. It is widely admitted, even within the industry, that the 1980s were the 'bad old days' of timeshare, during which pressure selling was rife in the industry:

As I am sure you are aware, the timeshare industry was historically fraught with substantial market failures and inappropriate sales conduct. Part of this was due to it being a complex product which was not completely understood by consumers or, as one found upon inquiry, by sales personnel. It was sold with high-pressure sales tactics, frequently using the seminar style of sales presentation.⁸

5.20 These practices established for timeshare an infamous and shady reputation which it still has not overcome. One reason for the relatively low demand for timeshare is almost certainly the legacy of disrepute left by timeshare operators in the past.

5.21 One objective of ATHOC is to establish a professional and reputable timeshare industry which can step out of this historical shadow. The entry into the timeshare market of large corporates with well known brands (such as Accor and, overseas, Disney) may also tend to suggest that the industry has moved beyond the legacy of sharp, small-time journeymen.

5.22 Certainly before this Committee, the industry took great pains to claim that pressure selling in this industry is a thing of the past:

I think the industry has been tainted historically, and a lot of us in the industry are now moving towards an area where we can actually hold our heads up and say, 'We are time share.' We are, relatively, an infant in this market, although we have been around for a long time. I think there is going to be significant growth and I think it is going to be in a positive way—rather than dragging a negative perception behind us.⁹

5.23 In a supplementary submission ATHOC expressed this view quite forcefully:

The misconception raised during the hearings that timeshare is sold under a 'high pressure' environment is outdated, highly subjective, and tends to be

8 Mr Paul O'Shea, Lecturer at the Beirne School of Law, University of Queensland, *Transcript of evidence*, 28 April 2005, p. 1.

9 Mr Gary Knowles, Vice President and CEO, RCI Pacific, *Transcript of evidence*, 13 April 2005, p. 43.

an echo of opinions formed long ago during the 1980s, before the current regulatory environment came into existence and before many of the key operators commenced trading.¹⁰

5.24 Unfortunately, the Committee considers these views to be aspirational rather than actual. The Committee received a number of submissions and items of correspondence, some of them confidential, from individuals who felt they had been subjected to pressure selling at timeshare seminars. On the day following the Committee's hearing in Surfers Paradise, the Committee visited 'sales decks' at resorts operated by Trendwest and Classic Holidays. Even during these brief tours, which included discussion with some sales staff, the Committee gained the impression that the margin between 'salesmanship' and 'pressure selling' is very hazy and is almost certainly crossed by eager sales personnel in pursuit of a commission.

5.25 Perhaps the most revealing evidence on this question came from outside this inquiry altogether. Concurrently with this inquiry, the Committee is conducting an inquiry into property investment advice, with an emphasis on property 'spruikers'. A witness to that inquiry, Mr Jason Coppard from the Law Institute of Victoria, in an effort to provide contemporary examples of spruiking behaviour, drew on his own recent experience as a timeshare client. His evidence bears repeating at length:

I like the idea of predisclosure, so that they must give a lot of information, including a valuation of the property—and give people a chance to actually get away from them before they sign something, because the high-pressure tactics are applied: 'You've got to sign this now, because if you don't sign it now you'll never get this opportunity again.' I knew this hearing was coming up, and I was up in Queensland, so I went to a place that was selling time share. It is not quite the same as this, but I was aware that they would be using the same tactics.

CHAIRMAN—Can I just intervene, Mr Coppard. We are also concurrently conducting an inquiry into time share, so anything you say on that could be relevant as well.

Mr Coppard—I think the same selling tactics are applied. Up there, you are offered a free gift if you come to a session to learn about lifestyle. I knew it was time share, and I went along there specifically, knowing that this was coming up, and thinking that I would like to get a firsthand experience of it. The pressure that was put on you to sign on the spot! You were put in a one-on-one situation. Initially he made out that you were stupid if you did not sign these things, because it was such a great deal. He then became quite angry and aggressive, saying, 'Why are you wasting my time?' It was certainly a high-pressure situation—and those are the same sorts of tactics that have been described to me from these real estate sales.

There is one thing that I thought was comical. I even told the seller, the agent, that I was a solicitor. He jotted down figures to try to show how it was going to be a great advantage for our family if we bought into this time

10 ATHOC, *Submission 10C*, para 4.0.

share. I said: 'Look, I'd like to think about it. Can I have a copy of the figures?' He said: 'Oh, I couldn't do that; that's the law. I can't give you that; that's the law.' I am not aware of any law that says he cannot give me a copy of his figures. The other thing he said was: 'Look, I can only offer you this deal now. You will never get offered this deal again'—with all the bells and whistles that he wanted to throw in. And again he said: 'Of course, that's the law. You can't possibly get this deal if you don't sign it today. That's the law.' I thought it was quite interesting that he said those things, but everything he said was very high pressure and very intense. It even made me feel guilty for not proceeding. That is the type of pressure that is applied.¹¹

5.26 The Committee found this evidence compelling. On balance, it is more likely than not that pressure selling remains an important element in the sale of timeshare in Australia. At the very least, there should be a strong regulatory regime that makes pressure selling as difficult as possible. Such a regime should push current pressure sellers to reform, and should prevent future sales staff from using these techniques.

Recommendation 4

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

Recommendation 5

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

Recommendation 6

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

The use of bait

5.30 The Committee is concerned about the use of 'bait' to procure the attendance of potential customers at timeshare sales seminars. This bait takes on a number of forms, but is usually in the form of a substantial product (such as a DVD player) or accommodation at one of the timeshare chain's hotels (during which the sales presentation takes place). The inducement is sometimes characterised as a prize

11 Mr Jason Coppard, Inquiry into the regulation of property investment advice, *Transcript of evidence*, 28 April 2005, p. 16.

(which it is usually not; although a lottery system may be used the gift is not generally 'won' as a result of either skill or luck)¹² or as a gift (which it is not, as a gift is by definition given without requiring any consideration in return, whereas in this case the recipient undertakes to provide consideration in the form of attendance at the sales seminar).

5.31 ATHOC told the Committee that the use of these inducements must be accompanied by a clear statement that the purpose was to sell timeshare:

In our codes—and you have copies of those—we make it very clear that all our members who market to consumers must say, 'This is a timeshare or holiday ownership presentation.' 'The consumer must know that that is what they are attending. They must not be told, 'Come to a holiday expo or a tour of our resort', without being told that they are coming to be sold a product. That is important.¹³

5.32 The Committee has obtained a recent example of the inducements used to generate attendance at sales seminars.¹⁴ A letter, sent to potential customers whose details are obtained from various sources such as the electoral roll, tells the customer they have been selected for a prize:

Congratulations!

You are in a very select group! The Accor Premiere Vacation Club (APCV) is delighted to inform you that you have been selected to receive one of the following gifts with a retail **VALUE OF UP TO \$800:**

[The 'gifts' include accommodation in Australia, NZ and New Caledonia or various electrical goods]

Be our guest at one of the trusted brand names in the Accor family, or choose a gift for yourself or that special someone. It's up to you!

For details on how to receive this exciting package simply call **toll free on 1800-70-80-90**, but you must **call within 72 hours of receipt of this letter!**
[...]

Don't miss this opportunity—**call now!**¹⁵

5.33 In the fine print it states that in order to obtain the prize, the customer 'must complete an Accor Premiere Vacation Club (APVC) holiday ownership presentation (minimum 90 minutes)'. This is on the fifth line of a ten line block of tightly printed text. In the Committee's view, it is entirely plausible that some attendees could arrive without even knowing in advance what product they will be pitched.

12 See Mr Ramy Filo, *Transcript of evidence*, 13 April 2005, pp. 26–27.

13 Mr Ramy Filo, *Transcript of evidence*, 13 April 2005, p. 26.

14 This example was from APVC but the Committee considers it consistent with general practice.

15 All emphases in the original.

Recommendation 7

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

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

Pressure to sign immediately

5.35 Timeshare is extremely complex in nature. The older fully sold schemes, where a purchaser obtained the right to use a particular room in a particular week in a particular resort, may have been easy to understand. Contemporary timeshare, with different levels of membership, entitlement to points, worldwide booking processes, points exchange systems, exchange fees and the like, are very difficult for the majority of consumers to understand.

5.36 Even an informed, sensible consumer is likely to find it very difficult to understand exactly what rights they obtain on entry to the scheme. Because they are enticed to attend seminars rather than seeking out the timeshare product, many consumers are likely to come to the sales seminar 'cold' without having undertaken any preliminary research. The sales person becomes their sole source of advice in relation to the product. If, as noted above, the sales person then applies pressure selling techniques including accusations of stupidity and time-wasting, or alternatively provides offers only available if the consumer signs immediately, then the consumer's chance to make an informed choice is lost.

5.37 This situation becomes worse when consumers are pressured to sign a contract immediately, without having time to seek other advice or even read their Product Disclosure Statement documentation properly. As noted below, these consumers still have a cooling-off period but this can not be held out as a substitute for being given appropriate time and opportunity to consider a contract before signing it. The practice of offering spurious discounts which are 'only available today' has been the subject of legal action in this industry in the past¹⁶ and, according to the evidence noted above, this process continues. The Committee considers that so-called discounts designed to pressure potential consumers into signing immediately must stop.

16 See *ACCC News Release 'ACCC Gains Court Orders on Timeshare'*, 7 January 1997, relating to the sales practices of the timeshare firm Holiday Concepts.

Recommendation 8

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

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

Timeshare and real property

5.39 The Committee found that, despite the modern prevalence of points-based schemes and the relative scarcity of title-based schemes, there remains a perception that an interest in timeshare amounts to an interest in real property:

From what consumers are telling us, it seems that the spark in interest in timeshare schemes has in part been driven by rising property values and people viewing time share as a cheap way of acquiring a limited proprietary interest for much less than it would take to acquire a property.¹⁷

5.40 Industry witnesses made it clear that timeshare is not real property but that every interest in timeshare is, ultimately, secured by a small amount of real property usually held in a trust. Timeshare customers, therefore, obtain 'a beneficial interest in a pool of real estate that is backed by real estate and trust'.¹⁸

5.41 The language employed in discussing timeshare was a source of great interest for the Committee. The language used in evidence, and in describing the product to customers, appears to be designed to profit from the confusion of the customer regarding the nature of the timeshare. While, as noted in Chapter 4, timeshare is not an investment in the financial sense, the word 'investment' still came up often in evidence, presumably because 'investment' sounds better in the ears of customers than 'expense'. Mr Filo from ATHOC, for instance, told the Committee that timeshare 'is an investment in lifestyle, but you should not use the word 'investment'.¹⁹

5.42 Also of interest was the constant reference to 'owners' and 'ownership'. The use of this term, too, is spurious. Timeshare members may be customers of a management scheme, and beneficiaries of a trust (although highly unlikely ever to receive a disbursement from this trust), but they are not 'owners' of anything in relation to the timeshare scheme.²⁰

17 Ms Catherine Wolthuizen, Senior Policy Officer, ACA, *Transcript of evidence*, 15 April 2005, p. 1.

18 Mr Martin Kandel, *Transcript of evidence*, 13 April 2005, p. 41.

19 Mr Ramy Filo, *Transcript of evidence*, 13 April 2005, p. 25.

20 Members of the old style title-based schemes are an exception. They are discussed in more detail in Chapter 6.

5.43 The use of such imprecise language, combined with the reliance on sales staff for advice, and the common misperceptions of the nature of timeshare, almost certainly result in timeshare consumers at the point of sale who believe that they are purchasing an interest in real property. This is important because Australian consumers are reputed to attach a sentimental value to real property, which increases willingness to pay and allows the price to be higher than the market could otherwise bear.

Recommendation 9

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

- **made prior to contract formation;**
- **made in clear language; and**
- **included in relevant Schumer boxes.**²¹

Selling 'upgrades'

5.45 The Committee learned, both in evidence and during its visits to two timeshare resorts, that one major source of sales for points-based schemes is the sale of 'upgrades' to people who are already members of the scheme:

Both of our organisations rely heavily upon referrals from existing owners and what we call upgrades from existing owners. We have an existing owner that owns a certain number of interests in these trusts, and we will solicit them to upgrade or buy more interest in the trust. That is a significant profit source and a significant revenue source.²²

5.46 There is of course nothing intrinsically negative about the process of upgrades—in fact, if current timeshare customers are happy with the service they receive, they may be highly motivated to purchase additional points or to upgrade their membership category. If this occurs, then a healthy flow of retails could be a sign of a timeshare scheme which is delivering for its consumers.

5.47 The Committee is concerned, however, that customers who enter timeshare schemes should know exactly what an initial, basic membership package entitles them to. At one resort, the Committee learned that the 'show' apartment was larger than the room a basic timeshare holder would be entitled to. The Committee was shown the pool and observation deck on the building, but learned that it was only for customers who had a certain level of membership.

21 See below for discussion of Schumer boxes.

22 Mr George Dutton, Chief Financial Officer, APVC, *Transcript of evidence*, 13 April 2005, p. 50.

5.48 The industry must beware that it does not stray into two-tiered sales processes whereby customers enter the scheme with an expectation of certain levels of service, but then find themselves under pressure to purchase additional points or higher grades of membership in order to gain access to services they had expected in the first place.

Direct marketing and anti-hawking provisions

5.49 Sections 992A and 992AA of the *Corporations Act 2001* introduce so-called 'anti-hawking' provisions which prohibit corporations from making an unsolicited approach to sell financial products or managed investments, unless certain conditions (contained in each section) are met.

5.50 Ms Jodie Sangster, Director Legal and Regulatory with the Australian Direct Marketing Association, raised an issue relating to the application of anti-hawking provisions to direct timeshare marketing where the purpose of the contact is to induce attendance at a sales seminar:

With regard to the antihawking provisions as they are at the moment, there are a couple of issues that make it difficult for the industry. The first is that, in the context of my observation that time share is not actually sold on the telephone, the purpose of the telephone call is really to set up a sales briefing or to invite somebody to attend a sales briefing. It is quite unclear at the moment as to whether the antihawking provisions apply to that telephone call. Obviously, if they are selling on the telephone then the antihawking provisions automatically apply—that is clear. But if the telephone call is to set up one of these briefings, it is not clear whether the antihawking provisions apply to that, and that is mainly due to the term 'because of' in the legislation.

In the guide to the antihawking provisions which has been provided by ASIC it says that a breach of the antihawking provisions occurs where the offer of a financial product is made to the consumer during a telephone call or because of a telephone call. It is this term 'because of' that is causing a bit of difficulty in the industry because they are not sure, if somebody attends a briefing as a result of a telephone call, whether that sale is 'because of' that call. It is important that they know whether or not the legislation applies because, obviously, if it does apply, then there are a number of criteria that they need to meet to make sure that they do not breach the antihawking provisions.²³

5.51 The Committee considers that anti-hawking provisions should apply where an unsolicited approach is made to a potential client by a timeshare seller or their agent, in order to secure their attendance at a sales seminar. There is very little practical difference between a telephone call selling timeshare, and a telephone call soliciting attendance at a sales seminar.

23 Ms Jodie Sangster, *Transcript of evidence*, 15 April 2005, p. 25.

Recommendation 10

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

Training and licensing

Current training requirements

5.53 In its submission, ATHOC outlined the current training requirements for timeshare advisers in the following terms:

Policy Statement 146 (Licensing: Training of Financial Product Advisers) sets out the minimum training standards for people who provide financial product advice to retail clients. PS146 is applicable to the timeshare industry because timeshare is legally classified as a financial product.

PS146 requires all advisers to have generic knowledge and specialist knowledge, with skills to match client's needs to specific investments/risks cover and strategies. Advisers are required to undertake training at either Tier 1 or Tier 2 level. Timeshare advisers are required to comply with Tier 1 level, which is equivalent to 'diploma' level and requires advisers to:

- demonstrate an understanding of the generic and specialist knowledge requirements that are relevant to their tasks and specific industry and product;
- analyse and plan approaches to technical problems and client issues;
- evaluate information for planning and research purposes;
- apply their knowledge to relevant tasks;
- apply judgement to the selection of products and services for clients;
- apply knowledge, and evaluation and coordination skills to a variety of technical situations; and
- apply knowledge and skills to developing and analysing strategies for clients.²⁴

5.54 ATHOC then sought relief from this training requirement, asking that the lesser Tier 2 level should apply:

Tier 1 level is perhaps too harsh on timeshare advisers who generally provide advice on the purchase of a single product which deals with holiday needs and which does not have an investment element. The adviser would not be performing any analysis in relation to technical problems, devising strategies, recommending selection of products or doing research. Tier 2

24 ATHOC, *Submission 10*, p. 25.

level is perhaps a more appropriate level for timeshare advisers, as it is sufficient for them to know the product they are advising on and perform some minor tailoring of the product to suit certain predictable holiday needs or expectations.²⁵

5.55 Associate Professor Mike Dempsey, who is involved in post-training assessment of timeshare trainees at Griffith University, took the view that Tier 1 is more appropriate:

If that education was considered appropriate to tier 1—with its generic knowledge component and then splitting off into its particular stream, whether it is insurance or financial planning—for purveyors of insurance or financial planning products, it strikes me that the purveyors of time share should have the same level of education and awareness of the market, the same perspective of that particular product within the range of the other products that are out there in the marketplace for the public, as the purveyors of, say, insurance or financial planning. They should have that same education rather than being blinkered to the product itself without any sense of feeling a need, as there is in tier 1 compliance, to know the customer and to relate to what is best for the customer in some shape or form.

All of that is negated if you move to tier 2 compliance. In tier 2 compliance, the purveyor has not really got any responsibility to the would-be client other than to shift the product and make a sale, short of presumed certain statutory requirements, like telling the truth.²⁶

5.56 In Chapter 4, the Committee explained its view that, while timeshare should not longer be considered a managed investment, it should still be regulated in an analogous way. In the Committee's view, this includes a requirement for a high level of training. The presence of well trained sales personnel is necessary for the sale of a complex and expensive financial product such as timeshare. A poorly trained sales force could be disastrous both for consumers and for the industry. The only way for the industry to genuinely overcome the legacy of the 1980s is to have a long term, committed, professional trained corps of sales personnel.

5.57 However, given the Committee's view that timeshare should no longer be considered a managed investment, future Tier 1 training for timeshare sales personnel should be custom developed for the timeshare industry, so that the training provides students with appropriate skills relating to timeshare rather than irrelevant knowledge relating to managed investments.

25 ATHOC, *Submission 10*, p. 26.

26 Associate Professor Mike Dempsey, *Transcript of evidence*, 13 April 2005, p. 3.

Recommendation 11

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

Cooling-off periods

5.59 A 'cooling-off period' is a period after a sales contract is signed, during which the consumer can reconsider the contract and, at their discretion, withdraw without penalty. Currently, timeshare contracts have a mandatory cooling-off period of 10 business days. ATHOC members have a shorter cooling-off period of five business days.

5.60 ATHOC argued in its submission and in evidence that there should not be a regulatory cooling-off period for timeshare at all:

Other than the fact that timeshare products have historically been subject to cooling-off requirements, there appears no logical reason why they should be subject to these requirements as the legislature has turned its collective mind to cooling-off requirements and has deliberately excluded illiquid schemes [such as timeshare] from these requirements.²⁷

5.61 However, ATHOC goes on to state that it continues to regard cooling-off periods as an important consumer protection measure:

It should be noted that ATHOC's Code of Practice already requires its members to offer a cooling-off period to all purchasers of timeshare interests. This clearly demonstrates the importance that the industry attaches to this powerful consumer-protection measure.²⁸

5.62 It therefore appears to the Committee that ATHOC is in the somewhat contradictory position of supporting cooling-off periods, but opposing the effort to give them regulatory teeth. As noted above, the Committee has found that the marketing and sale of timeshare in Australia remains unsatisfactory. The use of bait followed by pressure selling means that the consumers who are subject to these tactics must obtain the protection which a cooling-off period implies. The Committee considers that this should be backed by legislation.

Recommendation 12

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

27 ATHOC, *Submission 10*, p. 25.

28 ATHOC, *Submission 10*, p. 26.

Disclosure of cooling-off periods

5.64 Another concern expressed by industry regarding cooling-off periods related to the disclosure to customers of the cooling-off entitlements:

Initially there was some requirement that they be prominent. Then there was another requirement that there be a prominent document in addition to a prominent disclosure. Then there was another requirement that there be an acknowledgment on this prominent document that someone had actually received the prominent document, and that acknowledgment needed to be on the prominent document. So there are all of these prominent statements and prominent documents, and the person who is actually being told this and who is signing off concludes, from a selling point of view, that the product must in some way be defective because they are being told that, even though it is a great product, you can change your mind.

A survey was done two or three years ago which indicated that, with the disclosure of the cooling-off obligations in this prominent way versus just putting something in a disclosure document that draws prominence to it, twice as many people cooled off with the prominent treatment as with the non-prominent treatment, even though they were being pitched the same product, if you like. So the only variable was the degree of prominence and the additional documents and acknowledgments.²⁹

5.65 As one member of the Committee commented immediately following this evidence, the number of people cooling-off could simply be an indication that the process is working.

5.66 During its visit to timeshare resorts, the Committee was given examples of cooling-off documentation and was impressed. On this question, there is little doubt that the industry is doing well—the disclosure processes are more than adequate to ensure that customers obtain sufficient notice of their entitlement to a cooling-off period. The Committee considers that it is probably unnecessary to make a series of separate written pieces of advice to customers about cooling-off periods. Instead, the Committee proposes that cooling-off entitlements should be advised (as currently) via a single, separate document; and should also be noted in the timeshare contract's Schumer box (see below).

Recommendation 13

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

- **a document of one page approved by ASIC for this purpose; and**

29 Mr Joseph Bengasino, Director and Legal Adviser, ATHOC, *Transcript of evidence*, 13 April 2005, p. 25.

-
- **advice of the entitlement and the length of the cooling-off period in the contract's Schumer box.**

Service during the cooling-off period

5.68 The Committee learned that, while cooling-off periods may be given to consumers, the intended effect of the cooling-off period can be subverted by the companies simply failing to make sales staff available for follow-up questions which may be necessary to assist the consumer finally decide whether to proceed with the contract:

What I have found in many of these cases is that during the cooling-off period, consumers, having left the hothouse atmosphere of the sales seminar and gone home, need to ask more questions or want to make inquiries upon their reading of the documents. This is good. Cooling-off is a remedy not directed to the justice of a contract or the fairness of a contract but rather towards repairing information asymmetries. Quite often, the people they want to talk to are not available or they are told, 'You need to speak to this representative, they are not here.' Certainly, the person who spoke to them when they left the main body of the sales seminar and went off to the little rooms or separate tables where they were finally signed up is frequently not available because they are off selling more time shares. So very often the consumers let the cooling-off period pass but have serious questions unanswered about the product. The industry response is often, 'Why didn't they just let it cool off?' I find that to be not a good enough answer. In fact, my view is that the failure to answer questions about the product undermines the effectiveness of the cooling-off provisions.³⁰

5.69 In this way, the company can simply run out the clock while hoping that the consumer chooses not to pursue their request for their questions to be answered, or to invoke the cooling-off provisions in their contract.

5.70 A range of other pieces of Commonwealth legislation impose timing requirements for decision-making. For instance, referral determinations under the *Environment Protection and Biodiversity Conservation Act 1999* and applications for private income tax rulings, both require the relevant ministers or public servants to make decisions within specified time periods. In each case, however, if the decision-maker requires further information, the clock stops until the information is provided. The Committee proposes that such a process should apply in this case. Once a consumer, in their cooling-off period, either telephones, emails, or otherwise contacts the timeshare company seeking further information, the clock should stop on their cooling-off period until the information is provided.

30 *Transcript of evidence*, Mr Paul O'Shea, 28 April 2005, p. 4.

Recommendation 14

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

Disclosure

5.72 Section 710 of the Corporations Act requires that the prospectus of any managed investment scheme must contain 'all the information that investors and their advisers would reasonably require to make an informed assessment'.

5.73 ASIC Policy Statement 175 interprets that requirement for holders of financial service licences. It provides that the information must be set out in a Product Disclosure Statement, a Financial Services Guide, and/or a Statement of Advice. The three disclosure documents have a slightly different emphasis:

- the Financial Services Guide (FSG) is intended to provide consumers with information about the types of services being offered by a financial services provider;
- the Statement of Advice (SOA) is intended to ensure that consumers receive information necessary to make informed decisions whether to act on the advice; and
- the Product Disclosure Statement (PDS) is the point-of-sale document which is intended to provide the consumer with sufficient information to make informed decisions in relation to the acquisition of financial products, including the ability to compare a range of products.³¹

5.74 The industry position on disclosure is that requirements governing the product are inappropriate for timeshare and confusing to the consumer. Trendwest stated:

Time share is fundamentally a holiday and leisure product, and labelling it as a financial product and providing documents such as a financial services guide at the onset of a sales presentation will produce, and does produce, inevitable confusion among the public.³²

5.75 Two main objections to the disclosure requirements were:

- the duplication of information required by the production of the three disclosure documents—the FSG, SOA and PDS; and
- the volume of information needed to satisfy full disclosure in the PDS.

5.76 Industry representatives considered that provision of three documents was unnecessary given the nature of the product. The duplication in the documents was

31 Summary drawn from Financial Services Reform Bill 2001, *Explanatory Memorandum*, Parliament of Australia, House of Representatives, paras 12.6; 12.50; and 14.28.

32 Mr Shin Siow, Senior Counsel, Trendwest, *Transcript of evidence*, 13 April, 2005, p. 37.

also thought to contribute to the risk that the consumer would be misled into thinking that he or she was purchasing in investment-linked product.³³ RCI stated:

The disclosure requirements can be confusing because consumers, in our view, are not expecting such a vast array of legal documentation in order to consider whether they should purchase timeshare. Recently, a well known ex politician commented that he can walk down the streets of Surfers Paradise and consider buying a half a million dollar investment property based solely on a real estate agent's opinion that the investment market 'looks pretty good mate' and no other formal information or in-depth disclosure is required. Yet if he were interested in buying a \$10, 000 timeshare week, he would be presented with a plethora of disclosure information.³⁴

5.77 ATHOC, with industry's support, asked that the requirement for provision of the FSG should be waived.³⁵ Mr Shin Siow, Trendwest Senior Counsel, said at hearings:

I am trying to understand why financial services require commission to be disclosed. For example, if a financial planner is selling multiple products from different entities, you could be selling an AMP product versus another product, that is where commission really is important because that impacts on the price of the product. Whereas, we are all selling our own individual products. Trendwest would not sell an Accor product; neither would Accor sell a Trendwest product. So I cannot stand why the commission is relevant. Just as a Ford motor car dealer selling for Ford would not be telling you how much he earned—³⁶

5.78 The ACA strongly disagreed. It stated that commission disclosures must be mandatory:

Where people are approaching this as an investment—where they are being told: 'This is a property investment and in the future you will be able to sell on your interest and it will be worth more'—you really need to put in place a more robust regime than simply misleading and deceptive conduct. You need to ensure that people are being told that the sales person who is telling them that is receiving a commission for it. You need to ensure that the risks are appropriately disclosed to them and, again, that should anything go wrong they have access to a good complaints scheme to pursue their complaint.³⁷

5.79 The Committee also noted that the Parliamentary Secretary to the Treasurer the Hon. Chris Pearce MP has recently announced a review of some FSR provisions

33 Trendwest, *Submission 8*, p. 6.

34 RCI Pacific, *Submission 12*, p. 5.

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

36 Mr Shin Siow, *Transcript of evidence*, 13 April 2005, pp. 51–52.

37 Ms Catherine Wothuizen, ACA, *Transcript of evidence*, 15 April 2005, p. 3.

of the Corporations Act. The format of PDS documentation is one area receiving serious consideration. Refinement proposal three is to:

Amend the regulations to allow issuers of financial products to provide a 'short form' Product Disclosure Statement that contains core information, with full product information available on request or through an easily accessible forum, such as the internet.³⁸

5.80 Such a proposal, if supported, could overcome some of the concerns expressed by industry in this inquiry.

Schumer disclosure box

5.81 One idea which came to the Committee's attention during the inquiry was a disclosure box, or a 'Schumer' box which could be placed prominently on the front of timeshare contracts. Mr Paul O' Shea outlined in brief the simple yet extremely useful purpose of the Schumer box:

The Ministerial Council on Consumer Affairs is expected this year—I am talking within a couple of months—to produce detailed regulations for the amendment of the consumer credit code by the template legislation amongst the states—to enhance that disclosure by the use of the Schumer box. Do you know who Senator Schumer was? He was an American senator who, during hearings into the uniform commercial code—and I do not want to bung on his accent—simply asked, 'Why don't we put it all in a big box on the front?' That form of disclosure has since then been known as the Schumer box.³⁹

5.82 The Committee is unable to find an objection to Senator Schumer's rhetorical question. Why not put it all in a big box on the front of the contract? A Schumer box is an excellent idea for timeshare contracts. A range of the most important facts and warnings relating to the contract could be placed on the front of the contract, flagging for consumers those issues which are most likely to be of concern.

5.83 The Committee considers that the Schumer box on the front of a timeshare contract should provide the following details:

- the term of the contract;
- the total cost of the contract in current dollars (that is, the initial entry price, plus the total of all annual fees which may be payable for the entire term of the contract at current rates, plus any other fees and charges which may apply);
- a statement that the purchase of timeshare is not a purchase of real property;

38 Treasury (2005) *Refinements to Financial Services Regulation*, p. 12.

39 Mr Paul O' Shea, *Transcript of evidence*, 28 April 2005, p. 4.

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- notification of the applicable cooling-off period (and the relevant suspension of this period upon the consumer requesting further information);
 - a statement that timeshare is not an investment and will not provide a direct financial return;
 - a statement of the guaranteed buy-back amount; and
 - the enquiry telephone number of the applicable complaints resolution scheme.

5.84 The provision of this information 'up front' provides benefits for both the consumer and the industry. The consumer obtains the information in a short, simple form which is easily comprehensible; and the industry gains a reputation for ready disclosure and for having 'nothing to hide'. For the industry, the use of Schumer boxes on contracts may be one important step in the process of shaking off the 1980s image of timeshare. Benefits should also be provided to regulators and complaints handling bodies through the reduction in consumer complaints.

Recommendation 15

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

Exiting timeshare and reselling interests

5.86 If a person purchases a car, a house, a parcel of shares, or virtually any other form of tangible or intangible property, and then regrets the purchase, they will be able to sell the property on to another buyer. If lucky, they may break even or possibly make a profit. In the case of a product such as a car, the seller will almost certainly make a loss. However in the end, for these forms of property, it is possible to exit the arrangement and well functioning markets exist in order to allow this to happen. This is not the case for timeshare.

5.87 Timeshare lacks a well developed secondary or 'resales' market. There are few market facilities for consumers to make their demand for timeshare known, or to purchase timeshare on the secondary market. Brokering of secondary timeshare interests would require an Australian Financial Services licence unless the sale is made by the timeshare member themselves.

5.88 Where a secondary market exists, its most notable feature is the negligible price on offer. Timeshare interests that might sell for upwards of \$15,000 in the primary market might sell for a tenth of that on the secondary market. Mr Martin Kandel, CEO of APVC, took the realistic approach of saying there is essentially no secondary market:

There is clearly no resale market to speak of, and there is no sense in me or anyone else ducking that. That is the hole in the doughnut, and the way we at Accor address that is to say, 'There is no resale market—flat out, full stop.' If I hear any of my salespeople pitching an investment, they will be terminated immediately, and I have been doing that very same thing for 15 years. This is, as you have heard, a lifestyle product, and if somebody wishes to resell it then I would recommend to them to give it to their children, to their parents, to a relative or to a friend. If you are not using it, please give it to somebody who will, and that is where you will get your value. To put it on the market, through the internet or any other way, is problematic at this point in time. I think as the industry continues to mature there will become a resale market, but as it exists today there is none. That is clearly the case.⁴⁰

5.89 While this approach is honest and accurate, it is also alarming. It implies that, having paid a substantial entry fee, timeshare members are locked into a contract which might last generations, with no way out except to give away their interest or walk away from the scheme altogether. In either case, the initial payment of money is effectively an unrecoverable, sunk cost.

5.90 The Committee is of the view that a viable resales market is unlikely to emerge in the future. The prices available for timeshare interests, combined with the relatively small size of the market, are unlikely to result in a market emerging from outside the industry. Within the industry, there is no incentive to operate a secondary market because the industry players are selling *exactly the same* interests in the primary market at a significant premium. 1,000 points in an exchange program have exactly the same entitlement whether they are bought fresh from the company or bought from another timeshare member; so there is no incentive for the companies to operate a discount secondary market.

5.91 The solution to the problem of exiting from timeshare, then, is unlikely to emerge from the development of a viable secondary market. Another solution, however, was offered in evidence:

The other way of providing people with an exit and an evaluation is to force a provider to have a guaranteed buyback. In effect, you are saying, 'If I have to buy this back, I will buy it back at this price.' As an example, say you sold something for \$10,000 but would buy it back for \$5,000. There is no reason this derivative asset should change value. If it was five, 10 or 15 years later then maybe the property would have depreciated; maybe it has not been kept well. But there is nothing in the proposals that we see, from our research, that suggests that these assets devalue significantly. So it will force the providers to face up to what these assets are really worth. If they

40 Mr Martin Kandel, *Transcript of evidence*, 13 April 2005, p. 38.

are obliged to disclose this to the purchaser, it will make it obvious to the purchaser that there is a devaluing of this asset once purchased.⁴¹

5.92 This is an excellent suggestion. If timeshare sellers were required to offer a guaranteed buy back price, then two things would be accomplished:

- there would be a realistic point of exit for timeshare consumers; and
- at the time of purchase, a quick look at the Schumer box would put timeshare consumers on notice that most of their initial entry price is a sunk cost, unrecoverable from the moment the contract takes effect.

Recommendation 16

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

Conclusions

5.94 Timeshare has the capacity to realise its aspirations of becoming a mainstream and highly reputed form of leisure provision in Australia. Timeshare companies appear to operate high quality resorts which offer a good standard of accommodation to members in thousands of locations around the world. However, regulation is required both to protect consumers as they engage in complex, expensive and long term timeshare contracts; and to assist the industry by rewarding the honesty and efficiency of the best players, and stamping out tactics such as pressure selling.

5.95 The Committee considers that the recommendations contained in this chapter will, when used as timeshare-specific amendments to current FSR arrangements, assist the movement of the Australian timeshare industry towards both international competitiveness and local repute.

41 Mr Brian Gillard, Member, Legislation Reform Task Force, Commercial Law Association, *Transcript of evidence*, 15 April 2005, p. 9.

