ATHOC
AUSTRALIAN TIMESHARE & HOLIDAY OWNERSHIP COUNCIL LIMITED

25 February 2005

The Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Suite SG.64
Parliament House
Canberra ACT 2600

By email: corporations.joint@aph.gov.au

Subject: Inquiry into Regulation of the Timeshare Industry

Attached is the submission by The Australian Timeshare and Holiday Ownership Council (ATHOC) for the Joint Committee on Corporations and Financial Services on the Timeshare industry in Australia.

The submission is a result of consultation with the members of ATHOC and was compiled with input from the following companies:

- Accor Premier Vacation Club
- Classic Holidays
- Holiday Concepts
- RCI Pacific
- Trendwest South Pacific

We look forward to discussing or clarifying any facet of our submission with the committee, and I can be contacted through the ATHOC office on 07 5574 2622.

Yours sincerely
ATHOC

Ramy Filo
President

AUSTRALIAN TIMESHARE & HOLIDAY OWNERSHIP COUNCIL

SUBMISSION REGARDING THE REGULATION OF THE AUSTRALIAN TIMESHARE INDUSTRY

FEBRUARY 2005

INDEX OF CONTENTS

1 EXECUTIVE SUMMARY

1.1 Terms of Reference

This submission is made with reference to the following matters:

1.1.1 The effectiveness of the current regulatory arrangements for the timeshare industry under the Corporations Act 2001;
1.1.2 Advantages and disadvantages of possible models for reform of the regulatory arrangements applying to the timeshare industry;

1.2 Background

The Australian timeshare industry is regulated as a financial product under the terms of the Corporations Act 2001 as well as various Regulations, ASIC Policy Statements and conditions attached to the Australian Financial Services Licenses issued to timeshare promoters by ASIC.

With the increasing complexity and compliance burden of the regulatory arrangements over time there has been a growing concern within the industry that its specific and unique characteristics have been somewhat overlooked within a body of laws designed and intended for the financial services industry. The result is that the industry now regards itself somewhat as a “square peg in a round hole”. A specific example of the difficulties faced by the industry is the fact the ASIC Policy Statement 66 expressly forbids timeshare promoters to represent their product as an “investment” while at the same time they must operate it as a “managed investment scheme”. This is illogical and confusing for all stakeholders.

The timeshare industry has had some informal discussions with legislators and government ministers in recent years to express these concerns. The opportunity which the present enquiry provides to directly address members of the legislature is therefore extremely welcome.

1.3 Key Issues

Following consultation with its members, this submission focuses upon the following matters of concern to the industry:

1.3.1 The general appropriateness of the current regulatory arrangements – fitting the “square peg in a round hole”.
1.3.2 The practical operation of the current *cooling-off* requirements under PS160.

1.3.3 Lack of relevance and focus in the requirements of the current training provisions for authorised representatives under PS145.
1.3.4 Relevance of the PS175 requirements to provide consumers with a *Financial Services Guide* and a *Statement of Advice*.
1.3.5 The future regulation of Exempt Schemes.
1.3.6 The potential role of ATHOC as co-regulator with ASIC.

1.4 Recommendations

Following consultation with its members and advisers, ATHOC submits that the following should be done in order to produce a more practical and balanced regulatory framework for the Australian timeshare industry:

1.4.1 The Australian timeshare industry should continue to be regulated by the Commonwealth within the overall framework of the Corporations Act 2001 and ASIC should continue to be the government instrumentality with primary regulatory oversight of the timeshare industry.

1.4.2 However, if timeshare products are not intended to be perceived by consumers as an "*investment*", then the application of a uniform legislative framework which is designed predominantly for investment-linked products can only operate efficiently if it is substantially modified to better suit the application of that regime to the unique needs of timeshare consumers, promoters and operators. It is therefore submitted that if timeshare products lack, or should be perceived as lacking, an investment character, then statutory requirements capable of being identified as solely or substantially predicated on investor protection rather than more general consumer protection objectives should be waived or relaxed in so far as they apply to timeshare.

1.4.3 ATHOC believes that consumers should be granted cooling off rights and ATHOC's Code of Practice already includes a requirement that members must provide a cooling off period to their customers. However, it is submitted that the cooling off requirements for timeshare product should be no more onerous than those for other classes of non-liquid managed investment scheme. Class Order 02/315 and the relevant conditions in any AFS Licence should be modified so that:

a It is not necessary for each Application Form relating to an interest in the time sharing scheme to be accompanied by a separate statement in a form approved by ASIC (or in fact in any other form) describing the effect of the cooling-off period or stating that a signed Application Form will be of no effect unless the Applicant also signs an acknowledgment of receipt of such a cooling-off statement; and
b Cooling-off rights not be required to be disclosed prominently in a Prospectus or PDS and Application Form relating to the offer of

interests in the timeshare scheme. The disclosure requirements for a Prospectus or PDS would in any event require disclosure, however, it is a matter for judgment of the issuer as to whether such disclosure is prominent; and

c The Operator is not required to ensure that the cooling-off rights are complied with by any other person who offers an interest in the timeshare scheme for issue or offers an interest in the time sharing scheme for sale; and

d The Operator not be required to maintain written records relating to the issue by it of all cooling-off statements; and

e The cooling-off periods for members and non members set out in the ATHOC Code of Practice be altered to 7 calendar days and 14 calendar days respectively in lieu of 5 business days and 10 business day respectively.

1.4.4 ATHOC strongly supports compulsory training standards for timeshare advisers. However, it is submitted that the standard level could be eased down to Tier 2 level, with more emphasis being given to timeshare-specific knowledge. The generic knowledge section and the managed investment section should be dispensed with altogether since there is a danger that they will result in confusion for the advisers and also the general public.

1.4.5 Because the relevant information required by consumers to assist them in making an informed purchase decision is contained within the Product Disclosure Statement, the requirement to also provide a Financial Services Guide is excessive and inappropriate and should be waived.

1.4.6 Given the nature of the timeshare product, the context of the sales presentation and the potential for confusion in the minds of consumers, the requirement to give Statements of Advice to timeshare purchasers is inappropriate and should be waived.

1.4.7 ATHOC should work closely with ASIC to resolve a number of outstanding matters relating to exempt timeshare schemes.

1.4.8 ATHOC should be given formal recognition as a co-regulator with ASIC and should become the complaints handling body for the timeshare industry.

1.4.9 The regulation of the sales and marketing practices of the timeshare industry should be regulated at a Federal level by the ACCC under the Trade Practices Act and at the State level by the various consumer protection regulatory agencies operating under the statutes of their respective jurisdictions.

1.4.10 In consultation with ATHOC, ASIC should develop a special purpose AFSL for the timeshare industry and review the licensing requirements for those who merely “operate” a scheme.

ATHOC remains prepared to engage in a constructive and continuing dialogue with ASIC regarding the specific details of modifications and exemptions to the current regulatory arrangements which would recognise the distinctive characteristics of timeshare products and result in a fairer, more practical and less confusing environment for all stakeholders.

2 INTRODUCTION – THE TIMESHARE INDUSTRY

2.1 What is Timeshare?

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 a timeshare interest typically costs between $12,000 and $25,000. Historically, timeshare promoters have adopted one of the following structures for their product:

- Title-based (the timeshare is deeded and a title is issued and registered under the relevant state property laws)
- Share based (purchasers own a share in the club with a holiday entitlement attached)
- Unit Trust (similar but structured as a trust)
- Right to Use (usually used for shorter duration schemes, eg 20 years)
- Points Clubs (purchasers acquire points which they can redeem for holiday use)
- Combinations of the above

These structures usually provide purchasers with holiday entitlements of a week. In recent years however Points Clubs have dominated the market, providing greater flexibility by allowing shorter and longer stays, depending on the number of points used.

In addition to the initial purchase price, timeshare owners pay an annual club fee or maintenance levy to cover the costs required to run the club or resort including reserves for periodic refurbishment. These clubs/resorts are essentially non-profit organisations that are analogous to the body corporates of strata title real estate.

From the introduction of timeshare in Australia in the late 1970s until the early 1990s, nearly all timeshare products were title-based and related to just a single specific resort. Purchasers generally acquired a share in a club, a deeded interest in the title upon which the resort was constructed and a unit in an interim trust, the latter being an artificial device necessary to comply with the “prescribed interest” provisions.

Though this model served its purpose, it was superseded by a unit-trust based and share-based model in which title to the timeshare resort was held by a trustee and purchasers were issued with units in the trust. Such trust could gradually acquire interests in other properties, as well as leasehold interests and licences. This enabled holders of units in the trust to access holiday accommodation at other destinations to which the trust was in some way entitled. Some developers also allowed members in different trusts to exchange their annual accommodation entitlements so as to increase the number of holiday destinations available to members.

During the past decade, the nature of timeshare has changed significantly as operators have found the traditional product forms increasingly uncompetitive, especially those offering interests in just a single resort. An increasingly sophisticated public has demanded a wider range of choices as far as holiday destinations are concerned. Accordingly, the underlying property in recently established timeshare schemes generally comprises freehold, leasehold and right-to-use interests in numerous locations in Australia as well as overseas.

Not only have consumers sought greater choice in available destinations; they have also demanded greater flexibility in the way they take their holidays. Points-based timeshare schemes have been designed to meet this requirement for flexibility. Instead of accommodation entitlements being measured in weeks, they are measured in "points" or "credits" which are a form of holiday "currency" that can be redeemed to book holiday accommodation at various destinations. These points are backed by resort real estate held in trust by a managed investment scheme.

A significant feature of the timeshare industry is the ability of consumers to access a global network of thousands of timeshare resorts. An owner of a timeshare interest can place their annual accommodation entitlement into an "inventory pool" and exchange it for accommodation elsewhere in Australia or elsewhere in the world. This valuable service, which is used by many thousands of Australian timeshare owners every year, is provided by timeshare exchange companies which charge fees for their services.

Other services available to Australian timeshare owners include cruise exchanges, travel clubs and various exclusive discount programs. Operators are constantly seeking to add value to their products in an increasingly competitive environment.

2.2 Timeshare – a Global Industry

According to the World Tourism Organisation, Timeshare, or '*Vacation/Holiday Ownership'* as it is also known, is the fastest growing segment of the tourism and leisure industry worldwide (*"Timeshare: The New Force in Tourism")*. Over the past seven years, global growth has represented the equivalent of 14% per annum. The successful entry of leading international hospitality organisations, such as Marriott, Disney, Starwood, Hilton and Hyatt, has acted as a strong catalyst for growth.

The following statistics* summarise the scale of the global Time Share industry:

- US$9.4 billion timeshare sales in 2002
- 6.7 million households own the rights to about 10.7 million timeshare weeks
- 5,425 Time Share resorts worldwide
- 325,000 Timeshare accommodation units worldwide

** Source Ragatz Associates, "Resort Timesharing Worldwide: 2003 Edition Summary Report"*

2.3 Economic Benefits for Australia

Australia has seen a resurgence in timeshare in the past four years, stimulated by the entry into the market of US group Trendwest Resorts and the launch of Accor Premiere Vacation Club. The timeshare market in Australia is currently summarised as follows:

- $300 million timeshare sales in 2004
- 130,000 households own the rights to about 160,000 timeshare weeks
- 110 timeshare resorts in Australia

The timeshare industry has created more than 2,000 new jobs in the past four years, and growth is forecast to continue. The level of timeshare sales has, and will continue to, stimulated the need to construct purpose built timeshare resort accommodation, especially in regional Australia.

A survey of the five largest timeshare promoters in Australia reveals the following:

- No of staff employed today 2,365
- Forecast staff in
  - 1 year 2,700
  - 2 years 3,000
  - 5 years 3,900

In a recent study conducted by Ragatz Associates (full copy included as Appendix B), further economic benefit of timeshare to the Australian economy was measured as follows:

- Timeshare owners and guests spend approx $90.8 million in local communities when on holiday
- Annual maintenance levies payable by timeshare owners amount to $39.7 million per annum (and growing)
- Length of average stay of timeshare owners increased by 53% after timeshare purchase
- Annual occupancy of timeshare resorts is 96%.

These data indicate that the performance of the Australian timeshare industry is strongly aligned with tourism policy objectives of all the major political parties.

2.4 The Role of ATHOC

The Australian Timeshare & Holiday Ownership Council Limited (ATHOC) was established in 1994 to provide services to all stakeholders in the Australian timeshare industry. It is the representative body for timeshare resort owners, developers/promoters, marketers, exchange companies, resort managers and professional advisors to the industry.

The objectives of ATHOC include:

2.4.1 To unite persons and organisations actively engaged in or interested in the industry as a single and united body and to represent the Industry

2.4.2 To articulate and advocate the needs and interests of the Industry before legislative, administrative, regulatory, executive and judicial branches of Federal, State and Local government

2.4.3 To promulgate policies and to conduct programs, activities and services for the betterment of the Industry. In particular to provide opportunities for dialogue, education, advancement and improvement of all aspects within the Industry through meetings, seminars, communications, publications, policy formations and other programmes, services and activities

2.4.4 To provide leadership on issues of concern to Members of ATHOC

2.4.5 To promote and maintain high standards of conduct in the transaction of the industry business

To meet these objectives ATHOC currently provides a range of services to its Members, timeshare owners and consumers which include:

2.4.6 Provision of accredited training courses for resort staff in conjunction with TAFE colleges.

2.4.7 Development and ongoing fortnightly training to all authorised representatives to comply with the requirements of PS146 throughout Australia in conjunction with Griffith University.

2.4.8 A telephone service for consumers making enquiries or seeking specific information with regard to purchasing timeshare.

2.4.9 A complaints resolution scheme for all Exempt Members.

In order to continually foster high ethical standards and adherence to industry best practice, every Member of ATHOC is required to abide by a ***Code of Ethics*** and ***Code of Practice.*** Membership to ATHOC is by application and not by right. Once a Member is accepted they are bound by the Code of Ethics and Code of Practice. ATHOC conducts a strict surveillance regime and should any Member be found to breach either or both of the Codes, a range of penalties may be brought against the Member.

ATHOC always seeks to work closely with Commonwealth and State regulatory bodies such as ASIC and the various State-based consumer protection

organisation to ensure that any consumer concerns are dealt with promptly and fairly. Given that Members are bound to both Codes, ATHOC should be used by regulatory bodies as another check and measure to assure consumers in their purchase with ATHOC Members.

3 THE CURRENT REGULATORY ARRANGEMENTS

3.1 Background

It is a well established principle of Australian law that interests in a timeshare scheme are a 'security' product *(CCA v Lake Eildon Country Club Ltd (1981); A Home Away Pty Ltd v CCA (1981)).* This has resulted in the product being regulated by the Commonwealth as a special class of security, formerly known as '*prescribed interests'* and more recently known as '*managed investment schemes'*. This has had the effect of squeezing timeshare into the ever-tightening 'corset' of the rules designed for the financial investment services industry. The enactment of the Financial Services Reform Act and its new licensing regime has served to confirm this.

In order to sell what is effectively a pre-paid holiday plan, which costs less than other leisure-related products such as a mobile home or a caravan, timeshare promoters must do the following:

- Establish a managed investment scheme
- Create or appoint a Responsible Entity
- Establish a compliance plan, a compliance committee and appoint a compliance auditor
- Obtain an AFS License and comply with all of its requirements
- Conduct sales presentations to consumers that involve financial product compliance requirements such as:

    1 Applying the '*know your client'* rule,
    2 Production of a **Product Disclosure Statement**,
    3 Issue of a **Financial Services Guide** and
    4 Issue of a **Statement of Advice**.

Unsurprisingly, the industry incurs a high cost of compliance which is ultimately passed on the consumers.

In additional to the general financial services regulatory framework, the following ASIC policies are currently directly applicable to timeshare interests:

3.1.1 **Policy Statement 66.** This is now generally acknowledged to be largely redundant given that it deals with timeshare regulation in the context of the now long superseded prescribed interest and old securities industries licensing regimes.

3.1.2 **Summary Policy Statement 160**. This is arguably in need of urgent updating and augmentation given that it is only summary in form and deals extensively with issues relating to the transition to pre-existing timeshare

schemes to application on 1 July 2000 of the managed investment regime now in Chapter 5C of the Corporations Act. SPS160 has not yet been updated to deal with application of the subsequently introduced financial services regime in Chapter 7 of the Corporations Act to the extent that that regime affects the timeshare industry. Whilst it is understood ASIC is contemplating a review and augmentation of that policy, ATHOC is not aware as at the date of this submission of any tentative timetable for completion of that review.

Some updating has however been provided to a limited extent in ASIC PS167 "*Licensing: Discretionary powers and transition*" and PS169 "*Disclosure: Discretionary powers and transition*". These two policies clarify the extent to which ASIC will continue to modify the application of existing or already foreshadowed relief. They refer extensively to pre-existing relief affecting other financial product categories beyond timeshare and, in so far as they refer to timeshare policy at all, they merely clarify the application of existing policy rather than modifying that policy or introducing new policy.

3.2 The Regulation of Substantially "Sold-out" Timeshare Schemes

Under SPS160 ASIC indicated its willingness to exempt or "grandfather" from application of the Managed Investment regime a number of categories of timeshare schemes which, prior to 1 July 2000, were already either closed to new applications or well-advanced in their promotion and, accordingly, substantially only in operational phase. These categories were:

- schemes already afforded prior exemption under state law (SPS160.2);
- schemes in which participants hold legal title to real property and which were substantially sold-out (SPS160.3).

ASIC further agreed under SPS160.4 to use its statutory power to extend beyond 1 July 2000 the usual 2 year transitional period for application of the managed investment regime to "closed" schemes able to establish a finite life span of "*not exceeding 40 years from the date of first occupancy of scheme property*". As it transpired, many schemes arranged meetings of members prior to 1 July 2000 to vote to approve shortening the term of their particular scheme primarily or solely for the purpose of taking advantage of this relief and thus avoiding the perceived excessive compliance burden resulting from having to otherwise register as a managed investment scheme. Currently this extended transition for these schemes has been provided until 1 July 2010 with a further extension of that deadline presumably being considered by ASIC on either a global or case by case basis prior to that date.

Finally, under SPS160.12, ASIC agreed to consider case by case relief for Chapter 5C registered timeshare schemes in which a member-controlled club ultimately takes over the management of the scheme property from the responsible entity.

This effectively allows such schemes, whilst registered under Chapter 5C during the promotional phase of their existence, to ultimately opt out of the managed investment regime upon meeting a number of identified preconditions.

3.3 The Regulation of Timeshare Schemes with Ongoing Sales Activity

All timeshare schemes, other than those falling within the categories set out above, must satisfy the registration requirements of Chapter 5C of the Corporations Act (see SPS160.5).

SPS160 does however offer specifically designed modification relief to registered timeshare schemes, including:

3.3.1 Permitting Responsible Entities of timeshare schemes to maintain self-custody of scheme assets without meeting the usually applicable net tangible asset requirements. However relief is only offered to the extent that assets comprise reasonably charged scheme levies paid into an audited trust account and title to real property to which the schemes relate (SPS160.6);

3.3.2 Relaxing the usual requirement to have scheme property valued at regular intervals where updated valuations are not otherwise required in the best interests of scheme members (SPS160.7);

3.3.3 Conditional relief permitting ancillary rental pools operated in unison with a registered timeshare scheme from having to be separately registered (SPS160.14).

ASIC has exercised its discretionary powers to establish further defacto policy settings outside of SPS160. It has notably done so in AFS license conditions uniformly applicable to registered timeshare schemes or schemes which are actively engaged in the promotion and sale of scheme interests. These include:

3.3.4 The requirement that licensees offering the issue or sale of timeshare interests adhere to mandatory cooling-off obligations **additional to statutory requirements**. Licensees are required to offer consumers a cooling-off period of 5 business days if the licensee is a member of ATHOC or an ASIC approved “Industry Supervisory Body” and, in all other cases, 10 business days. License conditions also require the “prominent” disclosure to consumers of cooling off rights and the provision to consumers of separate “Cooling-off statements” to alert consumers to their rights. Licensees are also required to receive from consumers a signed acknowledgement of receipt of the Cooling-off Statements. (Refer to section 5 of this submission for a more detailed discussion of this issue.)

3.3.5 The requirement on the licensee to pay scheme levies calculated in an equivalent manner to those assessed to normal scheme members in relation to “any unsold interests” in the scheme;

3.3.6 The requirement to report and account to members at least annually on the composition and calculation of all charges to members;

3.3.7 Requirements that purchase deposits shall not to exceed 30%, all purchase monies shall be paid into a trust account, and shall not be dealt with until property development and title or interest has been delivered to the purchaser.

The issue of the desirability of a co-regulatory framework, with an industry representative body providing some level of member supervision, is further addressed below in this submission. It is ATHOC’s submission that it is already equipped to satisfy such a function without in any way diminishing ASIC’s role as front line regulator.

4 KEY ISSUES

4.1 Key Issue 1 - Application Of A Financial Services Industry Regulatory Framework

4.1.1 Background

The present licensing and regulatory arrangements effectively deem timeshare operators to be conducting their businesses as part of the broader financial services industry. However, it was recognised in Policy Statement 66, and has subsequently been consistently recognised, that an interest in a timeshare scheme is not an "investment" product in the sense used in the Act, nor is it an "investment" product as generally understood by the public. Accordingly, ASIC Policy Statement 66 specifically prohibits an interest in a time sharing scheme from being characterised as an "investment". This creates a fundamental dilemma which has been the source of much confusion for the industry and its customers and has given rise to a multitude of relief applications to ASIC.

The industry finds itself in a situation whereby, on the one hand timeshare is characterised as a "managed investment scheme", which expressly gives rise to the presumption that it is an investment product while, on the other hand, ASIC recognises that it is not an investment and prohibits an interest from being represented to consumers as an investment product. It is submitted that this state of affairs is neither sensible nor sustainable.

4.1.2 Jurisdictional Issues

It has sometimes been suggested that, as in other countries like the USA, timeshare should simply be regulated as a real estate product by the States and Territories. However, the experience in Australia, and indeed also in the USA, is that jurisdictional fragmentation is entirely unsatisfactory and leads to the multiplication of expensive and incompatible compliance regimes. Since timeshare promoters generally operate on a national scale, it is submitted that the most appropriate model is Federal regulation administered by a Federal body and ATHOC would strongly oppose any proposal to move to a State and Territory based regulatory framework.

4.1.3 A "Square Peg in a Round Hole"

It is submitted that the combination of a prescriptive legislative framework coupled with the conferral of power on the front line regulator (here ASIC) to exempt and modify extensive parts of that framework demonstrates a clear legislative intention that that framework be scalable and flexible in its

operation – ie capable of being modified and tailored sensibly to the specific and unique circumstances of parties which are subject to its application.

This is particularly evident in the case of the financial services regime in Chapter 7 of the Corporations Act. Whilst acknowledging that products as diverse as general insurance contracts, traditional securities, collective investments, superannuation interests and timeshare schemes could be loosely argued (to use the language of the Report of the Wallis Committee) as "functionally similar", it needs to be recognised that they each still display unique and sometimes vastly divergent features and were conceived and developed in the context of specific business models and prior regulatory environments.

The same principle applies to the wide range of different collective investment arrangements now subject to the managed investment regime. Timeshare in Australia, whilst now categorised by legislative convenience as a "managed investment" appears particularly exceptional given that it has, at least for the past decade, been prevented (by deed and license conditions imposed by the regulator) from being promoted, or otherwise referred to, as an "investment". Whilst this submission does not presently wish to challenge that restriction, it seeks to highlight its existence to emphasise that different considerations need to apply in ascertaining the best form, or intensity, of regulation to be applied to different aspects of the promotion and operation of timeshare schemes.

4.1.4 **ASIC's Powers to Modify and Exempt**

ASIC already has the capacity to achieve this purpose through the use of its exemption and modification powers. Alternatively, if ASIC's exemption and modification power is not more extensively utilised, special legislative rules are required, if not in the Corporations Act, then at least in the corresponding Corporations Regulations, in order to better tailor the application of Chapters 5C and 7 of the Corporations Act to the unique needs of stakeholders in the Australian timeshare industry.

We believe that ASIC has thus far been too sparing, or possibly risk adverse, in the use of its considerable powers. Examples of issues that have been put to ASIC seeking exemption and modification are given elsewhere in this submission.

ATHOC is aware of, and sympathetic to, the resource constraints affecting ASIC in undertaking its task of regulating the timeshare industry in unison with regulating the wide range of other financial product categories. However, the lack of more comprehensive formal policy settings specifically applicable to the timeshare industry appears to be a major

reason why ASIC is unable to speedily or more efficiently deliver the practical solutions that the timeshare industry requires.

Under current arrangements, enunciated in ASIC Policy Statement 51 dealing with applications to exempt and modify the Act, ASIC regards applications for relief for which a formal or analogous policy pronouncement does not exist, as "*outside of policy*". We understand that, in practice, ASIC prevents such applications from being determined operationally by individual officers but instead requires that they be referred to a higher policy review function within ASIC. Until recently, this has involved referral of the application to meetings of ASIC's Regulatory Policy Group. Whilst this procedure clearly adds extended time frames to the resolution of industry's issues, it also appears possible that the requirement for ASIC's determinations to achieve committee consensus may be responsible for deferral or rejection of applications in which a consensus is not immediately available.

ATHOC believes that the development by ASIC of more comprehensive formal policy settings based on submissions and feedback from timeshare industry stakeholders would greatly assist in resolving some of the issues already identified.

4.1.5 **Consumer Protection**

The development of the current strict regulatory framework governing timeshare was prompted in part by the perception of the existence in the past of unscrupulous timeshare promoters in the Australian market.

The industry acknowledges that the higher barriers to entry caused by tighter regulation have helped keep some of these operators out of the market. Furthermore, consumers are clearly strongly protected under this regime.

However, the vast majority of complaints received by the industry over the years have been about the sales and marketing practices of timeshare companies – not the product itself. Such complaints would likely concern the quality/delivery of promotional gifts offered as incentives to attend sales presentations, and the perceived pressure exerted at those sales presentations. It is submitted that these are the sorts of matters more usually regulated by the Trade Practices Act and its State based counterparts.

The actual level of complaints received is small. The following statistics summarise complaints received in respect of the sales and marketing of timeshare during the past two years (2003-2004):

- Number of sales presentations: 292,000
- Sales/marketing related complaints received: 1,368
- Complaints/presentations: 0.47%

Although The Corporations Act includes timeshare schemes within the definition of Managed Investment Schemes and therefore financial products, the sales and marketing practices of the industry already fall within the regulatory jurisdiction of:

- The ACCC under the Trade Practices Act and
- The various state-based consumer protection regulatory agencies operating under the statutes of their respective jurisdictions.

This situation amounts to a considerable overlap of regulatory authority and, potentially, an inefficient use of resources. Accordingly, while ASIC is clearly the most appropriate regulator for matters pertaining to the legal structure and compliance regime of timeshare schemes, the sales and marketing practices of the industry, which lie at the heart of the consumer protection objectives of the regulatory arrangements, are perhaps best regulated by the ACCC and the various state-based consumer protection regulators. This contention is further supported by the fact that, in practice, the sales and marketing practices of timeshare schemes have considerably more in common with the promotion of consumer products than with the promotion of investment or financial products. This may also result in a better direction of valuable regulatory resources.

4.1.6 **Licencing**

The Australian Financial Services Licences (**AFSL**) that have been issued to members of the timeshare industry contain little that is of specific relevance to the actual circumstances of their commercial operations and much that is irrelevant. The language employed is generally that of the financial services and investment community. It is submitted that a special purpose AFSL should be developed for timeshare schemes, containing only relevant, industry specific conditions and eliminating the investment-driven verbiage. This would help ASIC to articulate its regulatory requirements more clearly and assist licence holders and their advisors to frame more focused compliance plans and procedures.

Those members of the timeshare industry who merely “operate” a scheme and who are not actively engaged in any significant promotion of primary or secondary interests could be removed of the scope of the AFS licensing requirement altogether or, alternatively, be licensed using a greatly simplified format.

4.1.7 **Recommendations**

a The Australian timeshare industry should continue to be regulated by the Commonwealth within the overall framework of the Corporations Act 2001.

b ASIC should continue to be the government instrumentality with primary regulatory oversight of the timeshare industry.

c However, if timeshare products are not intended to be perceived by consumers as an “investment”, then the application of a uniform legislative framework designed predominantly for investment-linked products can only operate efficiently if it is substantially modified to better suit application of that regime to the unique needs of timeshare consumers, promoters and operators. It is therefore submitted that if timeshare products lack, or should be perceived as lacking, an investment character, then statutory requirements capable of being identified as solely or substantially predicated on investor protection rather than more general consumer protection objectives should be waived or relaxed in so far as they apply to timeshare.

d The regulation of the sales and marketing practices of the timeshare industry should be regulated at a Federal level by the ACCC under the Trade Practices Act and at the State level by the various consumer protection regulatory agencies operating under the statutes of their respective jurisdictions.

e In consultation with ATHOC, ASIC should develop a special purpose AFSL for the timeshare industry and review the licensing requirements for those who merely “operate” a scheme.

4.2 Key Issue 2 - Cooling-Off Requirements

4.2.1 Existing Cooling-Off Requirements

Class Order 02/315 issued on 9 March 2002 by ASIC revokes previous Class Order 01/180 and came into effect on 11 March 2002. The cooling-off requirements contained in the revoked Class Order did not change. In essence, these cooling-off requirements ("Existing Cooling-Off Requirements") contain the following elements:

a If the responsible entity operating the timeshare scheme ("Operator") is a member of ATHOC (or another ISB approved by ASIC), there is a cooling-off period of not less than 5 business days and in all other cases, there is a cooling-off period of not less than 10 business days;

b Cooling-off statements must be disclosed both in each Application and prominently disclosed in the Product Disclosure Statement ("PDS");

c Each Application must be accompanied by a separate statement, in a prescribed form approved by ASIC, describing the effect of the cooling-off period and stating that a signed Application will be of no effect unless the Applicant also signs an acknowledgment of receipt of such a cooling-off statement;

d The promoter must maintain written records relating to the issue of all cooling-off statements.

4.2.2 New Cooling-Off Requirements

Cooling-off periods are provided for in Division 5 of Part 7.9 of the new Corporations Act ("Act") (which includes the Financial Services Reform Bill which became effective on 11 March, 2002).

- **Section 1019A(1)(a)(iii)** provides that Division 5 applies to managed investment products (which includes timeshare schemes).
- **Section 1019B** provides that a client may return the financial product to the responsible entity and have money repaid by notifying the responsible person in one of three different ways within a 14 day period starting on the earlier of the time when the confirmation requirement is complied with or at the end of the fifth day on which the product was issued or sold to the client.
- **Division 7 of Part 7.9 of the Corporations Regulations ("Regulations")** modify the application of the cooling-off requirements in a number of cases.

The relevant provisions of the Act and Regulations dealing with cooling-off are referred to in this Submission as "**New Cooling-Off Requirements**". It is arguable that the Existing Cooling-Off Requirements and the New Cooling-Off Requirements start at the same time, at least for the purposes of the calculation of the cooling-off period or the 14 day time limit. With the Existing Cooling-Off Requirements, the cooling-off period commences on the date of receipt of the application, PDS and Loose Leaf Price List whereas with the New Cooling-Off Requirements, in time limit starts at the latest, at the time when the confirmation requirement is complied with. The confirmation requirement in Section 1017F(5)(a) is, in all likelihood, satisfied by the Application which contains, directly or indirectly, all the prescribed information.

4.2.3 Non-Application of New Cooling-Off Requirements

Regulation 7.9.64(1)(e) provides for exclusion paragraph 1019A(1)(a) of the Act of a managed investment product that is not liquid in accordance with Section 601KA of the Act at the time the managed investment product is issued. Section 601KA(4) provides that a registered scheme is liquid if liquid assets account for at least 80% of the value of scheme property. Section 601KA(5) provides for categories of liquid assets.

Regulation 7.9.64(1)(e) does not have exclusive application to timeshare schemes, it applies generally to non-liquid schemes. Accordingly, it was the legislative intent to exclude non-liquid schemes from the New Cooling-Off Requirements. Accordingly, were it not for Class Order 02/315 ("Class Order") given that timeshare schemes are illiquid, timeshare schemes would not be subject to any cooling-off requirements. Other than the fact that timeshare products have historically been subject to cooling-off requirements, there appears to be no logical reason why they should continue to be subject to these requirements as the legislature has turned its collective mind to cooling-off requirements and has deliberately excluded illiquid schemes from these requirements.

For ASIC to have issued the Class Order, it must believe that timeshare schemes are the only form of illiquid managed investment schemes for which additional consumer protection is required by way of the cooling off requirements. ATHOC has consistently challenged this belief and has adduced empirical evidence both to ASIC and to the ACCC to the effect that the number of complaints by applicants for interests in timeshare schemes are significantly below the level of complaints for any other industry (see below).

If considerations of equity were paramount, it is entirely inequitable for the Industry to have separate, discreet and tailor-made cooling-off requirements. It is even more inequitable for the Industry to be subject to

the Additional Requirements given that these Additional Requirements do not apply to any other financial product, even a financial product to which the New Cooling-Off Requirements apply.

Accordingly, even though the legislature deliberately excluded illiquid schemes from having to comply with the New Cooling-Off Requirements and even though timeshare schemes are illiquid schemes, timeshare schemes, because of the Class Order, not only need to comply with cooling-off requirements but also need to comply with the Additional Requirements which are far more onerous than the New Cooling-Off Requirements.

It is therefore submitted that, as a result of the application for Regulation 7.9.64(1)(e), the New Cooling-Off Requirements do not apply to any Operator in the Industry and that accordingly, the Existing Cooling-Off Requirements continue to apply.

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. That part of this Submission which requests that the cooling-off period be 7 days/14 days in lieu of 5 business days/10 business days relates to consistency between the Existing Cooling-Off Requirements and the New Cooling-Off Requirements, at least as far as the cooling-off period is concerned.

4.2.4 **Recommendations**

Class Order 02/315 and the relevant conditions in any AFS Licence should be modified so that:

a It is not necessary for each Application Form relating to an interest in the timeshare scheme to be accompanied by a separate statement in a form approved by ASIC (or in fact in any other form) describing the effect of the cooling-off period or stating that a signed Application Form will be of no effect unless the Applicant also signs an acknowledgment of receipt of such a cooling-off statement; and

b Cooling-off rights not be required to be disclosed prominently in a Prospectus or PDS and Application Form relating to the offer of interests in the timeshare scheme. The disclosure requirements for a Prospectus or PDS would in any event require disclosure however, it is a matter for judgment of the issuer as to whether such disclosure is prominent; and

c The Operator is not required to ensure that the cooling-off rights are complied with by any other person who offers an interest in the time sharing scheme for issue or offers an interest in the timeshare scheme for sale; and

d The Operator not be required to maintain written records relating to the issue by it of all cooling-off statements; and

e The cooling-off periods for members and non members of ATHOC be altered to 7 calendar days and 14 calendar days respectively in lieu of 5 business days and 10 business day respectively.

4.3 Key Issue 3 - Relevance of the PS146 Training Requirements For Authorised Representatives

4.3.1 Current Regulatory Requirements

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.

Tier 2 level is broadly equivalent to 'Certificate III' and enables advisers to:

- demonstrate an understanding of the generic and specialist knowledge requirements that are relevant to their tasks and specific industry and product;
- apply a range of well developed skills to a variety of customer services and technical situations;
- apply known solutions to a variety of predictable problems;
- perform processes that require a range of well developed skills when some discretion and judgment are required;
- interpret available information about client and product, using discretion and judgment.

In the generic knowledge section, advisers are generally expected to cover topics such as:

- the economic environment – characteristics and impact of economic and business cycles; interest rates and exchange rates; inflation; government and fiscal policies;
- operation of financial markets – roles played by intermediaries and issuers; structure and inter-relationships within the financial markets; inter-relationship between industry sectors;
- financial products – concept of a financial product – general definition, specific inclusions, exclusions; types of financial investment products; types of financial risk products (eg derivatives, risk insurance products)

In the specialist knowledge section, in addition to knowledge on timeshare products, timeshare advisers are expected to cover topics such as:

- various types of managed investment products such as property trusts, and primary production schemes;
- risks associated with managed investment schemes;
- relevant taxation issues.

4.3.2 **Relevance to Selling Timeshare Products**

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 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.

The generic knowledge section may not be relevant to timeshare advisers. While it may be desirable for anyone to have understanding or knowledge regarding the economic environment, there is no compelling reason why it should not be mandatory for an adviser who is merely recommending a holiday and leisure product such as timeshare, any more than it is relevant to the sale of mobile homes, caravans and boats. It also does not make sense for a timeshare adviser to know how the financial markets operate or the nature of the different financial investment products available in the market, as the adviser will not be, and should not be, discussing these with consumers.

4.3.3 **The Timeshare Education Program**

In order to meet the requirements of PS146 a Timeshare Education Program has been jointly devised by Griffith University and ATHOC. This comprises 54 pages of materials on generic knowledge, 40 pages on

managed investments, 6 pages on taxation, and 21 pages on legal environment. More than 70% of the course material covers topics that have no obvious relevance to the duties performed by timeshare advisers.

The Timeshare Education Program requires each timeshare adviser to complete 5 assignment questions and sit a 20 question multiple choice examination. The assignment questions generally feature 3 timeshare questions, 1 generic knowledge question and 1 managed investment questions. The multiple choice questions generally feature 9-10 timeshare questions with the remaining covering generic knowledge and managed investment type questions.

4.3.4 **Recommendation**

ATHOC strongly supports compulsory training standards for timeshare advisers. However it is submitted that the standard level could be eased down to Tier 2 level, with more emphasis being given to timeshare-specific knowledge. The generic knowledge section and the managed investment section should be dispensed with altogether since there is a danger that they will result in confusion for the advisers and also the general public.

4.4 Key Issue 4 - PS175 – Financial Services Guide And Statement Of Advice

4.4.1 Introduction

This issue is an example of the difficulties arising from the regulation of timeshare products within an unmodified financial services industry framework. The selling process is deemed to be the giving of financial advice and the sales force are deemed to be financial advisors. This state of affairs materially impacts upon the nature of the communication process between buyer and seller and creates a number of inappropriately onerous and confusing formal documentation requirements for promoters.

4.4.2 Policy Statement 175

PS175 (Licensing: Financial product advisers – conduct and disclosure) considers how certain conduct and disclosure obligations in Part 7.7 of the Corporations Act apply to the provision of financial product advice to retail clients. The policy statement covers the provision of

- A **Financial Services Guide**,
- The '***know your client'*** rule, and
- The provision of a **Statement of Advice**.

The Act (and the policy statement), when considering conduct relating to the provision of financial product advice, is based on the premise that the advice must be personal advice and as such it must take into account the client's personal objectives, financial situation or needs so that the client can then consider the appropriateness of the advice in the light of their own objectives, financial situation or needs before acting on the advice. This presupposes a level of complexity in the product and the advice. It also presupposes that the adviser could be recommending different financial products. Consequently the Act imposes obligations on the adviser to provide a financial services guide ("FSG") and a statement of advice ("SOA")

4.4.3 Financial Services Guide (FSG)

This is a disclosure document intended to help a retail client decide whether to obtain financial services from the providing entity. ASIC has indicated that it would only in limited circumstances allow the FSG to be combined with the Product Disclosure Statement as one document. This is because in ASIC's mind, the risk of consumers' confusion is too great in that they cannot differentiate information relating to financial products and information about financial services. However, as discussed above, timeshare is not an investment product, and therefore the process of selling timeshare should be presented in a manner which takes on the

appearance of giving investment advice. Members of the public simply do not understand why they are being given an FSG, and become increasingly confused and wary. Promoters are placed in the absurd position of having to attempt to explain that their product is not an investment but is regulated as a financial services product.

It is a requirement that promoters of financial products disclose details of remuneration, commissions and other benefits in the FSG. The rationale for this is to allow the clients to properly decide whether to acquire the financial service from the providing entity.

In the context of timeshare, where the providing entity invariably would be promoting a single product and the only variance is the number of points (in a points based scheme) or the number of fixed/floating weeks (in a weeks based scheme), it is perhaps not relevant or critical for the disclosure of remuneration, commission or benefit to be made. The level of remuneration, commission or benefit is not and does not influence a client whether to obtain financial service from the providing entity.

A FSG must include information covering: details of the providing entity, the licensee, the authorised representative, the purpose of the FSG, the different kind of financial services, the remuneration/commission, and the complaints handling body. Most of this information would be covered in the product disclosure statement. As timeshare sales are conducted at a scheduled presentation, it is perhaps excessive, wasteful, repetitive and confusing to have two disclosure documents provided at the same time to the client. The risk contemplated by ASIC above is unfounded in the context of timeshare.

It is submitted that the relevant information required by consumers to assist them in making an informed decision is contained within the Product Disclosure Statement and that the requirement to also provide a FSG is inappropriate.

4.4.4 **The 'Know Your Client' Rule**

Section 945 of the Corporations Act stipulates that where financial product advice is provided, reasonable inquiries about the client's ***relevant*** personal circumstances must be made, as well as reasonable consideration to, and investigation of, the subject matter of the advice given. The advice must be 'appropriate' for the client. In other words, an adviser, when providing the advice, must ensure that the advice is suitable to the client's **needs and objectives**. While ASIC recognises that the level of inquiry and the degree of consideration and investigation are contingent on the complexity of the advice, the potential impact of inappropriate advice on the client, and the financial literacy of the client ('scaleable

approach'), these factors or criteria are clearly catered for products or services that are financial investments in nature, rather than leisure and lifestyle products. As such, the criteria are inappropriate, confusing and sometimes absurd in the context of timeshare products.

If a more pragmatic, 'scaleable' approach were to be adopted, the inquiries that would be appropriate in a timeshare context would relate to a client's holiday related needs, including, but not necessarily limited to, where they would like to holiday and how much money they would spend on their holiday accommodation each year. These are questions which are already being asked at timeshare sales presentations.

Timeshare is a holiday, leisure and lifestyle product. Unlike investment related financial product where the financial profile of the client is critical, in the context of a holiday and leisure product, such risk profile is irrelevant, confuses the client and is often resented by the client as being intrusive. Consumers do not expect detailed questions concerning their financial and investments needs when purchasing a caravan or a mobile home or a boat. Neither do they expect it in the context of a timeshare sales presentation. Given ASIC's formal recognition in Policy Statement 66 that timeshare products are not an investment product, it is inconsistent, absurd and confusing to require timeshare representatives to cloth themselves in the procedural garments of the investment advisory industry. This is a clear example of the "square peg in a round hole" referred to earlier.

It is significantly more important for a timeshare sales representative to know the product he or she is advising on, rather than '*know your client'*. As there is no investment aspect to the product, and ASIC prohibits any representations to the effect that a timeshare interest is an investment product, the only questions the client needs to ask are '*will I use it'* and '*can I afford it'*. Requiring the adviser to spend time making irrelevant enquiries concerning a client's investment related circumstances is irrelevant, confusing for consumers and a waste of time for all concerned. The time is better spent on explaining features of the timeshare product clearly and concisely and answering the client's questions in relation to the product.

It is therefore submitted that the "*know your client*" rule, as it is applied to financial investment products, does not apply to timeshare sales presentations and that the relevant regulatory arrangements should focus instead upon ensuring that timeshare representatives are well versed in the features of the timeshare product that they are presenting and that they should take reasonable steps to ensure that the product is suited to the client's holiday, leisure and lifestyle aspirations.

4.4.5 **Statement of Advice (SOA)**

A SOA is a document intended to assist the consumer of financial advice to understand and decide whether to rely on the advice. The SOA is intended to spell out the financial advice given by the financial advisor, its basis, as well as information about the advisor's remuneration, commission or other benefits.

It is submitted that, given the nature of the timeshare product, the context of the sales presentation and the potential for confusion in the minds of consumers, the requirement to give SOA's to timeshare purchasers is inappropriate and should be waived.

4.5 Key Issue 5 - Regulation Of Exempt Schemes

ATHOC generally applauds the pragmatic approach that ASIC has taken in SPS160 in agreeing to grandfather or defer application of the managed investment regime to the majority of timeshare schemes closed or well-advanced in their promotion prior to the introduction of that regime. However ATHOC remains concerned in a number of regards that the existing policy has yet to resolve continuing uncertainty affecting forward planning by schemes which may have to date qualified for such relief. In particular:

4.5.1 The fact that under section 764A of the Corporations Act, interests in unregistered schemes are still "*financial products*". This means that, without further relief, exempted schemes are unlikely to be able to assist members and third parties in the secondary acquisition and disposal of scheme interests without potentially engaging in a business of "dealing" in those interests and therefore inviting application of the FSR licensing regime. Although superficially this may seem to be a desirable outcome, it needs to be recognised that in many cases relaxation of the usual licensing requirement may be warranted given the limited extent of that dealing or the fact that assistance may be rendered to members in a largely passive manner or without a profit motive.

a To continue to qualify for relief under either SPS160.2 or SPS160.3 schemes are required to satisfy a condition of relief that they belong to **either** an ASIC approved external complaints system or ASIC approved Industry Supervisory Body (ISB). Whilst ATHOC has sought approval as an ISB, as at the date of this submission ASIC has not approved ATHOC's application. Rather, ASIC has permitted interim modification of relief to 30 June 2005 permitting schemes to hold ATHOC membership in lieu of the usual ISB membership requirement. It needs to be recognised that should ATHOC not obtain approval as an ISB, unless ASIC further modifies existing policy, these two categories of exempt scheme will still be able to satisfy the existing condition of relief on the basis of membership of an ASIC approved external complaints system. At present the only complaints scheme approved by ASIC for the timeshare industry is the Financial Industry Complaints Scheme (FICS). For many exempt schemes, and in particular small member-controlled schemes, initial membership of FICS may present an affordable option, but referral of complaints based on FICS current fee scales and governing regulations incur costs directly to the scheme (rather than the complaining member) which makes such a system practically unaffordable or unviable. A separate, and perhaps more wide-ranging concern, is that membership of an external complaints system does not deliver the benefits of ongoing co-regulation or supervisory oversight that membership of an ISB does.

b Relief for fixed term schemes under SPS160.4 does not require any precondition of external complaints system or ISB membership. This arguably creates a serious regulatory gap with such schemes not subject to the Chapter 5C compliance regime, mandatory co-regulation by an ISB, or the obligation to submit complaints to an external complaints scheme.

4.5.2 **Recommendation**

In order to remove doubt and mitigate the ongoing level of risk for exempt timeshare schemes, ATHOC should work closely with ASIC to expedite the resolution of the matters raised above.

4.6 Key Issue 6 - The Role of ATHOC Within The Regulatory Arrangements

It has been the consistent submission of ATHOC that the only qualification for continuing exemption of sold-out schemes which have obtained exemption under Policy Statement 160 is for membership of those schemes with ATHOC and not with an external complaints scheme. ATHOC has included in its Constitution and its Code of Practice the very onerous Indicative Criteria required by ASIC as part of ATHOC's ISB Application to ASIC. No external complaints scheme (whether approved or otherwise) has any of these requirements in its constitution or rules nor does it have any obligation to supervise or conduct any surveillance of its members.

4.6.1 **ASIC Applications**

Since the establishment of ATHOC, it has been extremely active in making many applications to ASIC for relief from various provisions in the Act, largely on the basis that such provisions were inappropriate for time sharing schemes. ATHOC currently has two applications which are unresolved. These applications are as follows:

a **ISB Application** – this application was made in excess of 5 years ago and still remains unresolved. It was recognised by ASIC prior to the introduction of the Managed Investment Act into the Act that exempt timeshare schemes should not be required to comply with the managed investment provisions in the Act. ASIC developed the concept of an "industry supervisory body" as an effective co-regulator with ASIC of sold-out timeshare schemes. It developed a range of criteria (called Indicative Criteria) that need to be satisfied by an ISB before approval is given by ASIC. ATHOC has incorporated within its Constitution and its draft Code of Practice each of these Indicative Criteria and its members are subject to those criteria;

b **PS139 APPLICATION** – approximately 5 years ago, ATHOC made an application to ASIC for approval of it or an independent body incorporated by it as an external complaints scheme ("EDR") so that ATHOC members could have complaints dealt with by a scheme familiar with timeshare regulation rather than having to be a member of a scheme (such as the financial industry complaints scheme) which has little or no familiarity with timeshare regulation. The application by ATHOC was not approved by ASIC. The matter is currently before the administrative appeals tribunal for determination.

APPENDIX A
EVOLUTION OF THE AUSTRALIAN REGULATORY ARRANGEMENTS

Case Law. In 1980, the Supreme Court of Victoria held in each of the *CCA v A Home Away Pty Ltd and Ors* (both at first instance and on appeal) and in *CCA v Lake Eildon Country Club Limited & Neville Kay Pty Ltd,* that the sale of timeshares to the public constituted the sale of an "interest" within the meaning of sub-section 76(1) of the Companies Act 1961 (Victoria). Part of the judicial reasoning relied on American authority as there was a factual similarity between the Lake Eildon Case and a case decided in the Supreme Court of California, Silver Hills Country Club v Sobieski and also the fact that limb (b) of the definition of "interest" in the then Companies Act of Victoria had a close resemblance to the definition of "investment contract" as laid down in the case of SEC v Howey decided by the US Supreme Court in 1946. Each of the timesharing schemes in the A Home Away Case and the Lake Eildon Case was title-based.

After the *A Home Away* Case. As a result of the case law, full compliance with both the companies and securities legislation was then necessary. Each of these two schemes was subsequently exempted under paragraph 76(1)(g) of the Companies Act 1961 (Victoria) from compliance with the requirements of the companies and securities legislation, subject to certain conditions. The "interests" offered in the two schemes were declared to be exempt interests. To address new timesharing schemes, guidelines for exemption from compliance with the relevant legislative provisions were subsequently published in late 1981 in Queensland and in early 1982 in Victoria. These guidelines were short lived and timesharing promoters were required to fully comply with the companies and securities legislation until mid-1983.

NCSC (National Companies & Securities Commission) Policy Statement. On 20 July 1983, the NCSC issued a policy statement in relation to timesharing arrangements, although the arrangements had become effective several months prior to that date. The current range of exemptions in Policy Statement 160 issued by ASIC has its origin in the first policy statement issued by the NCSC in relation to time sharing. Conditions for exemption, particularly from the "buy back" requirement included a 7 day cooling-off period, the payment of maintenance fees for unsold time shares and the holding in trust of application moneys until the developer was able to transfer title of the unit purchased. Subsequently, exemption was granted for title-based schemes so that the issue of shares in a service company did not need to meet a raft of separate requirements dealing with new shares issued.

Managed Investment Scheme. The definition of "interest" in the Companies Act 1961 (Victoria) did not include a specific reference to a "timesharing scheme". This specific reference was included in the Companies (Victoria) Code subsequently and the expression "interest" was replaced with the expression "prescribed interest". The separate reference to "timesharing scheme" is retained in the definition of "managed investment scheme" in section 9 of the current Corporations Act 2001 ("Act"). In other

words, the only reason why a timesharing scheme is a managed investment scheme under the Act is because of limb (b) of the definition of "managed investment scheme" which specifically includes within that definition a timesharing scheme. The definition of "timesharing scheme", also in section 9 of the Act has survived more or less unaltered for over 20 years. It should also be noted that the definition of "managed investment scheme" specifically excludes a franchise and also a retirement village scheme, each of which expressions are also defined in section 9 of the Act.

Franchise/Retirement Village Scheme. Until mid 1980, a franchise and an interest in a retirement village scheme were considered to be "interests" for the purposes of the companies and securities legislation. Each of these two types of interest are specifically exempted from the managed investment definition and are regulated, in the case of franchising, under the Trade Practices Act (Federal) and in the case of retirement village schemes, on a State and Territory basis. This may be in recognition of the fact that franchising crosses State borders whereas retirement villages are generally State or Territory specific, at least geographically. It was recognised many years ago that regulation of franchising and retirement village interests under companies or securities legislation was entirely inappropriate and led to a number of unintended consequences both for the regulator and the consumer.

State/Territory Legislation. In 1980, following the two decided cases in the Supreme Court of Victoria, the attempt to regulate timesharing separately in each State and Territory of Australia met with almost total failure and was very short lived. It was unduly onerous, impractical and almost impossible for a developer to comply with different regulatory regimes in each of the States and Territories of Australia. Fortunately, the co-operative companies' legislation and the establishment of the NCSC addressed this problem by effective federal regulation (through the co-operative companies' scheme) and the issue of the NCSC policy statement providing a range of exemptions for a timesharing scheme from the then companies and securities requirements. This approach has continued with the NCSC policy statement being replaced by Policy Statement 66 and then by Policy Statement 160, the latter of which is the interim policy statement which still regulates timesharing schemes under the Act.

MIA Act Shortly prior to the introduction of the Managed Investment Act provisions within the Act, ATHOC made a range of submissions to ASIC for the exemption from the Act of sold-out timesharing schemes for a range of relief for timesharing schemes, interests in which were still sold to the public. It is important to recognise a fundamental change between the "prescribed interest" provisions in the Corporations Law which pre-dated the introduction of the Managed Investment Act and the managed investment provisions in the Act. The "prescribed interests" provisions were directed at the establishment of a timesharing scheme and sale of interests in that scheme. There was no particular authority or licence required for the operation of a timesharing scheme as a prescribed interest scheme. However, the Act, by incorporating the MIA Act requires an entity to hold a licence to operate a timesharing scheme, regardless of whether or not interests in that scheme have been fully sold. Because of this new requirement for a licensee to operate a managed investment scheme, sold-out schemes were granted

total exemption from the managed investment provisions in the Act (including the requirement to hold a licence) provided that the scheme was a member of an Industry Supervisory Body (“ISB”) or an external complaints scheme approved by ASIC.