Our Reference: CCU 04/751
Your Reference: Dr Marinac

25 February 2005

Dr Anthony Marinac
A/g Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Department of the Senate
Parliament House
Canberra ACT 2600

Dear Sir

Inquiry into the regulation of timeshare

We refer to the Committee's letter of 15 December to Mr. Jeffrey Lucy.

Please find attached information relating to timeshare schemes that ASIC has collated in order to assist the PJC inquiry.

ASIC would be happy to provide any further assistance if that is needed.

Please contact me on telephone (03) 9280 3639 if you have any further questions.

Yours faithfully

John Price
Director
FSR Legal & Technical Operations

ASIC

Australian Securities & Investments Commission

Australian Securities and Investments Commission

Regulation of timeshare

Information for Parliamentary Joint Committee on Corporations and Financial Services

February 2005

CONTENTS

1 INTRODUCTION AND OVERVIEW

This document contains comments by the Australian Securities and Investments Commission ('ASIC') on the issues raised by the terms of reference of the Parliamentary Joint Committee on Corporations and Financial Services into the regulation of timeshare. The inquiry was announced on 18 December 2004.

1.1 ASIC and timeshare regulation

Amongst other responsibilities, ASIC regulates the provision of financial products and services. Under Australian laws timeshare interests are interests in a managed investment scheme and so are financial products.

There are a number of implications for a timeshare scheme if it is registered as a managed investment scheme. For example, the scheme would need to comply with the requirements of Chapter 5C of the *Corporations Act 2001* (Act) with the responsible entity of the scheme holding an Australian Financial Services licence under the Act.

While some international jurisdictions treat the regulation of timeshare differently to Australia, others do recognise that timeshare schemes may have the characteristics of a collective investment. A brief summary of how timeshare is regulated in the United States and United Kingdom is attached to this submission (Attachment 'A').

1.2 Overview

ASIC’s comments primarily focus on providing some background into the timeshare industry; the legislative history of the regulation of timeshare, ASIC's current policy framework for timeshare schemes and the consumer experience of timeshares in Australia.

2 TIMESHARE: A BACKGROUND

2.1 Size of the industry

Registered managed investment schemes

ASIC made submissions to the Turnbull inquiry into the regulation of the *Managed Investments Act 1998* giving profiles of the managed investment industry as at 16 August 2001. Those figures are contained in Attachment 'B'. ASIC has updated those figures as at February 2005. These updated figures are contained in Attachment 'C'.

These figures show that in February 2005 there were 13 responsible entities for timeshare schemes compared to 7 in 2001. However, as a percentage of the managed investments industry as a whole, responsible entities of timeshare schemes declined from being 2% of all responsible entities in 2001 to making up 1% of all responsible entities in 2005.

Of course, there are also some timeshare schemes that do not need to be registered as managed investment schemes as a result of ASIC relief.

Timeshare schemes that are not registered because of ASIC relief

Section 4 of this paper sets out ASIC's policy approach to the regulation of timeshare schemes. Under that policy certain schemes need not be registered managed investment schemes.

Relief from the requirement to register as a managed investment scheme is provided under various ASIC 'pro-forma' instruments according to the particular type of timeshare scheme.

In September 2004, ASIC reviewed the numbers of timeshare operators that were in the various relief categories and concluded that there were:

- 4 operators relying on relief under ASIC pro-forma 205 (Schemes formerly exempt under State law);
- 2 operators relying on relief under ASIC pro-forma 206 (Member controlled clubs); and
- 26 operators relying on relief under ASIC pro-forma 207 (Title based schemes).

Further explanation about the types of timeshare schemes that are eligible for relief in each of these categories is contained in section 4 of this document.

Timeshare schemes that are prescribed interest schemes

Prior to the commencement of the *Managed Investments Act 1998*, timeshare interests were interests in prescribed interest schemes. As such they were regulated as collective investments under the Corporations Law (at that time). Generally speaking, regulation under these laws required:

- that an approved deed be drafted setting out the legal obligations of the parties;
- the appointment of a manager to run the scheme; and
- the appointment of a trustee to oversee investor's interests.

As a transitional measure granted upon the introduction of the *Managed Investments Act 1998*, ASIC was given power to allow the 'old' prescribed interest regime to continue to apply to certain collective investment schemes (including timeshare schemes). This was because in some cases it would be inequitable to require investors to incur costs in moving to the managed investments regime. For example, this relief has been provided to certain closed schemes (no longer being offered to the public) that have a nominated termination date in the future and that are simply continuing to operate until that date as previously agreed with all parties.

As at February 2005, ASIC estimates that there are 18 timeshare schemes that are still operating as prescribed interest schemes under these transitional arrangements.

2.2 Complaints

Timeshare complaints made to ASIC

Analysis of complaints about timeshare schemes received by ASIC for the period from 2002 to 2004 revealed a number of common themes which were also common to complaints received by regulators in the United States and the United Kingdom.

The types of misconduct alleged by complainants to ASIC have been fairly consistent over the period surveyed and, anecdotally, over the period that timeshare operators have been active in the Australian market.

The subject matter of the complaints have included:

- bad advice;
- failure to lodge documents or reports;
- fraud or negligence by officers;
- illegal fundraising;
- breach of license conditions;
- misleading offer documents;
- misleading reports or accounts;

- poor administration systems;
- unconscionable conduct;
- unsatisfactory complaints handling;
- lack of external or internal dispute resolution schemes; and
- lack of disclosure documents and false representations to consumers.

Misleading or illegal advice (usually connected to the sale of interests in the scheme) has been the most common complaint. Fraud or negligence by officers (usually involving an allegation of a breach of fiduciary duty by a manager or responsible entity) and unconscionable conduct are the next most common complaints. There have also been a number of complaints, mainly concerning selling and telemarketing practices; inappropriate advertising; and breaches of the anti-hawking provisions in the Act.

In particular, concerns have been raised with us that complainants were subject to pressure sales methods at seminars (being unconscionable conduct) to sign up for timeshare interests on the day of the seminar.

Complaints made to FICS

Many timeshare schemes are members of FICS (Financial Industry Complaints Service) which is an approved external dispute resolution body.

We have requested information from FICS about the number of complaints made to them in relation to timeshare matters. FICS have not supplied us with the number of complaints at the date of this submission.

Complaints made to ATHOC

ATHOC (Australian Timeshare and Holiday Ownership Council Limited) is a timeshare industry body.

We have requested information from ATHOC about the number of complaints made to them in relation to timeshare matters. ATHOC has not replied to our request at the date of this submission.

3 HISTORY OF TIMESHARE REGULATION IN AUSTRALIA

3.1 Case law

The first Australian cases to consider whether timeshare schemes were regulated by securities laws were brought in Victoria by the Commissioner for Corporate Affairs in 1980. The cases were brought against the promoters of two schemes that involved the sale of undivided shares of land that holiday accommodation was built on. In *A Home Away v CCA* [1981] VR 475, the Full Court of the Supreme Court of Victoria held that this structure was a 'prescribed interest' under s 76(1) of the *Companies Act 1961* (Vic). In this case, counsel for the promoter argued that the Court should interpret s 76(1) by reference to the types of activities parliament intended to regulate as prescribed interests. He argued that the primary purpose of the scheme was to provide accommodation, rather than to obtain financial gain, and that Parliament would not have intended that this activity should be regulated as a 'prescribed interest'. Counsel referred the court to the approach taken in the United States Supreme Court in regard to timeshare.

The Full Court rejected this approach. Jenkinson J, with whom the other members of the Court agreed, held that s 76(1) should be interpreted literally. He held that the purchaser's right to transfer of an undivided share in the land was a prescribed interest, declining to follow the US approach.

All three members of the Court commented on the breadth of the definition of 'prescribed interest' in s 76(1). Jenkinson J further commented that Parliament could exclude particular activities from the definition by regulations made under s 76(1)(g). This mechanism is also available under subsection (g) of the definition of 'managed investment scheme' in s 9 of the *Corporations Act 2001*.

3.2 Legislation

A specific statutory provision clarifying that timeshare schemes are collective investments under securities legislation was introduced later after the NSW Supreme Court held that a timeshare scheme structured using shares was not a 'prescribed interest' (*Brentwood Village v Corporate Affairs Commission* (1983) 8 ACLR 93). The purpose of the amendment was to ensure that schemes structured in this way were required to comply with the same requirements as other timeshare structures (which were taken to be regulated because of the decision in *A Home Away*): see Hansard, 3 April 1984 at page 1117 (Senator Evans).

However, while there was debate about the introduction of a definition of 'timeshare', this debate did not revisit the fundamental question of whether and why timeshare schemes should be regulated under companies and securities legislation.

4 ASIC'S POLICY APPROACH

Prior to the introduction of the *Managed Investments Act 1998* timeshare schemes were prescribed interest schemes. ASIC *Policy Statement 66 - Time-sharing schemes* [PS 66] set out ASIC's previous policy in regard to prescribed interest timeshare schemes.

After the commencement of the Act in 2001, ASIC released *Summary Policy Statement 160 Time-sharing schemes* [PS 160]. This has superseded [PS 66]. A copy of [PS 160] accompanies this submission.

4.1 Relief under Summary Policy Statement 160

[PS 160] outlines the classes of time-sharing schemes that can obtain relief from the managed investment provisions of the Act under ASIC's policy. This is in addition to those closed fixed term schemes permitted to continue to operate under the previous prescribed interest regime. The three main categories of schemes eligible for relief are:

(a) Schemes previously not required under State or Territory legislation to comply with the prescribed interest regime in the Corporations Law (see [PS 160.2] and Pro forma 205);

(b) Substantially sold-out title based schemes (see [PS 160.3] and Pro forma 207); and

(c) Schemes where the responsible entity relinquishes control over the operation of the timeshare property to a member-controlled "club" (see [PS 160.12] and Pro forma 206).

The policy statement contemplates in some of the conditions of this relief that there may be an industry supervisory body that meets certain requirements set out in our policy.

The body ATHOC has applied to ASIC to be recognised as an industry supervisory body. However, at this stage, ASIC is not satisfied that ATHOC meets all of its policy requirements that would enable it to be approved.

Further, ASIC is considering updating [PS 160] to reflect recent changes in financial services laws. It is also reconsidering the industry supervisory body concept set out in its policy. This is largely due to the fact that, to date, no industry supervisory body has been approved by ASIC.

Generally speaking, other timeshare schemes that are registered managed investment schemes have to comply with all of the relevant

provisions of the Act. However, some technical relief is available recognising the particular nature of timeshare schemes schemes.

4.2 Conditions of relief

The relief offered in each category of timeshare scheme is subject to different conditions

To be eligible for relief as a scheme formerly exempt under State law (under Pro forma 205) or a substantially sold out title based scheme (under Pro forma 207), the timeshare operator must either:

(a) be a member of an approved industry supervisory body; **or**
(b) be a member of an external complaints resolution scheme approved by ASIC that can deal with complaints relating to the operation of timesharing schemes; **or**
(c) in any period before 30 June 2005 be a member of ATHOC.

Note that option (a) has been inoperative because to date there has not been any approved industry supervisory body.

As at September 2004, there were 30 timeshare operators relying on this relief. While ASIC has not approved an industry supervisory body, the external complaints resolution scheme FICS can hear complaints on timeshare matters. Alternatively, until 30 June 2005 the timeshare scheme could be a member of ATHOC.

To be eligible for relief as a member-controlled club (under Pro forma 206), the relevant timeshare club must either:

(a) be a member of an approved industry supervisory body; **or**
(b) in any period before 30 June 2005 – be a member of ATHOC that has covenanted with that body, in the form of an agreement approved by ASIC, to comply with the complaints resolution procedures and other matters specified in that agreement.

As at September 2004, there were 2 timeshare operators relying on this relief. ASIC has not approved any industry supervisory body at this stage.

5. CONSUMER EXPERIENCE OF TIMESHARES IN AUSTRALIA

ASIC's experience is that timeshare schemes are usually marketed to retail investors. Consumer experience in relation to the sale of timeshare interests has been central to ASIC's consideration of how they should be regulated. This is reflected, for example, in the imposition of conditions of relief relating to membership of an ASIC approved complaints resolution scheme.

5.1 ASIC's consumer protection powers

Part 2, Division 2 of the *Australian Securities and Investments Act 2001* contains general consumer protection provisions modelled on Parts IVA and V of the *Trade Practices Act 1974*. These provisions of the *ASIC Act* prohibit, among other things, unconscionable conduct, misleading and deceptive conduct and false and misleading representations in relation to financial services. They also set out statutory conditions and warranties applicable to contracts for the supply of financial services to consumers. Section 992AA of the *Corporations Act 2001* also prohibits hawking of managed investment products to retail clients.

5.2 Regulatory action in Australia

In ASIC's view the greatest risk of consumer detriment in relation to timeshare, relates to the way in which timeshare interests are sold. A typical method involves requiring consumers to attend a sales seminar in association with the offer of a prize[1] - often a weekend stay at a particular resort. In the complaints that ASIC receives about these sales methods (see the discussion of these issues in section 2.2 above of this document), consumers are often unaware that they will be required to attend a seminar and/or that the prize is in any way associated with the sale of timeshare interests.

The actual conduct of timeshare seminars has previously been the subject of regulatory action by both the Australian Competition and Consumer Commission and ASIC in the matters of Holiday Concepts Management Ltd and Trendwest Resorts South Pacific respectively.

These cases were broadly based on allegations that the timeshare schemes were engaging in misleading and deceptive conduct in the promotion and selling of timeshare interests. In the Holiday Concepts

[1] Notification of the prize may be wholly unsolicited, or in response to an entry form filled in by the consumer

case the ACCC alleged that, during sales presentations, consumers were told they were being offered a special deal that was only available on that day (when in reality such benefits were part of the standards offers made at the time). In the Trendwest case, ASIC alleged that the scheme's sales representatives had stated that membership of the timeshare scheme was a good financial investment; that holiday credits could be resold for a profit and that a strong market existed for the secondary sale of holiday credits. In each case, Federal Court orders were made preventing the schemes from making such claims. Trendwest further undertook to provide each potential purchaser with information about the required cooling off period and that commissions earned as a result of holiday credits being purchased would be disclosed. [2]

5.3 Regulatory action overseas

ASIC's research also shows that there is a commonality in the overseas consumer experience of timeshare in the United States and the European Union.

Complaints to overseas regulators have encompassed similar types of misconduct, including misleading advertising offering prizes, aggressive sales techniques employed by sales staff and incomplete, misleading and false statements by sales staff. This has resulted in regulatory action in some cases.[3]

[2] *ACCC gains court orders on timeshare*, News Release, ACCC website http://www.accc.gov.au/content/index.phtml/itemId/87154 (Accessed 10 February 2005); Media Release [MR 02.420] *Timeshare seller provides undertakings to the Federal Court*

[3] *FTC Files Complaint Regarding Alleged Travel Fraud*, Federal Trade Commission web site, http://www.ftc.gov/opa/2001/04/travelexpress.htm (Accessed 10 February 2005); Citizens Advice Bureau, *Paradise Lost: CAB clients' experience of timeshare and timeshare-like products*, November 2003, http://www.citizensadvice.org.uk/paradiselost.pdf (Accessed 10 February 2005).

Attachment 'A' – Jurisdictional Analysis

United Kingdom

1. The Financial Services Authority does not regulate timeshare schemes in the UK. Timeshare schemes are specifically excluded from the ambit of the *Financial Services and Markets Act 2000* (UK) by the *Financial Services and Markets Act 2000 (Collective Investments Schemes) Order 2001* UK s 3 and Schedule, item 13.

2. Time share schemes are regulated under the *Timeshare Act 1992* (UK), which is enforced by Trading Standards. This Act provides protections including:

- A 14 day cooling off period.
- The right to receive written disclosure document and written contract in the purchaser's own language, including some prescribed content (names and addresses of parties, completion date, purchase price, other charges, cancellation information).

3. The UK regime is based on protections provided under Directive 94/47/EC of the European Parliament and the Council of the European Union, although the UK provides a slightly longer cooling off period than is required under the Directive.

United States

4. Only certain timeshare schemes fall within the definition of securities under the *Securities Act 1993* (US) and the *Securities Exchange Act 1934* (US). To fall within the definition one of the following characteristics needs to be present:

(a) An emphasis on the economic benefits that can be obtained from the management of renting the accommodation.
(b) An offer of a rental pool.
(c) An offer of an arrangement that materially restricts the purchaser's right to occupy or rent the accommodation, for example a requirement to hold the property available for rental, or a requirement to use an exclusive rental management agent.

The SEC has expressed the view from an enforcement perspective that schemes which meet one of these tests satisfy the definition of a 'security' in the form of an investment contract and participation in a profit sharing arrangement under the *Securities Act 1993* (US) and the *Securities Exchange Act 1934* (US): Securities Exchange Commission Release No. 33-5347, 4 January 1973 1973 SEC LEXIS 3277; 38 FR 1735.

The SEC commented in Release No. 33-5347 that "substance should not be disregarded for form, and the fundamental statutory policy of affording broad protection to investors should be heeded" (at 1). This approach is consistent with the decision in *SEC v WJ Howey*, 328 US 293, 329 US 819 (1946) where the United States Supreme Court emphasised the need to consider the purpose of securities laws and substance rather than form when deciding whether an interest is a security.

5. The role of the SEC as regulator of the timeshare industry has been further narrowed by the SEC's interpretation of when a rental management agreement amounts to a

material restriction on the purchaser's rights. SEC Release No. 33-5347 states that schemes that materially restrict the purchaser's right to use or occupy the property will amount to securities. However, a number of subsequent SEC No-Action letters in relation to particular schemes establish that timeshare schemes can offer rental management agreements with an affiliated agent without falling within the ambit of securities laws if the following conditions are met:

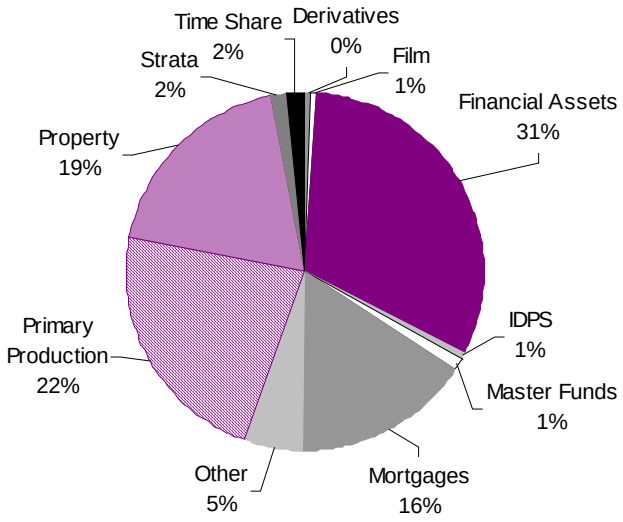
- The purchaser must have a choice about whether to enter a rental management agreement or not.
- The purchaser must also have a choice of rental management agents.
- The rental management agent affiliated with the scheme promoter must be a separate entity.
- The scheme promoter may disclose the existence of a rental management program offered by an affiliated agent, but must not provide detailed information about the performance of the rental management program, for example historical information, projections or tax information.
- The rental management agent may provide this information, but only in response to a specific request.
- The parties must not enter the rental management agreement before the purchase agreement is entered, but can do so after the purchase agreement is entered but before completion.

The SEC has adopted this approach stating in their release that only schemes with the aim of economic benefit were securities.

6. In many US jurisdictions, timeshare schemes are also regulated under state-based consumer protection laws. For example, in California timeshare is regulated by the *Subdivided Lands Law* under sections 11000-11200 of the *California Business and Professions Code* which is enforced by the Department of Real Estate. This statute requires:

- 3 day cooling off period.
- Promoter must obtain a Public Report issued by the Department of Real Estate and must give all prospective purchasers a copy of the report. Again, there is some prescribed content.

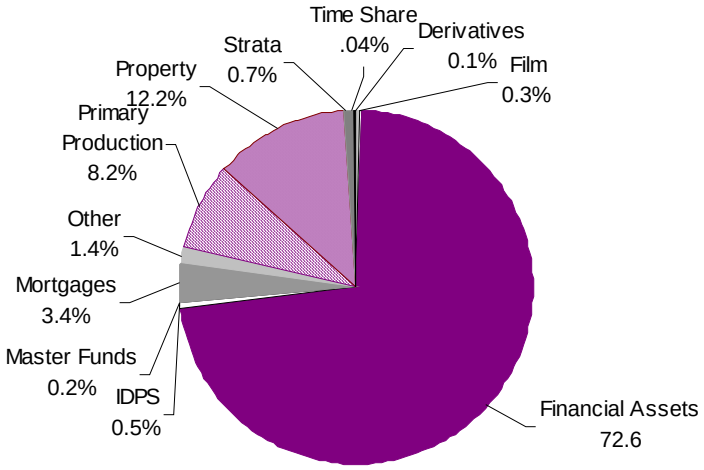
Managed investment schemes cover a wide variety of business activities, ranging from investment in financial assets such as shares and bonds, to primary production ventures, time sharing arrangements as well as property and mortgage schemes. The following charts and tables show the breakdown of licensed REs and managed investment schemes based on the nature of the scheme or the underlying assets.



Industry profile of licensed responsible entities as at 16 August 2001

Industry type	# of responsible entities
Derivatives	2
Film	3
Financial Assets	138
IDPS	3
Master Funds	5
Mortgages	71
Other	23
Primary Production	99
Property	83
Strata	7
Time Share	7

Industry profile of registered schemes as at 16 August 2001



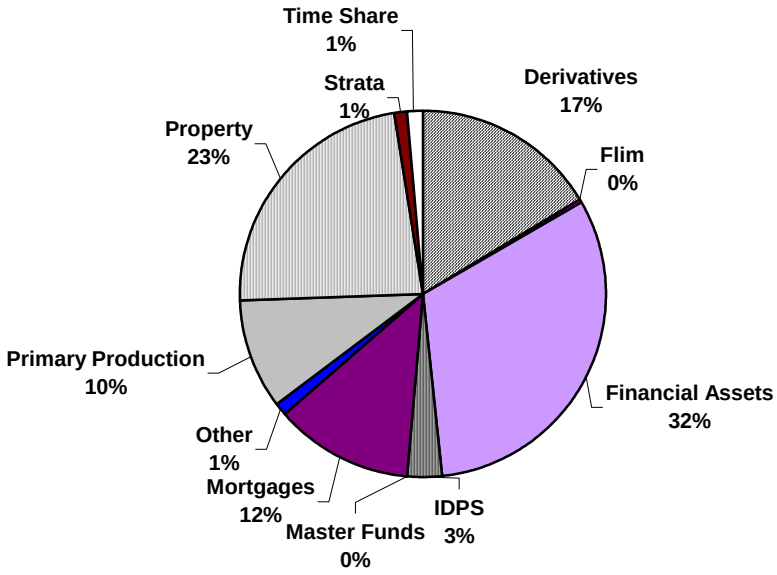
Industry profile of registered schemes as at 16 August 2001

Industry type	# of schemes
Derivatives	4
Film	9
Financial Assets	2052
IDPS	14
Master Funds	5
Mortgages	96
Other	39
Primary Production	233
Property	345
Strata	20
Time Share	10

Attachment 'C' – Industry Analysis – February 2005

As at 8 February 2005, there were 884 licensed RE's operating some 3855 registered managed investment schemes.

Industry profile of licensed responsible entities as at 8 February 2005



Industry profile of licensed responsible entities as at 8 February 2005

Industry Type	# of responsible entities
Derivatives	146
Film	2
Financial Assets	279
IDPS	28
Master Funds	0
Mortgages	108
Other	10
Primary Production	85
Property	204
Strata	9
Time Share	13
Total	**884**

[PS 160]
Summary Policy Statement 160
Time-sharing schemes

Issued 20/4/2000

Our approach to regulating time-sharing schemes

[PS 160.1] Generally if you promote or operate time-sharing schemes which are required to be registered by the Corporations Law (Law) you must comply with the managed investment provisions (Chapter 5C) and the fundraising provisions (Chapter 6D) of the Law.

Existing schemes

Exempt under state law

[PS 160.2] Some existing schemes were not required to comply with Div 5 of Pt 7.12 of the Law (now repealed) (or the corresponding previous laws if no primary offers were made after 1 January 1991) because of state legislation. We will not require these schemes to comply with the managed investment provisions and will give these schemes exemptions from the managed investment provisions of the Law. Scheme operators will need to apply for this exemption for each scheme and meet the following conditions:

(a) they must make no new primary offers after 31 May 2000 (other than offers that would not need disclosure under Pt 6D.2 if the scheme were registered); and

(b) they must belong to an approved external complaints system or approved industry supervisory body before 1 October 2000.

We will not take enforcement action in relation to fundraising undertaken by existing schemes from 1 July 1998 to the date of any exemption granted in the absence of misleading conduct.

Exempt title-based schemes

[PS 160.3] We will exempt certain title-based schemes from the managed investment provisions. Operators will have to apply for this exemption for each scheme. To take advantage of our exemption, operators must meet the following conditions:

(a) any buildings that were to be built under the terms of any prospectus have been substantially completed or the club notifies us that any buildings that were to be built under the terms of any prospectus need no longer be built and members will not be materially affected by the building not being built;

(b) 90% or more by value or number of all the interests that can be issued are held on 1 June 2000 by persons who are not, and are not associated with, any operator, manager, promoter or developer of the scheme. If there is any further issue or sale of interests by any operator, manager, promoter or developer of the scheme the operator, manager, promoter or developer as the case may be must ensure that:

  (i) Chapter 6D of the Law is complied with as far as practicable;

  (ii) the offeror holds a securities dealers licence with conditions relating to sales of interests in time-sharing schemes; and

(iii) the offeror complies with the conditions of the licence,

as if the scheme were a registered scheme;

(c) participants have received:

(i) their certificates of title to the real property in the scheme; or

(ii) copies of their certificates of title certified by a justice of the peace or a lawyer where the club has acknowledged that it is holding the member's certificate in safe custody for the member to be dealt with in accordance with provisions in the club's constitution that provide that the certificate may only be used to facilitate a transfer authorised by the member, or on forfeiture of the interest,

unless they became a member because a former member forfeited their interest; and

(iii) share or membership certificates in the club;

(d) any management agreement for the scheme or scheme property provides for the dismissal of the manager without any additional payment where members of the club satisfy one of the following voting requirements as determined by the club:

(i) 50% of all members vote for dismissal;

(ii) members holding 50% by value of the interests vote for dismissal;

(iii) 75% of members voting whether in person or by proxy vote for dismissal where at least 25% of members eligible to vote do so; or

(iv) members holding 75% by value of the interests that are held by members that vote, vote for dismissal whether in person or by proxy where members holding at least 25% by value of the interests eligible to vote do so;

unless:

(v) the management agreement was in force on 6 December 1999;

(vi) there has not since that date been any lawful means for the club to terminate the agreement;

(vii) members are given at least 21 days written notice that the operator seeks to rely on this exemption despite the fact that the management agreement does not meet the requirements that would otherwise apply;

(viii) the notice sent to members allows the member to requisition a vote by ticking a form accompanying the notice;

(ix) the notice contains the information about whether the operator should be able to rely on this exemption notwithstanding that the management agreement would not otherwise comply with the requirements of this exemption that would be required under paragraph 7.12.15(1)(g) of the Regulations of the old Law if the notice were a notice of a meeting to consider a resolution to that effect;

(x) the notice states prominently a reply paid address to which the form requisitioning a vote may be sent;

(xi) the notice states prominently that if:

(A) members who together hold at least 5% of the total value of the interests held by holders; or

(B) at least 100 members,

who would be entitled to vote at a meeting convened under s1457 requisition a vote by giving written notice to the reply paid address within 21 days from the date the notice may reasonably be expected to be received by members, a postal vote will be held

on whether the operator should be able to rely on the exemption notwithstanding that the management agreement would not otherwise comply with the requirements of the exemption;

(xii) a postal vote is conducted if requisitioned in accordance with the notice as soon as practicable;

(xiii) if there is a postal vote:

(A) a voting paper must be sent to each member which states a reply paid address to which the voting paper may be sent;

(B) members must be notified in, or in a document accompanying, the voting paper that only votes received at the reply paid address within 28 days after the issue of the voting paper will be counted and that the vote will be taken as passed if supported by either (as specified in the notice) a majority by value or by number that vote; and

(C) the voting paper must be accompanied by a notice that would have complied with the covenant required by paragraph 7.12.15(1)(g) of the Regulations of the old Law if the matter were put as a proposed resolution to a meeting; and

(xiv) ASIC has been notified in writing where a vote was required and if it was required as to the whether the vote was passed;

(e) the promoter and developer do not have outstanding contractual obligations to time-sharing participants which would adversely affect participants interests if they were not met;

(f) the constitution of the club provides for the removal of its directors if 50% of its members vote in favour of it;

(g) the club belongs to an approved external complaints system or an approved industry supervisory body before 1 October 2000; and

(h) each operator, including the club, must not facilitate the sale of an interest in the scheme unless the sale is subject to a cooling-off period of:

(i) ten business days, if the operator is not a member of Australian Timeshare & Holiday Ownership Council Ltd (ATHOC) or

(ii) five business days, if the operator is an ATHOC member.

Fixed term schemes

[PS 160.4] Where a time-sharing scheme has a fixed termination date (because of amendments to the deed or otherwise) which reflects the underlying economic life of the scheme property (which does not exceed 40 years from the date of first occupancy of scheme property), we will consider extending the transitional provisions for the schemes if its operators satisfy the requirements of Policy Statement 135. For time-sharing schemes we will take a scheme to be “closed” if there are no new primary offers after 31 May 2000. Initially we will give any extension to 1 July 2005. We will only give an extension when it is clear that the trustee and management company are accepting their responsibilities to ensure that the property is properly managed.

ASIC's existing Policy Statement 66 (based on the prescribed interests legislation which was repealed by the Managed Investments Act), continues to apply in relation to time-sharing schemes that obtain an extension of the transitional provisions.

Registered schemes

[PS 160.5] Generally, registered time-sharing schemes will have to comply with the managed investment provisions and the fundraising provisions applying to registered schemes.

Custody net tangible assets (NTA)

[PS 160.6] We will not apply our usual requirement that a person holding scheme property must have net tangible assets (NTA) of $5 million. This means that a responsible entity will be able to hold the following scheme property:

(a) scheme levies of a time-sharing scheme that are held in an account styled as a trust account that is audited twice annually by a registered company auditor with a report from the auditor to be provided to the responsible entity. We will allow these levies to be held in this manner if they are not more than the responsible entity reasonably considers necessary for maintaining, refurbishing or improving scheme property or meeting expenses required by law; and

(b) title to land to which a time-sharing scheme relates.

These assets can be held by the responsible entity or a third party custodian that has the same level of NTA as the responsible entity must have under s784(2A).

Valuation

[PS 160.7] We will not require scheme property to be valued at regular intervals under s601FC(1)(j) and s601HA(1)(c). The responsible entity will only be required to have scheme property valued when it has reasonable grounds to believe a valuation is in the best interests of scheme members.

Disclosure of prices

[PS 160.8] We will give relief so that if the promoter or operator sets out the consideration to be paid to acquire an interest in the scheme in the prospectus or in a looseleaf price list accompanying the prospectus, they will not have to set it out in:

(i) the constitution under s601GA(1)(a) {ASIC considers that if relief is not obtained the interests must be issued only at the independently verifiable price set out in the constitution}; or

(ii) where a looseleaf price list is to be used, the prospectus as required by s710.

Operators and promoters wishing to take advantage of this relief will have to meet the following requirements.

(a) **Cooling-off period**: The responsible entity must give cooling-off rights and must ensure those rights are given by anyone else who:

(i) issues an interest in the time share scheme; or

(ii) sells an interest in the time share scheme under an offer that must be disclosed under s707 (as amended by CLER).

Purchasers of (including subscribers for) time-sharing interests must be told about their rights to a cooling-off period in a separate statement. They must be given a copy of this statement to keep. The information must be in a form approved by us. Promoters must keep a record of all persons to whom cooling-off statements have been issued. The records should

include the date on which each statement was issued and the purchaser's signed acknowledgment of receipt. Promoters must prominently disclose the cooling-off requirement in the prospectus and application form for the issue of interests in a time-sharing scheme. (However, the requirement to have the cooling-off statement in 20 point bold print will not be mandatory.) If the prospective member decides not to proceed, *all* consideration they have provided, including any administration or other fees, must be returned.

The cooling-off period is:

(i) five business days if the applicant for relief is a member of the ATHOC;

(ii) ten business days in any other case.

The cooling-off period begins when all required documents (including the cooling-off statement) are given to the member and they have acknowledged in writing that they have received them;

(b) **Charges**: The responsible entity must pay, or must cause the developer to pay, the same continuing charges (for example, maintenance levies, special levies) for any unsold time-sharing interests, as members must pay for their time-sharing interests. The responsible entity must give time-sharing owners full details of the composition and calculation of continuing charges and levies to be imposed on members (including provision for maintenance and refurbishment). These details must be given at least annually;

(c) **Deposits**: If a development (or a stage of development) is incomplete, any deposit paid by a purchaser must be held on trust pending completion. The deposit must be not more than 30% of the total purchase price. If the development is not completed by the date specified in the prospectus, the deposit, and any income earned on the deposit, must be paid to the purchaser. Any fees and disbursements properly chargeable against the income can be deducted;

(d) **Price lists**: Any looseleaf price list must be accompanied by a copy of the current prospectus and include a reference to that prospectus;

(e) **Prospectuses**: If the prices are not set out in the prospectus the prospectus must prominently state that the prices of interests are set out in a looseleaf price list. It must also state that the responsible entity will be liable as if the price list were a part of the prospectus and when someone is given a prospectus they must also be given a price list;

In addition to stating the current offer price of an interest in the particular time-sharing scheme, each looseleaf price list must state:

(i) the minimum and maximum prices at which interests of each class have been sold during a period of at least one month immediately before the date of the price list; and

(ii) that it will be superseded by a looseleaf price list with a later date;

Each looseleaf price list must prominently state that any applicant for an interest in the scheme:

(i) must be given a prospectus before signing the application form; and

(ii) can only apply for an interest by completing the application form accompanying the prospectus; and

a looseleaf price list must not be given to any prospective applicant unless a copy of it has been lodged with us.

Licensing

Licensing of responsible entity

[PS 160.9] Securities dealers licences authorising operation of time-sharing schemes will generally include the requirements of paragraphs 8(a) to (d) as conditions.

If an applicant for a licence can demonstrate that they will operate the scheme honestly, efficiently and fairly on a different basis we may vary the conditions.

Licensing of clubs

[PS 160.10] Sometimes a club's only securities business may be to resell interests in the scheme which it operates as agent. In these cases the club will:

(a) be required to have NTA of only $5000; and
(b) not be required to have a performance bond.

Licensing of dealers in time shares

[PS 160.11] If we believe that an applicant for a securities dealers licence may deal in interests in time-sharing schemes we will include a special condition in their licence. Our condition is that the licensee cannot facilitate, nor be a party as principal or agent to, a sale of an interest in a time share scheme unless the sale has a cooling-off period. Purchasers of time-sharing interests must be told about their rights to a cooling-off period in a separate statement. They must be given a copy of this statement to keep. The information must be in a form approved by us. Licensees must keep a record of all persons to whom cooling-off statements have been issued. The records should include the date on which each statement was issued and the purchaser's signed acknowledgment of receipt. Licensees must prominently disclose the cooling-off requirement in any documentation for the sale of interests in a time-sharing scheme. If the prospective member decides not to proceed, *all* consideration they have provided, including any administration or other fees must be returned.

The cooling-off period is:

(a) five business days if the applicant for relief is a member of the ATHOC;
(b) ten business days in any other case.

The cooling-off period begins when all required documents (including the cooling-off statement) are given to the purchaser and they have acknowledged in writing that they have received them.

Chapter 5C relief

[PS 160.12] We will give case by case relief from the managed investment provisions when:

(a) a club has taken over management of the scheme property from the responsible entity;
(b) the club makes, or has a veto over, all decisions that materially affect the best interests of members. To benefit from our relief the club must only spend money in accordance with a budget which is notified at least annually to club members

and approved by the club;

(c) the club is a public company;

(d) the property is held on trust for the members or members hold title to the scheme property and have received:

(i) their certificates of title to the real property in the scheme; or

(ii) copies certified by a justice of the peace or lawyer where the club has acknowledged that it is holding the member's certificate in safe custody for the member to be dealt with in accordance with provisions in the club's constitution that provide for the certificate to only be used to facilitate a transfer authorised by the member, or on forfeiture of the interest,

unless they became a member because a former member forfeited their interest as a result of an offer made before 6 December 1999;

(iii) and share or membership certificates in the club;

(e) any buildings that were to be built under the terms of any prospectus have been substantially completed or the club notifies us that that any buildings that were to be built under the terms of any prospectus need no longer be built and members will not be materially affected by the building not being built and there are no outstanding contractual obligations that would adversely affect the time share members' interests;

(f) at least 90% of the time share interests have been issued. These interests are held by a person other than the promoter, developer, manager, responsible entity or an associate of any of them. If there is any further issue or sale of interests by any operator, manager, promoter or developer of the scheme that person or persons must ensure that:

(i) Chapter 6D of the Law is complied with as far as practicable;

(ii) the offeror holds a securities dealers licence with conditions relating to sales of interests in time-sharing schemes; and

(iii) the offeror complies with the conditions of the licence;

as if the scheme were a registered scheme. We will also give limited relief where all the requirements other than this are satisfied. The limited relief will exclude from the responsible entity's functions the management of the property to which the scheme relates. The scheme will remain registered and the responsible entity's duties in relation to the promotion and of the scheme and all other aspects of operating the scheme will remain until the 90% requirement is satisfied and having obtained relief the scheme is deregistered;

(g) the club, or a person or entity engaged by the club for management, maintains a trust account audited twice yearly by a registered company auditor;

(h) any agreement between the club and a person to supply management services to the scheme must include a provision for dismissing the manager in at least one of the following cases:

(i) 50% of all members vote for dismissal;

(ii) members holding 50% by value of the interests vote for dismissal;

(iii) 75% of members voting whether in person or by proxy vote for dismissal where at least 25% of members eligible to vote do so;

(iv) members holding 75% by value of the interests that are held by members that vote, vote for dismissal whether in person or by proxy where members holding at least 25% by value of the interests eligible to vote do

so.

Any such dismissal must not trigger any additional payment;

(i) the club is a member of an approved industry supervisory body;

(j) no operator, including the club, may facilitate the sale of an interest in the scheme unless the sale is subject to a cooling-off period of five business days; and

(k) the responsible entity does not operate any rental pool (although the club or another person may).

[PS 160.13] We will consider applications from organisations wishing to become approved industry supervisory bodies having regard to the indicative criteria published by ASIC.

Rental pools

[PS 160.14] We will exempt from the managed investment provisions, rental pools run by operators of time-sharing schemes that are exempt from the managed investment provisions. We are proposing to exempt such rental pools if they:

(a) relate to the use of members' time share rights; and

(b) are conducted by a person (who may or may not be the club) who maintains an account styled as a trust account which is audited twice annually by a registered company auditor with a report from the auditor to be provided to the club.

[PS 160.15] For timeshare resorts operated as registered schemes, we consider any associated rental pool operated by the responsible entity to be part of the same registered scheme.

[PS 160.16] When there is no current prospectus for time share interests and the rental pool is part of a registered scheme, an exemption for registered schemes from Ch 6D will be given. Where the rental pool is exempt under paragraph 14, the operator of the rental pool will not be required to lodge a disclosure document. However in either case the operator of the rental pool must provide potential participants in the rental pool with a document which contains the information a typical purchaser would need to assess the merits and risks of participating in the rental pool. The document should be kept with other scheme records and be available for us to inspect.

Non-accommodation based time-sharing schemes

[PS 160.17] ASIC will not give relief to a scheme merely because it does not involve accommodation. However some schemes that do not involve accommodation have special features that are a basis for relief. We will consider applications for relief case by case in the light of our general policy on exemptions for managed investment schemes in Policy Statement 136. In considering whether to give relief from Chapter 5C and the fundraising provisions for these types of schemes we will consider various factors including:

(a) whether the holder of the interest enjoys exclusive possession of a portion of the property at the relevant time;

(b) whether the interest is transferable;

(c) the value of the subscription required to obtain an interest;

(d) the degree of management necessary to run the scheme;

(e) the complexity of the scheme;

(f) whether the governing body of the scheme is elected by the holders of the interests;
(g) whether the scheme is incidental to other rights, eg real estate;
(h) how the scheme is promoted; and
(i) whether there is a cash return on the acquisition cost or enjoyment in specie.

If we decide to give relief it may be conditional on an adequate disclosure statement being provided to investors.

Stock markets

[PS 160.18] We propose to be guided by ASIC Policy Statement 100, *Stock markets*, when we consider whether to adopt a no action approach to the conduct of an unauthorised stock market. However we propose to object to an exempt stock market declaration if the operator or provider of the market does not hold a dealers licence that has the condition referred to at paragraph 11.

Key terms

In this policy proposal:
"ATHOC" means Australian Timeshare & Holiday Ownership Council Ltd ACN 065 260 095
"CLER" means the Corporate Law Economic Reform Act 1999
"club" means a company that is controlled by members of the time-sharing scheme (and the responsible entity, manager and any associate do not collectively have a voting interest exceeding 10%) that controls how the property to which the scheme relates is managed
"fundraising provisions" means Div 2, 3, 3A and 6 of Pt 7.12 and the provisions relating to disclosure in the Corporations Law from time to time
"Law" means Corporations Law
"managed investment provisions" means Chapter 5C
"NTA" means net tangible assets as defined in Policy Statement 131.
"s601ED" for example means section 601ED of the Corporations Law
"substantially completed" means any buildings that were to be built under the terms of any prospectus have been constructed to the extent that members will not be materially affected whether or not any further construction occurs